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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DeLEON, Defendant and Appellant.	B226617 (Los Angeles County Super. Ct. No. PA062172)

APPEAL from a judgment of the Superior Court of Los Angeles County, John David Lord, Judge. Affirmed.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Chung L. Mar and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Michael DeLeon appeals from the judgment entered following his convictions by jury on count 1 – second degree murder (Pen. Code, § 187) with findings a principal personally and intentionally used a firearm (former Pen. Code, § 12022.53, subds. (b) & (e)), a principal personally and intentionally discharged a firearm (former Pen. Code, § 12022.53, subds. (c) & (e)), and a principal personally and intentionally discharged a firearm causing great bodily injury or death (former Pen. Code, § 12022.53, subds. (d) & (e)(1)), and on count 2 – discharge of a firearm with gross negligence (Pen. Code, § 246.3, subd. (a)) with findings appellant committed the above offenses for the benefit of a criminal street gang (former Pen. Code, § 186.22, subd. (b)). The court sentenced appellant to prison for 40 years to life. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established in June 2007, Jovani Leiva knew appellant, Jesse Silva, and Marco Flores.[1] The monikers of the last three were Dreamer, Cholo (which means gangster), and Diablo, respectively. Leiva had met the three at Branford Park. According to Leiva, appellant was from the Pacoima Trece gang, Silva was from the Pacoima gang, and Flores was from the Orcas gang.

On the evening of June 15, 2007, David Delgado was at a party at 12462 Osborne in Los Angeles County. After midnight, Delgado and Albert Molina (the decedent) were inside the gate of the property and conducting patdown weapons searches of persons entering.

Leiva drove a car containing appellant, Silva, Flores, and a person named Lalo from Branford Park to a location near the party. Leiva parked and the group walked to the house. Leiva saw a black firearm in Flores's waistband. The group approached the gate.

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[1] Codefendants appellant and Silva were jointly charged but separately tried. Silva is not a party to this appeal.

According to Leiva, as Leiva walked towards the gate, he knew Flores had a gun, but Leiva did not say anything to Flores or to anyone else in the group. Leiva testified, "Who is going to tell these guys? You couldn't tell them nothing."

Appellant and Silva were searched. The persons conducting the search discovered the gun. Silva threw a punch at one of them and the gate was closed. Flores gave the gun to appellant and appellant shot it two to five times in the air. Leiva testified that, before any shots were fired, he heard "their gangs" being "yelled out." Appellant and Silva yelled Pacoima, and Flores yelled Orcas.

After appellant shot in the air, Silva obtained the gun and fired three or five shots into the crowd. During the shooting, someone was yelling Pacoima. Leiva was trying to convince people at the gate to let his group inside when he heard the shots in the air, looked back, and saw appellant handing the gun to Silva. After the shooting and as Leiva was running to his car, someone was yelling Pacoima. Leiva let the group enter his car because they had a gun and he could not stop them. Leiva testified the group was saying "get away." He also testified Flores took bullets from the gun and "they were throwing it [*sic*] out the window." Leiva initially made false statements to police because he was afraid.

According to Delgado, Delgado told members of the group at the gate to submit to a search. Delgado believed the group consisted of about four persons. A person, later identified as Silva, had one hand inside his waistband while his other hand held a beer bottle. Delgado testified someone in the group entered through the gate, and someone indicated "we're just going to come in. Nobody is going to search us." Delgado insisted on searching them.

At least two men in the group screamed profanities, yelled gang-related statements like "Fuck Vineland" and "Vegetables," and indicated they were looking for Vineland gang members. The word "vegetables" was a derogatory reference to the "Vineland Boyz" gang (Vineland). The males who were yelling stepped back, and one of Delgado's friends closed the gate.

Silva threw the bottle at Delgado and his companions, and the bottle broke on the gate. Someone in appellant's group tried to open the gate, but Delgado's group stopped them. Silva drew a gun and fired it once or twice in the air. Silva pointed the gun in the direction of the crowd and shot towards the crowd. Silva then moved the gun towards Delgado's group. Delgado grabbed Molina and moved, then Delgado heard a shot. Molina stepped back, held his chest, and said he could not breathe. Molina was mortally wounded. At the time of the shooting neither Delgado nor Molina had a gun. Appellant's group fled.

Los Angeles Police Detective Jose Martinez testified he had seen appellant prior to trial. A photograph shown to Martinez at trial depicted appellant's hair as short as Martinez had seen it in the past. Appellant's hair in the past appeared different than his hair at trial. Other photographs depicted tattoos on appellant's left hand and the letter P on appellant's left foot or left shin.

On June 9, 2008, Martinez, in the presence of appellant's mother, interviewed appellant at the police station about the above shootings. Martinez told appellant that Silva had said appellant did the shooting. Appellant told Martinez that Silva was out of control.

Appellant also told Martinez the following. Appellant did not shoot anyone. Appellant and his companions were walking to a party, a girl started repeatedly screaming Vineland, "[a]nd then start shooting." (*Sic*.) Appellant's companions were Silva, Flores, and someone else. Leiva was driving, and appellant thought Flores threw shells out the window. The gun was a chrome revolver with a black handle.

Appellant later told Martinez the following. Appellant shot the gun twice in the air that night because he saw many people coming towards him. Appellant told Martinez, "And then he was like, 'Give it to me.' " That person then shot for no reason. Appellant also said "they were coming at us" and that this occurred after appellant had fired shots. The approaching people were throwing beer bottles, and two of them closed the gate. Appellant later left with others.

Still later, appellant told Martinez the following. Appellant and his companions took a gun "just because" and because there were "three different hoods" going to the party. Treces and Orcas did not get along with Vineland. Flores had the gun when the group was "rolling up" on the party. An intoxicated girl was saying Vineland, so appellant and those with him started saying "fuck" "[v]egetables." Appellant obtained the gun when his group was near the gate. Persons at the gate were trying to conduct a search. Appellant had the gun "right here," moved back, "then that's when they tried to rush me." Appellant "pulled it out and shot two." Appellant's group was about to leave, then Silva "just gets it and started letting loose."

Appellant also told Martinez a person grabbed appellant and said the person was going to search appellant. Appellant backed off and hit the person. The person appellant hit went back, a group of persons went inside, the gate was closed, then another person started throwing bottles. Appellant was later told the person who had been shot had died.

Martinez asked appellant if he shouted Paca Treces, Paca, or Pacoima, and appellant replied, "I just said Pacoima." Martinez indicated one person shouted Orcas, and Martinez asked what Silva was shouting. Appellant replied, "Cayugas." Martinez asked appellant if appellant said Pacoima before or after the shooting. Appellant replied, "We said it before and after." Martinez asked why, and appellant replied he did not know. Martinez asked if it was done to scare people, and appellant replied, "I guess. We were just – it was in the moment, you know, screaming the hood out loud." Appellant told Martinez that appellant was 17 years old.

Los Angeles Police Officer Michael Yoro testified appellant, in the courtroom, had a full head of hair and was wearing glasses, but Yoro denied appellant always had had a full head of hair and always had worn glasses. During Yoro's previous contacts with appellant, appellant always had a shaved head or closely cut hair.

Yoro, a gang expert, testified concerning the Pacoima Treces (PT) gang. The Pacoima Cayuga Street Locos (PCSL) gang and the "Orkas" gang were allies of, and derived from, PT. Vineland was a rival gang of PT. The address of 12462 Osborne was

in an area occupied by members of, inter alia, PT. PT members congregated in Branford Park. Appellant and Flores were PT members.[2] Silva was a PCSL member who perceived Vineland as his enemy.

The prosecutor posed without objection a hypothetical question which was based on facts corresponding to evidence of the events leading to and including the above shootings, and the prosecutor asked whether the "shooting was for the benefit of or in the association with or at the direction of a criminal street gang, [PT]." In response, Yoro opined the shooting in the air, as well as the shooting and killing of the decedent, were gang-related and "done in benefit and in association of the [PT] gang."

Yoro testified "the fact that these individuals arrived at the party and refused to be searched shows that they will not be disrespected and, how dare you come to our neighborhood and either charge us or search us. You will allow us entry. That's their mentality." Yoro also testified "these gang members" communicated verbally by claiming their gang territory by yelling Pacoima, and communicated nonverbally by firing shots into the air and later towards the crowd, resulting in the death of a person conducting a search. Yoro testified this "[s]hows that they will not be disrespected and you will recognize and fear our gang." Appellant presented no defense evidence.

ISSUES

Appellant claims (1) his statement to Martinez was inadmissible under *Miranda*,[3] (2) the trial court erroneously permitted the prosecutor to pose leading questions to Leiva, (3) the prosecutor committed misconduct during jury argument, (4) Yoro's expert testimony was elicited through the prosecutor's impermissible hypothetical questions, (5) cumulative prejudicial error occurred, and (6) appellant's sentence constituted cruel and unusual punishment.

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[2] Yoro testified it had been said Flores was a member of Orkas, a gang closely associated with PT.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*).

DISCUSSION

1. *No Miranda Error Occurred.*

a. *Pertinent Facts.*

During pretrial proceedings, appellant moved to exclude his statement to Martinez on the ground he obtained it in violation of *Miranda*. At the hearing on the motion, appellant indicated he was disputing whether he was in custody for purposes of *Miranda*. Martinez later testified at the hearing as follows. On June 9, 2008, Martinez was investigating a case involving appellant, Silva, and Flores. Prior to June 9, 2008, Martinez had spoken to Silva and had read a report prepared by a detective who had spoken to Flores.

On the morning of June 9, 2008, Martinez served a search warrant at appellant's home. Appellant was not present but his mother was. Martinez told appellant's mother that Martinez was investigating appellant in relation to a murder. Martinez told appellant's mother that Martinez had an arrest warrant for appellant. The warrant was not for the 2008 murder of Johnny Lopez.[4]

Later on June 9, 2008, appellant's mother brought appellant to the Foothill station. Nonetheless, Martinez would have let appellant walk out if appellant had chosen to do so. At the time, appellant was a suspect in the Molina murder. Martinez was not at the station when appellant arrived. Martinez was called, and he returned to the station to interview appellant.

During cross-examination, Martinez testified as follows. Once Martinez arrived at the station, if appellant had walked out, Martinez would have let appellant leave, even though Martinez had the arrest warrant. At the time, Martinez was not going to take appellant into custody for either murder. During cross-examination, appellant's counsel indicated he was asking Martinez about whether Martinez was going to take appellant into custody for the Molina murder, and Martinez replied, "At that point, no." When

[4] Respondent concedes Martinez obtained the arrest warrant "for appellant's arrest with respect to the Molina murder," and so informed appellant's mother.

appellant and his mother came to the station to talk to Martinez, Martinez told appellant that appellant was free to go. Martinez testified, "Actually, I told them that [appellant] could go at any time prior to any conversation and he could leave any time."

Prior to the interview, Martinez told appellant that appellant was not under arrest and appellant could go whenever he wanted to go. After Martinez said this to appellant, Martinez began questioning appellant about the Molina and Lopez murders. Appellant was not in handcuffs when Martinez began interviewing him. The interview occurred in an interview room. Appellant's mother was present but no officer other than Martinez was present. Martinez recorded the conversation from its inception.

The interview of appellant and his mother lasted about 110 minutes. Martinez denied that during the first approximate 30 minutes of the interview, appellant implicated himself in the 2007 Molina incident by "admit[ing] to being there." Probably the majority of the first 30 minutes consisted of Martinez "interviewing [appellant's] mother and us discussing" the Lopez murder. About 55 minutes into the interview, Martinez began discussing with appellant that appellant was present during the Molina incident. Appellant was never charged with the Lopez murder and the portion of Martinez's conversation with appellant about that murder was investigatory. During the interview, appellant gave Martinez a statement that implicated appellant in the Molina murder. Martinez did not advise appellant of his *Miranda* rights prior to, or during, the interview.

Based on appellant's statement implicating him in the Molina murder, Martinez decided to take appellant into custody. At the end of the interview, Martinez told appellant that appellant was going to be arrested for firing a gun. Martinez also testified he told this to appellant, "I would say 7/8's in the complete interview." After the interview concluded, Martinez took appellant into custody in his mother's presence. Another officer read to appellant his *Miranda* rights at that time. Appellant's mother left after the interview.

During argument on the motion, appellant urged as follows. Based on Martinez's conversations with the codefendants, his obtaining of a search warrant for appellant's

home, and Martinez's obtaining of an arrest warrant for appellant, appellant was a suspect at least in the Molina murder case and was going to be arrested. Appellant's mother brought appellant into the station and, although "that was voluntarily," appellant should have been advised of his *Miranda* rights at that time. As to the Lopez murder, appellant conceded Martinez might have been merely conducting an investigation.

The trial court stated, "State of the law after *Berkemer*[5] . . . would be that it would require more than what was within the police officer's mind." The court denied appellant's motion to exclude his statement.

b. *Analysis.*

Appellant claims his statement to Martinez was inadmissible under *Miranda*. We disagree. The issue is whether any interrogation of appellant was custodial. Whether a person is in custody is an objective test; the pertinent inquiries are whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest and whether a reasonable person in the defendant's position would have felt free to end the questioning and leave. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.) We "[d]isregard[] the *uncommunicated* subjective impressions of police regarding the defendant's custodial status as irrelevant." (*People v. Stansbury* (1995) 9 Cal.4th 824, 830 (*Stansbury*), italics added.)

In the present case, there was substantial evidence as follows. Appellant was not formally arrested until after the interview concluded. Although Martinez had an arrest warrant for appellant, no evidence was presented at the hearing that this fact or the fact appellant was a suspect was ever communicated to appellant. Appellant conceded below his mother brought him to the station voluntarily, and there was no evidence he came other than voluntarily. When appellant and his mother arrived, Martinez told appellant and his mother that appellant could go at any time prior to any conversation, and that he could leave at any time.

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5 The trial court was presumably referring to *Berkemer v. McCarty* (1984) 468 U.S. 420, 439-440 [82 L.Ed.2d 317] (*Berkemer*).)

Prior to the interview, Martinez told appellant that appellant was not under arrest. Although Martinez interviewed appellant (a juvenile) for almost two hours at the station, appellant's mother was present and the only officer present was Martinez. Appellant was not handcuffed when the interview began, no evidence was presented at the hearing that any restrictions were placed on his movement during the interview, and no evidence was presented Martinez was aggressive, confrontational, or accusatory, or that Martinez pressured appellant. Apparently, Martinez and appellant's mother conversed during the first approximate 15 minutes of the interview; appellant's involvement in that portion of the interview was not clear. Appellant did not dispute below Martinez's conversation with appellant about the Lopez murder was investigatory.

We conclude there was substantial evidence supporting the trial court's implied finding no custodial interrogation occurred. When appellant made his statement to Martinez, appellant was not in custody for purposes of *Miranda*. (Cf. *People v. Whitson* (1998) 17 Cal.4th 229, 248; *Stansbury, supra,* 9 Cal.4th at p. 830; *People v. Clair* (1992) 2 Cal.4th 629, 679; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404; *In re Kenneth S.* (2005) 133 Cal.App.4th 54, 63-66; *People v. Lopez* (1985) 163 Cal.App.3d 602, 608; *United States v. Hinojosa* (6th Cir. 2010) 606 F.3d 875, 883-884; *United States v. Reynolds* (6th Cir.1985) 762 F.2d 489, 491-494.) Nor does the record of the hearing demonstrate Martinez attempted to circumvent *Miranda*.

2. *The Trial Court Did Not Erroneously Permit Leading Questions By the Prosecutor.*

Appellant claims the trial court erroneously permitted the prosecutor during her redirect examination of Leiva to ask two leading questions eliciting Leiva's testimony that he saw appellant extend his hand to give the gun to Silva. Appellant argues the testimony was crucial to the People's effort to prove he aided and abetted murder, or assault with a deadly weapon. The two questions are italicized below and, for the reasons discussed below, we reject the claim.

a. *Pertinent Facts.*

Leiva testified during cross-examination to the effect that when he was trying to enter the gate, he heard shots in the air, looked back, and saw appellant "handing the gun to [Silva]." Leiva also testified, "I don't know if [Silva] grabbed it or it was a [handoff][.]" Leiva further testified he was "not sure if it was [a handoff] or grabbed it." (*Sic*.)

During redirect examination, the following occurred: "Q. And when you say you don't know whether [Silva] grabbed the gun or whether there was a [handoff], did you actually see [appellant] hand the gun? [¶] A. Yes. [¶] . . . [¶] A. Then he shot towards -- [¶] Q. Then [Silva] took it? [¶] A. Yeah. [¶] Q. . . . *But you actually saw [appellant] extend his hands*? [¶] A. Yeah. [¶] [Appellant's Counsel:] Objection, leading the witness. [¶] The Court: Overruled. [¶] Q. (By [The Prosecutor:]) *And when I say extend his hand, I mean extend his hand with a gun to [Silva]?* [¶] A. To [Silva]. [¶] [Appellant's Counsel:] Again, your Honor, objection, leading. [¶] The Court: Overruled." During recross-examination, Leiva testified that appellant gave the gun to Silva, *and* that Silva grabbed it.

b. *Analysis.*

Evidence Code section 764 states, "A 'leading question' is a question that suggests to the witness the answer that the examining party desires." Evidence Code section 767, subdivision (a)(1), states, "(a) *Except under special circumstances where the interests of justice otherwise require*: [¶] (1) A leading question may not be asked of a witness on direct or redirect examination." (Italics added.) Trial courts have broad discretion to decide when such special circumstances are present. (*People v. Williams* (1997) 16 Cal.4th 635, 672 (*Williams*).) For example, "A leading question is permissible on direct examination when it serves 'to stimulate or revive [the witness's] recollection.' " (*Id*. at p. 672.)

Prior to the two challenged questions, portions of Leiva's cross-examination testimony could be understood to indicate Leiva saw appellant in the process of handing the gun to Silva prior to the point of transfer of the gun from appellant to Silva, but Leiva "[did not] know" and "was not sure" whether, at the point of transfer, appellant handed the gun to Silva or Silva merely grabbed it. Assuming appellant posed timely objections to the challenged questions and they were leading, they were permissible to serve to stimulate or revive Leiva's recollection about what happened at the point of transfer. The court did not abuse its discretion in permitting the challenged questions. (Cf. *People v. Collins* (2010) 49 Cal.4th 175, 215; *Williams, supra*, 16 Cal.4th at p. 672-673.)

Moreover, even if the trial court erred, it does not follow we must reverse the judgment. During appellant's cross-examination of Leiva, Leiva testified he saw appellant "handing the gun to [Silva]." Leiva's redirect examination testimony prior to the challenged questions reasonably may be understood to indicate Leiva actually saw appellant hand the gun to Silva and Silva take it. Leiva's testimony during recross-examination indicated, inter alia, appellant gave the gun to Silva.

As our Factual Summary reveals, there was ample other evidence appellant was an aider and abettor to Silva's murder of Molina, including gang evidence providing a motive for appellant to aid and abet Molina's murder, and statements appellant made to Martinez which reasonably may be construed as admissions appellant gave the gun to Silva. Any trial court error in permitting the two challenged questions was not prejudicial. (Cf. *Williams, supra*, 16 Cal.4th at p. 673; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. *No Prejudicial Prosecutorial Misconduct Occurred.*

a. *Pertinent Facts.*

During opening argument, the prosecutor argued that under aiding and abetting law, what appellant did was, in many ways, worse than what Silva did because appellant handed Silva, appellant's "homie," a loaded gun when they were confronting rivals.

The prosecutor then commented without objection, *"And although [appellant] sits here looking like he's going to -- a nice school boy with a full head of hair and his nice studious glasses,* that's not the Michael DeLeon at the party that killed Albert Molina. He didn't have the full head of hair. He didn't have the glasses. But he did have a loaded gun. This isn't *the sweet, innocent kid that he portrays himself to be right here in this courtroom. I guess we're all on our best behaviors in the courtroom, especially when we're the ones on trial.* He isn't innocent. He is a full-fledged member, a documented member, of the Paca Trece gang. *He is a hood rat who walked around with his other hood rats using guns and killing people just because they thought they were dissed,* just because they thought they didn't like the people at the party." (Italics added.)

At the end of the prosecutor's closing argument, the prosecutor commented without objection, "*We're not hearing about this 16-year-old getting a respectable job. We're not hearing about this 16-year-old going to school and going to college. We're not hearing about this 16-year-old doing anything like that*. This 16-year-old is a killer and a gang member and that's all he is. I ask you for a verdict of guilty. Thank you." (Italics added.)

b. *Analysis.*

Appellant claims the prosecutor committed misconduct during jury argument. We address appellant's arguments the prosecutor (1) commented upon appellant's demeanor in the courtroom, (2) invoked racial and class stereotypes, and (3) commented upon appellant's failure to present character evidence.

At the outset, we conclude appellant waived all issues of prosecutorial misconduct by appellant's failure to object to the challenged comments on the ground of prosecutorial misconduct and by his failure to request a jury admonition with respect to said comments, which would have cured any harm. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Sandoval* (1992) 4 Cal.4th 155, 185.)

Even if the issues were not waived, appellant's claim lacks merit for the reasons discussed below. Prosecutorial argument may be vigorous as long as it amounts to fair comment on the evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) The testimony of Martinez and Yoro provided evidence appellant's hair had been shorter prior to trial than appellant's hair was at trial and, although appellant was wearing glasses at trial, he had not always done so prior to trial. The first two previously italicized comments of the prosecutor were fair comment on the *evidence*. We reject appellant's vague claim the prosecutor improperly commented upon appellant's courtroom demeanor.

Moreover, the first two previously italicized comments reasonably could be construed as arguments the jury should disregard appellant's courtroom demeanor in favor of considering the evidence, in which case no misconduct occurred. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 148-149 (*Yeoman*); *People v. Boyette* (2002) 29 Cal.4th 381, 434.)

As to the prosecutor's use of the term "hood rat," appellant, citing an Internet dictionary, asserts the term is derogatory and invokes racial and class-based stereotypes. According to appellant, the dictionary he cites gives two meanings for the term (1) a young promiscuous woman from an impoverished urban area, and (2) " 'someone who hangs around the [black] neighborhood.' " (Bracketed word in the original.)

The term "hood rat" does not expressly refer to race or class. However, we assume without deciding the jury understood the term to refer to the alleged second meaning from the Internet dictionary. While we do not condone the use of opprobrious terms during jury argument, the prosecutor's brief references to the term during closing argument (which was otherwise free of prejudicial prosecutorial language) cannot reasonably be considered prejudicial prosecutorial misconduct in light of the ample evidence of appellant's guilt. (Cf. *Yeoman, supra,* 31 Cal.4th at p. 149.)

Our conclusion is reinforced by the facts the court, using CALCRIM No. 200, instructed the jury not to let bias, including bias based on race or socioeconomic status, influence their decision; that same instruction told the jury to decide this case based only

on the evidence; and the court, using CALCRIM No. 222, instructed that nothing attorneys said was evidence. To the extent appellant relies on the mere reference to "hood," we note appellant told Martinez that appellant and his companions took a gun "just because" and because there were "three different hoods" going to the party.

We reach the same conclusion, as to the prosecutor's comments pertaining to a respectable job and college. Finally, to the extent appellant claims he received ineffective assistance of counsel by reason of his trial counsel's failure to object to the challenged argument, our analysis compels the conclusion no such ineffective assistance occurred.

4. *Yoro's Gang Expert Testimony Was Admissible.*

Appellant claims Yoro's gang expert testimony was elicited through the prosecutor's impermissible hypothetical questions, in response to which, according to appellant, Yoro presented expert opinion testimony on whether the offenses appellant committed were gang-related and done for the benefit of, and in association with, PT. Appellant argues that, as a result, his conviction on count 1, and the true findings as to the former section 186.22, subdivision (b) enhancement allegations, must be reversed.[6]

Appellant failed to object below to Yoro's expert testimony which appellant now challenges; therefore, appellant waived the issues. (Evid. Code, § 353, subd. (a)). Even if the issues were not waived, they lack merit. In *Vang, supra,* 52 Cal.4th 1038, a gang expert, in response to hypothetical questions posed by a prosecutor, testified an assault would benefit a named gang and was committed in association with the gang and at the direction of the gang's members. The expert also testified the attack was gang-

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[6] Appellant acknowledges that, at the time he filed his opening brief, a related issue of whether a trial court erred by permitting certain hypothetical questions to a prosecution expert witness was pending before our Supreme Court in *People v. Vang* (2010) 185 Cal.App.4th 309, review granted September 15, 2010 (S184212). In his reply brief, he acknowledges our Supreme Court's decision in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), and claims "for purposes of further review in federal court" the prosecutor's hypothetical and Yoro's answer violated appellant's Fifth, Sixth, and Fourteenth Amendment rights.

motivated. *Vang* concluded the prosecutor's hypothetical questions, although based on evidence-specific assumptions, were properly based on evidence at trial and the expert's opinion testimony in response was admissible and not rendered inadmissible by the fact, if true, the testimony pertained to an ultimate issue(s) to be decided by the trier of fact. (*Id*. at pp. 1042-1049.)

In the present case, the prosecutor essentially posed a hypothetical question which asked Yoro, an expert, to assume various facts based on the evidence. The prosecutor's question was proper and, in response, Yoro properly gave his expert opinion testimony. (Cf. *Vang, supra,* 52 Cal.4th at pp. 1042-1049.) To the extent appellant claims he received ineffective assistance of counsel by reason of his trial counsel's failure to object to Yoro's expert testimony, our analysis compels the conclusion no such ineffective assistance occurred. We also reject appellant's claim cumulative prejudicial error occurred.

5. *Appellant's Sentence Was Neither Cruel Nor Unusual Punishment.*

The probation report, prepared for a June 2009 hearing, reflects as follows. Appellant was born in March 1991. He was placed on juvenile probation in July 2007 for grand theft and had a pending probation violation. Appellant was a PCP abuser. Appellant was 16 years old when he committed the present offenses. Appellant told police he punched Molina, fired shots in the air, handed the gun to Silva, and Silva shot Molina. The probation officer stated, "the defendant and co-defendants discharged a firearm towards the air and the victim, murdering him; while shouting their gang names. The crimes were merciless and the victim's life [cannot] be recovered."

During the August 4, 2010, sentencing hearing, the court, which presided at appellant's jury trial, stated, "even though you may not have pulled the trigger on the final shot, you're a cold-blooded murderer. You took an active role in this whole situation, which resulted in the death of somebody who had absolutely, positively no reason whatsoever to be in the line of fire. So you will almost certainly die in prison, which is appropriate because you stole Mr. Molina's life for no reason whatsoever." The

court, without objection, sentenced appellant to prison for 40 years to life, consisting of 15 years to life for second degree murder, plus 25 years to life pursuant to Penal Code section 12022.53, subdivisions (d) and (e). The court found Penal Code section 654 applied to count 2.

Appellant claims his sentence was cruel and unusual punishment under the Eighth Amendment and state Constitution. We conclude otherwise. First, appellant waived the issues by failing to raise them below. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229.)

Even if the issues were not waived, appellant's claim is without merit. We have set forth the pertinent facts concerning appellant, and the present offenses. Appellant aided and abetted a gang-related intentional shooting and murder of an unarmed victim. Even taking into consideration appellant's age at the time of the offenses, appellant has failed to raise an inference of gross disproportionality for purposes of Eighth Amendment analysis, and has failed to demonstrate his sentence was so disproportionate to the crimes committed that his sentence shocks the conscience and offends fundamental notions of human dignity for purposes of his analogous state constitutional argument. Appellant's federal and state constitutional challenges fail. (Cf. *People v. Murray* (2012) 203 Cal.App.4th 277, 284-285.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.