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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALLAN VILLEDA et al., Defendants and Appellants.	B230494 (Los Angeles County Super. Ct. No. TA111443)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant Allan Villeda.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Luis A. Escatel.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendants and appellants Allan Villeda and Luis Alonso Escatel guilty of multiple counts of second degree robbery. The trial court sentenced Villeda to 38 years in prison, and Escatel to 17 years.

Appellants contend the trial court abused its discretion by refusing to bifurcate trial of gang allegations; there was insufficient evidence to support gang enhancements; the trial court prejudicially erred by allowing the prosecutor to pose an improper hypothetical question to a gang expert; and Villeda's counsel rendered ineffective assistance. Discerning no prejudicial error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Viewed in accordance with the usual rules governing appellate review (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304; *People v. Robinson* (1997) 53 Cal.App.4th 270, 273), the evidence relevant to the issues presented on appeal established the following.

(i) *Robbery of Ignacia Melendez.*

On October 20, 2009, at approximately 2:30 p.m., Ignacia Melendez was getting ready to pick up her son from school. As she was about to open the door to her car, which was parked in front of her Compton home, Villeda pulled up alongside her in a red Ford Explorer. He called to her in Spanish. She approached the Explorer to speak to him. Villeda demanded that Melendez give him two gold necklaces she was wearing. She saw he was holding a gun in his lap, pointed at her. She nonetheless refused and walked toward her home. Villeda exited the Explorer and followed Melendez, holding the gun. He threatened to shoot her unless she stopped. Villeda pulled the gold chains from Melendez's neck, and left in the Explorer. Melendez's husband, Conception Hurtado, was inside the house and saw what was happening. When he observed Villeda following his wife with the gun, he came outside and confronted Villeda. He observed

Villeda pull the necklace from Melendez's neck. Hurtado positively identified Villeda as the robber in a pretrial photographic lineup and at trial.[1]

(ii) *Robbery of Victor Solórzano.*

At approximately noon on October 29, 2009, Victor Solórzano was working at an Arco AM/PM gas station and market located in Carson. As he was walking into the store after completing duties outside, he walked past Escatel. Solórzano felt a tug on his neck, and realized his gold necklace, which was worth approximately $200, was gone. Solórzano called to Escatel and began to follow him. Escatel turned, placed both hands on his waistband area, and looked at Solórzano. Solórzano saw that Escatel had a black gun tucked in his belt. Frightened, Solórzano opted not to pursue him. Escatel ran to the passenger side of a red Explorer with a license plate beginning with "6." The incident was captured on the store's surveillance system, and a videotape was played for the jury. Escatel stipulated that he took the chain.

(iii) *Robbery of Ever Pineda.*

On February 14, 2010, Ever Pineda was washing a truck in Compton, accompanied by his wife and two children. At approximately 1:00 p.m., as Pineda was bending down cleaning the tires, Villeda approached and yanked a gold chain from Pineda's neck. Pineda turned to find Villeda pointing a gun at him. Villeda demanded Pineda's money. Pineda complied, giving him approximately $85. Villeda removed Pineda's wallet from his pocket and looked at Pineda's driver's license, stating, " 'Just in case you talk to the police.' " Villeda walked to a red or burgundy Ford Explorer parked nearby, and drove off.

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[1] Melendez was unable to identify Villeda at trial, and identified another individual as looking like the robber in a pretrial photographic lineup.

Pineda identified Villeda as the robber at trial. He also identified Villeda in a pretrial photographic lineup, indicating he was 90 percent sure Villeda was the culprit.

(iv) *Robberies of Oscar Hernandez and Julio Nunez.*

On March 11, 2010, Oscar Hernandez and Julio Nunez were rebuilding a wall at a house in Gardena. Between 3:00 and 4:00 p.m., the men began cleaning up after the day's work. Hernandez walked across the street to his truck, intending to make a telephone call to check on his son. He saw a red sport utility vehicle (SUV) park near the house, where Nunez was still cleaning. Escatel exited the red SUV and spoke with Nunez. Hernandez got out of his truck and walked toward Nunez and Escatel to "see what was going on." Escatel stated that he was inquiring about the availability of work. At the same time, Villeda exited the SUV, approached Hernandez, grabbed his neck in a "headlock," and told him, " 'Walk.' " Hernandez felt a hard object "like a pipe" pushed against his back. Escatel got behind Hernandez as well. One or both of the assailants removed a cellular telephone and cash from Hernandez's pockets, and Villeda tore a gold chain from Hernandez's neck. Escatel also went through Hernandez's pockets. Afraid for his life, Hernandez told the men he had nothing else, and to " '[t]ake everything.' " Villeda then walked toward Nunez, went through his pockets, and took a cellular telephone. Villeda and Escatel returned to the red SUV and drove off. The incident was captured by a security video camera mounted on the house, and a videotape was played for the jury. Escatel stipulated that he was one of the persons seen in the video. Hernandez identified Escatel and Villeda at trial and in a pretrial photographic lineup.

(v) *Search of Villeda's Explorer.*

Villeda was detained on March 20, 2010, while inside a red Ford Explorer that was registered to him, with a license plate number of "6DWA523." Inside the Explorer, officers discovered a business card for a company that purchased gold.

(vi) *Gang evidence.*

At the time of the crimes, the Alondra 13 was a small, Hispanic criminal street gang with between 35 and 40 members. It claimed a territory in Compton roughly bordered by West Cypress Street, Caldwell Street, Central Avenue, and McKinley

Avenue. The gang's symbol was the Atlanta Braves' "A." Both Villeda and Escatel were members of Alondra 13 as evidenced by, inter alia, their gang tattoos. Villeda had admitted to gang investigator and expert Joseph Sumner that he was an Alondra 13 member. Villeda's monikers were "Evil," "Demon," and "Chuckie." Escatel's was "Wicked." Villeda was the senior member of the gang and was active in recruiting members. The gang had been largely dormant as of 2002, but its membership and activity had increased in 2008 when Villeda returned to the area. A notebook recovered from Villeda's Explorer contained Alondra 13 gang-related writings and "roll call[s]" listing the monikers of current members.

Investigator Sumner testified that in the gang culture, earning "respect" and instilling fear in the community and other gangs is of paramount importance. Gang members earn respect by "putting in work," that is, committing crimes for the gang. The more serious and audacious the crime, the more "respect" the gang and gang member earns. Committing crimes in broad daylight shows the gang member is unafraid, and thus garners respect. Gang members may commit crimes both within and outside the gang's territory, and the victims may be rival gang members or simply members of the community. It is common for gang members to carry guns and share them with other gang members.

The Alondra 13 gang commits thefts, narcotics sales, weapons sales, robberies, burglaries, assaults, and shootings. Crimes such as robbery, burglary, and narcotics sales benefit the gang because the proceeds are typically used to purchase guns or narcotics that are then shared among the gang as a whole. The commission of such crimes also benefits the gang by instilling fear and garnering respect. In Sumner's opinion, although it is possible for a gang member to commit a crime purely for his own benefit, 90 percent of crimes committed by gang members benefit the gang. Exceptions are crimes such as domestic violence, child abuse, shoplifting, and personal use of narcotics.

When given a hypothetical based on the facts of the case, Investigator Sumner opined that the charged robberies were committed for the benefit of the Alondra 13 gang.

As a predicate offense, the People introduced evidence that Villeda had suffered a prior conviction for unlawful possession for sale of a controlled substance (Health & Saf. Code, § 11351).

b. *Evidence presented by defendant Villeda.*

Villeda's neighbor, Osmar Salazar, testified that on February 14, 2010, Villeda's truck had a dead battery and remained parked on their street all day. Villeda was with Salazar all afternoon until approximately 5:30 or 6:00 p.m.

c. *People's rebuttal.*

Public Defender Investigator Yolanda McAllister interviewed Salazar before trial. Salazar's statements to her were inconsistent in several respects with his testimony at trial, including the times at which Villeda was with Salazar on February 14, 2010.

2. *Procedure.*

Trial was by jury. Villeda was convicted of the second degree robberies of Melendez (count 1), Pineda (count 3), Hernandez (count 4), and Nunez (count 5). (Pen. Code, § 211.)[2] The jury found true allegations that Villeda personally used a firearm during commission of each robbery (§ 12022.53, subd. (b)) and that the crimes were committed for the benefit of, at the direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)(1)). The jury acquitted Villeda on count 2, the robbery of Solórzano. The trial court sentenced Villeda to a term of 38 years in prison. It imposed a restitution fine, a suspended parole restitution fine, a DNA penalty assessment, and a court security fee.

The jury convicted Escatel of the second degree robberies of Solórzano (count 2), Hernandez (count 4), and Nunez (count 5). (§ 211.) The jury found the crimes were committed for the benefit of, at the direction of, and in association with, a criminal street

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

gang (§ 186.22, subd. (b)(1)). It found the allegations Escatel personally used a firearm during commission of the robberies not true. The trial court sentenced Escatel to a term of 17 years in prison. It imposed a restitution fine, a suspended parole restitution fine, a DNA penalty assessment, and a court security fee, and ordered Escatel to pay victim restitution.

Villeda and Escatel appeal.

DISCUSSION

1. *Refusal to bifurcate trial of the gang enhancements was not prejudicial error.*

a. *Additional facts.*

Before trial, appellants moved to bifurcate trial of the gang allegations from the substantive charges, on the ground the gang evidence had little probative value on the question of guilt but was highly prejudicial. Relying on *People v. Hernandez* (2004) 33 Cal.4th 1040 (*Hernandez*), the trial court denied the motion, finding *Hernandez* to be "almost on all fours" with the instant matter. The trial court concluded the gang evidence was relevant to establish motive and its probative value was not outweighed by the potential for undue prejudice. Appellants argue the trial court's ruling was an abuse of discretion, and admission of the gang evidence requires reversal.

b. *Discussion.*

A trial court has discretion to order bifurcation of a gang enhancement from the trial of the substantive offenses. (*Hernandez, supra,* 33 Cal.4th at pp. 1048, 1050.) Bifurcation is unnecessary when the evidence supporting a gang enhancement would be admissible at trial of the substantive offenses. (*Id.* at pp. 1049-1050.) We review the trial court's decision for abuse of discretion. (*Id.* at p. 1048; cf. *People v. Carter* (2003) 30 Cal.4th 1166, 1194.)

In *Hernandez,* our Supreme Court considered the propriety of bifurcating gang allegations. *Hernandez* first compared the issue to the bifurcation of prior conviction allegations. The court observed that because of the "unique prejudice that may ensue" if a jury learns of a defendant's prior convictions, the value of bifurcating trial of those allegations has been recognized by the Legislature. (*Hernandez, supra,* 33 Cal.4th at

pp. 1048-1049.) On the other hand, "the Legislature has given no indication of a similar concern regarding enhancements related to the charged offense, such as a street gang enhancement. Nothing in section 186.22 suggests the street gang enhancement should receive special treatment of the kind given [to] prior convictions." (*Hernandez, supra*, at p. 1049.) *Hernandez* observed that the trial of gang-enhancement allegations differs from that of prior conviction allegations. "A prior conviction allegation relates to the defendant's *status* and may have no connection to the charged offense; by contrast, the criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*Id*. at p. 1048.)

Hernandez clarified: "This is not to say that a court should never bifurcate trial of the gang enhancement from trial of guilt. . . . The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Hernandez, supra*, 33 Cal.4th at p. 1049.)

Where a gang enhancement is *not* charged, evidence of gang membership is potentially prejudicial and should not be admitted unless it is relevant and probative on the issues of identity, motive, modus operandi, specific intent, and the like. (*Hernandez, supra,* 33 Cal.4th at p. 1049.) But when a gang enhancement *is* charged, a unitary trial is permitted even if some of the expert testimony would have been excluded under Evidence Code section 352 at a trial limited to guilt. (*Hernandez, supra*, at pp. 1050, 1051.) *Hernandez* reasoned that in the context of the severance of charged offenses, the law favors joinder; the trial of counts together ordinarily conserves funds and judicial resources. (*Id.* at p. 1050.) To a lesser extent, the same tends to be true in the context of bifurcation of a gang enhancement. (*Ibid*.) A trial court's discretion to deny bifurcation is broader than its discretion to admit gang evidence when no gang enhancement is

alleged. (*Ibid.*) The burden is on the defendant " 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' " (*Id*. at p. 1051.)

In *Hernandez,* two victims were seated in a parked car in front of a residence. Defendants Hernandez and Fuentes, who were members of two allied gangs, approached the car and demanded cigarettes and money from one of the victims. Hernandez stated, " 'you don't know who you are dealing with,' " and told the victim she was dealing with " 'Hawthorne Little Watts.' " (*Hernandez, supra,* 33 Cal.4th at p. 1045.) Hernandez threatened to take the victim's car if she did not give them money. The defendants opened the car door, pulled the victim from it, choked her, pointed a knife at her neck, and took her necklace. (*Ibid.*) The trial court declined to bifurcate the gang allegations. A gang expert thereafter testified regarding the defendants' gang membership, tattoos, and monikers; the gangs' composition, size, alliances, territory, and criminal activities; and three "predicate" convictions suffered by gang members other than the defendants. The expert explained that gang members reveal their gang's name during a crime because they want the victims to know who committed the offense in order to gain respect for the gang and instill fear in the community. (*Id.* at p. 1046.)

On these facts, *Hernandez* concluded the court's denial of bifurcation was not an abuse of discretion. (*Hernandez, supra*, 33 Cal.4th at p. 1044.) "Much of the gang evidence . . . was relevant to the charged offense. Indeed, defendant Hernandez himself injected his gang status into the crime" by identifying himself as a gang member and attempting to use that status in demanding the victim's money. (*Id.* at pp. 1050-1051.) The gang expert's testimony helped the jury understand the significance of Hernandez's announcement of his gang membership, "which was relevant to motive and the use of fear." Evidence of an alliance between the two defendants' gangs was relevant to explain why they would act together in the commission of the crime, "thus buttressing such guilt issues as motive and intent." (*Id.* at p. 1051.) The expert's testimony was therefore "relevant to permit the jury to understand Hernandez's statement, to show intent to steal, to show a motive for the crime, to explain how Hernandez's statement could induce fear

in the victim, and to explain how the two defendants were working together, all of which were factors relevant to defendants' guilt." (*Id.* at p. 1053.)

The bifurcation issue here presents a somewhat closer question than in *Hernandez.* Gang evidence is "relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168.) " ' "[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence." [Citations.]' " (*Id*. at p. 1168.) *Hernandez* teaches that, in a robbery case similar to that presented here, evidence of motive is relevant to the issue of guilt. Further, *Hernandez* found gang evidence relevant to explain why two defendants would commit a crime together, "buttressing such guilt issues as motive and intent." (*Hernandez, supra*, 33 Cal.4th at p. 1051.) A gang enhancement was charged in the instant case and, unlike in *People v. Albarran* (2007) 149 Cal.App.4th 214, cited by appellants, the evidence was sufficient to support the jury's true finding on the gang enhancement.

However, unlike in *Hernandez,* neither Villeda nor Escatel injected his gang affiliation into the crimes: neither announced or otherwise referenced the gang when committing the robberies. The crimes took place outside of Alondra 13's claimed territory. There was no evidence the victims knew appellants were gang members. Thus, gang evidence was not relevant to show appellants used the fear instilled by their gang ties to effectuate the robberies. There was also no showing appellants, or their gang, bragged about the crimes; the evidence was therefore not particularly probative to prove the robberies were intended to gain recognition for the gang's criminal acts. (See *People v. Albarran, supra,* 149 Cal.App.4th at p. 227.) Nor was this an apparently senseless or random crime that could be explained only by reference to gang rivalries or norms. (Cf. *People v. Vang* (2011) 52 Cal.4th 1038, 1049-1050, fn. 5.) To the contrary, as appellants point out, the motive for robbery is commonly inferred to be a desire for pecuniary gain. Although the People argue the gang evidence explained why the robberies were committed in broad daylight, the time of the crimes was not a contested

issue. These factors made the gang evidence here considerably less probative on the issue of motive than in *Hernandez* and similar cases. Where gang evidence has minimal probative value, it should be excluded. (*People v. Albarran*, *supra*, at p. 223; *People v. Carter, supra,* 30 Cal.4th at p. 1194; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.)

Additionally, the failure to bifurcate was especially problematic as to Villeda. Evidence of his prior conviction for possession of a controlled substance for sale was admitted as a "predicate" offense to prove the gang allegation, implicating precisely the type of concerns about the admission of "status"-related priors expressed in *Hernandez.* (*Hernandez, supra,* 33 Cal.4th at p. 1048; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 983 ["if the jury is permitted to learn of a defendant's prior conviction, it may be disposed to lean toward a determination of guilt in the current proceedings"].) Had the court granted the bifurcation motion, this evidence would have been inadmissible in the trial on the substantive offenses.

But assuming arguendo the court should have granted the bifurcation motion, and the gang evidence should have been excluded, the error was harmless. The erroneous admission of evidence requires reversal only if it is reasonably probable that appellants would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Marks* (2003) 31 Cal.4th 197, 226-227.)[3] Here, the non-gang evidence against appellants

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3 Appellants contend that the admission of the gang evidence was so highly prejudicial as to render the trial fundamentally unfair, and therefore the *Chapman* reasonable doubt standard applies. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Albarran, supra,* 149 Cal.App.4th at pp. 229-231; *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 19-20.) " 'Ordinarily, [the] erroneous admission of evidence does not offend due process unless it is so prejudicial as to render the proceeding fundamentally unfair.' [Citations.]" (*People v. Covarrubias, supra,* at p. 20.) "For example, even the improper admission of evidence of uncharged crimes committed by the defendant does not ordinarily amount to constitutional error." (*Ibid.*) Here, although the gang evidence may have constituted a significant part of the People's case, it was not the primary evidence of guilt on the substantive crimes. To the contrary, the videotapes

overwhelmingly established they were guilty of the robberies. (See *People v. Williams, supra,* 170 Cal.App.4th at pp. 612-613.) The robberies of Hernandez, Nunez, and Solórzano were captured on videotape, which was shown to the jury. Melendez's husband, Hurtado, witnessed the robbery of his wife and positively identified Villeda as the robber in a pretrial photographic lineup and at trial. Pineda likewise identified Villeda at trial and in a photographic lineup. Escatel stipulated to pulling the necklace from Solórzano's neck and being present at the scene of the robberies of Hernandez and Nunez. The modus operandi of the robbers, including the use of Villeda's red Explorer and the robbers' penchant for yanking gold necklaces from the throats of their victims, strongly linked the Hernandez/Nunez and Solórzano robberies to the two robberies that were not caught on tape. We are not persuaded by appellants' argument that the prosecution's proof of the substantive offenses suffered from a variety of purported shortcomings.

Further, there is no evidence the jury's " 'passions were inflamed' " by the gang evidence. (See *People v. Williams, supra,* 170 Cal.App.4th at pp. 612-613.) The jury acquitted Villeda on count 2, the robbery of Solórzano, even though Solórzano saw Escatel enter the passenger side of a red Explorer immediately after Escatel took Solórzano's necklace. The jury also rejected the personal use of a firearm allegations charged against Escatel. "Thus, the jury did not accept the gang evidence and prior

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and victim and eyewitness testimony provided the primary proof. (See *People v. Covarrubias, supra,* at p. 20.) Moreover, while the gang evidence—especially the evidence regarding Villeda's prior conviction and his leadership role in Alondra 13—was doubtless unhelpful to the defense case, it cannot be compared to the evidence presented in *Albarran,* which included evidence that the defendant sported a tattoo indicating he was associated with the Mexican Mafia, and graffiti found around his home contained threats to kill police. (*People v. Albarran, supra,* at p. 220.) This is not one of those " 'rare and unusual occasions' " in which an error in admitting evidence is "of federal constitutional dimension." (See *People v. Williams* (2009) 170 Cal.App.4th 587, 612.) In any event, as we discuss *post,* the evidence was so strong that it is clear beyond a reasonable doubt appellants would not have received a more favorable result even if the gang evidence had been excluded.

crimes evidence uncritically." (*Id*. at p. 613.) Admission of the gang evidence did not cause the jury to be swayed by prejudice or abdicate its duty to properly weigh the evidence. In short, it is clear under any standard that appellants would not have obtained a more favorable result had the gang evidence been excluded from the trial of guilt on the substantive offenses. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

2. *The prosecutor's use of a hypothetical question based on the facts of the case was not improper; the expert did not impermissibly opine regarding appellants' subjective knowledge or intent.*

During direct examination the prosecutor posed a lengthy hypothetical question to gang expert Sumner that closely tracked the evidence presented in the case. After setting forth the hypothetical, the prosecutor queried, "Do you have an opinion as to whether these robberies, in the fashion that they were committed, were committed for the benefit of, in association with, or at the direction of a criminal street gang?"[4] Sumner answered affirmatively, and explained the basis for his opinion.

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[4] The prosecutor's question was as follows: "[On] October 29th, Ignacia Melendez is walking to her car to go and pick up her son from school. She is at [a residential street] in Compton. A person pulls up in a burgundy Ford Explorer, has a gun, demands her gold necklace. She refuses, goes towards her house. [¶] The person gets out of the burgundy Ford Explorer, chases her, and then catches up to her, and snatches the chain off of her neck. The person gets back in the burgundy Ford Explorer and takes off. This is also witnessed by her husband, Concepcion Hurtado. [¶] Assume the following also: on October 9, Victor Solórzano is working as a clerk at the AM/PM Mini Market on Albertoni Street in Carson. He is walking in the store when he is approached by an individual that says, 'What's up?' and then grabs his gold chain with a cross from his neck. The person walks away. [¶] Victor says, 'Hey,' follows him. The person turns around, motioning to his waist area, and Victor Solórzano stops following him. Victor Solórzano sees what appears to be a black object in his waistband, thinking that it's a gun, and then the person gets in the passenger side of a burgundy Ford Explorer and drives off. [¶] And assume on February 14th of 2010, Ever Pineda has a mobile car wash business, and he's washing a car [on] Stoneacre. A person comes up to him, points a gun at him, demands his money, snatches a gold chain with a cross off of his neck, and then takes his money, 80 to $85, takes his wallet out of his pocket, takes his California ID card, and says, 'in case you talk to the police.' The person then gets in a burgundy Ford

Appellant Escatel complains that the hypothetical was improper, because it too closely tracked the evidence presented in the case. He argues that the hypothetical question improperly called for the expert's opinion on Escatel's "subjective motives or thinking," elicited an improper opinion "on the ultimate issue" in the case, and "directed the jury to decide a certain way." These contentions lack merit.

First, the defense made no objection to the hypothetical question or this aspect of Sumner's testimony, and Escatel has therefore forfeited the point. (Evid. Code, § 353, subd. (a); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81-82; *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.)

The claim fails on the merits as well. Escatel's complaint that the hypothetical question too closely paralleled the evidence at trial is foreclosed by *People v. Vang supra,* 52 Cal.4th 1038. *Vang* considered the same contention made here and rejected it,

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Explorer and takes off. [¶] Now, assume, also, the following: On March 11th, 2010, Oscar Hernandez and Julio Nunez are working on [a street] in Gardena, remodeling a portion of a house. A person walks up to Julio Nunez and asks about work. Julio Nunez tells him there's no work. The person walks away, and Oscar Hernandez walks up. [¶] The person that initially asked Julio Nunez about work meets up with another person that gets out of a burgundy Ford Explorer. The two of them go up together behind Oscar Hernandez, snatches the chain off his neck, a gold chain he had gotten from his father, who is deceased, that also had a pendant of an animal's tooth that he had gotten from his son. They both go through his pockets, removing money and a cell phone. At that point —and Oscar Hernandez also feels something hard in his back. [¶] One of the persons then goes over to Julio Nunez and goes through his pockets, removing his cell phone. The two of them get into—they walk away and get into a burgundy Ford Explorer and they leave. [¶] Now, assume that in each of these instances where property is taken, the property that is taken are all money, cell phones, and gold chains with cross pendants on them, except for Oscar Hernandez. And assume that in each one, a gun is used. Assume that all of these robberies occur in broad daylight by individuals not wearing masks, not disguising themselves in any fashion, and they all occur between the hours of 1:00 o'clock p.m., to about 4:30 p.m. [¶] Now, assuming those facts—and also assume that the individuals the property was taken from are Spanish speakers and they're all working during the day. [¶] Do you have an opinion as to whether these robberies, in the fashion that they were committed, were committed for the benefit of, in association with, or at the direction of a criminal street gang?"

reasoning, "It is *required, not prohibited,* that hypothetical questions be based on the evidence. The questioner is not required to disguise the fact the questions are based on that evidence." (*Id.* at p. 1041, italics added.) Indeed, a hypothetical question *not* based on the evidence "is irrelevant and of no help to the jury." (*Id.* at p. 1046.) Thus, in *Vang* the gang expert "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Id.* at p. 1048.) Escatel's contention that the hypothetical was improper thus fails.

Escatel's argument that the gang expert, in answering the hypothetical question, improperly rendered an opinion on Escatel's subjective thoughts, intent, or knowledge, fares no better. It has long been held that expert testimony regarding the culture, habits, and psychology of gangs is permissible, because these subjects are sufficiently beyond common experience that expert opinion would assist the trier of fact. (*People v. Vang, supra,* 52 Cal.4th at p. 1044; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1512-1513; *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) An expert may properly testify about the size, composition, or existence of a gang; the motivation for a particular crime; whether a crime is gang-related; and " 'whether and how a crime was committed to benefit or promote a gang.' " (*People v. Garcia, supra,* at p. 1512; *People v. Vang, supra,* at pp. 1049-1050, fn. 5; *People v. Albillar* (2010) 51 Cal.4th 47, 63; *People v. Gardelely* (1996) 14 Cal.4th 605, 619-620; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; *People v. Valdez, supra,* at p. 509 [holding that expert opinion regarding whether the defendant acted for the benefit of a gang was admissible].) An expert's testimony is not objectionable merely because it embraces the ultimate issues to be decided by the trier of fact. (Evid. Code, § 805; *People v. Vang, supra,* at p. 1048; *People v. Valdez, supra,* at p. 507.) An expert may not, however, testify that an individual had specific knowledge or possessed a specific intent. (*People v. Garcia, supra,* at p. 1513; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.)

Here, Investigator Sumner opined that the crimes would benefit the Alondra 13 gang because, inter alia, "[e]verything they're taking is going to be turned in, sold for money. That money is going to be used to buy guns, narcotics, or split up between the parties involved taking the property. That, whether it be a gun, will be passed throughout the gang. Whether it be narcotics, will be shared or sold by the gang. [¶] Not only that, it's also going to bolster the reputation of the individuals committing the crime as individual members of the gang." Escatel contends this portion of Sumner's testimony amounted to an improper opinion about his state of mind and specific intent.

But Investigator Sumner did not, in the cited portion of his testimony, opine about appellants' knowledge or subjective intent. The challenged testimony merely described what, in the expert's opinion, gang members typically do with the fruits of their crimes, and how the crimes benefit the gang as a whole. This was not improper. As *Vang* explained, " 'Expert opinion that particular criminal conduct benefitted a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement." (*People v. Vang, supra*, 52 Cal.4th at p. 1048.) Likewise, "[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1)." (*People v. Albillar, supra,* 51 Cal.4th at p. 63.)

People v. Killebrew, supra, 103 Cal.App.4th 644, cited by Escatel, does not assist him. In *Killebrew*, a gang expert testified 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." (*Id.* at p. 652, fn. omitted.) *Killebrew* reasoned that such testimony was improper because it went to the "subjective *knowledge and intent* of each occupant in each vehicle," a matter "much different" than the general expectations of gang members when confronted with specific actions. (*Id*. at p. 658.) Sumner did not offer comparable testimony regarding appellants' knowledge or intent. The mere fact the prosecutor used a fact-specific hypothetical did not convert Sumner's answers into improper opinions on

appellants' state of mind. (*People v. Vang*, *supra*, 52 Cal.4th at pp. 1047-1048 & fn. 3 [disapproving *Killebrew* to the extent it can be read to bar or limit hypothetical questions]; *People v. Ward* (2005) 36 Cal.4th 186, 209-210.)

3. *The evidence was sufficient to prove the gang's primary activities.*

When determining whether the evidence was sufficient to sustain a criminal conviction, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses 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. [Citations.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66; *People v. Carrington* (2009) 47 Cal.4th 145, 186-187; *People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Section 186.22, subdivision (b)(1), provides for a sentence enhancement when the defendant is convicted of enumerated felonies "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 . . . ." A criminal street gang is statutorily defined 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 one or more of the criminal acts enumerated . . . , 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." (§ 186.22, subd. (f).) Therefore, to prove a section 186.22 enhancement, the People must establish three elements: (1) that there is an ongoing association involving three or more participants, having a common name, identifying sign, or symbol; (2) that one of the group's " 'primary activities' " is 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. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1399-1400; *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610-611; *People v. Vy* (2004) 122 Cal.App.4th 1209, 1222; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1457.) Appellants contend the evidence was insufficient to establish the second element, that is, the gang's "primary activities."[5]

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.]" (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 323; *People v. Duran*, *supra*, 97 Cal.App.4th at p. 1464.) "Proof that a gang's members consistently and repeatedly have committed criminal activity listed in section 186.22, subdivision (e) is sufficient to establish the gang's primary activities. On the other hand, proof of only the occasional commission of crimes by the gang's members is insufficient." (*People v. Duran, supra*, at pp. 1464-1465; *People v. Sengpadychith, supra*, at pp. 323-324.) Past offenses, as well as the circumstances of the charged crime, tend to prove the group's primary activities. (*People v. Duran*, *supra*, at p. 1465; *People v. Sengpadychith*, *supra*, at p. 323.) "The testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran, supra*, at p. 1465; *People v. Sengpadychith*, *supra*, at p. 324; *People v. Vy*, *supra*, 122 Cal.App.4th at p. 1226; *People v. Augborne* (2002) 104 Cal.App.4th 362, 372.)

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[5] Appellants do not challenge the sufficiency of the evidence supporting the other elements of the gang enhancement, and accordingly we do not discuss them here.

In *In re Alexander L., supra,* 149 Cal.App.4th 605, a minor was alleged to have committed vandalism based on his "tagging" activities. When asked about the gang's primary activities, a gang expert testified only that: " '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.' No further questions were asked about the gang's primary activities on direct or redirect examination." (*Id.* at p. 611.) "No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. [The expert] did not directly testify that criminal activities constituted [the gang's] primary activities." (*Id*. at pp. 611-612.) Thus, the basis for the expert's knowledge of the gang's primary activities was never elicited, and his testimony lacked sufficient foundation. (*Id*. at pp. 612, 614.)

Appellants urge that Investigator Sumner's testimony resembled the testimony found deficient in *Alexander L.* They characterize Sumner's testimony as "[t]he sole source of evidence" proving the primary activities element. Accordingly, they urge, the evidence was insufficient. In contrast, the People argue that Sumner's testimony, standing alone, was sufficient to prove the primary activities prong.

Here, much like the expert's testimony in *Alexander L.,* Investigator Sumner did not directly testify that any particular crime was one of the gang's primary activities. After eliciting Sumner's opinion that Alondra 13 was a criminal street gang, the prosecutor asked, "What are some of the crimes that are committed by . . . Alondra 13?" Sumner responded, "Those crimes vary anywhere from petty thefts, car thefts, narcotic sales, weapon sales, burglaries, robberies, assaults, shootings." The prosecutor failed to ask, and Sumner therefore did not state, that any of these crimes constituted one of the gang's primary activities. Moreover, although Sumner later opined that Alondra 13 members had been involved in "numerous shootings," when pressed for information Sumner knew only that since 2008, an Alondra 13 member with the moniker "Silent" had been arrested in connection with a shooting and charged with attempted murder; he did not know whether Silent was still in custody. When asked whether he knew of any other

gun-related violence involving the gang, Sumner did not mention any additional shootings. He did, however, know of two occasions in which police removed guns (a rifle and a pistol) from the homes of Alondra 13 members, and that on another occasion, an Alondra 13 member was arrested for possession of a gun. Thus, contrary to the People's argument, Sumner's testimony did not, standing alone, prove the primary activities element.

But this does not mean the evidence was insufficient. While the primary activities element may be proved via expert testimony, this is not the sole method by which proof may be had. There is nothing magic about a gang expert's statement that a particular crime constitutes a primary activity. Contrary to appellants' assertions, here the expert's testimony was *not* the only evidence supporting the primary activities element. The jury had before it, and credited, the People's evidence that Villeda and/or Escatel, both gang members, had robbed five persons, in under five months, in four separate incidents. Especially given the gang's small size—only 35 to 45 members—the jury could reasonably conclude commission of the charged offenses during this short period amounted to more than isolated incidents or the occasional commission of robbery. (See *People v. Vy*, *supra*, 122 Cal.App.4th at pp. 1225-1226 [evidence of three violent crimes committed by gang members during three months was sufficient to support the primary activities element]; see generally *People v. Duran, supra*, 97 Cal.App.4th at pp. 1465-1466.)

Moreover, Sumner testified in sufficient detail as to how those robberies benefitted the gang. Unlike in *Alexander L.*, the foundation for Sumner's testimony and his knowledge of the Alondra 13 gang were sufficiently established, and appellants do not argue to the contrary.[6] This evidence was sufficient to prove that one of the gang's

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[6] In addition to Sumner's testimony about his extensive training and experience with gangs in general, he testified that he had worked "the area of Alondra 13" and handled "cases of Alondra 13." He had assisted in the investigation of crimes involving the Alondra 13 gang; he had spoken to other officers about Alondra 13; he had read reports made by other officers regarding the gang; he had observed Alondra 13 graffiti;

primary activities was the commission of robberies, one of the statutorily enumerated "primary activities" in section 186.22. (§ 186.22, subds. (e)(2), (f).) Certainly, if Sumner had testified as an expert that robbery was one of the gang's primary activities, and then detailed five robberies committed by the gang within five months, the evidence would be deemed sufficient. We discern no meaningful difference when the same evidence was put before the jury as part of the trial of the charged offenses. Accordingly, despite any deficiency in the gang expert's testimony, the evidence was sufficient.

4. *Villeda has failed to establish defense counsel rendered ineffective assistance during cross-examination of the gang expert.*

During cross-examination, defense counsel asked a series of questions aimed at testing the gang expert's actual knowledge about the Alondra 13 gang and the specific crimes committed by the gang. Some of these questions yielded unfavorable, or not entirely favorable, answers. In particular, Villeda complains that defense counsel elicited the following damaging information from Investigator Sumner: Villeda was the only active senior member of the gang. He was "in charge of the gang, started recruiting new members, and was the senior member, what they called 'running the little kids around.' He's the one ordering everybody around to do things." The gang had "pretty much fallen off the map" until Villeda "showed up," at which point the gang's activities and membership increased. Villeda had, "[d]uring other crimes he's committed within the city," kept the proceeds of crimes for himself, rather than sharing them with the gang. He had distributed weapons to two other gang members. Counsel also volunteered, when asking about arrests of other Alondra 13 members, that Villeda was in custody. Villeda argues that as a result of counsel's questions, the jury was exposed to considerable negative evidence regarding his activities that had not come in during the People's case-

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and he had had spoken with Alondra 13 members, both in casual conversations and in the course of making arrests.

in-chief. He posits that the jury would have had a less favorable impression of him after cross-examination concluded than before it commenced.

"A meritorious claim of constitutionally ineffective assistance must establish both: '(1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) . . . there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted.' " (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105.) " 'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' " (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "[T]he manner of cross-examination [is] within counsel's discretion and rarely implicate[s] ineffective assistance of counsel." (*People v. McDermott* (2002) 28 Cal.4th 946, 993.)

Villeda has failed to establish either prong of his ineffective assistance claim. Our careful review of the entirety of counsel's cross-examination of Investigator Sumner suggests counsel had a reasonable, tactical basis for his questions. Investigator Sumner tended to testify about the Alondra 13 gang in rather general terms. He was not the investigator actually assigned to the Alondra 13 gang. Counsel could reasonably have concluded that the best chance of undermining the evidence on the gang enhancement was to press Sumner for details, thereby undercutting his general statements about the gang. Counsel's questions were appropriate to this end. Indeed, counsel's strategy was not entirely unsuccessful.[7] It is clear that counsel was not, as Villeda suggests, simply

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[7] For example, as we have discussed, Sumner testified that the gang had committed "numerous shootings," narcotics sales, and firearms possession, but when pressed was able to provide few details on the shootings. He was only able to recall one shooting and did not know the outcome of the case. In regard to one of the guns that Villeda was supposed to have passed to other gang members, counsel elicited that the gun was never recovered, reported stolen, or reported to have been used in another crime.

asking open-ended questions without awareness of Sumner's likely responses. As our Supreme Court has explained, "[w]e rarely second-guess counsel's cross-examination tactics, despite the elicitation of seemingly damaging testimony." (*People v. Ervin* (2000) 22 Cal.4th 48, 94.) This is so "[e]ven where defense counsel may have ' "elicit[ed] evidence more damaging to [defendant] than the prosecutor was able to accomplish on direct" ' [citation], . . . where a tactical choice of questions led to the damaging testimony." (*People v. Williams* (1997) 16 Cal.4th 153, 217.) "Cross-examination is always a risky process—even experienced counsel conducting a brilliant cross-examination might inadvertently elicit damaging disclosures, a risk inherent in the tactical decision to conduct cross-examination." (*People v. Ervin, supra,* at p. 94.) *People v. Cooper* (1979) 94 Cal.App.3d 672 and *People v. Perez* (1978) 83 Cal.App.3d 718, cited by Villeda, are factually dissimilar to the instant matter and do not compel a finding of ineffective assistance.

Even if counsel's conduct of Sumner's cross-examination could be considered to have fallen below an objective standard of reasonableness, Villeda has failed to demonstrate prejudice. As we have discussed in more detail *ante,* the evidence against appellants overwhelmingly established they were guilty of the robberies, and the fact the jury acquitted Villeda on one count demonstrated the admission of the gang evidence did not prejudice the jury. Villeda's ineffective assistance claim therefore fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.