

Expert Testimony
(April 16, 2008)

Gang Expert Testimony (Pen. Code, § 186.22 cases)

General Scope of Gang Testimony

- “An expert is permitted to offer an opinion on ‘a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.’” (*People v. Mayfield* (1997) 14 Cal.4th 688, 766, quoting Evid. Code, § 801, subd. (a).)
- Expert opinion must be based upon materials “reasonably relied upon by an expert in forming an opinion upon the subject to which his testimony relates” (Evid. Code, § 801, subd. (b).)
- Gang evidence in the form of expert testimony is admissible provided the evidence is relevant and its prejudicial effect does not substantially outweigh its probative value (Evid. Code, § 352). (*People v. Champion* (1995) 9 Cal.4th 879, 923.)
- Gang experts may testify about the culture and habits of criminal street gang, as well as gang psychology and sociology. (*People v. Gardeley* (1996) 14 Cal.4th 605; *People v. Olquin* (1994) 31 Cal.App.4th 1355; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Expert Testimony Offered to Prove the “Primary Activities” of the Gang

- Gang expert testimony admissible to prove the “primary activities” of the gang. (*People v. Vy* (2004) 122 Cal.App.4th 1209 [extensive gang expert testimony offered to prove “primary activities”].)
- Expert testimony alone may be sufficient to satisfy “primary activities” element. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)
- *In re Alexander L.* (2007) 149 Cal.App.4th 605, court found expert testimony insufficient to prove the “primary activities” of the gang was to commit predicate offenses where the expert testified, “I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’ve been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.”

- *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, the court found the expert testimony insufficient to prove “primary activities” of the gang where expert stated that “the primary activity of all of the gangs in his area is criminal.”

Expert Testimony Offered to Prove the “Pattern of Criminal Gang Activity”

- *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, the court found insufficient evidence that the gang had “pattern of criminal gang activity” because the predicate offenses had not been proven.
- *In re Leland D.* (1990) 223 Cal.App.3d 251, the court found insufficient evidence of a “pattern of criminal gang activity” where the expert testified that “members of the Fink White Deuces have engaged in the sale of rock cocaine, have committed vehicle thefts and have been involved in assaults with deadly weapons.”

Expert Testimony Offered to Prove Crime Committed for the Benefit of the Gang

- “Record must provide some evidentiary support, other than merely the defendant’s record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang.” (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762.)
- *People v. Albarran* (2007) 149 Cal.App.4th 214: Expert opined that crimes were gang related because they were committed within the gang’s territory, they occurred at a party when gang crimes are often committed, the crimes would benefit the gang because the gang members would gain respect within the gang by word of mouth regarding the crimes and the offense would serve to intimidate people. Court rejects respect argument because there was no evidence that the shooters made any announcements re: gang affiliation (i.e. throwing gang signs, gang graffiti). Only evidence of gang purpose was based on gang affiliation.
- A gang expert’s testimony alone is insufficient to find an offense gang related. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 931.)
 - Must be corroborating testimony related to the crime. *Ferraez* was a drug case. “Other evidence” offered was the fact that the defendant was selling drugs in gang territory, had gained the gang’s permission to sell drugs, admitted gang membership and his associations with the gang.

Information Expert Relies Upon is Admissible for Non-Hearsay Purposes: To Explain the Expert's Opinion

- Gang experts may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.)
- Opinion testimony of gang experts is admissible, as well as the information the expert relied upon in forming his or her opinion as long as the information is reliable and reasonably relied upon by other experts in the particular field in forming opinions. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620; Evid. Code, § 801.)
- Expert testimony may not be used “as a vehicle to bring before the jury incompetent evidence.” (*People v. La Macchia* (1953) 40 Cal.2d 738, 745-746 cited in *People v. Odom* (1980) 108 Cal.App.3d 100 and *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003 [“While experts may offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence.”]; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1464.)
- No *Crawford* violation where a gang expert discloses the basis for his or her opinion, including hearsay, because the information is not offered for its truth. (*People v. Thomas* (2005) 130 Cal.App.4th 1202 [“materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert’s opinion”]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422 [testimony of gang expert that two members of defendant’s gang had prior convictions for murder and attempted murder and crimes were committed for the benefit of the gang did not violate the Confrontation Clause].)

Gang Expert May Not Testify As to the Defendant's Specific Knowledge or Intent

- Gang expert cannot testify to a defendant's subject expectation; he or she can testify as to what "a gang member" might typically expect from a particular interaction. (*People v. Olquin* (1994) 31 Cal.App.4th 1355, 1371.)
- Gang expert may testify that an individual is a member of a gang. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1464; *People v. Valdez* (1997) 58 Cal.App.4th 494.)
- Trial court error in admitted expert testimony that "when one gang member possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*People v. Killebrew* (2002) 103 Cal.App.4th 644.)
- *In re Frank S.* (2006) 141 Cal.App.4th 1192, appellate court reversed where expert improperly testified that the minor possessed the knife to protect himself and the knife possession benefitted the gang by providing them with protection in the event of an assault. Gang enhancement dismissed because the expert testimony was the only evidence supporting the specific intent element (i.e. that minor "committed [the crime] for the benefit of, at the direction of, or in association with any criminal street gang . . .").
- *People v. Ward* (2005) 36 Cal.4th 186, California Supreme Court rejects argument that the gang expert's answers to fact-specific hypothetical questions to elicit testimony that a gang member going into rival gang territory (like defendant) would do so as a challenge and would protect himself with a weapon. Court finds opinion falls within the gang culture or habit approved in *Gardeley*; substance of testimony related defendant's motives for entering rival territory and his likely response, but did not express an opinion as to guilt.
- See sample arguments from *People v. C. Loza*, G035759 and *People v. Reynaldo Ruiz*, E042886.

CSAAS (Child Sexual Abuse Accommodation Syndrome) Testimony

- CSAAS testimony is inadmissible to prove or disprove child abuse. (*People v. Wells* (2004) 118 Cal.App.4th 179, 188; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 [defense tried to present evidence that V did not display expected symptoms of a child abuse victim]; *People v. Bowker* (1988) 203 Cal.App.3d 385.) CSAAS does not pass the *Kelly-Frye* test. (*Id.* at p. 391.)
- CSAAS testimony is admissible to rebut a particular “myth” or “misconception” used by the defense to attack the victim’s credibility such as delayed reporting or recanting testimony. The government’s burden is to identify the myth or misconception the evidence is designed to rebut. (*People v. Wells* (2004) 118 Cal.App.4th 179; *People v. Bowker* (1988) 203 Cal.App.3d 385.) The testimony must be tailored to this specific purpose. (See sample argument from *People v. Dougherty*, E040980.)
- Evidence is properly admitted to explain delayed reporting, concealment, and conflict in testimony where it focused on a class of victims, not the particular victim. (*People v. Stark* (1989) 213 Cal.App.3d 107, 116.)
- Prosecution need not state on the record which myths it intends to disabuse with the CSAAS testimony. (*People v. Patino* (1994) 26 Cal.App.4th 1737, 1744-1745.) “It is sufficient if the victim’s credibility is placed in issue due to the paradoxical behavior, including a delay in reporting molestation.” (*Ibid.* citing *People v. Harlan* (1990) 222 Cal.App.3d 439, 449-450.)
- Evidence can be offered in the prosecution case in chief in order to address credibility issues; government need not wait for rebuttal case. (*People v. Sanchez* (1989) 208 Cal.App.3d 721, 735-736; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.)
- Similarly, rape-trauma syndrome does not pass *Kelly Frye* because the scientific community does not rely for the same purpose the prosecution seeks to use it (i.e. the fact that the victim is suffering from rape-trauma syndrome does not mean the victim was actually raped). (*People v. Bledsoe* (1984) 36 Cal.3d 236.) It was developed as a therapeutic tool, not to determine the accuracy of a past event. Evidence of rape-trauma syndrome is admissible to “disabus[e] the jury of some widely held misconceptions about rape and rape victims” (*Id.* at pp. 247-248.)

- Expert cannot opine that a witness is telling the truth because the determination of credibility is not sufficiently beyond common experience that the expert opinion would assist the trier of fact. (*People v. Coffman* (2004) 34 Cal.4th 1 [case involving male and female co-defendants where female claimed she was a battered woman, psychologist testified that female codefendant was credible; error].)
- Limiting instruction: Jury must be instructed that the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true. The evidence is admissible solely for the purpose of showing that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested. (See CALJIC No. 10.64 [child abuse/rape trauma syndrome]; CALCRIM Nos. 1192 [rape trauma syndrome], 1193 [child sexual abuse accommodation syndrome]; Sample argument from *People v. Rodriguez*, E043031.)
- Instruction must be given sua sponte. (*People v. Housley* (1992) 6 Cal.App.4th 947, 958-959.)

Drug Experts

- Prosecution expert was unqualified to render an expert opinion about whether the marijuana was being illegally possessed for sale as opposed to lawful possession under the Compassionate Use Act. (*People v. Chakos* (2008) 158 Cal.App.4th 357.)
- Detective's testimony concerning a two digit code on a pager is admissible. The seller paged the defendant from a public telephone booth, the phone number which appeared on the defendant's pager was followed by a code, "-35." Detective testified that the code ("-35") was utilized by more sophisticated drug dealers to identify the caller to the supplier. Detective was an experienced narcotics investigator and his opinion was limited to an explanation as to the significance of the number on the pager. (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1071.)
- Expert may testify that under the facts of a given hypothetical, drugs were possessed for purposes of sales. (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1495-1496.)
- In a prosecution for conspiracy to sell cocaine, expert permitted to explain the various roles and culpability manifested by each defendant in a Columbian cocaine distribution cell. (*People v. Harvey* (1991) 233 Cal.App.3d 1206.) Expert explained the significance of various transactions (i.e. one meeting was a cocaine trafficking meeting, another meeting involved the transfer of money) and the role of each defendant in the hierarchy.