Filed 4/17/12 P. v. Burghardt CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DARRYL BURGHARDT, Defendant and Appellant.	B227564 (Los Angeles County Super. Ct. No. TA109929)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark S. Arnold, Judge. Vacated in part.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Darryl Burghardt was convicted of attempted first degree murder (Pen. Code,[1] §§ 187/664); shooting at an inhabited dwelling (§ 246); two counts of assault with a firearm (§ 245, subd. (a)(2)); and misdemeanor battery (§ 242). The jury found true a gang enhancement allegation (§186.22) with respect to each felony count. Burghardt appeals, contending that (1) the convictions and gang enhancement findings must be reversed because of improper opinion testimony by the gang expert; (2) the gang enhancement findings must be vacated because the jury was improperly instructed; (3) if he forfeited his objections to the expert witness's testimony or instructional error by failing to object at trial, trial counsel was ineffective; and (4) the trial was compromised by the cumulative effect of these errors. We vacate the findings on the gang enhancement allegations but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. October 2009

In October 2009, La Charrie Langram was watering the grass outside her home when Burghardt approached on a bicycle and attempted to sell marijuana to her. Langram declined, and she and Burghardt had a conversation in which he told her his name was "Young Watts," that he was from the Front Street Crips gang, that he had just been released from jail, and that this was his "hood" in which he knew everyone. Burghardt wanted to know where Langram was from, to which she responded that she was not a gang member. During the conversation, Burghardt became agitated. He asked Langram, who was rather tall and dressed "like a guy," whether she was male or female, and when she said she was female, he hit her in the face. Langram's friend Davvisha Moore intervened; Burghardt said he would be back and left on his bicycle.

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

Moore reported the events to Langram's mother, Chenee Stone. Moore and Langram's parents drove around the area looking for Burghardt. When they spotted Burghardt, Langram's parents confronted him, resulting in a physical altercation. Burghardt ran away, threatening as he fled that he and his "homeboys" would come back to their house.

B. November 2009

On the day before Thanksgiving, Moore was in a nail salon when she saw Burghardt outside on the street. Waiting in a car outside, Langram also saw Burghardt, and asked him, "Don't I know you from somewhere?" Burghardt first said no, but then said, "Well, I'll be over there tomorrow."

On Thanksgiving Day, Burghardt came to the door of the residence where he had encountered Langram the month before. Langram's seven-year-old sister ran to answer the door but Stone stopped her and admonished her not to open the door. Instead, Stone opened the wooden door, leaving the security gate closed. Burghardt asked for the mother at the house, and Stone identified herself as the mother. Burghardt then said, "You guys have one more time to threaten me," or something similar. In one motion, he pulled a gun from his waistband and fired multiple shots through the window of the house into the living room. Stone pushed the door closed when she saw the gun; she pushed her daughter down and they ran away from the front window, down a hallway.

The police were summoned and Moore told the police that "Young Watts" was the shooter. The police brought Moore a photograph of Burghardt and Moore confirmed he was the shooter. Moore and Stone also identified Burghardt from a photographic lineup.

Burghardt was arrested and charged with attempted murder (§§ 187/664); shooting at an occupied dwelling (§ 246); two counts of assault with a firearm (§ 245, subd. (a)(2)); and misdemeanor battery (§ 242). Each of the felony charges included a gang enhancement allegation under section 186.22, and the attempted murder and assault with a firearm charges also included firearm enhancement allegations.

C. Trial

In addition to Moore, Langram, and Langram's parents, Los Angeles Police Department Detective Erik Shear testified at trial. Shear testified that he was a gang impact officer and to the nature of his duties. He testified that he had investigated the shooting in this case and had identified Burghardt as a suspect. Shear described the process of creating and using a photographic lineup Shear testified that Burghardt wore a grill (a decorative dental apparatus) bearing the letters "F.S.," and opined that "F.S." stood for "Front Street." He described personally searching Burghardt's residence in December 2009, and finding a black baseball cap with a Florida Marlins logo of an "F" with a marlin behind it. Shear testified that based on his knowledge, training, and experience, the "F" on the hat referred to the Front Street Crips. Letters Shear found at Burghardt's residence were addressed to Darryl B. or Darryl Burghardt, and they also said "Young Watts." The letters included gang graffiti relating to the Front Street Watts Crips, and the text included the word "back" being spelled "bacc"—the significance of this spelling, Shear testified, being that Crips avoided using the letters "C" and "K" together because they stood for "Crip killer."

Shear testified that he had interviewed Burghardt in December 2009, and that based on the residence information Burghardt gave, he lived near the nail salon when Moore and Langram saw him on the street there. During the interview Burghardt admitted that he had a grill with "F.S." on it; he claimed it stood for "Fashion Statement." Burghardt denied being a gang member or being called "Young Watts," and claimed not to know anything about the Front Street Crips. According to Shear, Burghardt first said that on Thanksgiving Day he and his girlfriend got a ride to his aunt's house, but then he said that he went without his girlfriend and that he traveled by bus.

Next, Shear testified to his background and expertise with gangs, noting that "black street gangs" were his specialty. He gave a general overview of these gangs in Los Angeles, then focused on the Crips. Crips, he testified, commonly referred to each other as "Crip" or "Cuz" either as a term of friendship or as a challenge. Gang members

in general, Shear testified, no longer commonly wore their gang colors head to toe because this was a tip-off to law enforcement; now they had generally become more subtle, using belt buckles, colored accessories, or sports gear for teams with initials matching their gang to signify their allegiance.

Shear testified about "gang-banging," stating that "[g]etting banged on is a kind of a way of someone being confronted by a gang member. A common way to get banged on is for someone to say, 'Where you from?'" Shear explained that the question was not an inquiry into where one was born but a question of the gang to which someone belongs. The question, "What's up, Cuz?" lets people know that you are a Crip. Gang-banging, Shear testified, is a way to challenge others and also of informing others that one is a gang member, "which is intimidating."

Shear testified that "in the gang world" fear and respect are synonymous and that "[a] gang has to keep a neighborhood in fear. That's how they thrive in that neighborhood and commit crimes and prevent other gangs from coming into that neighborhood and challenging them." Fear empowers gangs, Shear testified, because it makes witnesses less likely to report crimes to the police, making it "so much easier for them to commit their crimes. I mean they can do robberies and shootings and sell drugs and all of these other things, burglaries." Shear testified that in his experience, gang members react to a showing of disrespect with violence: "[T]hat's really the only acceptable way to respond. They can't be challenged and not do anything about it because then no one would be afraid of them."

Shear testified that he was "very familiar" with the Front Street Crips: he had been assigned to investigate them, and he had encountered, contacted, and arrested members. Front Street Crips were formerly two groups, but the Front Street Watts faction, approximately 100 strong, had become the main group. Shear testified to their territory and that he had investigated "[m]any crimes" committed by the gang, ranging from vandalism to street-level narcotic sales Front Street typically traded in marijuana and cocaine, but sometimes ecstasy and Oxycontin. Front Street Crips, he testified, "[a]bsolutely" committed shootings, which occurred for multiple reasons: "They can

happen as the result of a robbery, a robbery where guns are being used, and then shooting ends up occurring. [¶] They can happen as a result of offensive action against another gang. So if they're having a problem with another gang, like, let's say, the Back Street Crips. Back Street Crips are probably their biggest enemy. [¶] They would go on, for lack of a better word, missions to do drive-by shootings or walk-up shootings, against the Back Street Crips. They could be for defensive reasons where you have maybe gang members with guns in their own neighborhood to protect the neighborhood" against a rival gang. Also, there are "officer-involved shootings where police are attempting to apprehend people or serving bench warrants or things like that and armed suspects shoot at the police and engage in shootouts with the police."

Shear next testified that he was familiar with Burghardt through seeing him on the street associating "with other Front Street Crip gang members," and other investigations with which Shear had been involved. Shear added that "most of my detailed information has come from this investigation where I read the letters that were to him from other Front Street gang members. [¶] Got to search his house and see some of the gang writings and gang paraphernalia that he possessed. [¶] But I really remember him because he's the only guy I have known that had the F.S. grill[] on his teeth and that obviously stands out." Shear opined that Burghardt was a Front Street gang member based on seeing him in the neighborhood with other known gang members; Burghardt's grill; other investigations involving Burghardt; contacts with other officers; the letters he had reviewed; the hat and clothing recovered during the search; listening to calls that Burghardt had made; "[a]nd also the facts of this case and talking to the witnesses in this case and hearing their testimony." He also testified that an address Burghardt used was slightly outside the Front Street territory but that several members of the gang have claimed that location as an address over the years.

The prosecutor next elicited evidence that one Front Street Crips member, Perry Stuart, had been convicted of a drug offense in 2007, evidence that, the jury was advised, pertained solely to proving that the Front Street Crips were a criminal street gang.

Next, the prosecutor began asking Shear to opine concerning various issues in the criminal case. First, he asked, without using a hypothetical format, with reference to the October 2009 assault on Langram, "Did you have an opinion that that crime was committed to benefit, promote, or enhance the Front Street Crip gang?" Shear responded that he believed the assault was committed for the benefit of the gang and to promote the gang. Shear explained, "[W]hen Miss Langram didn't want to purchase the marijuana, didn't want to talk to this defendant and, in his mind, disrespected him by kind[of] saying, 'Why are you still here?' and things of that nature, he felt that he had to correct that situation and make it be known that he's in charge of that neighborhood, this is Front Street neighborhood, he's a member of Front Street Crips, and he can't allow someone to challenge him like that or else again the gang is powerless. [¶] So by attacking her in that way, it creates that atmosphere of fear and intimidation in the neighborhood that you don't refuse them, you don't challenge them, and, you know, as I explained before, that's how they commit their crimes, and—and that's how it's easier for them to operate in those neighborhoods."

The prosecutor asked how the confrontation with the Stones would "come into play," and Shear answered, "Well, it's extremely—the gang would consider that extremely disrespectful. It's pretty uncommon, and it would be looked at—it has to be dealt with severely. [¶] You can't—I mean, that's their neighborhood. For someone to, first of all, challenge them and then even worse to actually go looking and challenge them again in their neighborhood in front of everybody, that absolutely cannot be tolerated where the gang has no fear, and they may be looked at as a bunch of like, punks on the street." He concluded, "The gang can't allow that to happen."

The prosecutor then asked Shear about the Thanksgiving Day incident, again without using the format of a hypothetical question based on the facts of the case. Shear opined that the crime was committed to benefit, promote, or enhance the Front Street Crips. Shear testified that the shooting was prompted by the earlier challenge to the gang. "Again, it wasn't even just a minor challenge where the incident that happened was at the home. But even going out and seeking out the gang member that committed

that crime and fighting in public that way to where he actually had to retreat, that is just not acceptable. [¶] The gang can't accept that. The individual can't accept that or else his status within the gang would be destroyed. [¶] So situations like that have to be dealt with. That's the gang mentality. And by going there and doing something like shooting and trying to . . . shoot and kill people . . . that's the ultimate threat. [¶] And the message that it sends is pretty clear to the rest of the neighborhood and to that family itself."

The prosecutor asked how the fact that Burghardt went up to the door and showed that he was the shooter, rather than shooting anonymously from a car, would enhance the gang's reputation, and Shear identified two ways: establishing with certainty for the family that this was Burghardt, and demonstrating the "dedication or the desire" to complete the crime "properly." Shear explained, "[A] drive-by shooting and maybe you will hit somebody in the house, your chances are a lot less likely. [¶] But the reputation of the gang is much more calculated and cold. If they knock on the door, here comes someone at the door and now rounds are fired into the house. [¶] I mean . . . there's a lot more . . . dedication to commit that crime. And again the statement is really sent to the rest of the neighborhood and that family, in particular, 'Don't mess with us.'"

The prosecutor prompted Shear to discuss the import of Burghardt's statements to Langram, and Shear responded, "When he has the conversation with [Langram] and, you know, [Moore] is also there for it . . . there is no hesitation in telling [her] who he is or where he's from and even that, you know, he just got out of jail. [¶] He wants them to know who he's dealing with, who they're dealing with, and not just him as an individual but the gang. [¶] I mean it's—it's not hidden at all. It's very clear that he wants them to know these factors before they make whatever decision they are going to make."

Burghardt presented three alibi witnesses concerning his whereabouts and activities on Thanksgiving Day, and testified in his own defense. Burghardt denied trying to sell Langram marijuana or hitting her. He denied being involved in an altercation the same day with the Stones. He claimed to have been at a relative's house on Thanksgiving Day and denied shooting into the Stones' home. On cross-examination,

Burghardt attempted to explain his questions and reactions in a taped telephone call after his arrest during which he asked his girlfriend numerous questions about what the police had taken from his home during a search and what she had said to them. He also testified that the letters including gang references were not the original letters matching the envelopes that were sent to him and suggested that they had been altered.

Burghardt was convicted of all charged offenses, with all gang and firearm enhancement allegations found true. Burghardt was sentenced to life in prison for the attempted murder, with an additional 20 years for the use of a firearm and a 15 year minimum term before being eligible for parole; plus 60 days in county jail to be served consecutively to the state prison commitment.

DISCUSSION

I. CALCRIM No. 1401

Burghardt contends that the modified version of CALCRIM No. 1401 used in this case to instruct the jury on an element of the gang enhancement under section 186.22 failed to properly instruct jurors and lessened the prosecution's burden of proof, requiring reversal of the gang enhancement findings. To find true a gang enhancement under section 186.22, subdivision (b)(1), the jury must determine, inter alia, that a defendant committed the charged crime for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subd. (b)(1).) A criminal street gang is defined by statute as an ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of certain specified crimes, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. (§ 186.22, subd. (f).)

The "pattern of criminal gang activity" is at issue in this portion of Burghardt's appeal. This phrase, also defined by statute, means "the commission of, attempted

commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" of a list of specified offenses, "provided at least one of these offenses occurred after the effective date" of the statute "and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

The prosecution presented evidence of one qualifying offense committed by Front Street Crips member Perry Stuart. For the other qualifying offense, the prosecution relied on Burghardt's commission of the Thanksgiving Day crimes, as it was legally permitted to do. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624-625 (*Gardeley*).) Evidence, therefore, that would permit the jury to find a pattern of criminal gang activity was presented to the jury at trial.

What was not presented to the jury was a proper jury instruction to permit the jury to evaluate whether a pattern of criminal gang activity had been proven beyond a reasonable doubt. The court instructed the jury with a modified version of CALCRIM No. 1401 that stated in relevant part that a pattern of criminal gang activity meant:

1. The commission of, or attempted commission of, or conviction of, attempted murder, assault with a firearm, shooting at an inhabited dwelling;
2. At least one of the crimes was committed after September 26, 1988;
3. The most recent crime occurred within three years of one of the earlier crimes; and
4. The crimes were committed on separate occasions or were personally committed by two or more persons.

No evidence was presented at trial of any other attempted murder, assault with a firearm, or shooting at an inhabited dwelling other than the Thanksgiving Day shooting with which Burghardt was charged. As given, the instruction did not permit consideration of the other predicate offense, Stuart's narcotic offense conviction. The jury, therefore, was instructed to look solely to the charged Thanksgiving Day offenses to find the requisite pattern of criminal gang activity although they were legally insufficient to establish the commission of two or more offenses on separate occasions, or by two or

more persons. (§ 186.22, subd. (e).) The jurors were instructed that they could not find a pattern of criminal gang activity "unless all of you agree that two or more crimes that satisfy these requirements were committed," but the jury was never instructed that the Stuart conviction was among the statutorily-specified offenses that qualified to prove this element of the enhancement. The modified version of CALCRIM No. 1401 given here incorrectly set forth an element of the gang enhancement allegation and failed to properly guide the jury on the appropriate consideration of the evidence in determining whether the prosecution had proven a pattern of criminal gang activity. This instructional error affects Burghardt's substantial rights and therefore requires no objection for appellate review. (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

The Attorney General acknowledges that the instruction incorrectly limited the offenses to be considered but argues that the jury must have compensated for the error by considering the evidence of other criminal activity in assessing whether a pattern of criminal gang activity had been proven. This argument explains how the jury could have found the fourth element of the enhancement (separate occasions or two or more persons) to be satisfied despite the first element's restriction of the crimes that could be considered to the offenses encompassed by the Thanksgiving Day shooting—crimes committed on one occasion by one person. However, if the jury attempted to remedy the failure of the jury instruction to properly guide it by considering crimes other than the crimes it was told to consider in evaluating whether there was a pattern of gang activity, it cannot be determined whether the jury relied on the qualifying predicate offense—the Stuart narcotics conviction—or whether it improperly considered the expert witness's general testimony as to the kinds of crimes that Front Street Crips members committed (tagging and vandalism, usually misdemeanor vandalism; street level drug sales; shootings). The latter evidence, given as part of the gang expert's testimony as to the culture and habits of gangs, encompassed offenses that would qualify and those that would not qualify as predicate offenses under section 186.22, subdivision (e), and provided no specific information as to the date of commission or the identity of the actor. We cannot, therefore, consider the instruction's deficiency to have been cured by the presentation of

other crimes evidence that could properly have been considered when other crimes evidence was also presented that could not properly have been considered by the jury on this enhancement allegation. Accordingly, we vacate the true findings on the gang enhancement allegations. Should the People wish to conduct a new trial on the gang enhancement allegations, within 60 days of the remittitur they may file a written demand for a new trial. If such a demand is made, a new trial may be held on the allegations under section 186.22; if no demand is made within 60 days, Burghardt shall be resentenced on the offenses of which he was convicted and the remaining enhancements that were found true.

II. Gang Expert Testimony

Burghardt argues that the expert witness testifying about gangs impermissibly offered opinions on Burghardt's intent and the ultimate question of guilt, and that the improper testimony prejudiced him, requiring reversal of both the gang enhancement findings and the underlying substantive offenses. The Attorney General argues that any objection was waived by Burghardt's failure to object, and that there was no error.

An expert may render an opinion as to whether a crime is committed for the benefit of, at the direction of or in association with a criminal street gang, provided that the opinion testimony is "on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.]" (*Gardeley*, *supra*, 14 Cal.4th at p. 618.) The expert witness may express opinions that embrace an ultimate issue to be determined by the trier of fact, provided that the expert's opinion is otherwise admissible. (Evid. Code, § 805.) This does not mean, however, that an expert may express any opinion he or she may have. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 651 (*Killebrew*), disapproved on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*).) In *Killebrew*, the appellate court rejected a gang expert's opinion that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652.) As the court explained, a gang

expert's opinion may address the ultimate issue in the case, but it is improper for an expert to opine on whether a "specific individual had specific knowledge or possessed a specific intent." (*Id*. at p. 658.) Because the expert's testimony provided the only evidence to establish the elements of the crime, it "did nothing more than inform the jury how [the expert] believed the case should be decided." (*Id*. at p. 658; accord, *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197-1198 ["Similar to *Killebrew*, the expert in this case testified to subjective *knowledge and intent* of the minor. [Citation.] 'Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action.' [Citation]"].)

Recently, in *Vang*, *supra*, 52 Cal.4th 1038, the California Supreme Court approved the elicitation of expert witness opinion testimony through hypothetical questions based upon evidence in the case. (*Id*. at pp. 1045-1047, 1050, fn. 5 ["It has . . . long been settled that expert testimony generally, and expert testimony regarding whether a crime is gang related specifically, may be given in response to hypothetical questions"].) As the court explained, the expert witness "could not testify directly whether [the defendants] committed the assault for gang purposes" because the witness lacked personal knowledge as to whether they had committed the charged assault, "and if so, how or why; he was not at the scene." (*Id*. at pp. 1048, 1049.) The expert witness, however, "properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Id*. at p. 1048.)

The *Vang* court emphasized the "critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves."[2] (*Vang*, *supra*, 52 Cal.4th at p. 1049.) Opinions that specific defendants committed a crime for a gang reason are inadmissible not because

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[2] In a footnote, the *Vang* court acknowledged a decision holding that in some circumstances, expert testimony regarding the particular defendants was proper, but the Supreme Court decided *Vang* on the express assumption that the expert could not properly have testified about defendants themselves. (*Vang*, *supra*, 52 Cal.4th at p. 1048, fn. 4.)

they embrace the ultimate issue in the case, but because they offer the jury nothing of value. "[T]he reason for the rule is similar to the reason expert testimony regarding the defendant's guilt in general is improper. 'A witness may not express an opinion on a defendant's guilt.' [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt."' [Citations.]" (*Vang*, at p. 1048.)[3]

The hypothetical question format respects that "critical difference" discussed in *Vang*, *supra*, 52 Cal.4th at page 1049, by providing a vehicle for eliciting admissible expert opinions about whether an offense, if committed under the circumstances presented in the hypothetical, was committed with the requisite gang-related motivation, while simultaneously tending to avoid the elicitation of improper expert testimony that can be of no proper use to the jury concerning the acts and motivations of specific defendants. As the Supreme Court explained in *Vang*, the expert witness's testimony in *Killebrew*, *supra*, 103 Cal.App.4th at page 658, was held to be improper because the expert witness "'simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved to the trier of fact.' [Citation.]

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[3] Many courts have, like the *Vang* court, characterized improper expert witness opinion testimony as offering no assistance to the jury, but it has also been recognized that this unhelpful testimony is simultaneously "perhaps too helpful." (*Summers v. A.L. Gilbert Company* (1999) 69 Cal.App.4th 1155, 1183.) The *Summers* court explained that "when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Ibid*.) In that case, improper expert opinion testimony on liability was received from a witness named Anderson, and the court concluded that the opinion testimony was "nothing more than an attempt to direct the jury to the ultimate conclusion they should reach." (*Id*. at p. 1185.) The court said, "Reading Anderson's testimony in its entirety, we conclude that he was *advocating*, not *testifying*. In essence, cloaked with the impressive mantle of 'expert,' Anderson made plaintiffs' closing argument from the witness stand. This is a misuse of expert witnesses, and renders his testimony inadmissible under Evidence Code section 801." (*Ibid*.)

(*Vang*, at p. 1049, quoting *Killebrew*, at p. 658.) In contrast, opinion testimony given in response to hypothetical questions does not cross that line: in *Vang*, "the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether the defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case." (*Vang*, at p. 1049.)

Here, it is uncontested that the procedure outlined in *Vang*, *supra*, 52 Cal.4th at pages 1048 and 1049, was not observed, for the prosecutor did not use a hypothetical format when questioning the gang expert. Shear was asked to testify directly if he believed Burghardt committed the crimes charged here to benefit his gang, and he testified extensively both that Burghardt had committed the offenses and about his particular motivation in doing so. "Obviously there is a difference between testifying about specific persons and about hypothetical persons." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.) Here, in giving his direct opinion of Burghardt's mental state or purpose in committing the crimes, Shear's testimony exceeded the scope of a permissible expert opinion by testifying that Burghardt committed the charged crimes, by attributing a specific intent to Burghardt's conduct, and in essence, by advising the jury how to decide the case both on guilt and on the enhancement allegations. (See *Vang*, at pp. 1048-1049; *People v. Torres* (1995) 33 Cal.App.4th 37, 46 [expert witness may not directly opine as to the defendant's guilt or innocence].)[4]

Burghardt's argument that the improper expert testimony requires the true findings on the gang enhancement allegations to be vacated is moot in light of our determination that those findings must be vacated on the basis of instructional error. Burghardt, however, also contends that the admission of this evidence necessitates a new trial on the underlying substantive offenses. This court has recognized that under certain

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[4] It is the difference between the hypothetical person, and the objective manifestations of mental state or purpose, and the actual defendant's subjective intent that is made clear for the jury by using the hypothetical format. Thus, the fact that the witness is the investigating officer, and has personal knowledge of the objective facts, is insufficient reason to dispense with the use of the hypothetical question.

circumstances, the admission of improper gang evidence can so infect the entire trial that federal due process requires a new trial. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 228-232.)

Burghardt failed to object to the prosecutor's improper questions or to the detective's opinion testimony. He has forfeited this assertion of error by failing to make it in the trial court. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 505.) Burghardt alternatively contends that his counsel's failure to object to this testimony constituted ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668. To establish ineffective assistance of counsel, Burghardt must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Neely* (1993) 6 Cal.4th 901, 908.)

As a general rule, ineffective assistance of counsel claims are more suited to petitions for habeas corpus than direct appeals. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [a claim of ineffective assistance of counsel relating to "'why counsel acted or failed to act in the manner challenged' . . . is more appropriately decided in a habeas corpus proceeding"].) We requested supplemental briefing to address whether the effectiveness of Burghardt's trial counsel could properly be decided on direct appeal. Although the parties agreed that the ineffectiveness claim could be resolved on the record and briefing presented on direct appeal, we disagree. "In order to prevail on [an ineffectiveness] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.) Although the parties do not identify a rational tactical purpose for the failure to object to the improper examination and testimony, we cannot say that the record affirmatively discloses the lack of a rational tactical purpose for counsel's inaction. Moreover, even if counsel's failure to object constituted representation falling below an objective standard of reasonableness for professional

representation, it cannot be determined on this record whether the result would have been more favorable to Burghardt if counsel had objected. Proof of these matters requires a showing beyond the scope of the record on appeal. Accordingly, we conclude that Burghardt's challenges to his convictions may not be resolved on direct appeal but should be raised by means of petition for habeas corpus. (*Mendoza Tello*, at pp. 266-267; *People v. Jones* (2003) 29 Cal.4th 1229, 1263 ["As the record on appeal does not reveal why defense counsel chose not to object to this line of questioning, this ineffective assistance of counsel claim would be more appropriately raised on a habeas corpus petition"].)

III. Cumulative Error

Burghardt's final contention is that the cumulative effect of the claimed errors deprived him of due process of law, the right to present a defense, and a fair trial. The cumulative effect of multiple errors may constitute a miscarriage of justice (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1236.) Here, Burghardt has established one error cognizable on direct appeal: the jury instruction on the gang enhancement allegations, and that error has been remedied by the order vacating the enhancement findings. With respect to the other error he has identified, the improper opinion gang expert testimony, the record provided on appeal is insufficient to demonstrate that Burghardt was deprived of due process, the right to present a defense, or a fair trial.

DISPOSITION

The findings on the gang enhancement allegations under Penal Code section 186.22 are vacated. If the People within 60 days from the issuance of the remittitur file a written demand for a new trial on the enhancement allegations, such a trial shall take place; if no such demand is made, the trial court shall, on that 60th day, proceed to resentence Burghardt. In all other respects, the judgment is affirmed.

ZELON, J.

I concur:

JACKSON, J.

PERLUSS, P. J., Concurring.

I agree the true findings on the gang enhancement allegations under Penal Code section 186.22 must be vacated because of the erroneous jury instruction. I also agree Darryl Burghardt forfeited any claim of error concerning the gang expert's testimony by failing to object to that testimony (or the People's questions) in the trial court. Finally, I join the majority's conclusion any claim of ineffective assistance of counsel with respect to that expert testimony should be raised by Burghardt in a petition for writ of habeas corpus since the record on appeal does not reveal why defense counsel chose not to object. Accordingly, I concur in today's decision.

I disagree, however, with my colleague's assessment—unnecessary for disposition of the case—that the testimony of the People's gang expert, Los Angeles Police Detective Erik Shear, "exceeded the scope of a permissible expert opinion." (Slip opn. at p. 16.) To be sure, Detective Shear did not give his opinion in response to a hypothetical question that asked him to assume various facts based on the evidence in the case. But unlike the situation in *People v. Vang* (2011) 52 Cal.4th 1038, *People v. Gardeley* (1996) 14 Cal.4th 605 and virtually every other published decision discussing the use of hypothetical questions to elicit a gang expert's testimony, here Detective Shear was not only the gang expert but also the lead investigating officer: Detective Shear investigated the shooting and interviewed the victims; he created and displayed the photographic lineup from which the victims identified Burghardt as the assailant; and he interviewed Burghardt and searched his residence. In short, many of the facts a different gang expert would have needed to assume to proffer an opinion whether the crimes charged were gang related—whether the offenses had been committed for the benefit of a criminal street gang—were within Detective Shear's personal knowledge and thus a proper basis for his expert opinion.

"'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." (*People v. Vang*, *supra*, 52 Cal.4th at p. 1048; accord, *People v. Albillar* (2010) 51 Cal.4th 47, 63.) That is, such opinion testimony is

"[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact," as required by Evidence Code section 801, subdivision (a). (See *Vang*, at p. 1049 & fn. 5; *People v. Gardeley*, *supra*, 14 Cal.4th at p. 618 [expert testimony by police detective particularly appropriate in gang enhancement case to assist fact finder in understanding gang behavior]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-946 [reaffirming *Gardeley* and admissibility of officer's expert testimony in the area of gang culture and psychology]; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1207-1208 [affirming admission of officer's expert opinion, based on hypothetical similar to facts in case, that sole gunman who displayed no gang signs during shooting acted to bolster gang and his own reputation in gang]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384 ["[i]t is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect'"]; but see *Vang*, at pp. 1052-1055 (conc. opn. of Werdegar, J.) [although expert may properly testify on gang culture and practices, expert opinion not generally necessary to explain how a crime might be gang motivated].)

Usually, because the People's gang expert has no personal knowledge whether the defendant committed the charged offense and, if so, how or why (see, e.g., *People v. Vang*, *supra*, 52 Cal.4th at p. 1048), the expert must offer his or her opinion based on hypothetical questions that track the evidence at trial. The Supreme Court in *People v. Gardeley*, *supra*, 14 Cal.4th at page 618, held use of such hypothetical questions rooted in facts shown by the evidence was appropriate in gang cases: "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.'" But such use of a hypothetical, while permissible, is not necessarily mandatory as my colleagues suggest. Evidence Code section 801, subdivision (b), allows an expert to base his or her opinion on matter "perceived by or personally known to the witness or made known to him at or before the hearing . . . ." The Law Revision Commission Comments explain, "Under subdivision (b), the matter upon which an expert's opinion is based . . . must be perceived by or personally known to the witness or must be made known to him at or before the hearing at which the opinion

is expressed. This requirement assures the expert's acquaintance with the facts of a particular case either by his personal perception or observation or by means of assuming facts not personally known to the witness."

Here, Detective Shear was most assuredly familiar with the facts of the particular case being tried based on his own thorough investigation. Where most, even if not all, of the evidence upon which an expert's opinion is based is within that witness's personal knowledge and has already been the subject of his testimony, it seems a pointless exercise to require the prosecutor to summarize that evidence in the form of a hypothetical question before asking for the expert's opinion.[5] On this record, and without generalizing to other situations not before us, I am not prepared to hold Detective Shear's testimony exceeded the scope of a permissible expert opinion. (See generally *People v. Vang, supra*, 52 Cal.4th at p. 1048, fn. 4 ["[i]t appears that in some circumstances, expert testimony regarding the specific defendants might be proper"].)

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[5] Indeed, defense counsel's failure to object to the absence of a hypothetical question may have been based on a reasonable, tactical decision to avoid giving the prosecutor an opportunity for an early, pre-closing argument summary of the damaging evidence linking his client to the crimes charged.