No. S273134

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ROBERT COOPER,
Defendant and Appellant.

Second Appellate District, Division Six Case No. B304490
Los Angeles County Superior Court, Case No. TA140718
The Honorable Allen Joseph Webster, Jr., Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Must any of defendant's sentencing enhancements be vacated due to recent statutory changes requiring that the offenses necessary to establish a "'pattern of criminal gang activity' . . . commonly benefited a criminal street gang, and the common benefit from the offense is more than reputational" (Pen. Code, § 186.22, subd. (e)(1), as amended by Stats. 2021, ch. 699, § 3)?

INTRODUCTION

Assembly Bill No. 333 recently amended the statutory provisions found in Penal Code section 186.22 relating to gang enhancements.[1] Among other changes, the revised statute now requires that past crimes used to demonstrate a pattern of criminal activity that qualifies an organization as a "criminal street gang"—so-called predicate offenses—must have "commonly benefited" the gang in a way that was "more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1), eff. Jan. 1, 2022.)

Appellant Robert Cooper claims that, under the rule of *In re Estrada* (1965) 63 Cal.2d 740, these new requirements apply to his nonfinal case in which the jury found true a gang enhancement prior to the enactment of AB 333—a point the People do not contest. He further argues that reversal is required because it cannot be determined beyond a reasonable doubt that

[1] All further undesignated statutory references are to the Penal Code.

his jury would have found, under updated gang enhancement instructions, that the predicate offenses put forward by the People involved a common, more-than-reputational benefit to his gang.

Cooper's argument for reversal relies in part on an overly restrictive reading of the *Chapman* harmless error standard.[2] His argument also rests in part on a misapprehension that the Legislature's narrowing of the gang enhancement statute circumscribes the scope of the evidence a trier of fact may consider in assessing the new predicate offense requirements. On a proper view of the governing harmlessness standard and the trial record, reversal is not required here.

The evidence in this pre-AB 333 case was not directly geared to the new "common benefit" and "more than reputational" requirements. Nonetheless, the evidence presented at trial leads unavoidably to the inference that the predicate offenses identified by the prosecution satisfied the new statutory requirements. Those offenses—robbery and narcotics sales—were among the gang's primary activities, were committed by dedicated members of Cooper's gang, and yielded common financial benefits for the gang. There is therefore no reasonable doubt that the result of Cooper's trial would have been the same had his jury received instructions on the new "common benefit" and "more than reputational" requirements.

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[2] *Chapman v. California* (1967) 386 U.S. 18.

LEGAL BACKGROUND

Section 186.22 prohibits active participation in a criminal street gang and also calls for sentence enhancements when a person commits a crime "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).) AB 333, which became effective January 1, 2022, amended the definition of a "criminal street gang" for purposes of this statute, narrowing it in several ways. (Stats. 2021, ch. 699, § 3; see also *id*., § 2 [Legislature's findings and declarations describing a variety of negative effects resulting from overbreadth of former gang enhancement statute].)

Formerly, section 186.22 defined a "criminal street gang" as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of [certain offenses enumerated in subdivision (e) of the statute], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (Former § 186.22, subd. (f).) The term "pattern of criminal gang activity" was defined, in turn, as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in former subdivision (e)], provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on

separate occasions, or by two or more persons." (Former § 186.22, subd. (e).) Subdivision (e) of the statute, referenced in relation to both the gang's "primary activities" and its "pattern of criminal gang activity," listed more than 30 offenses ranging from unlawful homicide to fraudulent use of an access card.

As amended by AB 333, a criminal street gang is now defined as "an ongoing, organized association or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in subdivision (e), having a common name or common identifying sign or symbol, and whose members collectively engage in, or have engaged in, a pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (f).) A "pattern of criminal gang activity" is now defined as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of, two or more of [the offenses enumerated in subdivision (e)(1)], provided at least one of these offenses occurred after the effective date of this chapter, and the last of those offenses occurred within three years of the prior offense and within three years of the date the current offense is alleged to have been committed, the offenses were committed on separate occasions or by two or more members, the offenses commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(1).)

The bill also added clarifying language stating: "Examples of a common benefit that are more than reputational may

include, but are not limited to, financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (g).) In addition, AB 333 shortened the list of enumerated offenses that may be used to show a gang's primary activities and its pattern of criminal activity, eliminating looting, vandalism, and several financial fraud offenses. (Stats. 2021, ch. 699, § 3; § 186.22, subds. (e)(1)(A)-(e)(1)(Z).) And it specified that "[t]he currently charged offense shall not be used to establish the pattern of criminal gang activity." (Stats. 2021, ch. 699, § 3; § 186.22, subd. (e)(2).)

STATEMENT OF THE CASE

A. The trial

Cooper was tried in the Los Angeles County Superior Court for a gang-related murder that occurred in October 2012. The trial evidence showed that Cooper, a member of the Leuders Park gang, was among a group of people gathered at Gonzales Park in Compton when he was confronted by Nicos Mathis, a member of the rival Mob Piru gang. (2RT 1874-1876, 1882; 3RT 2455-2456, 2458-2459.) Mathis challenged Cooper to a fight, but Cooper walked away. (2RT 1883-1884, 1948-1949, 1951.) The group eventually dispersed, and Mathis left the park about 20 minutes later with Monique Peterson, who was friendly with both Mathis and Cooper. (2RT 1885; see 2RT 1871-1872, 1877.) As Peterson was leaving with Mathis, she saw two Leuders Park gang members arrive in a Buick Regal. (2RT 1885-1887.)

Mathis drove Peterson and two others away in his Ford Escort. About 15 minutes after leaving the park, Mathis pulled over to pick up another friend. While they were stopped, Peterson heard several gunshots. (2RT 1891-1892.) She turned and saw two cars, the Buick Regal and an Infiniti. (2RT 1892.) The Infiniti had stopped next to the driver's side of Mathis's car with its windows rolled down; Peterson recognized Cooper and two other Leuders Park gang members inside the Infiniti. (2RT 1893-1894.) Peterson saw two guns pointed at Mathis's car from the front and rear passenger's side windows of the Infiniti. (2RT 1894, 1897, 1922.) Mathis was killed by multiple gunshots. (2RT 1900-2901; 3RT 2407.) The Infiniti sped away, but nearby Los Angeles County Sheriff's deputies spotted and pursued the car. (2RT 1965-1967, 1981-1982.) Cooper was arrested at the end of the pursuit. (2RT 1992-1993, 1998-1999.)

Los Angeles County Sheriff's Detective Joseph Sumner testified at trial as a gang expert. (3RT 2426-2427.) He is intimately familiar with the history, evolution, and inner workings of Compton street gangs, including Leuders Park and Mob Piru. (3RT 2432-2434.) According to Detective Sumner, the Leuders Park gang claims territory in Compton and its primary activities include "[t]heft, burglary, robbery, vehicle theft, narcotics sales, narcotic possession, weapons sales, weapons possession, assault [and] murder." (3RT 2451.) Detective Sumner explained that most Leuders Park gang members merely "play that role of a gang member and act hard," but a smaller group of the most active members are the ones who commit

serious crimes and sustain the gang's reputation. (3RT 2433-2434.) Over the generations, Leuders Park has had "different groups that do robberies, shootings, run girls, [and] sell narcotics." (3RT 2434.) Money is a gang's most important commodity, according to Detective Sumner, followed by respect from other gangs. (3RT 2460.)

To show Leuders Park's pattern of criminal gang activity, the People introduced a certified Los Angeles County Superior Court minute order showing that Ricky Lee Vaughn had committed robbery in 2012. (3RT 2451-2452; Peo. Exh. 32.) The People also introduced a Los Angeles County Superior Court minute order showing that Donald Wayne Mahan had been convicted of selling narcotics in 2012. (3RT 2453-2455; Peo. Exh. 33.) Detective Sumner knows both Vaughn and Mahan to be Leuders Park gang members. (3RT 2452.) According to Detective Sumner, Mahan is, in fact, "[p]robably the most senior Leuders Park Piru gang member on the street right now." (3RT 2454.)

Based on a hypothetical scenario mirroring the facts of this case, Detective Sumner testified that in his opinion the murder would have been committed in association with the gang and for its benefit. (3RT 2459-2462.) Detective Sumner explained that the murder benefited the gang by eliminating a rival. It also maintained respect for the gang. The murder was committed in retaliation for the public challenge in the park, and failing to retaliate would have caused the gang to lose respect, which in

turn could have resulted in further attacks on the gang. (3RT 2460.)

The jury instructions that the court read to the jury before deliberations included CALCRIM No. 1401, which set out the requirements then in effect for proving a gang enhancement under section 186.22:

> If you find the defendant guilty of the crime charged in Count 2, you must then decide whether the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang.
>
> To prove this allegation, the People must prove that:
>
> 1. 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; and
>
> 2. That the defendant intended to assist, further, or promote criminal conduct by gang members.
>
> A criminal street gang is any ongoing organization, association, or group of three or more persons, whether formal or informal:
>
> 1. That has a common name or common identifying sign or symbol;
>
> 2. That has, as one or more of its primary activities, the commission of robbery and sales of narcotics; and
>
> 3. Whose members, whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity.
>
> In order to qualify as a primary activity, the crime must be one of the group's chief or principal activities rather than an occasional act committed by one or more persons who happen to be members of the group.

A pattern of gang activity, as used here, means:

1. The conviction of at least one of the following crimes: robbery and sales of narcotics;

2. At least one of the crimes were committed after September 26, 1988;

3. The most recent crime occurred within three years of one of the earlier crimes; and

4. The crime[s] were committed on separate occasions or were personally committed by two or more persons.

The crimes, if any, that establish a pattern of criminal gang activity, need not be gang-related.

The People need not prove that the defendant is an active or current member of the alleged criminal street gang.

[The] People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

(3RT 2730-2732; see 2CT 286-287; former § 186.22, subds. (e), (f) & (j).)[3]

During closing argument, the prosecutor briefly mentioned the gang predicate offenses:

If you recall, I was asking Detective Sumner, I was reading off these predicates, I was stating this guy was convicted on this date for this violation. Essentially I had to do that because this is what the law says. The law says that I have to prove that Leuders Park is a

[3] The court also read to the jury CALCRIM No. 1402, which tied the requirements of section 186.22 to the gang-related firearm enhancement allegation under section 12022.53. (3RT 2732-2734; see 2CT 288.)

> gang. [¶] So that little back and forth that I was having with Detective Sumner, you're going to see it in the jury instructions. That was just to establish that Leuders Park was a gang. So it's clear as day.

(3RT 2754.)

The jury convicted Cooper of willful, deliberate, and premeditated murder (§ 187, subd. (a)) committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and also found that a principal used and discharged a firearm causing death in the commission of a gang-related offense (§§ 186.22, subd. (b), 12022.53, subds. (b)-(e)). (2CT 299A-303.) The trial court separately found that Cooper had suffered a prior "strike" conviction within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). (2CT 361; 4RT 4203-4204, 4220-4222.) The court sentenced Cooper to a total prison term of 75 years to life, which included a term of 25 years to life for the gang-related firearm enhancement that was based on the section 186.22 gang enhancement. (2CT 360-362; 4RT 4225-4226.)

B. The Court of Appeal's decision

Cooper appealed, and while his appeal was pending AB 333's changes to the gang enhancement requirements came into effect. He argued that the changes applied to his nonfinal case and that he was entitled to retrial on the charges tied to section 186.22 "because the jury was not instructed that the predicate offenses must commonly benefit the gang and the benefit must be more than reputational." (Opn. 13.) The Court of Appeal disagreed that reversal was required:

> The prosecution introduced evidence of convictions for robbery in 2012 and sale of narcotics in 2016. Detective Sumner testified that the offenses were committed by Leuders Park gang members and that robbery and sale of narcotics are some of the gang's primary activities. The evidence was uncontradicted. The benefit to the gang of robbery and sale of narcotics is more than reputational. The evidence of gang involvement in the instant case is beyond dispute. [¶] There is no reasonable doubt that the jury would have found the gang enhancement true had it been instructed with the amendments to section 186.22. Reversal is not required. (*Chapman v. California* (1967) 386 U.S. 18.)

(Opn. 13-14.)

ARGUMENT

THE TRIAL RECORD SHOWS BEYOND A REASONABLE DOUBT THAT A RATIONAL JURY WOULD HAVE FOUND A "PATTERN OF CRIMINAL GANG ACTIVITY" EVEN UNDER THE NEW DEFINITION

Cooper argues that AB 333's amendments to the definition of a "criminal street gang," including the definition of a "pattern of criminal gang activity," apply to his nonfinal case, requiring reversal of his gang enhancement and gang-related firearm enhancement. (OBM 17-18.) He contends, in particular, that he was prejudiced because his jury was not instructed that the predicate offenses put forward by the prosecution to support the gang enhancement had to have commonly benefitted Leuders Park in a way that was more than reputational. (OBM 20.) The People agree that the new statutory requirements apply in this case. Under the usual *Chapman* harmless error standard, however, reversal is not required because the record shows beyond a reasonable doubt that the absence of updated instructions did not affect the outcome of the case. While the

evidence presented at Cooper's pre-AB 333 trial was not directly tailored to the new statutory requirements, the only reasonable inference to be drawn from all the evidence was that the predicate offenses of robbery and narcotics sales provided a common financial benefit to Leuders Park, and there was no evidence that undermined that conclusion.[4]

A. AB 333's amendments to section 186.22 apply to this nonfinal case

Section 3 of the Penal Code provides that new criminal statutes operate prospectively unless the enactment expressly states otherwise. But beginning with the decision in *In re Estrada*, this Court has recognized and gradually defined an exception to that rule for new laws that mitigate punishment. (*People v. Padilla* (2022) 13 Cal.5th 152, 160; *People v. Esquivel* (2021) 11 Cal.5th 671, 675-676; see *Estrada*, *supra*, 63 Cal.2d at

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[4] Other issues concerning AB 333's amendments to the gang-enhancement statute have arisen in the Courts of Appeal. (See, e.g., *People v. Burgos* (2022) 77 Cal.App.5th 550, 564-569, review granted July 13, 2022, S274743 [addressing whether section 1109, added by AB 333 and requiring bifurcation of a gang enhancement allegation upon request, applies retroactively to nonfinal cases]; *People v. Delgado* (2022) 74 Cal.App.5th 1067, 1088-1090 [addressing whether, after AB 333, each predicate offense must be committed by two or more gang members].) Cooper's opening brief on the merits addresses only the question that was decided by the Court of Appeal below and that is identified in this Court's order granting review: whether reversal is required because of the absence of an instruction that the gang's predicate offenses had to commonly benefit the gang in a way that was more than reputational. (See OBM 27, fn. 6; Motion for Eventual Remand.) This brief likewise addresses only that issue.

p. 745.) Under the *Estrada* exception, when the Legislature amends a statute so as to lessen punishment, courts will presume, absent evidence to the contrary, that the new penalty is intended to apply to all cases that are not yet final. (*Padilla*, *supra*, 13 Cal.5th at p. 160; see also *Esquivel*, *supra*, 11 Cal.5th at p. 675.)

There is no dispute that the *Estrada* rule makes AB 333's amendments to section 186.22 applicable here. Those amendments narrow the gang enhancement in a variety of ways, including, as relevant here, by now requiring that a predicate offense commonly and more-than-reputationally benefit the gang. Because these amendments "redefine, to the benefit of defendants, conduct subject to criminal sanctions," they apply to this nonfinal case. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 300-301; see also *People v. Renteria* (2022) 13 Cal.5th 951 [297 Cal.Rptr.3d 344, 351] ["the parties agree Assembly Bill 333 applies retroactively to nonfinal cases"]; *People v. Vasquez* (2022) 74 Cal.App.5th 1021, 1032-1033 & fn. 9 [AB 333's amendments to section 186.22 are retroactive in nonfinal cases].)[5]

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[5] The People do not address here whether section 1109 applies to nonfinal cases under the *Estrada* rule. (See fn. 4, *ante*; *People v. Ramirez* (2022) 79 Cal.App.5th 48, 65, review granted Aug. 17, 2022, S275341 [section 1109 applies prospectively only]; *People v. Perez* (2022) 78 Cal.App.5th 192, 207, review granted Aug. 17, 2022, S275090 [same]; but see *People v. Ramos* (2022) 77 Cal.App.5th 1116 [section 1109 applies retroactively under *Estrada*]; *Burgos*, *supra*, 77 Cal.App.5th at pp. 564-569 [same].)

B. The *Chapman* standard governs Cooper's claim

The instruction given to Cooper's jury setting out the former elements of the gang enhancement statute, while correct at the time, may now be seen as erroneous in light of AB 333's amendments and by operation of the *Estrada* rule. The parties agree that the error is reviewed for harmlessness under the *Chapman* standard. (See OBM 20-27; *People v. Wilkins* (2013) 56 Cal.4th 333, 348 [misinstruction on element of offense reviewed under *Chapman*]; see also *People v. Wright* (2006) 40 Cal.4th 81, 98-99 [assessing harmlessness of failure to give defense instruction that was retroactively applicable under *Estrada*].) Cooper's opening brief, however, articulates an overly restrictive version of that standard.

Under *Chapman*, "before a federal constitutional error can be held harmless" a reviewing court must determine "beyond a reasonable doubt that the error did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at p. 24.) "'To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) If, after reviewing the record, a court can "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error," it is proper to affirm. (*Neder v. United States* (1999) 527 U.S. 1, 19; accord, *People v. Mil* (2012) 53 Cal.4th 400, 417.)

Cooper claims that, when assessing instructional error under *Chapman*, a reviewing court must determine that any

omitted elements were "in some sense decided despite their omission." (OBM 22.) His argument rests in part on *Sullivan v. Louisiana* (1993) 508 U.S. 275, which held that a court applying *Chapman* must look "to the basis on which the jury actually rested its verdict" rather than speculate "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." (*Id*. at p. 279, internal quotation marks, citation, and italics omitted; see OBM 20, 23.) But as the United States Supreme Court later recognized, "this strand of reasoning in *Sullivan* cannot be squared with our harmless-error cases." (*Neder*, *supra*, 527 U.S. at p. 11.)

The Court in *Neder* rejected *Sullivan*'s suggestion that a reviewing court must look to the basis on which the jury's verdict actually rested, observing that this is "simply another form of the argument that a failure to instruct on any element of the crime is not subject to harmless-error analysis." (*Neder*, *supra*, 527 U.S. at p. 17.) Instead, *Neder* held, the proper harmless-error question is whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (*Id*. at p. 18.) The Court explained that this analysis "will often require that a reviewing court conduct a thorough examination of the record." (*Id*. at p. 19.) If "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." (*Ibid*.) In other words, a reviewing court asks

"whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is 'no' . . . " then the error is harmless. (*Ibid*.) And, as this Court has confirmed, a reviewing court may consider "the entire cause, including the evidence, and . . . all relevant circumstances" in making that determination. (*People v. Aledamat* (2019) 8 Cal.5th 1, 13.)

Cooper also claims that courts have "generally" held that the omission of an instruction on an element of an offense is harmless under *Chapman* only if the missing element was proved as a matter of law or was both uncontested and supported by overwhelming evidence. (OBM 22-23.) The *Neder* Court, it is true, observed that "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Neder*, *supra*, 527 U.S. at p. 17.) "But while this was one way to establish harmlessness, the *Neder* court did not suggest it was the only way or set out these circumstances . . . as requirements." (*People v. Glukhoy* (2022) 77 Cal.App.5th 576, 594, fn. 38.) Similarly, this Court in *Aledamat* made clear that, while affirmance would be justified where the record shows that the jury actually made findings equivalent to a proper instructional theory, that is only "one way" to satisfy the *Chapman* standard. (*Aledamat*, *supra*, 8 Cal.5th at pp. 12-13.) Fundamentally, the same general beyond-a-reasonable-doubt harmlessness standard applies to all

instructional misdescriptions or omissions of the elements of an offense. (See *id*. at p. 9.)

C. Section 186.22's new statutory requirements do not alter the ordinary rule that reasonable inferences may be drawn from all the evidence

Cooper's opening brief suggests, in part, that the Legislature's narrowing of the gang enhancement statute circumscribes the scope of the evidence that may be considered in assessing section 186.22's predicate offense requirements. (OBM 29-38.) But while the Legislature, in passing AB 333, restricted the legal requirements of the gang enhancement, it did not alter ordinary evidentiary rules, including the principle that reasonable inferences may be drawn from the evidence.

Section 186.22, subdivisions (e)(1) and (f) now specify that the predicate offenses used to establish a gang's pattern of criminal activity must have commonly benefited the gang in a way that was more than reputational. And section 186.22, subdivision (g), gives examples of benefits that are more than reputational, including "financial gain or motivation, retaliation, targeting a perceived or actual gang rival, or intimidation or silencing of a potential current or previous witness or informant."

Unlike other aspects of section 186.22—such as whether a predicate offense is listed as a qualifying crime under subdivision (e)(1) or was committed within the statutory time frame—proof of a common, non-reputational benefit will frequently rely on circumstantial evidence. For example, gangs are unlikely to keep an accounting of the income from crimes that yield a financial benefit. And other extra-reputational benefits, such as targeting

a rival or intimidating a witness to thwart police, require insight into a gang's motivations that will rarely be directly disclosed.

In reaching its ultimate conclusions on issues such as those, a trier of fact is entitled to draw reasonable inferences from all the evidence and may rely on circumstantial evidence to support its findings. (See 2CT 263-264 [direct and circumstantial evidence instructions]; *People v. Livingston* (2012) 53 Cal.4th 1145, 1165-1167; *People v. Wallace* (2008) 44 Cal.4th 1032, 1094.) A trier of fact may therefore reasonably infer in a particular case that an alleged predicate offense commonly benefited a gang based, among other things, on the nature of the offense and whether it is among the gang's primary activities. For instance, an offense that by its nature involved financial gain naturally gives rise to an inference that its benefit was more than reputational. (See § 186.22, subd. (g).) And if that predicate offense is part of a gang's primary activities, that may additionally give rise to an inference that the offense provided a common, rather than individual, benefit. The plain language of section 186.22, subdivision (e), does not require that a trier of fact ignore such evidence or decline to draw such inferences.

Thus, Cooper is mistaken insofar as he suggests that assessment of a gang's predicate offenses is, as an evidentiary and analytical matter, entirely distinct from its primary activities. (OBM 30-34.)[6] It is true that a common benefit is not

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[6] Cooper makes several arguments along these lines: that the two elements are aimed at different concepts (OBM 30-31); that consideration of a gang's primary activities in determining

(continued…)

shown as a matter of law simply because a predicate offense is among a gang's primary activities. But the fact that a particular type of predicate offense is among the gang's primary activities may provide a basis for inferring that the offense commonly benefitted the gang in a way that was more than reputational. To be sure, the revised statute does not permit a gang enhancement to be found true if the predicate offenses merely personally benefitted the gang members who committed them, or benefitted the gang in a way that was merely reputational. But that does not mean, as Cooper suggests, that the statute disallows reasonable inferences based on the facts of a particular case—including inferences from the evidence about a gang's primary activities—that might inform whether a predicate offense involved a common benefit that was more than reputational.

In the same vein, Cooper invokes AB 333's legislative purpose of narrowing the scope of the gang enhancement in

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(...continued)

whether a predicate offense commonly benefited the gang under section 186.22, subdivision (e)(1) would render superfluous subdivision (f)'s requirement that a criminal street gang have as one of its primary activities one or more of the criminal acts listed in subdivision (e)(1) (OBM 31); that it would be improper to presume that a crime involving financial gain such as robbery or narcotics sales "inherently renders" an extra-reputational benefit to the gang, as such a presumption would obviate the requirement of section 186.22, subdivision (e)(1) that the benefit also be common to the gang as a whole (OBM 32-33); and that "gang-related conduct cannot be inferred from gang status alone" (OBM 33-34).

general and requiring a more-than-reputational common benefit in particular. (OBM 35-38; see Stats. 2021, ch. 699, § 2 [statement of Legislature's declarations and findings].) He argues that, in light of that purpose, a predicate offense's benefit to "the gang as a whole . . . cannot be inferred from the financial nature of a crime alone, which, by itself, inures only to the offender, and instead it must be shown that an actual, non-reputational benefit was rendered to the organization." (OBM 37.)

In enacting AB 333, the Legislature accomplished its goal of restricting the applicability of the gang enhancement by altering the statutory elements in a variety of ways, including through the addition of the requirement that predicate offenses must have "commonly benefited a criminal street gang, and the common benefit from the offenses is more than reputational." (§ 186.22, subd. (e)(1).) But nothing about AB 333's legislative purpose suggests that the bill was also designed to rigidly restrict the evaluation of evidence in the way Cooper suggests. (See *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1167 [no statute "pursues its broad purpose at all costs" and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law," italics original, internal quotation marks omitted]; see also *People v. Morales* (2016) 63 Cal.4th 399, 408 [observing that Proposition 47's purpose to save money does not require that the legislation be interpreted "in every way that might maximize any monetary savings"].) Rather, reasonable inferences may be

drawn by a trier of fact in determining whether the "common benefit" and "more than reputational" aspects of the gang enhancement have been proved—including reasonable inferences based on the nature of the predicate offenses, the gang members who committed them, and the gang's primary activities.

D. In light of the trial evidence, reversal is not required under *Chapman*

Future cases will no doubt feature evidence that is more directly oriented to the new "common benefit" and "more than reputational" requirements than was the evidence at Cooper's pre-AB 333 trial. Nonetheless, the strong inferences that can be drawn from the evidence in this case leave no reasonable doubt that the jury's verdict would have been the same even had it been instructed on the new elements of the gang enhancement. Affirmance is therefore appropriate under *Chapman*. (See *Neder*, *supra*, 527 U.S. at p. 19; accord, *Mil*, *supra*, 53 Cal.4th at p. 417.)

The People's gang expert, Detective Sumner, testified in detail about the history and inner workings of Compton-area gangs, including Leuders Park. (See 3RT 2426-2474.) Among other things, he explained that Leuders Park's primary activities include robbery and narcotics sales. (3RT 2451.) He also explained that money is a gang's most important commodity. (3RT 2460.) Robbery and narcotics sales are offenses that inherently involve a financial benefit. Importantly, moreover, he explained that those types of offenses are committed by the "most active guys" in Leuders Park, as opposed to members that merely "play the role of a gang member and act hard." (3RT 2434.) More specifically, Detective Sumner testified that Mahan, the

perpetrator of the narcotics sales predicate offense, was "[p]robably the most senior Leuders Park Piru gang member on the street right now" (3RT 2454), and that Vaughn, the perpetrator of the predicate robbery offense, was a well-known and admitted Leuders Park member (3RT 2452).

Taken together, this evidence unmistakably showed that the predicate offenses commonly benefitted the gang in a way that was more than reputational. Such offenses may of course be committed by gang members only for personal gain (which, relatedly, may benefit the gang only reputationally). But here, the gang expert's testimony made clear that those types of crimes are within the core activity of Leuders Park, that they are typically—and were here—committed by the most active or most senior gang members, and that financial gain is vital to the gang. Given that context, there is no reasonable doubt that the jury, had it been given updated instructions, would have drawn the reasonable inference that the predicate offenses put forward by the prosecution provided Leuders Park a common benefit that was more than reputational.

Cooper points to several recent Court of Appeal decisions reversing pre-AB 333 gang enhancements in light of the intervening statutory amendments. (OBM 39-40, 42-43.) Those decisions are of limited relevance here.

The decision in *People v. Lopez* (2021) 73 Cal.App.5th 327 does not make clear whether the Court of Appeal there concluded that reversal was required under a harmless error standard or whether it determined that the error was not amenable to

harmless error analysis at all. (*Id*. at p. 346 ["To rule that the existence of evidence in the record that would permit a jury to make a particular finding means that the jury need not actually be asked to make that finding would usurp the jury's role and violate Lopez's right to a jury trial on all the elements of the charged allegations"].) To the extent *Lopez* declined to apply the *Chapman* standard, it erred for the reasons discussed above. (See Arg. B, *ante*.)

In any event, *Lopez* does not usefully inform the analysis here. The charged offenses in *Lopez* included three murders and the sale of methamphetamine. (*Lopez*, *supra*, 73 Cal.App.5th at p. 331.) The predicate offenses were two murders committed by gang member William Vasquez and a carjacking and robbery committed by gang member Guillermo de Los Angeles. (*Id*. at p. 344.) On appeal, the People contended that "there exists evidence that [the predicate crimes] benefitted the gang in a way compliant with the new statutory provisions." (*Id*. at p. 346.) The Court of Appeal rejected that argument on the ground that "the evidence described by the People in their supplemental briefing was not evidence presented to the jury in this case—instead, the People draw their information from unpublished appellate decisions concerning Vasquez and a codefendant of De Los Angeles." (*Ibid*.) Here, in contrast, the harmless error determination may properly be based on the testimony given by the gang expert at trial.

In *People v. Sek* (2022) 74 Cal.App.5th 657, the Court of Appeal purported to apply *Chapman* but concluded that reversal

was required because the gang expert had testified at trial to both the reputational and the non-reputational benefits of the predicate offenses. (*Id*. at pp. 667-680.) The *Sek* decision, however, used an improperly stringent harmless error test that looked to the basis upon which the jury actually rested its verdict. (See *id.* at p. 668, citing *Sullivan*, *supra*, 508 U.S. at p. 279; see also *id*. at p. 669 ["the basis of the jury's verdict is not so clear"].) As discussed above (see Arg. B, *ante*), this Court's and the United States Supreme Court's precedents make clear that, while affirmance is proper if it can be determined that the jury actually rested its verdict on valid grounds, that is not the only way to satisfy *Chapman*. (See *Neder*, *supra*, 527 U.S. at p. 11; *Aledamat*, *supra*, 8 Cal.5th at pp. 12-13.)

The *Sek* decision is also distinguishable. There, one of the explanations the gang expert gave for why the predicate offenses benefited the gang was that they could "enhance [its] reputation," so the court held that "we cannot rule out the possibility that the jury relied on reputational benefit to the gang as its basis for finding the enhancements true." (*Sek*, *supra*, 74 Cal.App.5th at p. 669.) But here, Detective Sumner did not testify that the predicate offenses of robbery and narcotics sales benefited Leuders Park in a reputational way. While the detective testified about how the charged shooting benefitted the gang by maintaining its respect (see 3RT 2460), he did not offer a parallel opinion about the predicate offenses. As explained above, the straightforward, common-sense inference about the predicate offenses of robbery and drug sales committed by the most

dedicated Leuders Park gang members was that they provided a common financial benefit to the gang. And even if the predicate offenses in this case also happened to confer reputational benefits, that would not undermine the strong evidence of extra-reputational benefits that satisfied the new statutory terms. (See § 186.22, subd. (e) [specifying that common benefit to gang must be *more* than reputational].)

Finally, in *People v. E.H.* (2022) 75 Cal.App.5th 467, the gang's primary activities included robbery, burglary, carjacking, and shooting, and the predicate offenses shown at trial were robbery, two instances of grand theft with gang enhancements, attempted murder, assault with a deadly weapon, and burglary. (*Id*. at p. 473.) The People's gang expert testified that violent crimes bolster a gang's reputation, and that crimes such as burglary, robbery, and drug sales benefit the gang financially. (*Ibid*.) The Court of Appeal held that the failure to instruct that the predicate offenses had to commonly benefit the gang in a more-than-reputational way was not harmless beyond a reasonable doubt. (*Id*. at p. 479.)

Like the decision in *Sek*, the *E.H.* decision employed an erroneously stringent harmless error analysis looking to whether "the missing element from an instruction was uncontested or proved as a matter of law." (*E.H.*, *supra*, 75 Cal.App.5th at p. 479; see Arg. B, *ante*.) But in any event, in *E.H.* the predicate offenses included crimes that conferred an inherently financial benefit—such as robbery, burglary, and grand theft—as well as those that did not—such as attempted murder and assault. The

evidence from which the jury could have drawn proper inferences about the new gang enhancement requirements was therefore mixed. Here, however, the unavoidable inference regarding the only two predicate offenses put forward by the People was that they provided a common, financial benefit to the gang—an inference that was not undermined by any other evidence before the jury. Under these circumstances, the record shows beyond a reasonable doubt that the result would have been the same even had the jury been given updated instructions.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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October 7, 2022

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 6,557 words.

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October 7, 2022

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *People* v. *Cooper (Robert)* Case No.: S273134

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 7, 2022, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system.

Elizabeth K. Horowitz
Attorney at Law
(Served via TrueFuling)

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Valerie Cole
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The Honorable Allen Joseph Webster, Jr.,Judge
Los Angeles County Superior Court
Compton Courthouse
200 West Compton Boulevard
Department E
Compton, CA 90220

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 7, 2022, at Los Angeles, California.

Vanida S. Sutthiphong	/s/ Vanida S. Sutthiphong
Declarant	Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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Case Number: **S273134**
Lower Court Case Number: **B304490**

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/s/Vanida Sutthiphong
Signature

Lee, Charles (268057)
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