**PEOPLE v. HALL**

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*THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LEE HALL, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Four.

Filed September 21, 2010.

***Attorney(s) appearing for the Case***

*Landra E. Rosenthal, under appointment by the Court of Appeal, for Defendant and Appellant.*

*Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.*

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, Acting P. J.

A jury convicted defendant Michael Lee Hall of one count of second degree murder (Pen. Code, § 187, subd. (a)),[1](https://www.leagle.com/decision/incaco20100921023#fid1) and one count of attempted murder (§§ 664/187, subd. (a)). In each count, the jury found true a gang enhancement (§ 186.22, subd. (b)(1)) and a firearm enhancement (§ 12022.53, subd. (d)). The trial court sentenced him to a total term of 59 years to life in state prison. On appeal, he contends that the evidence is insufficient to support the gang enhancement, that the prosecutor committed misconduct by introducing photographs she had taken, and, if the issue of misconduct is forfeited, that defendant received ineffective assistance of counsel. We affirm the judgment.

**BACKGROUND**

***Prosecution Evidence***[**2**](https://www.leagle.com/decision/incaco20100921023#fid2)

Andrew Maree belonged to the Inglewood Family Bloods gang.[3](https://www.leagle.com/decision/incaco20100921023#fid3) On April 1, 2007, around 1:30 p.m., Maree was driving on 94th Street near Gramercy in Los Angeles with a passenger, Kenneth Frison. The area is in territory claimed by the rival Rollin' 90's Neighborhood Crips. Maree saw a person on the street, later identified as defendant, whom he recognized as a member of the Rollin' 90's. Defendant looked right at him and reached for his waistband. Maree stepped on the gas, ducked, and heard several gunshots. The rear window of the car shattered. Kenneth Frison was shot in the back of the head and died from the wound.

Tony McClendon belonged to the Rollin' 90's and knew defendant to also be a member of the gang.[4](https://www.leagle.com/decision/incaco20100921023#fid4) McClendon witnessed the shooting from an alley about a block away, while with another Rollin' 90's member, Charles Fowler (who was a witness called by the defense). McClendon saw defendant pointing what appeared to be a handgun at a car that was moving slowly, and saw puffs of smoke come from the gun. Defendant fired several times at the passenger's side as the car passed. Defendant then ran past 94th Street between some houses.

Creighton Douglas, who lived in Rollin' 90's territory at 1930 West 94th Street, testified that after the shooting, a car drove up while he was standing outside his house. The front passenger, whom Douglas said he did not know (he denied it was defendant) told him to get a pistol from where it was hidden in a small space in the backyard of a house down the street. Douglas agreed and the car drove off. But instead of looking for the gun, he went inside his house.

About 90 minutes after the shooting, Tony McClendon returned to the alley and saw defendant. Defendant said that he had done the shooting and that "Creighton" might have picked up the gun from where he left it in a backyard by Creighton's house.

Around 9:15 p.m. on the day of the shooting, police found a .9 millimeter semiautomatic handgun between a wall and a garage at 1910 West 94th Street. Eleven .9 millimeter shell casings were found at the shooting scene, all of which, according to ballistics testing, were fired by that gun. Defendant's DNA was discovered in samples swabbed from the gun.

Asked a hypothetical question based on the prosecution's evidence, the prosecution gang expert, Los Angeles Police Officer Kevin Currie, opined that, based on the assumed facts, the shooting was carried out for the benefit of the Rollin' 90's to protect their territory and criminal activities.

***Defense***

Defendant testified that he belonged to the Rollin' 90's, but denied involvement in the shooting. On the day of the shooting, he held a "smoke out" at his residence, at which friends gathered to smoke marijuana. Afterward, he saw that police had taped off 94th Street. He explained the presence of his DNA on the firearm used in the shooting by testifying that his gang kept the gun in a "stash," and that he took the gun to a "gang banging party" a few nights before the shooting. Further, he explained that although his gang does not get along with the Inglewood Family Bloods, and although he knew Maree was a member of that gang, he was friendly with Maree from time they were in custody together and he would not shoot him simply for driving into Rollin' 90's territory. According to defendant, there are "people who shoot for the hood," but he was not one of them.

Charles Fowler testified that on the day of the shooting, he was walking with Tony McClendon in an alley south of 94th Street when he heard gunshots. They looked at each other, and continued to walk, headed to a McDonald's.

**DISCUSSION**

**I. The Gang Enhancement**

Defendant contends that the evidence was insufficient to support the gang enhancement. In particular, he challenges the sufficiency of the evidence to prove one element of the enhancement: whether the shooting was "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).) He argues that in the absence of specific evidence tying the shooting to a gang-related motive (e.g., the shouting of gang slogans or the display of gang signs), the testimony of the prosecution gang expert, Officer Currie, was inadequate to prove this element. We disagree. In reviewing the claim, we examine the entire record in the light most favorable to the judgment. (*People v. Ochoa* (1993) [6 Cal.4th 1199](https://www.leagle.com/cite/6%20Cal.4th%201199), 1206.)

The trial evidence showed that defendant belonged to the Rollin' 90's Neighborhood Crips. Maree belonged to the Inglewood Family Bloods. The two gangs had been feuding for years, and had engaged in shootings and other violence against each other. According to Tony McClendon, the two gangs were "mortal enemies" and around the time of the shootings were engaging in "feud[s], shootings," and "were . . . more or less at war." According to Charles Fowler, any Bloods-affiliated gang was an enemy of the Rollin' 90's. Even defendant conceded that the Rollin' 90's and the Inglewood Family Bloods were rival gangs and did not get along, but he portrayed the rivalry as "not, like, . . . a constant war."

Defendant knew Maree and his gang affiliation. Upon seeing him drive past in Rollin' 90's territory, he shot at him without warning. In relevant part, Officer Currie testified that if an Inglewood Family Bloods gang member drove through the territory of the Rollin' 90's Neighborhood Crips, and a member of the Rollin' 90's shot at him, the shooting would be committed for the benefit of the Rollin' 90's to protect their territory and criminal activities. As he explained: "For a rival gang member to come into their territory is . . . disrespect[ful] to this gang. . . . Also, the purposes of why he would come . . . there is to potentially sell narcotics or to scout the area to commit a crime against a gang member or to possibly commit a crime himself. By the individual shooting at the rival gang member, it shows that he's not welcome there. It shows the violence that will be put upon him if any members of the rival gang come into the neighborhood. . . . [A]lso — citizens hear about and see this type of violence that occurs. When they see that, they believe that that violence could possibly be used upon them or they could be mistaken for a gang member. And they fear that if they come forward and assist in the investigation or talk to the police, that type of violence could be used upon them." Further, such a shooting helps the gang protect its drug sales in its territory.

We note, further, that in his testimony, defendant conceded that some gang members shoot at trespassing rival gang members "for the hood," although he claimed that he was not one of them. Of course, the jury was not required to accept his claim of innocence.

This evidence, taken as a whole, is sufficient to infer that defendant, a Rollin' 90's gang member, shot at Maree and his passenger because he believed that they belonged to a rival gang, and that defendant acted to protect his gang, its territory, and its criminal enterprises, including drug sales, against trespass or encroachment.

Defendant asserts that the evidence in this case was no stronger than that in *People v. Ramon* (2009) [175 Cal.App.4th 843](https://www.leagle.com/cite/175%20Cal.App.4th%20843), in which the court of appeal found the evidence insufficient to prove the gang enhancement because "[t]here were no facts from which the expert could discern whether [defendant]," a gang member who was arrested in his gang's territory while driving a stolen pickup truck and was convicted, inter alia, of receiving stolen property, was acting on his own behalf or on behalf of his gang. (*Id.* at p. 851.) By contrast, in the present case, given the ongoing violent rivalry between the Rollin' 90's and Inglewood Family Bloods, it is easily inferable that defendant shot at Maree's vehicle to protect the Rollin' 90's and their territory. Indeed, on this record, there is no other viable explanation for the otherwise unprovoked shooting.

To the extent defendant relies on the Ninth Circuit's interpretation of section 186.22, subdivision (b)(1), in *Garcia v. Carey* (9th Cir. 2005) [395 F.3d 1099](https://www.leagle.com/cite/395%20F.3d%201099), and *Briceno v. Scribner* (9th Cir. 2009) [555 F.3d 1069](https://www.leagle.com/cite/555%20F.3d%201069), we agree with prior California decisions holding that the Ninth Circuit misinterprets the statute. (See, e.g., *People v. Vasquez* (2009) [178 Cal.App.4th 347](https://www.leagle.com/cite/178%20Cal.App.4th%20347), 354 (*Vasquez*); *People v. Hill* (2006) [142 Cal.App.4th 770](https://www.leagle.com/cite/142%20Cal.App.4th%20770), 774; *People v. Romero* (2006) [140 Cal.App.4th 15](https://www.leagle.com/cite/140%20Cal.App.4th%2015), 19.) As stated in *Vasquez, supra,* 178 Cal.App.4th at page 354: "[W]e reject the Ninth Circuit's attempt to write additional requirements into the statute. It provides an enhanced penalty where the defendant specifically intends to `promote, further, or assist in any criminal conduct by gang members.' (§ 186.22, subd. (b)(1).) There is no statutory requirement that this `criminal conduct by gang members' be distinct from the charged offense, or that the evidence establish specific crimes the defendant intended to assist his fellow gang members in committing."

**II. Photographic Exhibits**

Defendant contends that the prosecutor committed misconduct by introducing "photographs" she had taken which bolstered the testimony of Tony McClendon concerning his ability to identify defendant as the shooter. The contention is meritless.

Defendant fails to identify the "photographs" in question. Based on our review of the record, the prosecutor used only two photographs in examining Tony McClendon. One was a composite of several aerial photographs of the shooting scene (People's Exhibit No. 3), which does not appear to be a "photograph" the prosecutor took. The second was a single street-level photograph (People's Exhibit No. 4).

At the close of the People's case, defense counsel moved for a jury view of the shooting scene. After the court denied that motion, defense counsel moved to call the prosecutor as a witness to examine her regarding "photographs" she had taken (he did not identify the specific photographs), contending that the "photographs" were misleading and taken with a telephoto lens. The prosecutor responded that Detective Garza was present when she took photographs and could testify to the type of camera and lens used, although neither Detective Garza nor the prosecutor could provide information on the settings and other technical information. Defense counsel conceded that his investigator had taken his own photographs of the relevant area which he believed were more accurate, but he nonetheless insisted on examining the prosecutor about the photographs she took. The court ruled that he would be allowed to call the prosecutor as a witness, if he chose.

Defense counsel did not call the prosecutor or Detective Garza as a witness. He did, however, call his investigator, James Belknap, who testified concerning measurements of the scene, described several photographs he took, and described a video he made tracking the alleged route of Maree's vehicle. Defense counsel did not object to introduction of any of the prosecution's exhibits.

We reject defendant's claim of prosecutorial misconduct for the following reasons. First, the issue is forfeited, because defendant made no timely claim of prosecutorial misconduct in the trial court, and did not object to introduction of the photographs used to examine McClendon. (*People v. Benavides* (2005) [35 Cal.4th 69](https://www.leagle.com/cite/35%20Cal.4th%2069), 108 (*Benavides*) [failure to object to misconduct forfeits the issue where an instruction could have cured any prejudice].)

Second, there was no misconduct. "To constitute a violation of the federal Constitution, prosecutorial misconduct must `"so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves `"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" [Citation.]" (*Benavides, supra,* 35 Cal.4th at p. 108.) Here, the prosecutor did nothing more than use a photograph she took when accompanied by her investigating officer to illustrate McClendon's testimony. Even assuming that the photograph was taken with a telephoto lens (the record on appeal in inadequate to substantiate that claim), that circumstance did not translate into misconduct, as there was nothing unfair, deceptive, or reprehensible about it. Defense counsel was free to call the prosecutor or Detective Garza to examine them about the photograph (he did not) and free to contest its accuracy (he did, through evidence of his investigator, and later in argument, portraying the photograph as a "trick" and a "distortion").

Third, even if, arguendo, the prosecutor committed misconduct, there was no prejudice, because through the defense investigator the defense presented its own evidence depicting the shooting scene and the purported inability of McClendon to see what he testified he saw. Thus, absent the one prosecution photograph in issue, it is not reasonably probable that a different result would have been reached. (*People v. Watson* (1956) [46 Cal.2d 818](https://www.leagle.com/cite/46%20Cal.2d%20818), 836.)

Finally, because we have determined that there was neither misconduct nor prejudice, we need not consider defendant's contention that his counsel was ineffective for failing to effectively object in the trial court.

**DISPOSITION**

The judgment is affirmed.

We concur.

MANELLA, J.

SUZUKAWA, J.

**FootNotes**

1. All undesignated section references are to the Penal Code.

2. Because defendant does not challenge the sufficiency of the evidence to support his conviction, we only briefly summarize the evidence of guilt. We save the bulk of our summary of the evidence supporting the gang enhancement until we discuss the contention that the evidence does not support the enhancement.

3. Maree died before trial, and his preliminary hearing testimony was read to the jury. Also, certain inconsistent statements he made to Los Angeles Police Detective Refugio Garza were introduced.

4. McClendon had a lengthy felony record and acted as a police informant in this case and another murder case. He received a reduced sentence for several of his crimes, and was relocated at government expense.