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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. KENNETH RAY SMITH, Defendant and Appellant.	B236611 (Los Angeles County Super. Ct. No. BA363755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Stephen B. Bedrick, 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, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Kenneth Ray Smith was tried by a jury on three felony counts arising from two separate shooting incidents. As to the first incident, the jury acquitted defendant of the murder of Jeremy Solomon (Pen. Code, § 187, subd. (a), count 1)[1] and the attempted murder of Kevin Randolph (§§ 664, 187, subd. (a), count 2).

As to the second incident, the jury convicted defendant of the first degree murder of Overland Campbell and found true the special circumstance allegation of an intentional killing committed to benefit a criminal street gang. (§§ 187, subd. (a), 190.2, subd. (a)(22), count 3.) It also found true the criminal street gang and firearm enhancement allegations. (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (c), (d), (e)(1).) The trial court sentenced defendant to prison for life without parole and imposed and stayed the criminal street gang and firearm enhancements.

In his appeal from the judgment, defendant raises issues concerning the erroneous admission of evidence, prosecutorial misconduct, and refusal to sever counts 1 and 2 from count 3. Finding no error, we affirm.

BACKGROUND

I. The December 26, 2007 Shootings of Solomon and Randolph

On the afternoon of December 26, 2007, Solomon and Randolph were shot as they were sitting in Randolph's car in the parking lot of Jesse Owens Park (park) in the City of Los Angeles. The park is in an area claimed by the Rolling 90's Gang. Solomon died of multiple gunshot wounds. Randolph survived three gunshot wounds but did not testify at trial.

A. Shearer's Pretrial Identification of Defendant as the Shooter

Ramses Shearer, the prosecution's sole eyewitness to the shooting, was sitting in his truck near the victims' car when the shooting occurred. Immediately after the

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

shooting, Shearer told responding Los Angeles Police Department officers that the shooter was an African-American male who was shorter than Shearer (who is six feet one inch tall), and had light skin, freckles, short hair, and a "kind of thick" build. During the police investigation, Shearer reviewed several photographic six packs and selected defendant's photo.

In court, however, Shearer was an uncooperative witness. His preliminary hearing testimony consisted primarily of a single response, "I can't answer that." At trial, he refused to be sworn as a witness even in the face of contempt charges. After finding Shearer to be unavailable as a witness (Evid. Code, § 240), the trial court allowed the prosecutor to read to the jury the transcript of Shearer's preliminary hearing testimony and play his recorded pretrial interview. In this manner, the jury was informed of Shearer's pretrial identification of defendant's photograph.[2]

The prosecutor then resumed questioning Shearer in front of the jury. Shearer was now more cooperative but gave contradictory responses. On the one hand, he admitted that the recording was accurate and that he had identified defendant's photograph. On

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[2] According to the interview transcript, Shearer made the following statements:

Shearer appeared as a witness at the preliminary hearing but did not want to testify because he was in prison and did not want to be a snitch.

Shearer was at the park on December 26, 2007. After parking his truck, he went to the restroom, returned to his truck, and noticed the victims' car. He was paying attention to his surroundings because he was not in his own neighborhood. As he sat in his truck, the two men in the victim's car were shot by an African-American male in a white t-shirt and blue jeans. The shooter, who was alone, had light skin, freckles, short hair, and a "kind of thick" build. The shooter was shorter than Shearer, who is six feet one inch tall. No one pointed a gun or fired at the shooter.

After the shooting, Shearer watched as the shooter ran away and the victims' car drove out of the parking lot. Shearer also started to leave when he heard sirens and saw a police helicopter overhead. Shearer waved at the helicopter. A patrol car came by and Shearer told the police officers that "these two dudes, they just got popped right there."

Later, Shearer was contacted by detectives. Shearer went to the 77th Street Station, was visited by detectives in Long Beach, and was visited by detectives in Men's Central Jail. He was shown several photographic six packs. He identified photo number 4 (defendant's photo) in one of the six packs. He did not see defendant's photo in the other six packs. He was 100 percent certain of his identification of defendant.

the other hand, he repudiated his identification of defendant as false. He testified that he had falsely selected defendant's photograph because Detective Roger Guzman was tapping it with his finger.[3] He claimed that he did so because he was in custody and had been promised "all kinds of things" including "[m]oney on [his] books." "I was just sentenced to 21 years, going to prison. I was offered a few amenities and I said okay, no problem. Everything in there is true except for the identity of the person who did it." "I was taken from high security lock down and brought down to 77th Street jail, given my own cell, my own magazines, my cigarettes, my eight-hour visits, free phone calls." Shearer read to the jury the two letters that he had written to Detective Eric Crosson requesting money and other amenities for his testimony.

B. The Corroboration of Shearer's Pretrial Identification

The prosecution sought to corroborate Shearer's pretrial identification of defendant by showing that: (1) defendant's High Standard Double Nine Revolver, which ballistics testing had excluded as the murder weapon, was the same type of firearm that could have been used to shoot Solomon and Randolph, and (2) defendant was seen running from the park in the same clothing described by Shearer—a white t-shirt and blue jeans—immediately after the shooting.

1. Defendant's High Standard Double Nine Revolver

The prosecution presented evidence that on June 23, 2008, defendant was pulled over in his car by Los Angeles County Sheriff's Deputy Terence Peterson, who searched the car and found a loaded gun hidden behind the side panel of the driver's seat. Defendant admitted to Peterson that the gun was his and that he belonged to the Eight Trey Gangster Crips.

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[3] In his testimony, Detective Guzman denied Shearer's allegation that he had pointed to defendant's photo. Guzman stated that such behavior could cause him to lose his job and go to jail.

The prosecution presented evidence that defendant's gun, a .22 caliber High Standard Double Nine Revolver, was the type of firearm that might have been used in the shooting of Solomon and Randolph. Shearer's description of the shooting coupled with the physical evidence suggested that the shooter had used a .22 caliber revolver that, like the High Standard Double Nine Revolver, fires nine rounds without ejecting any casings.[4] Detective Crosson testified that High Standard is the only company that makes a .22 caliber revolver that can hold nine rounds. Firearms examiner Rafael Garcia testified that although ballistic tests excluded defendant's High Standard Double Nine Revolver as the murder weapon, it was possible that a similar weapon had been used in the December 26, 2007 shooting. Several police officers testified that High Standard Model Double Nine Revolvers are rare. Garcia testified that in his 16 years as a firearms examiner, he had seen fewer than 10 such weapons.

The prosecution argued that defendant's possession of a High Standard Double Nine Revolver that is rarely seen by law enforcement officers in Los Angeles was relevant to establish his knowledge and ability to commit the December 26, 2007 shooting.

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[4] The physical evidence indicated that the shots were fired through the passenger window, the only broken window on Solomon's car, which was consistent with Shearer's description of a single shooter with only one gun.

Because no casings were found at the crime scene, the murder weapon was either a revolver (casings are not ejected from revolvers) or an automatic (in which case, all of the casings had been collected before the police arrived).

The physical evidence indicated that nine .22 caliber bullets were fired during the shooting. Six .22 caliber bullets were recovered from Solomon's body. A seventh bullet remained lodged in Randolph's groin. An eighth bullet was retrieved from the door panel of Solomon's car. A ninth bullet left an impact mark on the right rear door of Solomon's car.

Because the evidence suggested that the shooter did not stop to reload or collect casings, the prosecution theorized that the murder weapon was a revolver that, like defendant's gun, can fire nine .22 caliber bullets without ejecting any casings.

2. Defendant Was Seen Running From the Park After the Shooting

The prosecution also offered evidence that defendant was seen running from the direction of the park immediately after the shooting in the same clothing (a white t-shirt and light blue jeans) that Shearer had described in his interview statement.

Prosecution witness Michael Johnson testified that on December 26, 2007, he was standing in front of his house near the park when he heard several gunshots. A few minutes later, Johnson saw a Black male running from the direction of the park. As the man ran by, he was glancing over his shoulder and holding the front of his shirt with both hands near the waistband. The man was approximately six feet tall, 215 or 220 pounds, and wearing a large white t-shirt and baggy light blue jeans. A black four-door Pontiac turned the corner and slowed down for the man, who got into the rear seat. The driver, a Black male, looked at Johnson with a "slight smirk" and "gave what appeared like a peace sign."

Johnson went to the police station the next day to provide a description of the man who was running from the direction of the park. Although Johnson identified defendant at trial, he did not do so at the preliminary hearing. At trial, Johnson attributed his failure to identify defendant at the preliminary hearing to his being afraid and "a little unsure." He testified that after leaving the preliminary hearing, he had sent Detective Guzman a text message stating that although he was nervous, he was sure "[t]hat was him."

Johnson was still fearful of retaliation because he lives in the same house near the park and two vehicles were vandalized in his driveway the previous weekend. Three "X's" were written on the hood of his truck and "bitch" was written on the hood of his fiancée's car.

Johnson had prior convictions for robbery and false imprisonment. Johnson was aware of the $75,000 reward offered in this case.

II. The September 5, 2008 Shooting of Campbell

The incident in count 3, the September 5, 2008 murder of Campbell, was the third gang-related shooting on that date. First, John Jackson (known as Baby Knockout), an

Eight Trey Gangster Crip, was shot by either the Rolling 60's or 18th Street, a Hispanic gang. Second, "three Hispanics" were shot by Baby Knockout's cousin, Rahmel Hunter (known as Tiny Knockout). And third, following a meeting of the Eight Trey Gangster Crips to discuss Baby Knockout's shooting, Campbell (the victim in count 3) was shot and killed outside some apartments on Florence Avenue where the Rolling 60's are known to gather.

The physical evidence indicated that a .357 revolver and a nine-millimeter semiautomatic were used in the Campbell shooting. Later that night, the police recovered a .357 revolver and a nine-millimeter semiautomatic in an area frequented by Eight Trey Gangster Crips. Both weapons were found after Los Angeles Police Department Officer Joshua Kniss and his partner came across a large group of people on 94th Street. When a man with gang tattoos (Jerry Forrest) spotted the officers, the man ran away while holding his waistband. The officers ran after Forrest because he appeared to be carrying a concealed weapon. During the chase, Forrest discarded a .357 revolver, which was later identified as one of the weapons used in the Campbell shooting. A 12-gauge shotgun and a nine-millimeter semiautomatic were also found nearby.

Based on a tip, Detective Guzman interviewed Devonte Brooks (known as G-Tay), an Eight Trey Gangster Crip, as a possible witness to the Campbell shooting. After viewing several still images from a surveillance videotape of a nearby business, G-Tay gave Guzman the names and monikers of the alleged participants in the Campbell shooting. Following this interview, Guzman focused on "a person" as a suspect in the shooting.[5] After a television segment on "Fox L.A.'s Most Wanted," Guzman received information concerning defendant.

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[5] The trial court sustained defense counsel's objection to Guzman's testimony that, after interviewing G-Tay, he focused on defendant as a suspect.

A. Defendant's Interview Statements

On September 29, 2009, Guzman interviewed defendant with regard to the Campbell shooting. The prosecution played video and audio tapes of defendant's interview for the jurors, who also received a written transcript.

During the interview, defendant initially denied any involvement in Campbell's shooting. Eventually, however, defendant admitted that he was told on September 5, 2008, about the shooting of Baby Knockout and was taken to a location where everyone was crying about the shooting. When everyone left the location, he got a ride home from a female (later identified as defendant's cousin). As they left 94th Street, one of the other passengers, G-Tay, directed the driver to an apartment on Florence where "they'd be at." The driver stopped the car on Florence where G-Tay and another passenger, G-Smash, got out. Defendant heard some gunshots. G-Tay and G-Smash returned to the car and the driver took defendant home.

According to the interview transcript, defendant described the above events as follows: "They called me and told me that Knockout had got shot or whatever. They came and picked me up. ** and everybody's crying ** and all that stuff. Then girl took me back to Hawthorne because everyone was starting to leave. It was getting late. As we're pulling off 94, she turned, and fuckin' G Smash busted. *** 60s. G Tay said an apartment they'd be at on Florence. So she pulled over and parked. And they just laughed, got out, walked up to an apartment towards this way on Florence. I heard a couple of shots. They ran and jumped back in the car. She drove off." "G Tay and G Smash" were the shooters. After the shooting, the car "went up to Florence, I mean to Venice. Took a left to El Segundo, and continued taking me home."[6]

During the interview, defendant claimed that he was no longer a gang member. He stated that as of two years ago (i.e., two years before the September 29, 2009 interview), he was no longer "from Eight Trey," which treats him "like an outsider." "I

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[6] According to Guzman, defendant identified the female driver of the car as Shanika English, who has a child with an Eight Trey Gangster Crip and has been affiliated with the gang "her whole life."

don't even be friends with G Tay, so it's not like he speaks to me or nothing. He has a vendetta towards me . . . ."

B. The Special Circumstance and Gang Enhancement Allegations

The prosecution argued that regardless of defendant's current gang status, on the date of the Campbell shooting he was a self-professed member of the Eight Trey Gangster Crips. The evidence showed that when defendant was interviewed by Detective Ian Elliott of the Hawthorne Police Department both before (January 18, 2008) and after (August 21, 2009) the Campbell shooting, defendant had identified himself as an Eight Trey Gangster Crip. Elliott testified that according to his field interview card, defendant was still sporting his gang's color (blue shorts) and tattoos on August 21, 2009.

The prosecution's gang expert, Los Angeles Police Department Officer Marlon Prodigalidad, testified that in his opinion, defendant was a member of the Eight Trey Gangster Crips when Campbell was shot. Prodigalidad based his opinion on defendant's tattoos, the information provided by other police officers' field information cards, and defendant's gang monikers (Tiny Rowdy, Baby Bluestone, and Mack).

Prodigalidad testified that in his opinion, the three shooting incidents on September 5, 2008—(1) the initial shooting of Baby Knockout, (2) the retaliatory shooting of "three Hispanics" by Baby Knockout's cousin Tiny Knockout, and (3) the fatal shooting of Campbell in Rolling 60's territory—were all gang-related. He explained that in the gang culture, if an Eight Trey Gangster Crip is shot by rival gang members, the Eight Trey Gangsters must "put in work" and "shoot the rival gang" to avoid being "seen as weak" and discourage further attacks by rival gangs. The Eight Trey Gangsters must retaliate even if it is unclear which rival gang committed the initial shooting. In the gang culture, the Eight Trey Gangsters must retaliate by shooting someone and even a victim who has no gang ties will suffice. "[A]ll they need to do is send a message. Because eventually, it's going to get back to the [rival gang], hey, this guy got killed. So the rival is coming into our neighborhood shooting somebody. It could have been one of us."

Based on three hypothetical shooting incidents that tracked the prosecution's evidence of the three September 5, 2008 shootings, Prodigalidad testified that in his opinion, the third shooting was committed for the benefit of, at the direction of, and in association with a criminal street gang.

III. The Verdict and Sentence

As previously mentioned, the jury acquitted defendant of the December 26, 2007 murder of Solomon (count 1) and the attempted murder of Randolph (count 2), but convicted him of the September 5, 2008 murder of Campbell (count 3) and found the gang special circumstance and criminal street gang and firearm enhancement allegations to be true. (§§ 190.2, subd. (a)(22), 186.22, subd. (b)(1)(C), 12022.53, subds. (c), (d), (e)(1).)

On count 3, the trial court sentenced defendant to prison for life without parole and imposed and stayed the criminal street gang and firearm enhancements. This timely appeal followed. Additional evidence relevant to the issues on appeal will be discussed below.

DISCUSSION

Defendant contends the following evidence was inadmissible and the prosecutor committed misconduct by discussing: (1) Prodigalidad's and Guzman's opinions concerning his intent and state of mind; (2) the incriminating statements of an absent codefendant; (3) his High Standard Double Nine Revolver that was not tied to either incident; and (4) hearsay evidence of a gang meeting that preceded Campbell's murder.[7] In addition, defendant argues that the trial court erroneously denied his motion to sever counts 1 and 2 from count 3.

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[7] Because we reject these contentions on the merits, we need not reach defendant's related claims that his trial counsel provided ineffective assistance for failing to object to the disputed evidence at trial.

I. Evidentiary Error and Prosecutorial Misconduct

In reviewing claims of evidentiary error, we are guided by several principles. One basic rule is that only relevant evidence is admissible. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1170.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The trial court possesses broad discretion in determining the relevancy of the disputed evidence. (*Pollock, supra,* 32 Cal.4th at p. 1170.)

Another basic rule is that not all evidentiary errors will result in the reversal of a judgment. "We do not reverse a judgment for erroneous admission of evidence unless 'the admitted evidence should have been excluded on the ground stated and . . . the error or errors complained of resulted in a miscarriage of justice.' (Evid. Code, § 353, subd. (b); see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; *People v. Watson* (1956) 46 Cal.2d 818, 836 [error is harmless under our state constitutional standard unless it is 'reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error'].)" (*People v. Earp* (1999) 20 Cal.4th 826, 878.)

A. Defendant's Intent and State of Mind

Defendant contends that Prodigalidad and Guzman improperly testified as to their opinions on the ultimate issue: that he willingly participated in the Campbell shooting as an aider and abettor. He claims that without their improper opinion testimony, his uncontroverted denial of any knowledge or intent to participate in the shooting would have required his acquittal "for failure of proof of mens rea."[8]

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[8] According to defendant's opening brief: "The only evidence that contradicted Appellant's denial of knowledge or intent was the opinion testimony of the two officers. They repeatedly opined that Appellant was a lookout. They repeatedly said he was an aider and abettor. They repeatedly said that he was 'loyal' to the gang. They repeatedly said the gang would not have taken him to the scene of a homicide unless they knew that he was mentally loyal and ready to participate, including as a lookout or as a witness. The officers repeatedly testified that the gang does not take people with them unless they

Preliminarily, we note that because the prosecution had the burden of proving the gang-related special circumstance and enhancement allegations (§§ 190.2, subd. (a)(22), 186.22, subd. (b)(1)(C)), we must consider the disputed evidence in that context.[9] In addition, we note that no objection was raised below concerning Prodigalidad's qualifications to testify as the prosecution's gang expert.

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are loyal and are planning to participate. The officers repeatedly testified that the gang does not take 'unnecessary' people with them. And not just one officer, but two officers, gave this kind of testimony. Further, in jury argument the prosecutor relied heavily upon this opinion testimony by the officers. [Internal record reference omitted.] [¶] The opinion testimony was overwhelmingly prejudicial. It made the prosecutor's entire case. It proved through the mouths of two officers alleged facts not proven anywhere else, namely, that Appellant intended to help the 'mission,' and that Appellant intended to aid and abet the homicide. Without this opinion testimony, there was no evidence that Appellant had the necessary personal intent to kill. See, e.g., People v. Beeman [(1984)] 35 Cal.3d 547. Without this improper opinion evidence as to Appellant's state of mind, the jury would have had to acquit Appellant of this homicide for failure of proof of *mens rea*."

9 In order for a sentence enhancement under the Street Terrorism Enforcement and Prevention Act, also known as the STEP Act (§ 186.20 et seq.), to apply, the prosecution must prove that the felonious conduct was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "'In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a "pattern of criminal gang activity" by committing, attempting to commit, or soliciting *two or more* of the enumerated offenses (the so-called "predicate offenses") during the statutorily defined period. (§ 186.22, subds. (e) and (f).)' (*People v. Gardeley* [(1996)] 14 Cal.4th [605,] 616-617.)" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047.)

As defendant does not dispute the sufficiency of the evidence to support the determination that he belongs to a gang that committed two or more of the enumerated offenses during the statutorily defined period, we need not discuss that aspect of the evidence.

1. Expert Testimony Generally

"In order to prove the elements of the criminal street gang enhancement, the prosecution may, as in this case, present expert testimony on criminal street gangs. (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 617-620.)" (*People v. Hernandez*, *supra*, 33 Cal.4th at pp. 1047-1048.)

"California law permits a person with 'special knowledge, skill, experience, training, or education' in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' (*Id.*, subd. (a).) The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion. (*People v. Olguin* [(1994)] 31 Cal.App.4th 1355, 1370 ['The use of expert testimony in the area of gang sociology and psychology is well established.']; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966 [upholding the admission of opinion testimony by a gang expert]; *People v. McDaniels* (1980) 107 Cal.App.3d 898, 904-905 [same]; see *People v. Champion* (1995) 9 Cal.4th 879, 919-922 [holding that opinion testimony by an expert in juvenile gangs was relevant and therefore admissible].)" (*Gardeley*, *supra*, 14 Cal.4th at p. 617.)

"Expert testimony may also be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); *People v. Montiel* (1993) 5 Cal.4th 877, 918-919; *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923.) Of course, any material that forms the basis of an expert's opinion testimony must be reliable. (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 477, p. 448.) For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' (*Kennemur v. State of California*, *supra*, at p. 923.)

"So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. (*In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base 'opinion on reliable hearsay, including out-of-court declarations of other persons'] . . . .) And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. (*People v. Shattuck* (1895) 109 Cal. 673, 678 [medical expert could testify to patient's complaints in order 'to give a clinical history of the case to understand the significance of her symptoms']; *McElligott v. Freeland* (1934) 139 Cal.App. 143, 157-158 [certified public accountant could testify to information he relied on in property valuation]; see *People v. Wash* (1993) 6 Cal.4th 215, 251 [prosecution could elicit out-of-court statements relied on by the defense expert] . . . .)" (*Gardeley, supra,* 14 Cal.4th at pp. 618-619.)

"Because an expert's need to consider extrajudicial matters and a jury's need for information sufficient to evaluate an expert opinion may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment. (*People v. Montiel* (1993) 5 Cal.4th 877, 919.)" (*People v. Valdez* (1997) 58 Cal.App.4th 494, 510.)

2. Prodigalidad's Disputed Testimony

As the prosecution's gang expert, Prodigalidad explained that when a gang enters a rival gang's territory on a "mission" to commit a crime or shooting, it typically brings weapons and another car to act as a lookout. When the prosecutor asked Prodigalidad whether everyone in the car would know "what was going on," the trial court sustained defense counsel's unspecified objection. When the prosecutor restated the question in the

context of Prodigalidad's experience as a gang expert, the trial court again sustained defense counsel's unspecified objection, stating: "Sustained. Killibrew."[10]

The prosecutor then asked whether, in Prodigalidad's experience, a gang would take persons who were not loyal to the gang on a mission in rival territory. Over a defense objection on unspecified grounds, Prodigalidad answered, "No." He explained: "It's a liability for them. In essence, it's a liability that if a crime does occur, there's a witness that's not loyal to the gang. You don't bring somebody that's not loyal to the gang. Even though you might not be a shooter, you're going to be some kind of participant, you're going to be a lookout, you're going to say, hey, that guy is from the rival gang, shoot him. Or you might be the driver." Prodigalidad similarly testified, without objection, that in his experience, gangs do not take "unnecessary people" to commit a mission in rival territory for "liability" reasons.

The prosecutor inquired whether Prodigalidad knew if the "Eight Trey Gang had any type of meeting after Baby Knockout was shot." Prodigalidad answered yes, that other officers had told him that such a meeting had occurred. The prosecutor then asked whether in Prodigalidad's experience, a gang would invite strangers or those unaffiliated with the gang to that meeting. Prodigalidad replied that only strong associates or gang members would be invited, because the purpose of such a meeting would be to "talk about what happened and what's going to be done." Defendant did not object to the above testimony.

3. Guzman's Disputed Testimony

During trial, the prosecutor played the tape of defendant's interview. The tape contained Guzman's statements that two of the suspects had named defendant as a passenger in the car and one of them had identified defendant as one of the shooters.

The prosecutor also presented Guzman's testimony concerning his thought processes during the interview. For example, Guzman testified that when he told

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10 *People v. Killebrew* (2002) 103 Cal.App.4th 644.

defendant that "he was just a dumb ass in the car," he was not "trying to say he had no culpability," but was trying to encourage defendant to talk about "his role [in the shooting,] straight from his mouth." Guzman testified that he was trying to "flip" defendant against the other participants because, based on the information that he had at the time, he did not believe that defendant was the shooter. Guzman testified that during the interview, he believed that defendant was "an aider and abettor," "a lookout," or someone who helped hide evidence.

The prosecutor inquired whether in Guzman's experience, gang members would bring an extra person to a shooting. Guzman replied that in his experience, only "hardcore gang members" would be allowed in the car: "Q Why wouldn't they just take along an extra person? [¶] A Because it's a liability to them. They need to know that the people that are inside that car are trustworthy, that they know what they're doing and that they're absolutely reliable."

Although defendant did not object to the interview tape or the testimony quoted above, he objected on several occasions to Guzman's testimony concerning his intent or liability as an aider and abettor. As shown below, the trial court sustained those objections:

"Q And based on the information that you had at the time when you were interviewing Kenneth Smith, what did you believe Kenneth Smith's, that is, the defendant's role to be that you were trying to, in your words, flip him? [¶] A I believed that he was a lookout and a support of the actual shooter. [¶] Q So an aider and abettor, but not the person who actually shot the firearm, is that — [¶] MR. SCHMOCKER: Your Honor, I object to that question. [¶] THE COURT: Sustained. It calls for a legal conclusion. The jurors will decide that. [¶] BY MS. CHON: Q In your mind, at the time you're interviewing him and trying to flip him, did you believe he was the actual shooter? [¶] No, I did not. [¶] Q Did you believe that he went to the location with the actual shooter? [¶] A Yes."

"Q Now, based on your training and experience of investigating gang crimes, and especially the Eight Trey Gang, would the defendant, if he was not close to the Eight

Trey Gang, first of all, be notified that Baby Knockout was shot, and then brought to the gang meeting? [¶] A No. [¶] Q Why not? [¶] A People that are notified are more than likely to be active or strong — at least have a strong association with that gang or else why would you notify this circle of friends, or at least the tight circle of gang members that Knockout was associated with. [¶] Q And when the defendant said he wasn't really close to G-Tay and G-Smash when they drove to rival 60s hood and they took him along, in your experience, is that something that happens? [¶] MR. SCHMOCKER: I'd object to the intent issue. [¶] THE COURT: Sustained."

"Q Just so I understand, you're separating closeness between gang members versus being committed. What do you mean by that? [¶] A That they're going to take people that are reliable and trustworthy criminals, not so much that they're close friends. [¶] Q So that they are committed for the cause of whatever they're doing? [¶] A Correct. [¶] THE COURT: Miss Chon, the answer is stricken. He's not to testify about the intent or knowledge of anybody, including Mr. Smith. Next area, please."

4. Analysis

Under *Gardeley*, the experts' testimony was admissible to explain the unique culture and habits of gangs. (*Gardeley*, *supra*, 14 Cal.4th at p. 617.) Their disputed opinion testimony that a gang would not bring an innocent passenger to commit a shooting in enemy territory was relevant to the intent element of the gang-related special circumstance and enhancement allegations. The trial court reasonably concluded that the experts' opinion was admissible because the issue was "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)

The flaw in defendant's argument is that the experts were not allowed to opine as to what defendant was thinking when he was in the vehicle at the time of the Campbell shooting. Instead, the experts informed the jury, in general terms, that a gang would not allow a person who was not a loyal member to be present during a retaliation shooting. This testimony provided circumstantial evidence that defendant knew what was going to

occur when he got into the vehicle with his fellow gang members and intended to aid and abet in the subsequent shooting of Campbell.

As to Guzman, we conclude that his disputed testimony also was admissible to explain the statements he made during defendant's interview. In that context, his opinions concerning defendant's intent or culpability were not offered for the truth of the matter asserted, but to explain what he was trying to elicit from defendant during the interview. The trial court did not allow the prosecution free reign in this regard, but sustained several objections, including one of its own, to questions that it deemed excessive.

To the extent, if any, Guzman's opinion concerning defendant's intent or role as an aider and abettor was inadmissible, we conclude the alleged error was harmless. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The record contains substantial evidence even without Guzman's disputed testimony to support a finding that defendant possessed the requisite intent to be held liable for Campbell's murder as an aider and abettor. Defendant's gang membership on the date of Campbell's shooting was established through his extrajudicial statements to Elliott. Similarly, defendant's presence at the Eight Trey Gangster Crips meeting on the date of the shooting could be reasonably inferred from his recorded interview statements. Prodigalidad's expert testimony provided a reasonable basis for the jury to infer that defendant was a committed gang member who participated in the September 5, 2008 gang meeting and subsequent shooting with the knowledge and intent to shoot someone in a rival gang's territory in retaliation for the shooting of Baby Knockout.

B. Statements by an Absent Codefendant

Defendant challenges the admission of an absent codefendant's incriminating hearsay statements. The disputed statements were introduced in two ways: (1) through

Guzman's testimony at trial;[11] and (2) through statements made by Guzman during defendant's taped interview.[12]

On appeal, defendant contends that his absent codefendant's incriminating hearsay statements (i.e., the other suspects' statements that were repeated by Guzman during defendant's taped interview) were "inadmissible under the 6th Amendment's confrontation clause and they should have been excluded." He further contends that Guzman's testimony—that following G-Tay's interview, he focused "on a person" as a suspect in the Campbell shooting—was also inadmissible.

The Attorney General argues that these claims were forfeited because they were not properly raised below. The record supports the Attorney General's position. We conclude that because defendant did not raise a timely and specific objection to the disputed evidence, he failed to preserve the claims for appeal. (*People v. Samuels* (2005) 36 Cal.4th 96, 122.)

In any event, the disputed evidence was plainly admissible. Guzman's statements (relating the other suspects' statements) during the taped interview were not admitted for the truth of the matter, but for the nonhearsay purpose of showing their effect on defendant. (*People v. Jablonski* (2006) 37 Cal.4th 774, 820.) Similarly, Guzman's disputed testimony that he focused on an unnamed individual was offered for the nonhearsay purpose of explaining the course of his investigation of the Campbell shooting. (*People v. Samuels*, *supra*, 36 Cal.4th at p. 122.) Accordingly, the trial court did not err in admitting the disputed evidence.

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11 Guzman testified in relevant part: During his investigation of the Campbell shooting, Guzman interviewed Brooks (known as G-Tay) as a possible witness. G-Tay provided Guzman with the names and monikers of those allegedly involved in the shooting. Following G-Tay's interview, Guzman focused "on a person" as a suspect in Campbell's shooting. (The trial court sustained defense counsel's objection to Guzman's testimony that, following G-Tay's interview, he identified defendant as a suspect.)

12 During Guzman's recorded interview of defendant, which was played for the jury, Guzman repeatedly told defendant that two other suspects, G-Tay and G-Smash, had made incriminating statements about him.

Defendant contends his counsel should have objected on the proper ground—that the statements of the absent codefendant violated *Bruton v. United States* (1968) 391 U.S. 123 and *Gray v. Maryland* (1998) 523 U.S. 185. He asserts the strongest evidence the prosecution had was the codefendant's claim that defendant was one of the shooters. He urges his counsel's failure to object was inexplicable and constituted ineffective assistance.

Assuming, without deciding, that defendant's counsel committed unprofessional errors, defendant must establish there is a reasonable probability that but for the errors, "the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) He failed to carry that burden.

It is clear the prosecutor did not try the case on the theory that defendant was the shooter. After recounting the circumstantial evidence suggesting that defendant had fired a weapon at Campbell, the prosecutor stated, "I'm not sure. I'm not going to stand here and say to you I know for sure that — I am not going to vouch for the evidence." She recounted the testimony of a witness who said she saw only one shooter, the person who opened the front passenger door. (Defendant said he was in the front passenger seat.) She pointed out that the physical evidence did not match the witness's observations because two guns were used in the murder. The prosecutor then told the jury, "What we do know for sure and what the testimony does prove beyond a reasonable doubt is that the defendant was an aider and abettor, whether or not he was the actual shooter during the Overland Campbell case, because he got into that car after that gang meeting with the intent to help either shoot or with the intent to help those shooting . . . ."

The jury could not have convicted defendant as an aider and abettor unless it disbelieved defendant and accepted that a person not loyal to the gang would not have been allowed to simply tag along on a mission to retaliate for the shooting of one of its members. Defendant admitted: (1) he knew Baby Knockout had been shot; (2) he was present at a location where the shooting was discussed; and (3) after the meeting, he got into a vehicle with fellow gang members and was present when the Campbell murder was committed. Ample evidence supported the jury's rejection of defendant's claim that he

was an unwitting bystander to the homicide and its implicit finding that the passengers in the vehicle were willing participants in the killing, even if they did not personally fire a weapon. Accordingly, there is no reasonable probability the jury's verdict would have been different but for the admission of the codefendant's statement.

Finally, we reject defendant's related claim of prosecutorial misconduct. The misconduct claim is based on the prosecutor's statement during closing argument that during his interview, defendant was "confronted with the evidence against him," namely, the incriminating statements made by G-Tay and "another person." By referring to the other suspects' statements, the prosecutor was not improperly urging the jury to convict defendant on the basis of their statements, but on the basis of defendant's self-incriminating statements during the interview. The prosecutor was entitled to argue that defendant's statements concerning the gang meeting, the vehicle used in the shooting, and the type of weapons that were fired were relevant to show that he was a knowing and willing participant in the shooting.

C. Defendant's High Standard Double Nine Revolver

At trial, defendant objected to the admission of his .22 caliber High Standard Double Nine Revolver. He argued that because his revolver was determined not to be the murder weapon in the first incident and did not match the type of firearms used in the second incident, it bore no relevance to this case and its admission would be unduly prejudicial. (Evid. Code, § 352.)

The trial court overruled the objection, stating that "the People have a colorable relevance argument. They can argue, if they want, that the gun used on . . . December 26th [fired] nine shots and [defense counsel] can argue that that's not what the evidence shows and that [many] different guns . . . can fire a .22 [caliber bullet.]" The court stated that the prosecution's theory was that a .22 caliber High Standard Double Nine Revolver "is a somewhat unusual gun; that they think the December 2007 murder was committed with this kind of a gun; that your client was found six months later with the same kind of gun. They're not going to argue it was the murder weapon, they're going to concede that

it was determined not to be the murder weapon, but the relevance is what I just said, and I understand you may disagree."

Defendant argues on appeal that his .22 caliber High Standard Double Nine Revolver was inadmissible under *People v. Riser* (1956) 47 Cal.2d 566, 577 (*Riser*). In *Riser*, the prosecution's evidence showed that the murder weapon was a Smith and Wesson .38 Special revolver, and not either of the weapons (a Colt .38 and a P38) that were admitted into evidence. In discussing the defendant's argument that the Colt .38 and P38 should have been excluded at trial, the Supreme Court stated: "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*Ibid.*) On that basis, the Supreme Court held that the Colt .38 was inadmissible, but that the P38 was admissible on other grounds.

We conclude that *Riser* is distinguishable because in this case, the specific type of weapon used to commit the December 2007 shooting was *not* known. The prosecution's evidence did not show that the murder weapon was a High Standard Double Nine Revolver. At best, the prosecution's evidence showed that the murder weapon was either a .22 caliber revolver, which explained the absence of casings at the scene, or a .22 caliber semiautomatic, which did not explain the absence of casings at the scene. The evidence in this case failed to demonstrate whether the murder weapon was a revolver or an automatic, or the number of rounds that it could hold. Accordingly, even though it was determined not to be the murder weapon, defendant's .22 caliber High Standard Double Nine Revolver was relevant to show his familiarity with the only .22 caliber revolver in existence that can hold nine rounds. We conclude that the trial court did not

abuse its discretion in denying defendant's motion to exclude his revolver under Evidence Code section 352.

In any event, even if defendant's .22 caliber revolver was inadmissible, its admission did not result in any undue prejudice because defendant was acquitted of the only crimes (counts 1 & 2) in which a .22 caliber weapon was used. As to count 3, which was committed with a .357 caliber gun and a nine-millimeter gun, defendant was not alleged to be the shooter and it is not reasonably probable that he would have obtained a more favorable verdict if his .22 caliber revolver had been excluded from evidence.

D. The Gang Meeting Concerning Baby Knockout

As previously mentioned, the prosecutor asked if Prodigalidad knew whether the "Eight Trey Gang had any type of meeting after Baby Knockout was shot." Prodigalidad answered yes, he had heard from other officers that such a meeting had occurred. The prosecutor then asked whether in Prodigalidad's experience, a gang would invite strangers or those unaffiliated with the gang to that meeting. Prodigalidad replied that only strong associates or gang members would be invited, because the purpose of such a meeting would be to "talk about what happened and what's going to be done." Defendant did not object to the above testimony.

Defendant contends on appeal that "[t]he prosecutor improperly introduced hearsay, and improperly argued, that appellant attended a gang meeting, when there was no valid evidence to support the claims either that there was such a meeting, or that appellant attended it."

We conclude that defendant forfeited the hearsay objection by failing to raise it below. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) In any event, the evidence was admissible. The other officers' extrajudicial statements regarding the gang meeting were not offered for their truth, but as the factual basis for Prodigalidad's expert opinion that only strong associates or gang members would be invited to such a meeting.

As previously discussed, expert testimony may "be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon

by experts in the particular field in forming their opinions. [Citations.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) In this case, the reliability of the other officers' statements concerning the September 5, 2008 meeting was established by defendant's own statements. During his interview, defendant indicated that he had attended the gang's September 5, 2008 meeting concerning the Baby Knockout shooting: "They called me and told me that Knockout had got shot or whatever. They came and picked me up. ** and everybody's crying ** and all that stuff."

In a related claim, defendant argues that during closing argument, the prosecutor improperly referred to the September 5, 2008 meeting when there was no valid evidence that such a meeting had occurred. In light of our determination that the evidence concerning the meeting was properly admitted, we conclude the contention lacks merit.

II. The Motion to Sever Counts 1 and 2 from Count 3

Defendant contends that the trial court abused its discretion in denying his pretrial motion to sever counts 1 and 2 (the December 26, 2007 shootings of Solomon and Randolph) from count 3 (the September 5, 2008 shooting of Campbell).

"'"The law prefers consolidation of charges. (*People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Where, as here, the offenses charged are of the same class, joinder is proper under section 954. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030 . . . ; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315 . . . .)"' (*People v. Manriquez* (2005) 37 Cal.4th 547, 574 . . . .)" (*People v. Stanley* (2006) 39 Cal.4th 913, 933-934 (*Stanley*).)

In this case, defendant was charged with three felony counts of the same class. Accordingly, as stated in *Stanley*, where the offenses charged are of the same class, joinder is proper and "defendant can only predicate error in the denial of severance on a clear showing of potential prejudice. (*Manriquez*, *supra*, 37 Cal.4th at p. 574; *Kraft*, *supra*, 23 Cal.4th at p. 1030; *Bradford*, *supra*, 15 Cal.4th at p. 1315.) We review the trial court's denial of defendant's severance motion for an abuse of discretion. (*Manriquez*, at p. 574, and cases cited.)" (*Stanley*, *supra*, 39 Cal.4th at p. 934.)

In denying the severance motion, the trial court noted the absence of inflammatory evidence regarding either incident that would create a substantial danger of prejudice and require a separate trial of the charges. It also noted that both the gang evidence and the evidence of defendant's commission of the December 2007 murder were cross-admissible to show his intent to aid and abet the commission of the September 2008 murder.

Defendant argues on appeal that the prosecution's identification evidence for the December 26, 2007 shooting was weak because (1) Shearer was uncooperative at the preliminary hearing and at trial, and had requested money and special prison privileges for his testimony, and (2) Johnson, who did not witness the actual shooting but only saw a man running from the direction of the park, did not identify defendant at the preliminary hearing. We disagree. Because the prosecution presented evidence that both Shearer and Johnson were afraid to testify because of fear of retaliation, we are not persuaded that the identification evidence was weak.

We conclude that defendant has failed to establish that the denial of his motion to sever was an abuse of discretion.[13]

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[13] In light of our rejection of defendant's contentions, we need not reach his claim of cumulative error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.