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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. GEVONTE GWIN, Defendant and Appellant.	B230533 (Los Angeles County Super. Ct. No. VA101332)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Gevonte Gwin was charged with five counts arising from three separate incidents: count 1, discharge of a firearm with gross negligence on May

5, 2007 (Pen. Code § 246.3, subd. (a))[1]; count 2, murder of Lashaun Menefee on September 2, 2007 (§ 187, subd. (a)); count 3, attempted murder of Darryl Penniman on October 14, 2007 (§ 664/187, subd. (a)); count 4, assault with a firearm on Penniman (§ 245, subd. (a)(2)); and count 5, discharge of a firearm with gross negligence on October 14, 2007 (§ 246.3, subd. (a)). The information included firearm allegations (§§ 12022.5, 12022.53, subds. (b), (d)) and criminal street gang allegations (§§ 186.22, subds. (b)(1)(A), (B), & (C)).

The jury found appellant guilty of counts 1, 2, and 3, and not guilty of counts 4 and 5. The jury found the murder of Menefee to be in the first degree and the attempted murder of Penniman to be willful, premeditated, and deliberate. The firearm and gang allegations were found to be true. The trial court sentenced appellant to 40 years to life on count 3, a consecutive term of 50 years to life on count 2, and a consecutive two-year term on count 1. This appeal followed.

BACKGROUND

Count 1: Discharge of a Firearm with Gross Negligence, Denny's, May 5, 2007

On May 5, 2007, around 1:00 a.m., Kolena Simmons was working as a server and hostess at a Denny's restaurant in the city of Lakewood. A group of four or five young African-American men entered the restaurant, talking loudly and using profanity. Simmons asked if they could "keep it down" because it was a family restaurant. They agreed, but then continued to be loud. The manager asked them to leave. Many of the restaurant patrons were leaving because the group was so loud.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

As Simmons watched the men leave, one of them, whom she identified as appellant, pulled something out and raised his hands in the air. Appellant was outside at the time, between the restaurant and parking lot. Simmons then heard two gunshots. She ducked under a counter, waited a few seconds, and then looked to see if appellant was still there. He was still there, but he no longer had the gun in his hands.

Kamilah Dennis was at the Denny's with some friends and family members. While waiting, she heard a loud pop, and her cousin yelled that someone had a gun. Dennis saw a young African-American man with braids, a purple T-shirt, and jeans. He held a gun in his hand, pointed toward the ground.

Los Angeles County Deputy Sheriff Michael Varvais was nearby, heard gunshots, and immediately drove to the Denny's. Other units soon arrived. Simmons pointed out appellant to Deputy Varvais. Deputy Varvais walked over to appellant, who was standing between two cars. As Deputy Varvais approached, he heard the "clank of a metal object hitting the ground" near where appellant was standing. He ordered appellant to come to him, and appellant complied. Deputy Varvais put appellant in the back of his police car and then searched the area where appellant had been standing. He saw a gun under a car and retrieved it.[2]

Kamilah Dennis identified appellant in a field show up. At trial, she testified that appellant resembled the person she saw, except that, at the time of trial, appellant did not have braids and wore glasses.

Count 2: Murder of Lashaun Menefee, Chevron Gas Station, September 2, 2007

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[2] The gun was destroyed before trial. According to Deputy Varvais, it was jammed with two rounds in the chamber. It smelled like gunpowder, indicating that it had been fired. An expended nine-millimeter casing was found in the parking lot.

On September 2, 2007, Justin Holyfield was part of a group of about 20 persons, including Lashaun Menefee, in four cars that stopped at a Chevron gas station on Artesia Boulevard in Bellflower on the way to a party. The group was half male and half female, and the men were dressed in baggy white T-shirts and jeans or shorts. Holyfield is not a gang member, and he did not think any of the people he was with were gang members.

After three of the cars left for the party, Holyfield was standing at the gas station facing a wall. He was drunk and was rolling his head around, trying to "get [his] head back together" when he heard a barrage of gunshots and dropped to the ground. He did not see who shot. None of the people with him was armed.

Holyfield saw that Menefee had been shot, and the rear window of her car had been shot out. He and a friend drove her in Menefee's car to a hospital, where she died. An autopsy revealed that the cause of death was a single .45 caliber gunshot that entered her right arm and perforated her heart and left lung.

Shyndona Dickerson was driving northbound on Downey Avenue near the Chevron station around 12:30 a.m. on September 2, 2007.[3] She heard gunshots, and slowed down. A car was passing her slowly in the opposite direction, and she saw the driver leaning out the window and sparks coming from the window. She caught a glimpse of the driver's face. Dickerson was reluctant to stop. Not until the next morning, when she saw police tape at the gas station, did she decide to contact the police.

Dickerson spoke with Detective Jimmie Gates, the investigating officer, and, on September 5, 2007, she met with a composite artist to make a sketch of the

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[3] Dickerson had two federal convictions for drug trafficking, one in 1990 and one in 1999. She testified that she did not receive any special treatment regarding her federal convictions in exchange for her involvement in this case.

person she had seen. On May 5, 2007, Dickerson identified appellant as the shooter from a six-pack photographic lineup. She also identified him at trial.[4]

Count 3: Attempted Murder of Darryl Penniman, Barbary Coast, October 14, 2007

On October 14, 2007, around 11:00 p.m., Darryl Penniman went to a party at a strip club called the Barbary Coast in Gardena. The friend who drove him parked at a Taco Bell next to the club.

About five minutes after Penniman entered the club, a fight broke out and he heard gunshots. Penniman was not a gang member and was not involved in the fight. After the shots stopped, he left the club with his friends and walked to the Taco Bell parking lot. When he looked back, he saw an African-American man pointing a gun at him. The man said, "What, you want some, too[?]" The man was looking side to side as if getting ready to shoot, and Penniman began running. The man shot at him about nine times, striking him once in the back of his right leg. Penniman did not get a good look at the man's face or clothing.

Gardena Police Officer Mike Sargent was one of many officers who responded to the shooting. A green car started backing out of a parking space in the Taco Bell lot and Officer Sargent heard the metallic noise of a hard object hitting the ground. He told the driver to stop, and he saw a black .380 semiautomatic Browning handgun on the ground next to the car's tire. Another officer removed the magazine and a live round from the gun.

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[4] Dickerson testified that, during the preliminary hearing, appellant's hair was in a big afro, and that, although she was fairly sure appellant was the shooter, she was unsure about his lips. She was impeached with her preliminary hearing testimony in which she stated, "Honestly, I can't say that this is the gentleman. He doesn't appear to be the person that I saw."

Gardena Police Officer Peter Graffeo saw appellant leaning into the rear passenger area of a Toyota Camry. Officer Graffeo ordered appellant to come over, and when he hesitated, Officer Graffeo ordered him on the ground at gunpoint and handcuffed him. A .25 caliber handgun was later discovered in a Fritos bag in the back seat of the Camry. When appellant was booked at the jail, a .25 caliber round was found in his pocket.

Investigation

Ballistics comparisons showed that the .380 caliber gun found by Officer Sargent in the Taco Bell parking lot following the shooting of Penniman ejected the .380 shell casings found in that lot. The gun also ejected the .380 caliber casings found at the Chevron station in connection with the Menefee murder. Appellant referred to this gun in a monitored and recorded telephone call on March 26, 2008, while in custody following his arrest (portions of this recording and others made while appellant was in custody were played at trial). In this conversation, appellant referred to the gun and its connection to the Menefee murder, stating "the gun is enough to bail me over but at the same time there's loopholes with the gun because you know it was reported stolen and I didn't get caught with it right after the murder happened and all that."

In other monitored calls, appellant made incriminating statements concerning the shooting of Penniman. On September 29, 2008, appellant said that it was "good that [Penniman] might not come [to court]. But if he comes, we need him to be, like, he didn't shoot me, woo woo woo." At trial, surveillance videos from the Barbary Coast and the Taco Bell parking lot were played. Appellant was visible in the videos. On March 3, 2009, appellant acknowledged that the video showing the area outside the Barbary Coast showed him shooting: "The only part

is that it show outside like where it looks like I shot the gun one time. No more than one time. Like, they're trying to make it seem like I just unloaded the gun into a group of people. . . . You don't see . . . no group of people on the tape. . . . Like you don't even see nobody else in the camera but me, Brandon, and Little." On March 8, 2009, appellant said that the video showed him firing one shot, but did not show him unloading "into a group of people."

On March 8, 2009, he acknowledged that the video of the inside of the Barbary Coast depicted him during the fight that erupted inside the club. "And you see me in the picture [inside the club], and then you see everything out the picture. . . . That shit is hard to explain, but it was funny as fuck . . . Boom. And you see me, Little, and Little Scrap take off. I still got the fucking pool stick in my hand. Boom. When I get by the door, I . . . drop the pool stick. I get out the door. And in the parking lot you see a bunch of motherfuckers running in the parking lot."

In the March 3 and 8 2009 calls, appellant discussed his strategy to "beat" the charges of murdering Menefee and shooting Penniman. On March 3, he mentioned that his attorney wished to sever the charges. On March 8, referring to the two cases, he said, "so I got to beat that shit. . . . Get them all separated. Get the gang shit separated. Fight that separate. Fight the attempt separate. And fight the murder separate."

Gang Evidence

Appellant belonged to the Naughty and Nasty Crip gang, also called the 2Ns. According to the prosecution gang expert, Long Beach Police Detective Chris Zamora, at least one of appellant's tattoos attested to his membership. Appellant had a tattoo on his elbow saying "NIP Chubbz." "NIP" stands for "Naughty in Peace," a play on the abbreviation "RIP," which stands for "Rest In

Peace." "Chubbz" referred to the moniker of a fellow gang member, Darryl Tucker, who was killed in a gang-related shooting in 2005.

On November 10, 2007, in a routine inspection of the cell of appellant's brother at the Pitchess Detention Center, a deputy discovered in the bunk bed a letter written by appellant that made several gang references. According to Detective Zamora, appellant wrote that he is an original gang member and signed the letter with the moniker "Banng'em Skrap." In a monitored telephone call after the letter was discovered, appellant said that he had written his brother a letter which contained gang references and that the letter had been found in his brother's bunk. In a monitored call on April 24, 2008, appellant mentioned his newly coined gang moniker, "Banng'em": "I'm going to get the pistol on my hip and it's going to say bang bang. It's going to say Mr. Banng'em on the . . . set." In a call on November 16, 2008, he again referred to himself as "Banng'em."

A letter appellant received while in custody included a photograph of him displaying the gang signs of the Naughty and Nasty gang. In a monitored telephone call after the letter was seized, appellant told the sender to stop sending photos of him displaying the N2 hand signs.

Detective Zamora had met appellant on several occasions during his investigation of the Naughty and Nasty gang. Appellant admitted his gang affiliation to another officer in March 2006. Detective Zamora opined that appellant was a high-ranking, active member of the 2Ns. He relied on the recorded phone calls, in which appellant was heard giving out gang monikers and making decisions about gang hierarchy.

According to Detective Zamora, the Chevron station in Bellflower where Menefee was killed was within 2N territory. Also, the clothing of Holyfield and his companions as depicted in the surveillance video of the station was in the style

gang members wear, and it is not uncommon for people to be mistaken for gang members when wearing such clothing. When asked a hypothetical question by the prosecutor that used the facts of the Menefee killing and referred to appellant as a member of the 2Ns, Detective Zamora opined that the shooting was done to benefit the Naughty and Nasty gang because it was in their territory, involved gang attire, and was a violent drive-by shooting that promoted fear in the community.

As for the shooting of Penniman, Detective Zamora testified that on the surveillance video taken inside the Barbary Coast club, one of appellant's companions is seen displaying the 2Ns gang sign. After some others persons began displaying gang signs, appellant talked with them, and then the fight started.

Asked a hypothetical question using the facts of the Penniman shooting and referring to appellant as a "shot-caller in 2Ns, also named Skrap or Banng'em," Detective Zamora testified that the shooting was committed for the benefit of the gang because it illustrated appellant's willingness to escalate a fight by getting a gun, and because he came to the club with a gun.

DISCUSSION

I. *Prosecutorial Misconduct*

Appellant contends that prosecutorial misconduct rendered the trial unfair and deprived him of his right to due process. He alleges five instances of prosecutorial misconduct: (1) eliciting inadmissible hearsay evidence; (2) misstating the evidence during questioning of witnesses; (3) commenting on appellant's exercise of his right to severance and bifurcation; (4) disobeying the court's exclusion order; and (5) arguing facts not in evidence.

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury

commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.] In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]' [Citation.]" (*People v. Parson* (2008) 44 Cal.4th 332, 359 (*Parson*).)

If a defendant establishes misconduct or error implicating his rights under the federal Constitution, the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, applies. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1130.) If prosecutorial misconduct does not rise to the level of a federal constitutional violation, we determine, after reviewing the totality of the evidence, if "it is reasonably probable that a result more favorable to a defendant would have occurred absent the misconduct. [Citations.]" (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.) "'Additionally, when the claim [of prosecutorial misconduct] focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 427 (*Ochoa*).)

A. *Inadmissible Hearsay*

Appellant contends that the prosecutor attempted to elicit inadmissible hearsay from Darryl Penniman, the victim of the attempted murder outside the Barbary Coast, and Officer Graffeo, who detained appellant after the shooting.

However, appellant forfeited these claims of misconduct by failing to object on that ground at trial and failing to request an admonition. (*Parson, supra*, 44 Cal.4th at p. 359.) In any event, the incidents were innocuous and clearly not misconduct or prejudicial.

While Penniman was testifying about the Barbary Coast security video, the prosecutor asked him to identify the person he previously had told her was in the fight. After defense counsel objected, the prosecutor agreed to ask who was in the fight rather than asking him to repeat what he had told her. Obviously, there was no misconduct and no inadmissible evidence was introduced.

The prosecutor asked Officer Graffeo for the description that he received from dispatch of the suspect in the Barbary Coast shooting. The court sustained defense counsel's hearsay objection, but Officer Graffeo nonetheless answered that the suspect was a male black. Thereafter, under questioning by the prosecutor, Officer Graffeo gave a description of the suspect. Again, there was clearly no misconduct in this minor incident, and certainly no prejudice. The evidence, including the security video, left no doubt that the shooter was black. There was also little doubt that appellant was the shooter – he admitted as much in two of his monitored telephone calls. On March 3, 2009, appellant acknowledged that the video showing the area outside the Barbary Coast showed "where it looks like I shot the gun one time." On March 8, 2009, appellant said that the video showed him firing one shot, but did not show him unloading "into a group of people."

B. *Misstating the Evidence*

Appellant contends that the prosecutor mischaracterized witnesses' testimony in order to make their answers more favorable to the prosecution.

Shyndona Dickerson, who identified appellant as the shooter in the Menefee killing, testified that she had two federal convictions for drug trafficking, one in 1990 and one in 1999. The prosecutor asked, "These, you think drug trafficking or drug convictions, when did that happen?" Appellant argues that, by characterizing the prior convictions as either drug trafficking or drug convictions, the prosecutor implied that Dickerson was convicted of simple drug possession, which is not a crime of moral turpitude. To state the contention is to dispose of it: it is, to say the least, unlikely that the prosecutor's question could have been misconstrued in the manner appellant claims. (*Ochoa*, *supra*, 19 Cal.4th at p. 427.) Moreover, the claim is forfeited because appellant did not object in the trial court. (*Parson*, *supra*, 44 Cal.4th at p. 359.)

Appellant also argues that the prosecutor mischaracterized Dickerson's preliminary hearing testimony so as to convey greater certainty that appellant resembled the shooter than Dickerson actually expressed. Although the record shows that prosecutor's questioning of Dickerson regarding her preliminary hearing testimony was somewhat misleading, defense counsel repeatedly objected on the ground of misstating the evidence, and his objections were sustained. The trial court admonished the prosecutor several times to read from the preliminary hearing transcript, rather than summarizing Dickerson's testimony, and to follow the court's rulings. However, defense counsel never objected on the ground of prosecutorial misconduct and did not ask for an admonition. The claim of misconduct accordingly has been forfeited. In any event, there was no prejudice, given the strong evidence of appellant's guilt of the Menefee shooting, including his statement in a monitored phone call that "the gun is enough to bail me over but at the same time there's loopholes with the gun because you know it was reported stolen and I didn't get caught with it right after the murder happened and all that."

C. *Comment on Right to Severance and Bifurcation*

During closing argument, the prosecutor commented several times on appellant's desire, expressed in his monitored phone calls, to sever the charges. At one point, the prosecutor argued that it was "very interesting how [appellant] repeatedly wanted to get his cases separated," stating that he wanted to separate them so that the jury could not "consider all the evidence in his crime spree." She later quoted appellant's statement that, if he could separate the "gang shit" and have his cases tried separately, "it's a wrap." The prosecutor argued that this statement did not sound like one made by someone wrongly charged with murder, and later, that it did not "sound like a guy who just happened to be picked out of the blue for this murder."

Defense counsel objected to the line of argument as improper. The court overruled the objection, and admonished the jury that it needed to consider each charge separately.

On appeal, appellant argues that the prosecutor's comments violated his supposed constitutional right to severance, analogizing to the ban on prosecutorial comments about a defendant's exercise of the right to counsel or the right not to testify. He further argues that the trial court's admonition to the jury did not address the prosecutor's implication that appellant's efforts to sever his cases indicated consciousness of guilt.

We find no misconduct. "The prosecution is given wide latitude during closing argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it. [Citations.]" (*People v. Lee* (2011) 51 Cal.4th 620, 647 (*Lee*).) "'"Whether the inferences the

prosecutor draws are reasonable is for the jury to decide."' [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

It was perfectly proper for the prosecutor to argue that appellant's expressed desire to "beat" the cases through severance suggested a consciousness of guilt. Appellant's monitored conversations as a whole strongly indicate that he knew he was guilty of the Menefee murder and the Penniman attempted murder. He also wished to "beat that shit. . . . Get them all separated. Get the gang shit separated. Fight that separate. Fight the attempt separate. And fight the murder separate." The prosecutor's comments simply drew the obvious inference that appellant wanted to "beat" the cases despite knowing he was guilty. The comments were fair, were based on the evidence, and did not constitute an attempt to have the jury draw an adverse inference from appellant's mere exercise of his right to seek severance. (Cf. *People v. Hughes* (2002) 27 Cal.4th 287, 375.)

D. *Disobeying Exclusion Order*

Prior to Officer Graffeo's testimony about the security videos inside and outside the Barbary Coast club, defense counsel requested a sidebar to argue that Officer Graffeo should not be allowed to identify appellant as the person seen in the videos. The court reasoned that the videos inside the club were close enough to identify appellant, but the outside videos were too far away to identify him. The court thus ruled that, as to the outside videos, the prosecutor could only ask Officer Graffeo if the appearance of the person seen in the videos was consistent with appellant's appearance.

The prosecutor then proceeded to ask Officer Graffeo if the person seen on the outside video was the same person he identified on the inside video, prompting an objection from defense counsel that was sustained by the court. The court

admonished the prosecutor to be mindful of its prior ruling. However, the prosecutor again asked Officer Graffeo a question identifying appellant as the person seen in the outside video, leading to objections and a sidebar in which the court asked the prosecutor why she was not following its order.

"It is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order. [Citation.] . . . Because we consider the effect of the prosecutor's action on the defendant, a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct. [Citation.] A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

The prosecutor violated the court's order by seeking to elicit evidence that the court had excluded, and thereby committed misconduct. However, it is not reasonably probable that a result more favorable to appellant would have been reached without the misconduct. The jurors saw the videos themselves and could draw their own conclusions as to whether the person in the video resembled appellant. Indeed, during deliberations, the jury asked for a DVD player and projector to watch the videos. Moreover, there was no doubt that appellant was depicted in the videos – he acknowledged that fact in his monitored phone calls. Thus, it is not reasonably probable that appellant would have received a more favorable result without Officer Graffeo's identification of him in the outside video.

E. *Arguing Facts not in Evidence*

Appellant argues that the prosecutor committed misconduct when she argued that appellant admitted shooting a gun when Penniman was shot. During closing argument, the prosecutor stated that, "all the witnesses link the defendant to the guy who eventually ditches the 380 by that car to the defendant being the one that actually has this 380, the defendant even admits it." She later stated, "The defendant is proned out at the Taco Bell drive-thru and he admits shooting the gun."

Appellant failed to object to these comments on any ground. Thus, the objection is forfeited. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1323.) In any event, there was no harm.

"While counsel is accorded 'great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation],' counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation]." (*People v. Valdez* (2004) 32 Cal.4th 73, 133-134; accord *People v. Bordelon*, *supra*, 162 Cal.App.4th at p. 1323 ["'Counsel may not state or assume facts in argument that are not in evidence. [Citation.]'"].)

There was no evidence at trial that appellant admitted shooting a gun when he was arrested at the Taco Bell. But in his monitored telephone calls appellant admitted shooting a gun. Thus, even if there was misconduct (a conclusion we do not reach), it was harmless.

II. *Cross-Examination of Dickerson's Probationary Status*

Appellant contends that the trial court violated his Sixth Amendment right to confront and cross-examine witnesses when the court did not allow defense counsel to cross-examine Dickerson about being on probation. The trial court allowed Dickerson to be impeached with two prior federal drug trafficking

convictions, but did not allow defense counsel to question her about her probation status.

"Evidence about the status of a prosecution witness's parole is admissible to show the witness's potential bias resulting from concern about possible revocation. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 486.) Nonetheless, the admission of the evidence is within the trial court's discretion. (*People v. Chatman* (2006) 38 Cal.4th 344, 374 (*Chatman*).) Where there was no evidence or offer of proof that the witness spoke with law enforcement "around the time of her placement on probation or thereafter," and there was no showing that her probationary status could have affected her testimony, the court does not abuse its discretion in excluding the evidence. (*Ibid.*)

Dickerson's federal drug trafficking convictions were in 1990 and 1999, many years prior to the September 2007 murder of Menefee. There was no evidence or offer of proof that she spoke with law enforcement about the shooting "around the time of her placement on probation or thereafter." (*Chatman, supra,* 38 Cal.4th at p. 374.) Thus, the court did not abuse its discretion in precluding defense counsel from cross-examining Dickerson about her probation status.

III. *Admission of Evidence of Gang Moniker*

Appellant contends that the admission of evidence of his gang moniker was inadmissible character evidence pursuant to Evidence Code section 1101, subdivision (a).

"'Evidence is relevant if it tends "'logically, naturally and by reasonable inference' to establish material facts such as identity, intent, or motive."' [Citations.] Even if relevant, evidence may be excluded in the trial court's discretion 'if its probative value is substantially outweighed by the probability that

its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.) Rulings regarding relevancy and Evidence Code section 352 are reviewed under an abuse of discretion standard. [Citations.]" (*Lee*, *supra*, 51 Cal.4th at pp. 642-643.) "A trial court's decision to admit or exclude evidence is a matter committed to its discretion '"and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice."' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 585 (*Geier*).)

Defense counsel objected to the introduction of appellant's recorded phone calls on several grounds. As pertinent here, he objected to the introduction of a conversation in which appellant is heard discussing gang monikers because it could influence the jury to find appellant guilty, even though it had nothing to do with the crimes. The court overruled the objection because it found the evidence relevant to show motive for the murder. Defense counsel objected to another conversation that contained gang monikers, arguing that, because he had conceded that appellant had gang connections, this evidence was cumulative and could influence the jury to find him guilty. The court found that the evidence was not cumulative and overruled the objection.

Defense counsel subsequently learned that Detective Zamora was going to testify that appellant created the moniker "Banng'em" for himself "because that's what he does. He bangs, he shoots." The trial court excluded the testimony but allowed the prosecutor to argue it in closing, reasoning that the evidence of appellant's moniker and of his desire to get a tattoo of a pistol was contained in the recorded phone calls. Defense counsel objected to the court's ruling that the prosecutor could make this argument because monikers could sometimes be used

to convey the opposite meaning. The court told defense counsel he could elicit such testimony from Detective Zamora if he wished. Defense counsel also objected on the basis that the prosecutor would be relying on evidence that did not address whether appellant committed the crime to argue that he did commit the crime. The court excluded the evidence under Evidence Code section 352, but allowed the prosecutor to point out that appellant was now calling himself "Mr. Banng'em" and argue that it meant appellant considered himself a shooter or killer.

After defense counsel elicited testimony from Detective Zamora that monikers are sometimes descriptive and sometimes counter-descriptive, the court allowed the prosecutor on redirect to elicit testimony that a gang moniker such as "Banng'em" could be descriptive. The prosecutor repeatedly referred to appellant as "Mr. Banng'em" throughout closing argument.

Appellant contends that the admission of the moniker evidence and the prosecutor's repeated use of the moniker during closing argument constituted rendered the trial fundamentally unfair because it allowed him improperly to be convicted based upon bad character evidence. (Evid. Code, § 1101, subd. (a).)

The trial court did not abuse its discretion in admitting the moniker evidence. It could reasonably be inferred that appellant coined the nickname, Banng'em, while in custody after the shootings in this case, and that his desire, to get a tattoo of a "pistol . . . and it's going to say bang bang [and] Mr. Banng'em" was evidence that he committed the shootings so as to be entitled to have that tattoo and gang moniker. (See *People v. Leon* (2010) 181 Cal.App.4th 452, 461 [evidence that defendant had moniker "Chucky," a reference to a homicidal doll character in movies, was relevant for, among other reasons, to "show his fellow gang members that his moniker was well warranted since he, like the Chucky doll, was also a killer"].) Hence, the court's finding that appellant's discussion of the

moniker could be relevant to show motive was not "'"arbitrary, capricious, or patently absurd . . . ."' [Citation.]" (*Geier, supra*, 41 Cal.4th at p. 585.)

Nor did the court abuse its discretion in allowing the prosecutor to refer to the moniker during closing argument. As stated above, "[t]he prosecution is given wide latitude during closing argument to vigorously argue its case and to comment fairly on the evidence, including by drawing reasonable inferences from it. [Citations.]" (*Lee, supra*, 51 Cal.4th at p. 647.) The prosecutor's argument that appellant's choice of moniker indicated that he considered himself a shooter was a reasonable inference that could be drawn from the evidence.

IV. *Hearsay Evidence of Appellant's Gang Affiliation*

During an Evidence Code section 402 hearing, defense counsel objected on Confrontation Clause grounds to testimony by Detective Zamora that appellant admitted his gang affiliation to another officer. The court found the evidence admissible because it went to the foundation of Detective Zamora's opinion. Appellant contends that the admission of this hearsay testimony violated his right to confrontation under the Sixth Amendment and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). We disagree.

"As our appellate courts have repeatedly found consistent with the Supreme Court's Sixth Amendment precedent: 'Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned.' [Citation.] 'The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618–619; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter "whether or

not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates"].)' [Citation.]" (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 153.)

Appellant argues that the caselaw allowing hearsay evidence to support a gang expert's opinion that an assault was gang-related is incorrectly decided, citing *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1130, which criticized this line of thinking. We need not address this issue because, even if the evidence was admitted in error, it was harmless beyond a reasonable doubt given the overwhelming other evidence of appellant's gang affiliation. (See *People v. Brown* (2003) 31 Cal.4th 518, 538.)

V. *Gang Hypotheticals*

Appellant objected below to and challenges on appeal the gang hypotheticals posed by the prosecutor to Detective Zamora. In both hypotheticals, the prosecutor named appellant, described him as a "shot-caller" in the 2Ns gang, and used the facts of the Chevron shooting and the Barbary Coast shooting.

The California Supreme Court addressed the propriety of "thinly disguised" hypothetical questions in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*). *Vang* held that a prosecutor's hypothetical question needs to be based on the evidence in the case because "[a] hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Id.* at p. 1046.) The court commented that expert testimony regarding whether the specific defendant at issue acted for a gang reason might be objectionable, but it declined to address the issue because the expert there did not testify directly about the defendant. (*Id.* at p. 1048 & fn. 4.)

Here, the prosecutor asked Detective Zamora to testify directly about appellant in her hypotheticals. Nonetheless, "[t]he erroneous admission of expert

testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247.)

"[E]xpert testimony is permitted even if it embraces the ultimate issue to be decided. (Evid. Code, § 805.) The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang*, *supra*, 52 Cal.4th at pp. 1049-1050.) As in *Vang*, the trial court here instructed the jury that the meaning and the importance of expert opinion was for the jury to decide, and that it was for the jury to decide whether facts used in hypotheticals have been proved. (*Id.* at p. 1050.) Thus, even if it was error for the prosecutor to use appellant's name in her hypotheticals, it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of the error.

VI. *Sufficiency of Evidence to Support Gang Enhancements*

Appellant contends that the evidence was insufficient to support the gang enhancements as to the murder and attempted murder counts because there was no evidence that the shootings were committed for the benefit of a gang. Section 186.22, subdivision (b)(1) provides that "any person who is convicted of a felony 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, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ."

"'We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.] Thus, we presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.' [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 806.)

"On appeal, an appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence – which we repeatedly have described as evidence that is reasonable, credible, and of solid value – from which a reasonable jury could find the accused guilty beyond a reasonable doubt. [Citation.] 'In evaluating the sufficiency of evidence, "the relevant question on appeal is not whether we are convinced beyond a reasonable doubt" [citation], but "whether '"any rational trier of fact"' could have been so persuaded." . . .' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 996-997, italics deleted.)

"It is well settled that a trier of fact may rely on expert testimony about gang culture and habits to reach a finding on a gang allegation. [Citation.]" (*In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196 (*Frank S.*).) However, "[n]ot every crime committed by gang members is related to a gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) The statute "requires that a defendant commit the gang-related felony 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*Id.* at p. 64.)

Appellant relies on *Frank S.*, in which the court reversed the imposition of a gang enhancement that was based on the minor's possession of a red bandana, his admission of affiliation with a gang, and his stated need of a knife for protection. The court held that the gang enhancement was not supported by substantial evidence, reasoning that "[t]he prosecution did not present any evidence that the

minor was in gang territory, had gang members with him, or had any reason to expect to use the knife in a gang-related offense." (*Frank S., supra,* 141 Cal.App.4th at p. 1199.)

Appellant points out that there was no evidence here that gang members used the shootings to gain respect and enhance their status within the gang by, for example, announcing their presence or purpose at the shooting, bragging about their involvement or creating graffiti about the shooting. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227 (*Albarran*).)

The evidence presented here in support of the gang allegation consisted primarily of the testimony of Detective Zamora. He testified that it is important for a gang to maintain its reputation through fear and intimidation because it makes it easier for them to conduct criminal activity. According to Detective Zamora's testimony, gangs commit violent acts so that victims and witnesses will not want to come forward. He further testified that an individual gang member can maintain his own reputation through violence.

It is true that there was no evidence here that gang members announced their presence or purpose at any of the shootings, bragged about their involvement or created graffiti and took credit for the shootings. (*Albarran, supra*, 149 Cal.App.4th at p. 227.) Nonetheless, on appeal, "[w]e view the evidence in the light most favorable to the prosecution, adopt all reasonable inferences and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Vazquez* (2009) 178 Cal.App.4th 347, 352.) Applying this standard of review, we conclude that a reasonable jury could find beyond a reasonable doubt that appellant committed the offenses for the benefit of a gang.

VII. *Cumulative Effect of Alleged Trial Errors*

Appellant contends that the cumulative effect of the alleged trial errors deprived him of his rights to due process and a fair trial. "'[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (*People v. Bautista* (2008) 163 Cal.App.4th 762, 785.)

Assuming there was error here, "we would not say the whole of the trial court's errors outweighed the sum of their parts [citation], a result more favorable to [appellant] would have been reached in the absence of the errors [citation], or [appellant] suffered a miscarriage of justice [citation]." (*People v. Najera* (2006) 138 Cal.App.4th 212, 228-229.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.