Filed 2/22/17 P. v. Ross CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DASHAWN ROSS, Defendant and Appellant.	B263980 (Los Angeles County Super. Ct. No. BA400370)

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

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Dashawn Ross (defendant) appeals from his conviction of murder, attempted murder, felon in possession of a firearm, and shooting at an occupied motor vehicle. He contends: (1) that the trial court erroneously admitted expert opinion in response to an improper hypothetical question; (2) that the court erred in admitting evidence that a witness had participated in an FBI task force which investigated defendant's gang several years after the current crimes were committed; (3) that the trial court erred by failing to take judicial notice of the time of the sunrise on the morning of the crimes; (4) that the prosecutor repeatedly committed misconduct during the trial, and that defense counsel rendered ineffective assistance by failing to object to much of the misconduct; (5) that the gang enhancement was unsupported by substantial evidence; and (6) that the court erred by failing to dismiss his prior strike conviction for sentencing purposes. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).)

BACKGROUND

Defendant was charged as follows: count 1, the murder of Robert Donnell (Donnell), in violation of Penal Code section 187, subdivision (a)[1]; count 2, the willful, deliberate, and premeditated attempted murder of Mary Brown (Brown) in violation of sections 664 and 187, subdivision (a); count 3, felon in possession of a firearm in violation of former section 12021, subdivision (a)(1); and count 4, shooting at an occupied motor vehicle in violation of section 246.

The information alleged that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members pursuant to

---

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

section 186.22, subdivision (b). The information further alleged that defendant personally used and discharged a handgun during the commission of the crimes alleged in counts 1, 2, and 4, within the meaning of section 12022.53, subdivisions (b) through (d). As to all counts, it was alleged that defendant had suffered two prior serious felony convictions within the meaning of section 667.5, subdivision (b), sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i), and that defendant had suffered one prior serious or violent felony within the meaning of section 667, subdivision (a)(1).

A jury found defendant guilty as charged, found the murder to be in the first degree, and found true all special allegations. On April 30, 2015, the trial court denied defendant's motion to dismiss his prior strike conviction (*Romero* motion) and sentenced defendant to a term of 141 years to life in prison. As to count 1, the court imposed a total term of 81 years to life in prison, comprised of 25 years to life, doubled as a second strike to 50 years to life, with a consecutive firearm enhancement of 25 years to life under section 12022.53, subdivision (d), plus five years and one year for the prior conviction, pursuant to section 667, subdivision (a), and 667.5, subdivision (b). As to count 2, the court imposed a consecutive term of 60 years to life in prison, comprised of life with a 15 year minimum parole period due to the true gang finding, doubled to 30 years as a second strike, plus five years for the prior conviction, and a consecutive firearm enhancement of 25 years to life. The court ordered a concurrent three-year upper term as to count 3, doubled to six years; and as to count 4, imposed but stayed a total sentence 39 years pursuant to section 654, comprised of the high term of seven years, doubled as a second strike to 14 years, plus a gun enhancement of 25 years to life. Defendant was awarded presentence custody credit of 952 actual days, and ordered to pay mandatory fines and fees,

as well as victim restitution in an amount to be determined in a later hearing.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting

At approximately 6:30 a.m. on September 26, 2011, defendant fired a nine-millimeter handgun multiple times toward Donnell and Brown as they sat in Donnell's car in the area of Grand Avenue and 49th Street, Los Angeles. Defendant shot Donnell in the chest and Brown in the face. Donnell died from a gunshot wound to the lung and heart, and Brown lost an eye.

Brown testified that she and her friend Donnell, had been driving around in Donnell's car late that night just to "hang out." They stopped so that Donnell could obtain some crack cocaine while she waited in the car. Brown did not know where they stopped. They then drove around awhile until Donnell parked under a street light near the intersection of 49th Street and Grand Avenue. Donnell got into the back seat with Brown and they smoked the crack cocaine from a pipe for about 45 minutes to an hour. At about 6:30 a.m., when it was still dark, but with a little light, and not "nighttime dark," defendant approached from the front of the car with one hand in the pocket of his "hoodie." Brown could see defendant's face as he approached and as he went to the side of the car where he shot her. While she slumped over in the back seat, she could see Donnell get out of the car. She heard him lock the door, and saw him stand facing defendant, who then shot Donnell in the chest. Brown also heard a few more gunshots. Defendant ran away and Brown got out of the car, screaming for help.

A nearby resident, Tony Dixon, testified that he smoked a cigarette outside his apartment about 6:40 a.m., "right before the

sun came up," when it was starting to be daylight. It was a bit "blurry" out, but not dark, and he could see. He went back inside for a few minutes and as he was leaving the apartment again at about 6:45 a.m., he heard gunshots and ducked back inside. After the gunfire stopped, Dixon stepped into the open doorway of his apartment, saw Brown screaming and bleeding from the face, and then saw defendant approaching from about 15 feet away in a jog or fast-walk, holding something in his hand. Another area resident, Jose Rodriguez, testified that he heard the gunfire at 6:30 a.m. The first 911 call came in from another neighbor at 6:32 a.m., reporting gunfire and a woman screaming.

Donnell's car was struck by at least six bullets. Two fired bullets were found in the car and seven cartridge cases were recovered in the area.

Defendant's arrest and identification

Los Angeles Police (LAPD) Officer Jeremy Escamilla was working with Officers Algren and Rudolph on October 13, 2011, patrolling the 200 block of West 53rd Street, when he saw defendant at approximately 9:50 p.m., standing on the sidewalk next to a pillar in front of a house, holding a black plastic bag. When Officer Escamilla illuminated him with a flashlight, defendant tried to duck behind the pillar. As the other officers got out of their car to speak to defendant, he ran into the house and screamed, "Police. Get rid of it." Officer Escamilla ran to the back of the house, while the other officers followed defendant to the front entrance. Officer Escamilla encountered a man, later identified as gang member, Lord Kelly (Kelly), crawling out the back window, holding a large, dark semiautomatic gun in his hand. Kelly crawled back inside when the officer illuminated him with his flashlight. Inside the house, the officers detained defendant and the other occupants, including Robert Barnett, Sammie Hodges, and Roosevelt Sumpter.

In the back of the house, Officer Escamilla found a large, dark-colored nine-millimeter semiautomatic handgun next to the window. Officers also recovered a small .22-caliber handgun and a box containing 16 live rounds of nine-millimeter ammunition. On a desk close to where defendant was sitting they found marijuana, two digital scales (commonly used to weigh drugs for sale), a cell phone, and two plastic bindles of crack cocaine. Officer Escamilla also saw the black plastic bag that defendant had been holding, which contained marijuana. Later test-firing of the nine-millimeter firearm showed that the cartridge cases recovered from the scene of the shooting and bullets found inside Donnell's car had all come from that gun.

Detective Richard Arciniega testified that when he obtained the firearm evidence, he prepared a six-pack photographic lineup and placed a photograph of defendant in position No. 2. The remaining five photographs were chosen by a computer program designed to find people who resembled the suspect. On October 26, 2011, Detective Arciniega showed the photographic lineup separately to Brown and Dixon. Dixon very quickly identified defendant's photograph, but Brown did not identify any of the photographs. On July 18, 2012 (one year prior to the preliminary hearing), Detective Arciniega again showed Brown the photographic lineup, and on that date, Brown identified defendant's photograph as the shooter. Brown explained that she had recognized him the first time the detective had shown her the photographs, but had not wanted to say so because of fear. Brown identified defendant in court at the preliminary hearing and at trial as the person who shot her and Donnell. Dixon identified defendant at trial as the person who jogged passed him after the gunfire stopped that morning.[2]

---

[2] Dixon did not testify at the preliminary hearing.

Defendant's telephone conversations were recorded while he was in custody. During a call in May 2013, defendant told an acquaintance that his cellmate was an "OG" and his acquaintance said to tell the cellmate "Hi, OG." Defendant told her that he had been "reckless Randy" that time he had gone to her house, because he had been in possession of "them two guns."

Gang evidence

Both the scene of the shooting and the house where defendant was arrested were located within the territory claimed by the Five Deuce Broadway Gangster Crips gang. Officer Guillermo Garcia testified that he was assigned to the Gang Enforcement Detail, regularly patrolled the area, and took photographs of gang related graffiti, which was plentiful in the area at the time of the shooting. The gang name was often abbreviated to BGC, Five Deuce Broadway, 52, 5 Broadway 2 Gangstas, or simply Broadway. About three or four weeks after the shooting, Officer Garcia noticed graffiti he had not seen prior to the shooting. On a wall on Grand Avenue between 48th and 49th Streets, the graffiti read: "Smokers K K" with "BGC" underneath. Officer Garcia explained that in his experience, K stood for kill, and placing a K next to a person's moniker or crossing out the moniker, indicated that the person would be killed.

Defendant had been known to the police as a member of the Broadway Gangster Crips gang since at least 2005. Several officers testified that during a pedestrian stop or investigations in the gang's territory, they had conversations with defendant in which he admitted his membership in the gang. They documented the information obtained during these occasions on field interview cards.

Officer Alfred Garcia testified as the prosecution's gang expert. He had particular expertise with the Broadway Gangster

Crips gang (or BGC). As a gang officer he was assigned to the gang and its territory. During the summer of 2014, he assisted with an FBI task force that investigated the gang.

Officer Garcia was familiar with the 53rd Street house in the gang's territory where defendant was arrested, having been on that street hundreds of times. The house was a known "hangout" for certain BGC members. Officer Garcia explained that a gang hangout was a place where gang members and their acquaintances would congregate and often store guns and drugs. The officer had stopped BGC members on the porch of the house, made arrests for narcotics sales there, and had observed gambling and drinking by gang members there.

The BGC's primary activities were murder, attempted murder, assault with a deadly weapon, weapons possession, robbery, narcotics possession and narcotics sales. The gang had about 400 members and engaged in a pattern of criminal gang activity. Officer Garcia presented evidence of predicate convictions of two members of the gang, one for robbery, carjacking, and assault with a firearm, committed September 8, 2011, and the other for robbery, committed on January 4, 2009.

Officer Garcia testified that territory was very important to the gang, as the more territory it controlled, the more power it had, the more narcotics members could sell, which was the gang's main source of income. He explained the various ranks achieved by gang members within the gang. A higher ranking member of the gang was called an "OG" or "original gangster," who would supervise daily gang activities, ensuring the money count was right, that individuals were recruited into the gang, that rivals were addressed, and so forth. A "soldier" was a member who protected the territory and the product, i.e. narcotics sales. Soldiers were the "worker bees" who committed retaliatory shootings of rival gang members if called upon, carried weapons

on them, and committed higher-level robberies, such as bank robberies. Officer Garcia explained that the term, "put in work" meant doing work for the gang, from tagging graffiti, to committing robberies, murders, and selling narcotics. The more work put in by a gang member, the more respect he would earn within the gang and the higher in rank he would advance.

Officer Garcia explained the importance of reputation and respect to gang members. A reputation for fear and intimidation provided a benefit to the gang by discouraging witnesses from coming forward and by keeping rival gang members away. Officer Garcia interpreted the graffiti: "Smokers KK BGC" as meaning that the Broadway Gangster Crips gang was claiming responsibility for killing two crack cocaine users. There was no evidence that Donnell was affiliated with any gang.

The house on West 53rd Street was Kelly's residence in 2011. Kelly was then an active member in the Broadway Gangster Crips gang, and in Officer Garcia's opinion, he was a high ranking member of the gang, an "OG." Barnett and Hodges (who were detained with defendant at the house) were soldier-members of BGC gang. Sumpter was also a member of the gang.

Officer Garcia had known defendant for years, and had seen him almost daily within the BGC territory, where BGC members commonly congregated. In April 2005, when the officer documented his contact with defendant in BGC territory, defendant admitted he was a member of the Broadway Gangster Crips gang. Officer Garcia noted defendant's tattoos, including a B (for Broadway) on his left triceps, and a G (for Gangsters) on his right triceps. As defendant had tattoos in 2005, Officer Garcia believed he was an active member at least by then. Additional gang related tattoos observed in 2014 indicated to Officer Garcia that defendant had put in work for the gang in the meantime. He explained that people did not get such tattoos if

they merely associated with the gang but were not active gang members. If nonmembers did get gang-related tattoos, the gang would discipline them by physically assaulting or even killing them. Based upon conversations with other BGC gang members and knowing the older members with whom defendant associated, Officer Garcia was of the opinion that defendant had been an active member of the gang since 1999, and that he was a soldier and enforcer for the gang.

Given a hypothetical question mirroring the facts in evidence in the case, Officer Garcia gave his opinion that the shootings benefitted the Broadway Gangster Crips gang. Officer Garcia testified later that it would not have benefitted the gang to kill its own paying narcotics customers. However, it would benefit the gang to kill a rival gang's customers if they were smoking in this gang's territory. In such a case, the graffiti, "Smokers KK BGC" would send the message that any narcotics smoked in the gang's neighborhood would have to be purchased from the gang.

Defense evidence

Cognitive psychology professor Dr. Kathy Pezdek gave expert testimony on factors affecting eyewitness memory and identification, such as length of time observing a person, obstructions, lighting, differences in gender, race, and age, as well as the fairness and promptness of the identification procedure. She testified that just a glance in dim lighting, an exclusively front view lineup, an unfairly composed lineup, a time delay in identification, and the presence of a weapon during a crime, were all among the factors that would cast doubt on the accuracy of an identification.

The defense also presented the testimony of toxicologist John Treuting, who explained how the use of cocaine and chronic

drug use adversely affected the brain and thus memory and the ability to perceive reality.

DISCUSSION

I. Hypothetical question

Defendant contends that the trial court erred in allowing the prosecution to elicit opinion testimony from Officer Garcia regarding whether it benefitted the gang to kill its narcotics customers or those of rival gangs. Defendant asserts that the testimony was given in response to a series of improper hypothetical questions about whether the crimes were committed for the benefit of the gang. In essence, defendant makes the broad assertion that all the questions calling for Officer Garcia's opinion regarding gang benefit were improper hypothetical questions that included facts not in evidence.

As we explain within, we reject defendant's premise that the challenged questions were posed as hypothetical questions. A hypothetical question is a question posed on assumed facts. (Black's Law Dict. (10th ed. 2014).) "Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence. [Citations.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*).) However, a hypothetical question is not the only permissible method of eliciting expert opinion, which "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. [Citations.]" (*Id*. at p. 618; Evid. Code, § 801, subd. (b).) As respondent observes here, and as stated in *Gardeley*, "[s]o 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. [Citation.]" (*Gardeley*, at p. 618.)[3]

"A trial court . . . 'has considerable discretion to control the form in which the expert is questioned . . . .' [Citation.]" (*Gardeley, supra*, 14 Cal.4th at p. 619.) Whenever a discretionary power is vested in the trial court, the court's exercise of discretion "must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant complains that there was no evidentiary support for the following questions asked by the prosecutor: "Would it benefit the gang to kill its own paying customers"; "Would it benefit the gang to kill the customers of another gang if they're smoking in their territory"; and, "Does it benefit the defendant's gang to kill the customers, the narcotics customers of another gang?" Defendant objected to the questions on the ground that they assumed facts not in evidence, and amounted to improper opinion and speculation. Defendant contends here that the challenged questions were not rooted in the facts shown by the evidence, and were thus based upon an improper hypothetical.

Defendant's argument is premised on his mistaken conclusion that the challenged questions were based upon the following hypothetical scenario articulated by the prosecutor:

> "Assume that the following facts are true: on September 26th of 2011, a documented member of the

---

[3] *Gardeley* has been disapproved to the extent it suggests that an expert could properly testify regarding out-of-court statements that are specific to the case, without satisfying hearsay rules. (*People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

> Five Deuce Broadway Gangster Crips walks up to a car parked on the corner of 49th Street and Grand Avenue and begins shooting at the car where two people are sitting in the back of the car smoking crack cocaine; assume also that the victims are not documented gang members, and assume that two and half weeks later the shooter is standing in front of a house at 225 West 53rd Street, just a few blocks away from where the shooting had happened and runs into the house yelling: 'Police. Get rid of it,' as officers start approaching; officers enter the home, and they find drugs, they find guns, they find bullets, they find Five Deuce Gangster Crip gang members, including the shooter. One of the guns, ultimately, is tested and matches the casings found at the crime scene and bullets recovered from the car; assume that about three and a half weeks to a month later, after the murder, graffiti appears between 48th and 49th on Grand that says, 'Smokers KK BGC,' do you have an opinion as to whether the shooting that happened on September 26th of 2011, was for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members?"

Defendant objected to the statement of hypothetical facts as improper, and the trial court overruled the objection. The prosecutor asked the following question: "What is your opinion and why?" Officer Garcia responded to the question as calling for an opinion on whether the shooting benefitted the gang, replying that "those actions benefit the Broadway Gangster Crips." Officer Garcia referred to his earlier testimony regarding fear and intimidation in gang culture, and explained that the shooter elevated his own status within the gang and helped the gang by creating fear and intimidation within the community and rival gangs.

Defendant has pointed to no fact in the prosecutor's hypothetical facts which was not rooted in the evidence presented at trial. Instead, he paradoxically argues that the statement of hypothetical facts was improper because it did not state that defendant knew the victims were using drugs in the car and that they had bought drugs from a gang, while at the same time recognizing that including them in the hypothetical would have been improper, as there was no evidence of such facts. (See *People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046.)

The allegedly unsupported facts were not in the prosecutor's statement of hypothetical facts, because the challenged questions were not hypothetical questions. Here, the prosecutor did not tell the expert to assume that defendant knew the victims were using drugs in the car or that they had bought drugs from a gang. Instead, the objected-to questions called for the officer's opinion, based upon his admitted gang expertise, experience, and his testimony regarding gang culture, which is not challenged here.

It is clear the trial court was aware of the form in which the prosecutor was asking the challenged questions, as the court commented during discussion of the issue that the questions were not within the stated hypothetical facts. And because there was no such hypothetical question or evidence supporting it, the court properly excluded any opinion regarding the victims as customers of this gang or a rival gang. The court permitted the prosecution merely to bring out, in general, Officer Garcia's opinion that it would not be a usual practice of the gang or of benefit to the gang to shoot its own customers. The prosecutor then asked Officer Garcia whether it would benefit the gang to kill its own paying customer, and the officer responded that it would not.

The trial court sustained a defense objection when the prosecutor asked the officer, "So when you see graffiti like

'Smokers KK,' in what scenario would it benefit the gang to kill smokers?" The remaining questions on the issue were limited to the general area permitted by the trial court, and the expert gave his general opinion that it would not benefit the gang to kill its own narcotics customers, but would benefit the gang to kill a rival gang's narcotics customers found smoking in its territory. Officer Garcia explained that it would send a message to potential buyers that they must buy from this gang if they smoke the product in this gang's territory. Thus, the expert was not asked to assume that the victims were customers of the gang or a rival gang. There was no abuse of discretion in overruling defendant's objections on that ground.

Further, a review of Officer Garcia's testimony in its entirety demonstrates that the opinions regarding customers, while not based upon assumed facts in the context of a hypothetical question, were not speculative as they were based upon the evidence. In testimony given before the hypothetical question and the challenged questions that followed, Officer Garcia had testified that the sale of narcotics was the gang's primary source of income. Officer Garcia also testified that controlling territory and keeping rival gangs away was important to increasing its narcotics sales, and that the gang did this by enhancing its reputation for violence. Officer Garcia had also testified regarding the significance of the graffiti he had seen in Broadway Gangster Crip territory and near the scene of the shooting. Officer Garcia had already interpreted the meaning of Smokers as crack cocaine users, and K as kill; thus, he explained, "Smokers KK BGC," meant that BGC would kill or that they had killed two smokers. During the course of this testimony the court overruled defendant's objections, but defendant does not now assign error to those rulings and we discern none. Indeed, expert testimony is routinely admitted to interpret the meaning of

graffiti and gang signs (see *People v. Lindberg* (2008) 45 Cal.4th 1, 46-47), which may provide substantial evidence of guilt in some cases. (Cf. *People v. Fudge* (1994) 7 Cal.4th 1075, 1091, 1111.)

From our review of the entire record, we conclude that defendant has suffered no prejudice from the expert's opinions regarding drug customers. First we reject defendant's suggestion that without the opinions, the remaining evidence of gang motive was weak. In fact, there was ample evidence that the shooting benefitted the gang quite apart from the opinions regarding narcotics customers. Officer Garcia testified that the shootings benefit the gang by enhancing its reputation for fear and intimidation within the community and among rival gangs. That opinion alone was sufficient to raise a reasonable inference that the crime was committed for the benefit of the gang. (See *People v. Albillar* (2010) 51 Cal.4th 47, 63.) This evidence of motive is especially strong when considered with the evidence regarding the meaning of the gang's graffiti and the gang's pursuit of a violent reputation.

In addition, even if the opinions regarding narcotics customers could be construed as resulting from the hypothetical question, the trial court dispelled any possible prejudice after overruling defendant's objections, by giving the jury the following cautionary instruction:

> "In examining an expert witness, counsel may ask a hypothetical question. This is a question in which the witness is asked to assume the truth of a set of facts and to give an opinion based on that assumption. In permitting this type of question, the court does not rule and does not necessarily find that all of the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been

> proved. If you should decide any assumption in the question has not been proved, you are to determine the affect of that failure of proof on the value and weight of the expert opinion based on the assumed facts."

Prior to deliberations, the trial court repeated CALJIC No. 2.82, and read CALJIC No. 2.80, which instructed the jury, among other things, as follows: "An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based. You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable."

We presume the jury followed these instructions, and as defendant has not rebutted this presumption, no prejudice appears. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1326-1327.) Further, based on our review of the whole record and the circumstances discussed above, we conclude that had the trial court erred in admitting the testimony, any such error would have been harmless under any standard. (See, e.g., *Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result absent state-law error].)

II. FBI task force investigation

Defendant contends that the trial court erred in admitting evidence that Officer Garcia participated in a FBI task force which investigated criminal activities within the Five Deuce Broadway Gangster Crips gang, such as, "[n]arcotics sales and transportation over state lines, weapons possession, and also the

selling of weapons." Defendant argues that the evidence lacked relevance to any issue in the case since the crimes occurred in 2011, and the unrelated FBI investigation took place in 2014. He argues that the potential prejudicial effect of the evidence outweighed any probative value because it was irrelevant and inflammatory.

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) We review a trial court's relevance determination under the deferential abuse of discretion standard. [Citation.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 821.) If the evidence was relevant, we determine "'whether the trial court abused its discretion under Evidence Code section 352 in finding that the probative value of the [evidence] was not substantially outweighed by the probability that its admission would create a substantial danger of undue prejudice.' [Citation.]" (*People v. Heard* (2003) 31 Cal.4th 946, 972.) We may not disturb the trial court's ruling on the admissibility of evidence "'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. Goldsmith* (2014) 59 Cal.4th 258, 266.)

The prosecutor offered the challenged evidence on the issue of Officer Garcia's experience and expertise with this particular gang, and the court admitted it for that purpose. To be qualified as an expert, a witness must have sufficient "special knowledge, skill, experience, training, or education," which may be shown by "any otherwise admissible evidence, including his own testimony." (Evid. Code, § 720.) Both determinations are left to the discretion of the trial court. (*People v. Fudge, supra*, 7 Cal.4th at p. 1115.) Defendant has cited no authority suggesting

that an expert's special knowledge, skill, or experience, must be acquired prior to the crime at issue or that any training or education must have been completed prior to the crime. We find nothing arbitrary or capricious in the trial court's finding that Officer Garcia's participation in an investigation of the gang in 2014 was relevant to his expertise when he testified thereafter.

Defendant contends that there was a potential for undue prejudice because FBI involvement suggested that the gang's activities were somehow more criminal than crimes investigated by local police. He argues that this, in turn, could have caused jurors to conclude that because defendant was affiliated with such a gang, he was criminally oriented, and thus likely to have committed the crimes. Defendant concludes that this would potentially sway the jury to convict regardless of defendant's actual guilt.

Defendant did not make this argument below, instead he merely claimed that the evidence was prejudicial because the FBI investigation took place after the date of the shootings. As defendant did not give the trial court the opportunity to weigh this asserted potential for prejudice or to consider a limiting instruction, he may not now complain about an abuse of discretion he never asked the trial court to exercise. (See *People v. Partida* (2005) 37 Cal.4th 428, 434.)

Moreover, defendant did not object to the fact that the investigation was an FBI investigation. The prosecutor initially asked Officer Garcia two questions about the FBI investigation, and defendant objected only to the second one. The prosecutor asked: "This past summer did you assist with the FBI task force that investigated the Five Deuce Broadway Gangster Crips?" After Officer Garcia answered, "Yes," there was no objection or motion to strike. Then the prosecutor asked, "[W]hat happened?" Defendant interjected, "Objection. Relevance." The ensuing

discussion out of the jury's presence demonstrated that the trial court did not consider the objection to have been directed at both questions, as the court asked what activities the witness would talk about, and then ruled that only a general description of what they did would be allowed, not "some huge detail about the FBI investigation."

A judgment may not be reversed by reason of the erroneous admission of evidence "unless [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353.) As defendant did not object to the first question, move to strike the answer, request a limiting instruction, or argue that the fact that the FBI conducted the investigation was more prejudicial than probative, he has not preserved that issue for review.

In any event, we find no merit to defendant's argument that hearing of FBI involvement in an investigation of the gang would alone cause the jury to convict defendant. Evidence is not unduly prejudicial or inflammatory where it is brief and does not uniquely evoke an irrational or purely emotional response. (See *People v. Cowan* (2010) 50 Cal.4th 401, 475; *People v. Hamilton* (2009) 45 Cal.4th 863, 927.) An FBI investigation was no more inflammatory than evidence of investigations by the LAPD Gang Enforcement Detail and specially assigned gang officers, or the many conversations between those officers and defendant and other gang members since at least 2005, or the convictions of other members of the Broadway Gangster Crips gang.

We agree with respondent that defendant has failed to show prejudice. It is defendant's burden to demonstrate prejudice under the test of *Watson*, which asks whether there was the reasonable probability of a different result absent state law error. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.)

Defendant contends that the evidence was prejudicial because eyewitness identification was weak; because other "gang evidence permeated the trial to such a degree it undoubtedly influenced the jury against [defendant]"; and because it permitted the prosecutor to argue in summation: "[Y]ou heard about the task force that Officer Garcia participated in, the FBI task force of the gang's activities that they were investigating that they worked on this past summer. This gang is a big deal. They have instilled a lot of fear in that community. They have caused a lot of problems in that community with their drug sales."

We have already rejected the suggestion that FBI involvement implied that the gang's activities were somehow more criminal, but we do agree with defendant that there was considerable gang evidence permeating the trial; so much so, in fact, that excluding a brief reference to an FBI investigation would have no reasonable probability of changing the result.

III. Judicial notice of sunrise

Defendant contends that the trial court erred in refusing to take judicial notice of the time of sunrise on the morning of the shootings, and that the error resulted in a violation of his constitutional rights to due process, a fair trial, and to present a defense. Defendant argues that the time the sun rose was a crucial fact necessary to the determination of whether there was adequate light for Brown to have seen the shooter's face and whether the shooter was able to have seen that Brown and Donnell were using drugs in the car.

Upon request, and where the requesting party furnishes sufficient information, the trial court must take judicial notice of facts that are not reasonably subject to dispute, and that are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, §§ 452, subd. (h), 453.) However, "[e]ven if a matter is a proper subject of

judicial notice, it must still be *relevant*. [Citations.]" (*People v. Payton* (1992) 3 Cal.4th 1050, 1073; Evid. Code, § 350.) Thus, the evidence must have a "'tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "The provisions relative to judicial notice are likewise qualified by Evidence Code, section 352, which permits the exclusion of any otherwise relevant evidence in the discretion of the trial court '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.'" (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578; see also Evid. Code, § 454, subd. (a)(2).) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] 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. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Defense counsel represented on September 26, 2011, the sun rose at 6:44 a.m., and provided the court with a printout from the website, timeanddate.com. The trial court accepted the accuracy of the source, and agreed that the time of sunrise was properly subject to judicial notice. However, the court found that the time of sunrise was not particularly relevant to the issue of the lighting conditions, without other facts such as the weather that morning and the particular way the sun rose in that location.

Defendant contends that the sunrise time was relevant because the evidence would have shown that it was too dark for accurate identifications or for the shooter to have been able to see into the car, thus eliminating the drug-related gang motive for

the shooter. The shooting occurred at 6:30 a.m., and defendant has failed to explain how the fact that the shooting occurred approximately 14 minutes before sunrise would have any tendency in reason to prove just how dark or how light it was at the time of the shooting. Defendant does not suggest that the neighborhood of the shooting was always dark 14 minutes before sunrise, or that there were other conditions, such as clouds or mountains that would interfere with the predawn twilight. We agree with the trial court that the time of sunrise had negligible probative value to establish the lighting conditions 14 minutes earlier, and we cannot find that the court's refusal to take judicial notice was arbitrary, capricious, or patently absurd.

Moreover, defendant has not demonstrated prejudice. We reject defendant's contention that any error would be reviewed under the federal constitutional standard of *Chapman*. Had the court erred, it would not have resulted in the denial of defendant's right to present a defense. This was not a case in which the time of sunrise or sunset was essential to an element of the offense, as in the three cases that defendant cites to illustrate the trial court's authority to take judicial notice. (See *People v. Harkness* (1942) 51 Cal.App.2d 133, 134, 138-139 [nighttime requirement first degree burglary conviction under former statute][4]; *People v. Masters* (1933) 133 Cal.App. 167, 170 [same]; *Fouch v. Werner* (1929) 99 Cal.App. 557, 563 [collision proximately caused by violation of former motor vehicle statute requiring headlights during specified times before sunset and after sunrise].) We would thus review any error under the

---

[4] Former section 460 was amended in 1976 to eliminate requirement for first degree burglary that crime was committed at night. (See Stats. 1976, ch. 1139, p. 5120, § 206.5, operative July 1, 1977.)

standard of *Watson*. (See *People v. Jablonski*, *supra*, 37 Cal.4th at p. 821.)

Under the appropriate review we find no reasonable probability that the result would have been different had the trial court taken judicial notice that sunrise on September 26, 2011, was 6:44 a.m. At trial, although Dixon may have mistaken the time of the shooting for about 6:40 a.m., he testified that he heard gunfire just before sunrise, when it was starting to be daylight, a bit "blurry" out, but not dark. As Dixon stepped outside, he saw defendant coming toward him in a jog or fast walk from about 15 feet away. Brown testified that although it was still dark with a little light, it was not "nighttime dark." Brown saw defendant's face as he approached the front of the car and again through the untinted driver's side window. The exact time of sunrise would not have contradicted the witnesses' assessment of the lighting conditions, their ability to see, or their belief that it was defendant's face they saw.

Finally, the ample evidence which supported a reasonable inference that the crimes were committed to benefit the gang would not have been affected by the degree of predawn visibility whether or not defendant knew at the time he shot them that Brown and Donnell were smoking cocaine in the car. Officer Garcia explained that the graffiti, "Smokers KK BGC," meant that Broadway Gangster Crip gang members would kill or that they had killed two smokers, and that spreading fear and intimidation by violence in the neighborhood benefitted the gang's narcotics sales. Defendant was an active member of the gang as an enforcer and soldier, was identified as the shooter, and was linked to the murder weapon and the gang's drug trade.

IV. Prosecutorial misconduct

Defendant contends that prosecutorial misconduct so pervaded the trial that it resulted in a violation of his

constitutional right to a fair trial. Defendant lists four categories of alleged misconduct: (1) 10 instances of disregarding rulings or making rude remarks; (2) seven instances of making speaking objections, some amounting to testifying; (3) asking five leading questions; and (4) improper closing argument in which the prosecutor attempted to elicit sympathy for the victim 12 times, vouched for a witnesses, misstated the presumption of innocence, and commented on facts not in evidence. Each category contains alphabetically enumerated instances of alleged misconduct, about 30 in all, which occurred during the 10 days of trial between December 3 and 17, 2014. About half occurred during the presentation of evidence and the other half during final argument.

A prosecutor's improper remarks violate the federal constitution only when they are so egregious that they infect the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Otherwise, misconduct violates state law only if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill, supra,* at p. 819.) Where the prosecutor engaged repeatedly in unprofessional conduct, the "'critical inquiry on appeal is not how many times the prosecutor erred but whether the prosecutor's errors rendered the trial fundamentally unfair or constituted . . . reprehensible methods . . . .' [Citation.]" (*People v. Peoples* (2016) 62 Cal.4th 718, 793-794.)

"In order to preserve a claim of prosecutorial misconduct for appeal, the defense must make a timely objection at trial and request an admonition. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146.) One or the other is not enough; both objection and request for an admonition are required. (See *People*

v. Prieto (2003) 30 Cal.4th 226, 259-260.) Further, the defendant's objection must be on the same ground urged on appeal and include an assignment of misconduct, as well as a request that the jury be admonished to disregard the misconduct. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) The claim is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct. (*People v. Gutierrez*, at p. 1146.)

Defendant contends there is no forfeiture of the issue because the trial court was aware of the prosecutor's behavior, having reprimanded her several times or having told the jury to disregard it, and because defense counsel's evidentiary objections and comments about the prosecutor's behavior had alerted the court to the problem. Defendant does not claim to have assigned any of the incidents as misconduct or to have requested an admonition. Thus defendant has failed to preserve this issue for appeal.

Defendant also contends that there is no forfeiture because any objection would have been futile and any admonition would have been ineffective. To be excused from the necessity of either a timely objection or a request for admonition on the ground of futility, defendant must explain with "specificity as to why [a] particular objection would have fallen upon deaf ears." (*People v. Peoples, supra*, 62 Cal.4th at p. 797.) Further, it is defendant's burden "to demonstrate that, assuming misconduct, an admonition would have been an ineffective remedy." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108.) Defendant has failed to explain why an objection to each of the specific incidents would be futile. Instead, defendant argues in effect, that *all* objections would have been futile due to the prosecutor's persistent pattern of misconduct, and because whatever intervention the trial court did make did not appear to deter the prosecutor. Defendant

concludes that any additional objections during closing argument would have called more attention to the prosecutor's remarks, making any prejudice worse. As defendant makes no effort to specify why each particular objection would have been futile, he has provided no basis to relieve him of the forfeiture. (See *People v. Peoples*, at p. 797.)

Defendant suggests that we reach the issue regardless of the failure to preserve. Defendant's list of incidents of alleged misconduct cover over 17 pages of his opening brief, in which he has failed to make a particularized showing of futility. We decline to make that analysis for him. We do not reach undeveloped claims. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.)

In the alternative, defendant contends that if the issue is deemed forfeited, then defense counsel rendered ineffective assistance by failing to object. It then becomes defendant's burden not only to demonstrate that his counsel erred, but he must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

We begin with the presumption that defendant's trial counsel's actions and inactions were a matter of sound trial strategy. (See *Strickland v. Washington, supra*, 466 U.S. at p. 687.) "'If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.]' [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) It

does not appear here that counsel was asked for an explanation, and the record does not reveal why she did not object on the ground of misconduct or request admonitions.[5]

Defendant argues that "there was no reason for trial counsel not to object to all of the prosecutor's misconduct [because] [c]ounsel could not have wanted jurors to believe that there was nothing wrong with what the prosecutor was doing, and that what she testified to or argued, as opposed to the evidence presented, was the truth." Defendant concludes, "Unless trying to avoid focusing jurors on the comments, counsel's representation was unreasonable."

Defendant's argument that counsel could have had no satisfactory reason not to object to *all* (30 or so) instances of alleged misconduct, begs the question whether counsel might have had a satisfactory reason for not objecting to some or any of them. Again, defendant's analysis is insufficiently developed to permit a reasoned discussion. Moreover, despite defendant's shotgun approach, his argument encompasses only the allegations that the prosecutor gave what amounted to testimony and argued facts not in evidence. We have identified five instances of such alleged misconduct: four occasions of alleged improper testifying by counsel as items 2a, 2b, 2d, and 2g, under category No. 2; and one occasion of arguing matters not in evidence, listed under category No. 4 as item 4d. The list of alleged misconduct notes that the trial court instructed the jury to disregard the prosecutor's statement in items 2a and 2b, and sustained a defense objection to items 2d, 2g, and 4d. Thus, far

---

[5] We note that defendant has, in fact, posited an explanation with his contention that any objection to the alleged misconduct would have been futile. Defense counsel does not render ineffective assistance by failing to proffer futile objections. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587.)

from demonstrating that defense counsel had no satisfactory reason for failing to object, the trial court's rulings made it unnecessary.

Regardless, defendant has made no effort to demonstrate that there could be no satisfactory explanation for trial counsel's failure to request admonitions. Indeed, he has included no discussion of that issue. Defendant has thus failed to demonstrate that no reasonably competent attorney would have failed to request admonitions, and his claim of ineffective assistance of counsel must be rejected. (See *People v. Gamache*, *supra*, 48 Cal.4th at p. 391.)

Defendant's claim of ineffective assistance of counsel also fails for the additional reason that defendant has not demonstrated the reasonable probability of a different result. Defendant contends that the alleged misconduct must be reviewed for prejudice under the standard for reviewing constitutional error, as set forth in *Chapman*, which requires reversal unless the error was harmless beyond a reasonable doubt. Before we take that step, however, defendant must first "show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations.]" (*United States v. Cronic* (1984) 466 U.S. 648, 659 & fn. 26, citing *Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-696.)

Without contradiction by defendant, respondent has identified some 11 instances in defendant's list that occurred out of the presence of the jury or at sidebar, as well as approximately nine instances where the trial court sustained objections made on other grounds to allegedly improper questions or remarks, or told the jury to disregard them. Misconduct which occurs outside the presence of the jury and improper questions to which objections have been sustained are not generally prejudicial. (*People v. Peoples, supra*, 62 Cal.4th at pp. 793-794.)

The prosecutor's summation did of course occur in the presence of the jury, and there was one sustained objection among the 15 alleged instances of misconduct. Defendant has cited authority supporting the general propositions that it is improper for the prosecutor to attempt to elicit sympathy for the victim, to personally vouch for a witness's credibility, to misstate the presumption of innocence, and to comment on facts not in evidence,[6] and defendant has argued that the prosecutor's comments were improper under these authorities. However, defendant has not met his burden to show that, "'[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] . . . .'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667.) This was a 10-day trial. Instructions and arguments took up nearly an entire day, with the prosecutor's arguments accounting for almost a third of the time. Defendant has not attempted to discuss any of the allegedly improper comments in the context of the prosecutor's lengthy final argument as a whole or in the context of the trial court's instructions.

Regarding instructions, defendant merely argues that sometimes jurors do not follow instructions, citing *Parker v. Randolph* (1979) 442 U.S. 62, 70, which held that such a risk is great when powerfully incriminating extrajudicial statements of codefendant are admitted. Counsel's arguments are not powerfully incriminating evidence; and as the jury was instructed here, they are not evidence at all. Further, "arguments of counsel

---

6 See, e.g., *People v. Vance* (2010) 188 Cal.App.4th 1182, 1192 [sympathy]; *People v. Fierro* (1991) 1 Cal.4th 173, 211 [personal vouching]; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1407-1408 [presumption of innocence]; *People v. Harrison* (2005) 35 Cal.4th 208, 249 [misstate evidence].

'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.' [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 703, quoting *Boyde v. California* (1990) 494 U.S. 370, 384.) Here, both before opening statements and before closing arguments, the trial court instructed the jury in relevant part as follows:

> "First, you must determine the facts from the evidence received in the trial and not from any other source. A fact is something proved by the evidence or by stipulation. . . . Second, you must apply the law that I state to you to the facts as you determine them and in this way arrive at your verdict and any finding you are instructed to include in your verdict. You must accept and follow the law as I state it to you regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions. You must not be influenced by pity for the defendant or by prejudice against him. You must not be biased against the defendant because he has been arrested for this offense, charged with a crime, or brought to trial. None of these circumstances is evidence of guilt and you must not infer or assume from any or all of them that he is more likely to be guilty than not guilty. You must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling. Both the People and the defendant have the right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences. Statements made by the attorneys during the trial are not evidence."

In addition, both before opening statements and closing arguments, the trial court instructed the jury regarding the presumption of innocence and the prosecution's burden of proof. We presume that the jurors followed their instructions. (*People v. Peoples*, *supra*, 62 Cal.4th at pp. 798-799.)

Finally, defendant contends that a different result was probable without the improper remarks by the prosecutor because there was no evidence of gang motive, because the identifications made by Brown and Dixon were unreliable, because the photographic lineups were biased, and because evidence of guilt was not overwhelming. He argues that under such circumstances, the jurors may have convicted defendant on the basis of the prosecutor's argument, rather than the evidence.

Defendant's arguments are unpersuasive. We have already found substantial evidence to establish a gang motive (see section I above), and defendant fails to demonstrate here that the identifications were unreliable. Instead, defendant merely cites isolated bits of testimony which suggest that Brown selected defendant's photograph (solely) because of his hairstyle, and that Dixon selected defendant's photograph based on seeing the photograph, not upon seeing defendant run past his door. We note however that Dixon clarified his selection of defendant's photograph, saying it resembled the person he had seen running. And Brown clarified that she identified defendant "because it was him." Indeed, all the computer selected photographs in the six-pack lineup were of African-American men with braided hairstyles. Had Brown identified a suspect solely because of the hairstyle, she would have chosen all six photographs.

Defendant's assertion that the photographic lineups were biased is equally lacking in evidentiary support as it is based upon a jury note asking for a readback of the Brown and Dixon testimony, which noted that two jurors had voted not guilty,

"'stating that there is a bias in the six-pack photos.'" As there was a unanimous verdict after the readback, the two jurors were apparently satisfied either that the lineup was not biased, or other evidence was sufficient to find defendant guilty beyond a reasonable doubt. Contrary to defendant's claim, both witnesses selected defendant's photograph in 2011, before Brown saw defendant at the preliminary hearing, and before Dixon saw defendant at trial.

Moreover, defendant has not shown that the evidence of guilt was weak. Although Brown had been smoking cocaine, she was awake and alert when defendant arrived on the scene. Contrary to defendant's assertion that Brown did not get a good look at the defendant's face, Brown testified, "I saw him. I saw him," explaining that she saw defendant's face through the front windshield as he approached, again when he came to the side of the car to shoot her, and again when he circled around the back of the car to the driver's side and faced the window. In addition and again contrary to defendant's assertion that it was dark at the time of the shooting, Dixon testified that it was "right before the sun came up" and starting to be daylight when he saw defendant jog past his front door holding something in his hand, seconds after Dixon heard the final gunshot. Thus, Brown identified defendant as the shooter. Her identification of defendant was then corroborated by Dixon's observations. Finally, as respondent observes, the circumstances of defendant's arrest were overwhelmingly incriminating. Defendant was an active member (soldier and enforcer), of the Five Deuce Broadway Gangster Crips gang. Two weeks after the shooting, defendant was arrested inside a known hangout of the gang. He was in front of the house when he saw police officers approaching, ran inside, and yelled, "Police. Get rid of it." When the police searched the house, they found the murder weapon. Also, while

in custody, defendant telephoned an acquaintance and admitted to her that he had been reckless by going to her house in possession of "them two guns."

We conclude that defendant has forfeited his claim of prosecutor misconduct; and as we also conclude that he has failed to demonstrate how the alleged errors of counsel undermined the reliability of the jury's finding of guilt, we reject defendant's claim of ineffective assistance of counsel.

V. Cumulative effect of alleged prosecutorial misconduct

Having failed to demonstrate that any of the many instances of alleged prosecutorial misconduct individually amounted to prejudicial error, defendant contends that the cumulative effect of the alleged misconduct resulted in a denial of due process and an unfair trial in violation of the federal and California constitutions. Where, as here, a defendant has forfeited his claims of alleged prosecutorial misconduct by failing to object and request an admonition, and the case was not a close one, he has also failed to demonstrate a cumulative prejudicial effect or the denial of a fair trial. (See *People v. Mendoza* (2007) 42 Cal.4th 686, 705.)

VI. Substantial evidence of gang allegation

Defendant contends that the gang enhancements must be reversed as they were unsupported by substantial evidence.

We review gang enhancements under the same substantial evidence test applicable to convictions generally. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.) Thus, we must view the evidence in the light most favorable to the People, presume the existence of every fact the jury could reasonably deduce from the evidence, and determine whether, on the entire record, a rational trier of fact could find the enhancement true beyond a reasonable doubt. (See *People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on

circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Further, "because 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the true finding].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (b)(1), provides for enhanced sentences for felonies "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." Defendant challenges the first prong of the enhancement, arguing there was insufficient evidence that the crime was committed for the benefit of, at the direction of, or in association with that gang for the following reasons: Donnell was not a gang member; there was no evidence that Donnell purchased his drugs from a gang member; there was no evidence that defendant knew that Donnell and Brown were using drugs in the car; and Officer Garcia did not observe the gang graffiti regarding smokers until three or four weeks after the shooting.

Defendant does not explain why these specific facts must be proven to establish that the crime was committed for the benefit of, at the direction of, or in association with the gang. He ignores the requirement that on review, an appellate court must view the evidence in the light most favorable to the prosecution, presume the existence of every fact the jury could reasonably deduce from

the evidence and then determine whether on the entire record a rational jury could find the enhancement true. Our task is not to find other possible deductions of fact which counter the verdict, only to find facts sufficient to support it.

We previously found that Officer Garcia's opinion that the shootings would benefit the gang by enhancing its reputation for fear and intimidation within the community and among rival gangs was sufficient to raise a reasonable inference that the crime was committed for the benefit of the gang.[7] We are not persuaded otherwise by the line of cases upon which defendant relies to argue that a gang expert's opinion must be supported by additional evidence demonstrating that the crime was committed to benefit a gang. (See *People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 ["gang expert's testimony alone is insufficient to find an offense gang related"]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 [the gang "expert simply informed the jury of how he felt the case should be resolved"]; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199 ["expert simply informed the judge of her belief of the minor's intent"].) Since the publication of these cases, the California Supreme Court has held: "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*People v. Vang, supra*, 52 Cal.4th at p. 1048; see also *Albillar*, *supra*, 51 Cal.4th at p. 63.)

In any event, Officer Garcia's opinion that the crimes were committed for the benefit of the gang was in fact supported by other evidence that the crimes were gang related, such as

---

[7] See Discussion, section I, above.

evidence establishing defendant as the shooter.[8] Defendant was an active member of the Five Deuce Broadway Gangster Crips gang, and both the scene of the shooting and the house on West 53rd Street where defendant was arrested were located within the gang's territory. Officer Alfred Garcia testified that the sale of narcotics was the Broadway Gangster Crips gang's primary source of income, that controlling territory and keeping rival gangs away was very important to increasing its narcotics sales, and that the gang did this by enhancing its reputation for violence. Officer Guillermo Garcia explained that "Smokers" in the "Smokers KK BGC" graffiti, found near the scene of the shooting within a month afterward, referred to crack cocaine users. In the officer's opinion, the K in the graffiti meant kill, and the message was that BGC would kill or that they had killed two smokers. Officer Alfred Garcia testified that the graffiti indicated that the gang took responsibility for killing two smokers. These facts were sufficient to raise a reasonable inference that the shooting was related to the gang's drug trade and that it was committed to benefit the gang by enhancing its reputation for fear and intimidation within the community and among rival gangs.

The circumstances of defendant's arrest provided other evidence of the gang's connection to narcotics and the shooting. When defendant saw police officers he ran into the gang hangout yelling, "Police. Get rid of it," and within moments, an officer interrupted Kelly, a high ranking member of defendant's gang, attempting to flee through a back window in possession of the murder weapon. Officers then found marijuana, and two plastic bindles of crack cocaine in the gang hangout. The jury could reasonably infer that defendant intended for his fellow gang

---

[8] See Discussion, section IV, above.

member to hide the murder weapon, and that Kelly knew about the shooting. Defendant draws conflicting inferences. He argues that the fact that Officer Garcia did not see the graffiti until four weeks after the shooting meant that the graffiti could have pertained to some other drug-related incident in the area. He also argues that his call to "get rid of it" did not prove that he meant the murder weapon or that he had shot the victims. We may not reverse the judgment on the basis of inferences that conflict with the reasonable inferences apparently drawn by the jury. (See *People v. Millwee* (1998) 18 Cal.4th 96, 132.)

We conclude that defendant has not met his burden to show "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the gang enhancement].' [Citation.]" (*People v. Bolin*, *supra*, 18 Cal.4th at p. 331.)

VII. *Romero* motion

Defendant contends that the trial court abused its discretion in denying his *Romero* motion, brought under section 1385, subdivision (a), to strike his 1996 felony conviction, for purposes of the Three Strikes law. Defendant complains that the trial court failed to properly balance mitigating factors in defendant's background and the nature of the prior strike, against the seriousness of the current crimes. He asks that the enhancement be stricken. In the alternative, defendant asks that the matter be remanded to the trial court for a new sentencing hearing with directions to properly exercise discretion, taking into account the particulars of defendant's background and character.

The Three Strikes law limits a sentencing court's discretion to strike a prior serious or violent felony conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378.) The court must consider such factors as the nature and circumstances of the defendant's present felony and prior serious or violent felony

convictions, as well as his background, character, and prospects, to determine whether he may be deemed outside the spirit of the Three Strikes Law, in whole or in part. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) The failure to strike would constitute an abuse of discretion only in limited circumstances such as where the court was unaware of its discretion or applied impermissible factors, or in the extraordinary case where the appropriate factors "manifestly support the striking of a prior conviction and no reasonable minds could differ." (*People v. Carmony*, *supra*, at p. 378.) Our review of the trial court's discretion is deferential, and will not be disturbed unless the ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*People v. Williams*, *supra*, at p. 162; *Romero*, *supra*, 13 Cal.4th at p. 530.) It is the defendant's burden to show that the trial court's decision was irrational or arbitrary. (*People v. Carmony*, *supra*, at pp. 377-378.)

Defendant does not contend that the trial court failed to consider the appropriate factors, but rather that the court failed to "properly balance relevant factors," and gave insufficient weight to mitigating factors. Thus, he must demonstrate that this is an extraordinary case where the appropriate factors "manifestly support the striking of a prior conviction and no reasonable minds could differ." (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

Defendant argues that in considering the nature of the prior strike offense, assault with a deadly weapon, the court failed to give sufficient weight to the fact that it was a crime of passion, committed when he was just 19 years old after he encountered a man in bed with his girlfriend. The record shows that the trial court accepted defense counsel's representation that the 1996 assault with a deadly weapon involved a person found

with defendant's wife, but noted that the original charge was murder and that it was a serious offense which involved violence. The court also found that the prior strike was not remote, as defendant had spent more than 13 years in prison during the 16 years between 1996 and the current offenses.

The trial court considered defendant's adult criminal history, and the nature and circumstances of the defendant's present felony, noting that the current crime was a "very, very serious, extremely violent crime where the defendant shot a woman in the eye, . . . causing her to lose her sight in that eye, and he shot her companion to death without any apparent reason." Defendant contends that the court should have given greater weight to the fact that all his other crimes, up until the current crimes, were nonviolent. Defendant fails to mention however, that the trial court found that five of defendant's six prior felony convictions were strike offenses. Defendant does not challenge that finding. Nonviolent crimes are strike offenses if they are serious felonies enumerated in section 1192.7, subdivision (c)(1). (§§ 667, subd. (b); 1170.12, subd. (b)(1).) Defendant acknowledges that the Three Strikes law is intended to ensure longer prison sentences and greater punishment for serious recidivists. (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 357-358.) Serious recidivists are "those felony defendants who have previously been convicted of serious and/or violent crimes. [Citations.]" (*Ibid*.) As defendant does not challenge the finding that five of his prior convictions were strikes within the meaning of the Three Strikes law, there can be no merit or logic to his suggestion that the nature of the prior convictions take him outside the spirit of the Three Strikes law. And it is not enough to show that reasonable people might disagree. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 377.)

Defendant also suggests that the trial court failed to consider mitigating factors, and took "little account of [the] particulars of defendant's background and character"; however, he does not describe what part of defendant's background and character or any mitigating factors that he believes the trial court should have considered. The probation report offers no circumstances in mitigation. When the trial court attempted to consider defendant's background, character, and prospects, the court observed that very little evidence had been provided, other than the probation report, the testimony at trial, and a letter submitted on defendant's behalf which discussed only the period of his life subsequent to his arrest for the current crimes. The trial court found that defendant had been unsuccessful on probation, having been sent to prison twice after violations, that he was approximately 38 to 39 years old, had participated in gangs, had not participated in rehabilitation prior to his arrest, and had no substantial history of employment. The court found no evidence of any prospect for a stable life.

In sum, the trial court thoroughly weighed the appropriate factors, and defendant has failed to show that this was an extraordinary case such that the trial court's ruling was arbitrary, capricious, or fell outside the bounds of reason. (*People v. Carmony*, *supra*, 33 Cal.4th at pp. 377-378.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

---

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.