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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. OMAR JIMENEZ, Defendant and Appellant.	B226623 (Los Angeles County Super. Ct. No. GA066669)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice Claire Croft, Judge. Affirmed with directions.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Omar Jimenez appeals from a judgment of conviction entered after a jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a); count 1), attempted willful, deliberate and premeditated murder (*id*., §§ 187, subd. (a), 664; count 2), shooting at an occupied motor vehicle (*id*., § 246; count 4), and carrying a loaded firearm by a felon (*id*., § 12031, subd. (a)(1); count 3).[1] The jury found true the allegations the murder, attempted murder and shooting at a motor vehicle were committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)(1)(C)), and defendant personally discharged a firearm in the commission of the offenses (*id*., § 12022.53, subds. (b), (c) & (d)). The trial court sentenced defendant to 130 years to life plus 2 years.

On appeal, defendant challenges the sufficiency of the evidence to sustain his convictions. He also claims error in the admission of gang expert testimony and prosecutorial misconduct, and he requests that we independently review the sealed record of his *Pitchess*[2] motion. We affirm.

FACTS

A. *Prosecution*

1. The Shooting

At about 7:00 p.m. on August 21, 2005, Arturo Saenz (Saenz) picked up Luis Villanueva (Villanueva) in Rosemead and was driving to a party. Villanueva had been smoking crystal methamphetamine that day. He was a longtime methamphetamine user and believed it made him alert and focused, although it also made him paranoid.

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[1] This was defendant's third trial. The first two ended with deadlocked juries.

[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Saenz pulled to the curb on Strathmore Avenue by the Graves Avenue intersection to talk to his girlfriend on his cell phone. Villanueva saw a white Toyota Camry drive slowly past the front of Saenz's car on Graves Avenue. He saw two people in the front seat of the car. Both had shaved heads and looked like gangsters.

The Camry made a U-turn and stopped on Graves Avenue about 20 feet from Strathmore Avenue. Shortly thereafter, the Camry returned. Villanueva noticed four or five "young kids" in the back seat. The driver "mad-dogged" Villanueva and Saenz; Villanueva made eye contact with the driver and did not recognize him. The driver asked, "Where you vatos from?" Villanueva understood this to be a gang challenge. Saenz responded, "Do we look like gangsters?" The driver pointed a revolver out of the window of the Camry and fired several times. Someone in the Camry yelled "Lomas," which Villanueva recognized as the name of a gang, and the Camry sped away.

Saenz was shot in the head and died almost instantly. Villanueva was not hit.

Arthur Diaz was on the front porch of his house on Strathmore Avenue near Graves Avenue when he heard several gunshots. He then saw a white car driving north on Strathmore Avenue. There were three or four people in the car. There was a car parked at the corner. A few seconds after the white car drove away, the passenger got out of the parked car and yelled, "Call 911."

Wayne Co (Co), a code enforcement employee for the city of Rosemead, was driving north on Strathmore Avenue and stopped for a stop sign at the Garvey Avenue intersection, one block north of Graves Avenue. A white Toyota Camry heading north pulled up suddenly beside him and then turned left onto Garvey Avenue. The following day, Co was speaking to a sheriff's deputy who mentioned the shooting. Co asked whether a white Camry was involved. Co was then contacted by homicide detectives, who questioned him about what he had seen. They showed him photographic lineups, from which he identified Emmanuel Cervantes (Cervantes) as possibly being a passenger in the back seat of the Camry. Co was unable to identify defendant in a photographic lineup.

2. Defendant's Purchase of a White Camry

Cervantes is defendant's nephew.[3] Both Cervantes and defendant were raised by their grandmother. Cervantes is six and a half years younger than defendant, and defendant was like an older brother to him. Although defendant and other relatives were members of the Lomas gang, Cervantes stayed out of the gang at defendant's insistence.

In May 2005, defendant asked Cervantes and Gabriel Espinoza (Espinoza) to cosign on a car loan. They agreed and financed his purchase of a white Toyota Camry. Cervantes did not have a driver's license and never drove the car.

Julio Maldonado, who sold the white Toyota Camry to defendant, testified that it was not uncommon for him to sell a car to someone who used family members' credit for the purchase. He confirmed that Cervantes and Espinoza were listed on the sales contract.

3. The Weekend of August 13-14, 2005—Defendant's Birthday

Defendant's birthday was August 14. He had two parties in 2005. The first was on Saturday, August 13, at the apartment in Upland that he shared with his girlfriend, Aundrea Luevano (Luevano). The second was on Sunday, August 14, at his sister's house in West Covina.

4. The Weekend of August 20-21, 2005

Cervantes went to defendant's apartment in Upland on Saturday, August 20, for a barbecue. A small group of family members was there.

The following day, Cervantes returned to defendant's apartment. Late in the day, defendant went to take Cervantes home to Rosemead in the Camry.

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[3] Cervantes was granted immunity for his testimony at defendant's first trial. He did not believe his immunity extended to his testimony at the instant trial. Cervantes also testified that his testimony against defendant had generated animosity from family members, some of whom were in the courtroom.

Defendant stopped at a house on Graves Avenue, where he spoke to three of his fellow Lomas gang members. Cervantes got out of the car and smoked a cigarette. When they returned to the car, Cervantes and two of the gang members got into the back seat, while defendant got into the driver's seat and the third gang member got into the front passenger seat. Defendant then drove to the Strathmore Avenue intersection. There, defendant fired four or five shots; he did not say anything as he fired.

After the shooting, defendant told Cervantes not to say anything. Defendant told Cervantes that if he got caught by the police in the Camry, he was to say it was his car. Defendant assured him he would not get in trouble because the police would know he was not the shooter. Cervantes was willing to comply because he did not want to get defendant in trouble.

5. The Investigation

Sergeant Martin Rodriguez of the Los Angeles County Sheriff's Department Homicide Bureau was assigned to investigate the case. He arrived at the scene of the shooting about 8:00 p.m. He interviewed Villanueva a few hours later. Villanueva described the driver as a Hispanic male, "cholo type," 22 to 26 years old. He said the driver had close cut hair, possibly a mustache, with thick eyebrows, and was wearing a white tee shirt.

Through information obtained from informants and other sources, Sergeant Rodriguez focused his investigation on defendant and Cervantes. Sergeant Rodriguez and Detective Labbe interviewed Cervantes, who initially denied any knowledge of the shooting. When Sergeant Rodriguez confronted Cervantes with the information he had obtained in his investigation, Cervantes told him what he knew.

According to Sergeant Rodriguez, Cervantes first told him that he owned the Camry but had given it to Luevano in November 2005. Before that time, he had loaned the car to Luevano, but never to defendant, and defendant had never driven it. Sergeant Rodriguez then told Cervantes that there was a good chance he would go to prison for the crime. Cervantes then said that the Camry belonged to defendant and Luevano and that

defendant was driving the car and killed Saenz. Cervantes was upset and crying when he said this.

Cervantes testified that he initially did not tell the police anything because he did not want to get his uncle in trouble. Then the police told him he could "go down for this" and serve a life sentence. At that point, Cervantes "felt it wasn't my fault, so why should I go down for it." He told the police that defendant shot and killed Saenz.

On December 12, 2005, law enforcement observed defendant working on the Camry at an apartment in Upland. Defendant was arrested, the Camry was impounded and the apartment searched. The gun used in the shooting was not found.

6. Villanueva's Identification of Defendant

Villanueva testified that when the Camry passed by him, he was able to see the driver, but not the passenger. Even though the passenger was closest to him, he was focused on the driver. However, in December 2005, he had been shown a photographic lineup and identified the passenger in the Camry the first time the car passed him. At some point, he sat down with someone from the police department to help create a composite picture of the shooter. He indicated that defendant was the person depicted in the composite.

Villanueva explained that when he was at the police station, he told the police that it was the passenger "mad-dogging" him, not the driver, because he was scared. He also was paranoid from the methamphetamine. At some point, when Villanueva was in jail "for warrants," he told Sergeant Rodriguez that the person he identified in a photographic lineup was the driver. Villanueva said the driver had a bald head, mustache, and was wearing a white "wife beater" tee shirt. Villanueva said he saw no earrings or tattoos.

Villanueva testified at trial that defendant was the driver of the Camry, and he was 100 percent sure of his identification. He had a good view of defendant. He did not believe that his drug use affected his ability to see what happened.[4]

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[4] Villanueva testified that he had "been clean for four years."

Villanueva also testified that he had been scared to testify at the preliminary hearing and identify defendant. About that time, someone stopped in front of his house and started shooting. There also were telephone calls to his house. He told Sergeant Rodriguez and other officers about this, but they did nothing. He initially refused to identify defendant at the preliminary hearing. He said he was high and did not see the driver very well. He identified defendant only after the "judge yelled at" him for lying and playing games.

Villanueva acknowledged that at the first trial in August 2007, he told defendant's counsel that defendant was not the shooter. Defense counsel asked, "Are you sure that you are saying he wasn't the shooter because you are scared?" Villanueva responded, "No, I'm telling the truth." Then at the second trial, Villanueva testified that defendant was the shooter. Defense counsel asked why he changed his testimony. Villanueva told him that he had been afraid at the first trial.

Defense counsel questioned Villanueva as to why, if he was afraid, he was willing to identify the passenger, especially since he thought both were Lomas gang members. Villanueva responded that he wanted to be honest. Counsel pointed out that it would have been honest to identify the driver as the shooter, but he did not do that. Counsel asked whether he did not identify defendant as the shooter because he did not really get a good look at him. Villanueva reiterated that he did not make the identification because he was scared. Villanueva could not explain why he was not scared to identify the passenger.

Villanueva also acknowledged telling defense counsel that he felt sad and hurt that defendant did not go to jail after the earlier trials. He said that he wanted to see somebody pay for the crime.

Villanueva additionally testified that he no longer lived in the same area. That made him more comfortable testifying.

7. Gang Evidence

Deputy Joe Morales of the Los Angeles County Sheriff's Department testified as a gang expert. He opined that defendant was a member of the Lomas gang based on defendant's previous admission to police officers that he was a member of the gang and on defendant's tattoos. Defendant had a tattoo on his stomach containing the name Lomas. He had "L" and "S," signifying Lomas, tattooed on his head. He had "Hillside Strangler"—"Lomas" means "hills" in Spanish—tattooed on his scalp. He had an "L" tattooed on his right arm and an "S" tattooed on his left arm. He had a clown forming an "L" with his hand on his left shoulder, indicating he was a Lomas member who had been to prison. He had "brown" and "pride" tattooed on his shoulders, indicating he was proud to be a Hispanic gang member. He had a tattoo on his neck indicating he was 100 percent committed to Lomas. His gang nickname was "Necio," which means stubborn. Deputy Morales also testified that in 2005, defendant was a very active gang member and high up in the gang's chain of command.[5]

Deputy Morales explained that respect is very important to gangs and their members. Members earn respect and move up in rank by "putting in work," i.e., committing crimes on behalf of the gang. The more serious the crime, the more respect earned.

Gangs maintain control over their territory by committing crimes which instill fear in the community. Commission of crimes also serves to enhance the gang's reputation among rival gangs and to protect its territory from takeover attempts by their rivals.

The Lomas gang had about 150 to 160 members, and its territory included the intersection of Strathmore and Graves Avenues. The gang's primary activities were narcotics sales, robbery, carjacking, assault and murder/attempted murder. Deputy Morales gave specifics of the commission of crimes by Lomas members, including possession of a firearm by a felon, a drug offense and unlawful taking of a vehicle.

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[5] Deputy Morales had no information indicating that Cervantes, Villanueva or Saenz was a gang member.

Deputy Morales noted that guns would be passed around among gang members and used to commit crimes. Because parolees were not allowed to possess guns and their homes could be searched at any time, it was unlikely that a parolee would keep a "gang gun" at his house.[6] Instead, they would have other gang members hide the guns.

Deputy Morales was given a number of hypothetical questions which mirrored the facts of this case. He opined that under the circumstances given, the shooter intended to kill and killed the victim in order to benefit the gang and raise his own status within the gang.

B. *Defense*

1. Misidentification

In July and August 2005, defendant was working for an electrician who required him to grow his hair long enough that the tattoos on his scalp would not be visible. Luevano and defendant's friends confirmed that defendant did not have a shaved head at that time; his hair was about an inch long.

Gabriel Espinosa (Espinosa) went to high school with Cervantes, and the two of them spend time together. Espinosa testified that he is not a gang member, but Cervantes and another of defendant's nephews, Johnny Gonzales (Gonzales), were members of Lomas. Gonzales was known as "Lil Necio." Espinosa never saw defendant on the street with other Lomas members but only saw him at home with his family after work.

Espinosa and Cervantes purchased the white Toyota Camry together. While defendant was with them, he was not involved in the purchase. Espinosa never saw defendant drive the car.

According to Luevano, Cervantes originally owned and drove the Camry, although he allowed her to use it occasionally. In November 2005, Cervantes could no longer afford the car, so she took over the payments and took the car. She did not change the

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[6] Defendant was a parolee.

registration address until later. She did not change the name of the owner until about a month before trial.

Michael Pacheco (Pacheco) knew defendant to be a Lomas member nicknamed "Cyclone," but also called "Necio." Pacheco also knew Gonzales as "Necio."

On the day before defendant's birthday, August 13, 2005, Pacheco, Cervantes, their girlfriends and defendant went to Huntington Beach in Cervantes's white Toyota. They stayed at the beach until early the next morning.

Pacheco knew that Cervantes had been arrested for murder. Cervantes told him that the police had threatened him with a life sentence, so he lied and implicated defendant in order to be freed.[7] Cervantes did so because he knew defendant would eventually be freed. Cervantes did not tell Pacheco details about the murder.

Pacheco acknowledged he had been convicted of voluntary manslaughter a year before the trial and was in the process of appealing his conviction. He claimed he had been wrongly accused of being a gang member and harassed by sheriff's deputies.

Jose Lopez, a former gang member and now a retired professor, testified as a gang expert. He stated that Lomas territory is bordered by Garvey Avenue on the south.[8]

2. Alibi

Luevano organized a birthday party for defendant, and for her mother and uncle, who were twins; all three shared the same birthday. The party was to be held on August 21, 2005. Luevano mailed out some invitations and hand delivered others.

An invitation and envelope were introduced into evidence. The date stamp on the envelope was July 21, 2005.[9]

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[7] Cervantes denied telling Pacheco he lied to implicate defendant.

[8] Graves Avenue, where the shooting occurred, is south of Garvey Avenue.

[9] Luevano did not come forward with the invitation to establish defendant's alibi until two years after he was arrested.

The party started at 3:00 p.m. and continued through 10:00 or 11:00 p.m. A number of the guests testified that defendant was at the party the entire time. Several testified that Cervantes was not at the party.

Yolanda Tavera (Tavera), Luevano's aunt, received an invitation to the birthday party in 2005. The party was for defendant and for her brother and sister, who were born on August 10. It was Tavera who provided the invitation to defense counsel. She explained that while she knew defendant had been arrested, she did not know what he was arrested for until a year later. The invitation had been stored in a box while her house was remodeled, and she did not come across it until August 2007.

C. *Rebuttal*

1. The Invitation

Karen Santagata, a representative of American Greetings Corporation, testified that the invitation Luevano claimed she sent for defendant's birthday party did not go on sale until 2006. Additionally, according to her records, the postmarked envelope was not the one which originally came with the card; it was a different color. She acknowledged, however, that the envelope appeared to match envelopes packaged with the same card.

Postal inspector David Focht testified that the stamp on the envelope had been hand canceled, and it was canceled twice. In order for the envelope to be hand cancelled, it would have had to have been taken into the post office to a window clerk. The first cancellation was in red from the east Pasadena station. The second cancellation was in black. Ordinarily, a letter would not receive a second cancellation unless the stamp was not properly cancelled the first time. If the invitation had been put into a mailbox in

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An FBI document examiner confirmed that the same ink was used on the invitation and the envelope. A forensic document examiner from the Los Angeles Police Department found indentations in the upper left hand corner of the invitation that corresponded to Luevano's address. There were indentations in the center of the invitation, but the examiner could not identify any particular words. There were no indentations on the back of the envelope, indicating that something was in the envelope when it was addressed.

Rosemead, it would have been processed and cancelled mechanically in the City of Industry.

2. Ownership of the Camry

In a 2006 police interview, defendant's sisters, Rosa and Barbara Cervantes, stated that the Camry did not belong to Cervantes, who is Barbara's son. Rather, the Camry belonged to Luevano. Cervantes did not drive or have a driver's license, and he put the car in his name with the understanding that Luevano would make the payments. Luevano did not trust defendant with the car because he was in the United States illegally, and if he were stopped by the police, Luevano would lose the car.

Rosa Cervantes had testified that she told the police that the Camry belonged to Cervantes. After the recording was played, Rosa admitted that she told the police that the Camry belonged to defendant and Luevano, but stated that she did not know when Cervantes gave them the car.

3. Defendant's Birthday

Rosa Cervantes told the police that she hosted a birthday party for defendant at her house on August 14, 2005. Barbara Cervantes told the police that she thought defendant and Cervantes came to her house a week later, on Sunday, August 21. Neither woman mentioned a birthday party thrown for defendant by Luevano at their apartment on August 21.

4. Gang Evidence

Detective Michael Silva of the Los Angeles County Sheriff's Department is familiar with the Lomas gang. He testified that Espinosa was jumped into the Lomas gang in 2007. Pacheco was currently a Lomas gang member and was an "affiliate" of the gang in 2005; Pacheco did not have any gang tattoos in 2005. Detective Silva had no reason to believe that Cervantes was a gang member.

D. *Surrebuttal*

William Flores, a letter carrier, testified that he sorts the mail for his route and occasionally hand cancels letters. From time to time, he has inadvertently canceled letters that were already canceled.

DISCUSSION

A. *Sufficiency of the Evidence*

1. Introduction

Defendant describes the evidence supporting his conviction as consisting of Villanueva's and Cervantes' identifications of him as the shooter which were not credible and the gang experts' improper testimony. He adds that there was no physical evidence placing him at the scene of the crime and the murder weapon was never found. He also claims that prosecution witnesses' testimony was bolstered by prosecutorial misconduct. For these reasons he contends the evidence is insufficient to sustain his convictions and they must be reversed. We disagree.

2. Standard of Review

In assessing the sufficiency of the evidence to support a conviction, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and

the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

3. Villanueva's Identification of Defendant

Defendant devotes almost 30 pages of his opening brief to his challenge to Villanueva's identification of him as the shooter. He points to the inconsistencies in Villanueva's account of the shooting and description of the shooter. He claims the pretrial identification procedures were suggestive and coercive. He points to legal and scientific authorities on the unreliability of eyewitness identification. He points to factors in the instant case which reflect negatively on the reliability of Villanueva's identification of defendant as the shooter, including Villanueva's methamphetamine intoxication.

It is well established that "[w]eaknesses in the testimony of eyewitnesses are to be evaluated by the jury. [Citation.]" (*People v. Mendez* (2010) 188 Cal.App.4th 47, 59.) Only if the eyewitness's testimony is physically impossible, or the falsity of the identification is apparent without resorting to inference or deduction, may we reject an eyewitness identification that the jury has believed. (*People v. Thompson* (2010) 49 Cal.4th 79, 124.) Stated otherwise, "[a] jury's finding [on the believability of an eyewitness identification] will not be reversed unless it is clearly shown that under no hypothesis is there sufficient evidence to support it. [Citation.]" (*Mendez, supra*, at p. 59.) "'Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' [Citations.]" (*People v. Thornton* (1974) 11 Cal.3d 738, 754, disapproved on another ground in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12.)

We agree with defendant that there are many bases on which Villanueva's eyewitness identification testimony could be rejected as not credible. But Villanueva's identification of defendant as the shooter was not physically impossible, and there is nothing in the record which conclusively establishes its falsity. Hence, we must accept it as substantial evidence in support of the judgment. "We reject defendant's attempt to reargue the evidence on appeal and reiterate that 'it is not a proper appellate function to reassess the credibility of the witnesses.' [Citation.]" (*People v. Thompson*, *supra*, 49 Cal.4th at p. 125.)

4. Cervantes' Testimony that Defendant was the Shooter

Defendant's challenge to Cervantes's testimony that defendant was the shooter is similar to his challenge to Villanueva's testimony. He points to evidence that Cervantes owned the Camry and was in the car at the time of the shooting, was originally arrested for the crimes, admitted lying to law enforcement and only implicated defendant after being threatened with a life sentence. Again, the jury heard the evidence bearing on Cervantes's credibility and believed his testimony. We are not free to reject it merely because there would be bases for doing so. (*People v. Thornton*, *supra*, 11 Cal.3d at p. 754; *People v. Mendez*, *supra*, 188 Cal.App.4th at p. 59.)

B. *Gang Expert Testimony*

Defendant contends the gang experts' testimony usurped the jury's function, thereby depriving him of his constitutional rights to trial by jury, a fair trial and due process of law. He complains that through the use of improper hypothetical questions, the experts were permitted to give opinions as to defendant's guilt. We disagree.

The California Supreme Court addressed the permissible scope of gang expert testimony in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*). The court addressed "the propriety of permitting the gang expert to respond to the hypothetical questions the prosecution asked regarding whether the" crime was gang related. (*Id*. at p. 1044.) The appellate court had held that the trial court erred in allowing the gang expert "'to testify

in response to a hypothetical question that the [crime], thinly disguised in the hypothetical[,] . . . was for the benefit of [the gang] and was gang motivated.'" (*Ibid*.)

The Supreme Court held that "[t]he Court of Appeal erred in condemning the hypothetical questions because they tracked the evidence in a manner that was only 'thinly disguised.'" (*Vang*, *supra*, 52 Cal.4th at p. 1045.) Experts are permitted to give opinions on the basis of hypothetical questions which ask the experts to assume the truth of their facts. (*Ibid*.) However, the "[u]se of hypothetical questions is subject to an important requirement. 'Such a hypothetical question must be rooted in facts shown by the evidence . . . .' [Citations.]" (*Id*. at pp. 1045-1046.) It "'"may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question." [Citation.]'" (*Id*. at p. 1046.) "The reason for this rule should be apparent. A hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Ibid*.)

As applied to the case before it, the court explained, "this rule means that the prosecutor's hypothetical questions had to be based on what the evidence showed these defendants did," in order to "help[] the jury determine whether these defendants . . . committed a crime for a gang purpose. Disguising this fact would only have confused the jury." (*Vang*, *supra*, 52 Cal.4th at p. 1046, italics omitted.)

The court rejected the claim that such expert opinion is "'objectionable because it embraces the ultimate issue to be decided by the trier of fact.' [Citations.]" (*Vang*, *supra*, 52 Cal.4th at p. 1048.) While an expert may not express an opinion on *the defendant's* guilt, which is "the ultimate issue of fact for the jury," the expert may express an opinion on that ultimate issue based on hypothetical questions rooted in the facts of the case. (*Ibid*.) That the expert's "opinion, if found credible, might, together with the rest of the evidence, cause the jury to find the [crime] was gang related," "'makes the testimony probative, not inadmissible.' [Citation.]" (*Id*. at pp. 1048-1049.)

The court also rejected the claim "that permitting these hypothetical questions invades the province of the jury. However, as noted, expert testimony is permitted even

if it embraces the ultimate issue to be decided. [Citation.] The jury still plays a critical role in two respects. First, it must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Vang*, *supra*, 52 Cal.4th at pp. 1049-1050, fn. omitted.)

Here, defendant argues that the hypothetical questions were impermissible under *Vang* because it was clear the experts were referring to him, rather than to a hypothetical defendant, and because the expert impermissibly gave an opinion on guilt. He also complains about the phrasing of some of the hypothetical questions. The prosecutor did not begin his questions with "assume hypothetically" but instead set forth the facts on which he wanted the expert to base his opinion, e.g., "There is a Lomas gang member in trial. . . ."

Defendant's first argument was rejected in *Vang*. Hypothetical questions which are merely "'thinly disguised'" statements of the evidence in the case are permissible. (*Vang*, *supra*, 52 Cal.4th at p. 1045.) Defendant's second argument is unsupported by the record. Prior to the facts quoted by defendant, the prosecutor stated, "I am going to give my hypothetical again."

Under *Vang*, the hypothetical questions were proper and they did not usurp the function of the jury. (*Vang*, *supra*, 52 Cal.4th at pp. 1048, 1049-1050.) Thus, the gang expert testimony properly was admitted and may be considered in determining whether there is sufficient evidence to uphold defendant's conviction.

C. *Prosecutorial Misconduct*

Defendant claims that "[t]he prosecution having failed to obtain a conviction at two previous trials, prosecutor Paul Kim [Kim] engaged in pervasive misconduct at this third trial."[10] This misconduct included "changing his theory and 'facts' he relied on in

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[10] Kim was the prosecutor at the second and third trials, but not the first. There was a different judge at each trial.

bad faith; leading his key witnesses; presenting inadmissible evidence; vouching for prosecution witnesses; misstating the evidence, arguing facts not in evidence and propounding outright falsehoods."

"The law governing prosecutorial misconduct is well established. 'Conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury" [citations] or "is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process" [citation].' [Citations.] A finding of misconduct does not require a determination that the prosecutor acted in bad faith or with wrongful intent. [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm. [Citation.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 617-618, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Reversal for prosecutorial misconduct is not required unless defendant has been prejudiced thereby (*People v. Fierro* (1991) 1 Cal.4th 173, 209), i.e. if it is reasonably probable defendant would have obtained a more favorable result absent the misconduct (Cal. Const., art. VI, § 13; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Watson* (1956) 46 Cal.2d 818, 836).

The People assert that defendant has forfeited his claims of prosecutorial misconduct due to his failure to object to the claimed acts of misconduct. Defendant counters that the misconduct was so pervasive that objection and admonition would not have cured the harm. Inasmuch as we conclude there was, in any event, no prejudicial misconduct, we need not resolve the forfeiture issue.[11]

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11 Where the defense did object to the claimed prosecutorial misconduct, we may discuss whether the failure to request an admonition resulted in forfeiture.

1. Changing the Facts and Theory of the Case

Defendant first claims the prosecutor committed misconduct by changing his theory of the case. At the first trial, it was argued that defendant committed the murder on the orders of a higher-ranking gang member. The prosecution made "flatly inconsistent factual presentations and arguments to the juries in multiple retrials that the defendant was a high-ranking gang member who committed a murder in order to 'school' younger gang members."

In support of this claim, defendant cites a number of cases dealing with the prosecution's duty to disclose all substantial material evidence favorable to the defendant and its duty to correct false or misleading testimony by prosecution witnesses which the prosecution knows or should know is false or misleading. (See, e.g., *In re Jackson* (1992) 3 Cal.4th 578, 593-597, disapproved on another ground in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 6; *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1014-1015.) He also relies on *U.S. v. GAF Corp.* (2d Cir. 1991) 928 F.2d 1253 for the proposition that the prosecution may not "make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts." (*Id*. at p. 1260.)

In *U.S. v. GAF Corp.*, *supra*, 928 F.2d 1253, the defendants were indicted for stock manipulation. Prior to trial, they requested a bill of particulars detailing the stock transactions referred to in the indictment. The bill detailed stock transactions in October and November. This trial ended in a mistrial. A second trial also ended in a mistrial. (*Id*. at pp. 1257-1258.)

Prior to the third trial, the prosecution filed an amended bill of particulars including only the October transactions. The defense sought to introduce the original bill of particulars into evidence, but the trial court disallowed it, ruling that it was not a pleading and the government was not bound by it. The court also ruled it was not admissible evidence. (*U.S. v. GAF Corp.*, *supra*, 928 F.2d at p. 1258.)

On appeal, the defendants contended that the amended bill of particulars should have been admitted as an admission of a party opponent. (*U.S. v. GAF Corp.*, *supra*, 928

F.2d at pp. 1258-1259.) They also complained "that the government's original version of the events, which linked the October and November trades, had been discredited at the second trial and the government, therefore, deliberately adopted fundamental changes in its version of the facts in order to enhance its chances of success." (*Id*. at p. 1259.)

After discussing the law concerning party admissions, the court stated: "We think that the same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation. Although the government is not bound by what it previously has claimed its proof will show any more than a party which amends its complaint is bound by its prior claims, the jury is at least entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims. Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts. [Citation.]" (*U.S. v. GAF Corp., supra*, 928 F.2d at p. 1260.)

In support of his claim that the prosecutor presented false and misleading testimony, defendant points to changes in Cervantes's testimony between the first and third trials. A review of these changes suggests they resulted from a difference in questions asked, most likely due to an oversight on the part of the prosecutor, and from appellate counsel's misreading of the transcript.

At the first trial, Cervantes testified that after stopping at the house on Graves Avenue, three men got into the car with them. He was asked how old they were, and he responded that one was in his mid-20's, and the other two were in their late teens. He was in the back seat with two of the men, and the third was in the front passenger seat.

Cervantes testified that when they stopped at Strathmore Avenue, defendant said, "Where are you vatos from?" The prosecutor asked if any of the three men said anything, and Cervantes answered that one of the men in the back seat said, "Lomas."

The prosecutor asked what was the next thing he saw, and Cervantes answered, "I seen the front passenger handing him a gun and telling him to shoot, to shoot, to shoot them, you know. And he fired. He fired toward—towards the car." When asked, Cervantes said that he told Sergeant Rodriguez that he saw the front passenger pass the gun to defendant. The prosecutor later asked if he remembered the names of the three men. Cervantes said he knew the gang nickname of one of the men, "Silent."

In argument, the prosecutor stated that Cervantes cried and "had to compose himself before he was able to testify honestly and truthfully about what his own family had done. After stopping at the house on Graves Avenue when they got into the car, "one of the three—I'm going to call them 'boys' because he said they were young—got into the front seat and two of them were in the back."

The prosecutor continued by stating that after defendant asked where Saenz and Villanueva were from and they said they were from nowhere, "[w]ithout even a second passing, the defendant pulls out a gun, points at the car shooting at least four times killing [Saenz], one bullet in the head. [¶] [Cervantes] told you that whoever was in the front passenger [seat] of that car passed the defendant a gun and said, 'shoot, shoot, shoot.' [Cervantes] didn't remember testifying—or telling the police that he didn't remember telling that to the police. [¶] But . . . Detective Labbe said, yes, he did not tell us that the front passenger passed the defendant the gun. [Cervantes] got on the stand and remembers clearly at this point that the front passenger passed the defendant a gun telling him to shoot, and the defendant shot four times. . . ."

At the second trial, Cervantes testified that after the interchange between defendant and Saenz and Villanueva, "The passenger passed [defendant] a .357." The prosecutor asked whether defendant said anything to the passenger, and Cervantes answered that defendant said, "Pass me the gun." The prosecutor asked why Cervantes did not say that earlier, and Cervantes said it was because he was nervous."

On cross-examination, defense counsel questioned Cervantes about telling the police that he did not know where the gun came from. Cervantes testified that the first

trial was the first time he said anything about the front passenger handing the gun to defendant, and he identified that passenger as "Silent."

Defendant states that at the third trial, "Cervantes' story changed considerably. There was no mention of 'Silent.' This time [defendant] and Cervantes made a stop at the In 'N Out Burger on Strathmore. [Citation.] Cervantes claimed he was sitting in the back seat of the car, but there was no mention of someone handing a gun to [defendant] or anyone telling [defendant] to 'Shoot, shoot, shoot.' [Citation.] Cervantes' testimony was that [defendant] just suddenly shot somebody without saying anything."

At the third trial, Cervantes testified as follows:

"Q [Kim] What happened when you got to this house?

"A [Cervantes] We went with three other people.

"Q What happened?

"A I was going to be taken home.

"Q What happened as you were about to go home?

"A We made an in 'n out stop at Strathmore.

"Q At Strathmore and Graves?

"A Yes.

"Q What happened there?

"A Well, [defendant] shot somebody."

Clearly, Cervantes did not testify that they made a stop at the In-N-Out Burger. He did not mention Silent passing the gun to defendant, but the prosecutor did not ask him where defendant got the gun. Defense counsel could have brought out the discrepancies in Cervantes' testimony in an effort to discredit Cervantes. He brought up other discrepancies, such as Cervantes telling the detectives that defendant got out of the Camry, walked over to the other car and shot Saenz or that there were only three people in the Camry, not five. Defense counsel asked Cervantes whether he saw the gun; when Cervantes said he did, counsel asked what kind it was, and Cervantes said it was a .357. At that point, counsel could have asked where the gun came from, but he did not.

Defendant also claims that at the third trial, "the prosecutor argued that [defendant] is a 'hard-core,' experienced gang member, 100% committed to the gang, and was highly placed enough to teach younger gang members how to be gangsters. [Citation.] Through hypotheticals, Kim presented to the jury the theory that [defendant] was an older, more experienced gang member who shot Saenz as part of 'schooling' the younger gang members in the car. [Citation.] From the first trial to this trial, the other people in the car morphed from hardened men ranging in age from their late teens to early twenties [citation], to 'little young kids.' [Citation.] This was a 180-degree change in theory, with perjured 'facts' to match."

As previously stated, the prosecutor at the first trial described the three passengers as "'boys' because he said they were young." At the third trial, it was Villanueva who described the passengers in the back seat as "little young kids," not Cervantes or Kim.

In addition, defendant creates Kim's "argument" from various parts of the record, not from his actual argument to the jury. It was Deputy Morales who testified that defendant had a tattoo on his neck indicating he was 100 percent committed to Lomas and that in 2005, defendant was a very active gang member and high up in the gang's chain of command. Kim then asked him, "We are talking about the structure of a gang? How is it that the new individuals—the young gang members that just got jumped in, how is it they learn how to put in work?" Deputy Morales responded, "They learn from the older gang members who have been around for awhile and who have done the crimes, who have gotten the status and respect from other gang members, who have gotten the fear from rival gang members that they are hard core. The newer ones typically look up to the more experienced gang members."

Kim then moved on to a hypothetical question regarding the use of the phrase, "Where are you vatos from?" He presented Deputy Morales with a hypothetical question in which the speaker is an older gang member driving the car and there are younger gang members in the car. He asked, "Is that some sort of schooling lesson?" Deputy Morales said it was and explained what the lesson was.

In order to emphasize his point, defendant draws wholly unreasonable inferences from the record. From Cervantes's testimony at the first trial that the front seat passenger handed defendant the gun and told him to shoot, defendant argues that "at the first trial Cervantes testified that [defendant] committed the murder on the orders of a higher-ranking gang member." Nothing in Cervantes's testimony indicated that the front passenger was a higher-ranking gang member or that he ordered defendant to shoot.

In addition, defendant points to nothing in Kim's argument at the third trial which suggests that the age of three gang members in the Camry with defendant and Cervantes or where defendant got the gun was a critical part of the prosecution's case. None of the changes in Cervantes's testimony from trial to trial suggests that Kim was manipulating or falsifying the evidence in order to obtain a conviction. Neither can we characterize these changes as "a fundamental change in [the prosecution's] version of the facts between trials." (*U.S. v. GAF Corp.*, *supra*, 928 F.2d at p. 1260.)

2. Leading the Witnesses

Defendant devotes several pages in his opening brief to what he describes as leading questions and their answers. He characterizes this as improper prosecutorial testifying and thus misconduct.

Defendant relies on the well established principle that it is misconduct to ask questions calling for inadmissible and prejudicial answers. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) However, nowhere in his pages of objectionable questions and answers does he identify any answers which contained inadmissible and prejudicial evidence. Therefore, even if the prosecutor improperly asked leading questions, defendant has failed to show that this constituted prejudicial misconduct, i.e., that it is reasonably probable he would have obtained a more favorable result had the misconduct not occurred. (*People v. Hill*, *supra*, 17 Cal.4th at p. 844.)

3. Improper Expert Testimony

Defendant contends that the prosecutor improperly elicited expert testimony from Sergeant Rodriguez on the effects of methamphetamine on Villanueva's ability to perceive and recall. He further contends this constituted improper vouching for Villanueva's credibility.

The effect of methamphetamine on Villanueva's ability to perceive and recall the events in question was an issue at trial. Both the prosecutor and defense counsel questioned Villanueva in depth on this matter. On redirect examination, the prosecutor questioned Sergeant Rodriguez as follows:

"Q In your experience as a Los Angeles Sheriff's homicide detective, have you come across individuals that smoke methamphetamine before?

"A On a frequent basis, yes.

"Q Based upon your experience dealing with these sorts of individuals, have you been able to develop some sense of telling whether somebody is under the influence?

"A That as well as other experience I obtained.

"Q What has your experience been with individuals who smoke methamphetamine when it comes to their ability to interview with you and recite facts?

"A Most that I've spoken to can relate coherently information, describe information, if not be even more precise and sensitive when they are under the influence of methamphetamine.

"Q When you spoke to Luis Villanueva, was he able to relate to you the historical facts of what had happened while he was at the corner of Strathmore and Graves?

"A Yes."

Defendant relies on the principle that "'[e]vidence of habitual narcotics . . . use is not admissible to impeach perception or memory unless there is expert testimony on the probable effect of such use on those faculties.' [Citations.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 794.) The testimony complained of, however, was not about Villanueva's long-term methamphetamine use and its effect on his ability to perceive or remember. It

was on Sergeant Rodriguez's ability to determine whether someone was under the influence of methamphetamine, the ability of such a person to relate facts during an interview, and specifically whether Villanueva was able to relate facts concerning the events at issue. The testimony was based on the sergeant's experience and training as a police officer.

A police officer may testify as to whether someone is under the influence or not; expert testimony is not required. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1308; *People v. Williams* (1988) 44 Cal.3d 883, 914-915.) He may also give lay opinion testimony based on his own observations. (*McAlpin*, *supra*, at pp. 1308-1309.) Sergeant Rodriguez did no more than this.

Neither did Sergeant Rodriguez impermissibly give a "[l]ay opinion about the veracity" of Villanueva's statements or testimony. (*People v. Melton* (1988) 44 Cal.3d 713, 744.) He testified that Villanueva was able to "relate . . . the historical facts of what had happened." He made no comment on the "veracity of particular statements by" Villanueva. (*Ibid*.) Hence, there was no improper vouching for Villanueva's credibility.

4. Suggestion that the Prosecutor Had Evidence Outside the Record that Bolstered Villanueva's and Cervantes's Testimony

Defendant challenges testimony elicited from Detective Rodriguez regarding Villanueva's identification of defendant at the preliminary hearing, and the prosecutor's commentary on that testimony. Detective Rodriguez testified regarding the fear and reluctance witnesses have when asked to testify in gang cases. He discussed Villanueva's demeanor at the preliminary hearing, seeing the judge admonish Villanueva, and his conversation with Villanueva outside the courtroom. After a hearsay objection by defendant, the testimony proceeded as follows:

"Q Without telling us what you talked about, did you discuss his fear?

"A Yes.

"Q Did you discuss the need to be honest?

"A Yes, I did.

"Q After you had this conversation with Mr. Villanueva, would you say that his anxiety, at least in your lay opinion, appeared to have increased or decreased?

"A I would say momentarily decreased but subsequently increased.

"Q At that point did Mr. Villanueva go back into court?

"A Yes, he did.

"Q Did the judge yell at him again, or was the judge polite at that point?

"A The judge was back to a calm demeanor.

"Q Did Mr. Villanueva then make his identification while the judge was calm?

"A Yes."

The prosecutor, in arguing Villanueva's credibility to the jury, asked, "[D]id he seem to you the type of person that comes into this courtroom armed with prepared and prepackaged lies and then remembers them? I don't think so. I don't think that's the read you got. If you did, that's your privilege. . . . You're the jury. It's your right, but I submit to you that, when you look at it under the totality of the circumstances, Luis Villanueva came in here and told you what he remembers.

"He told you why he wouldn't identify the defendant, because he was scared of him and he was living in that territory. And then he gets identified at the preliminary hearing, same thing, and [defense counsel] made a big thing out of it. He's saying, well, there is a judge that yelled at . . . Mr. Villanueva.

"Luis Villanueva told you, 'I wasn't honest with the judge.' He told you why he wasn't being honest. That judge said something, told 'em to go outside and straighten himself out and come back in. [¶] Here is the interesting thing Luis Villanueva said over and over again. 'I wasn't being honest with the judge.' He was not being honest with a judge. I submit to you, if a witness came in here, wasn't being honest, it might fluster this judge.

"The fact of the matter is Luis Villanueva explained what happened. 'I felt better after I talked to [Sergeant] Rodriguez. I came in. Yeah, I was scared, but I did the right thing."

"A prosecutor may make 'assurances regarding the apparent honesty or reliability of' a witness 'based on the "facts of [the] record and the inferences reasonably drawn therefrom."' [Citation.] But a 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 432-433.)

Defendant claims that the prosecutor improperly vouched for Villanueva's credibility based on facts outside the record, i.e., the conversation between Villanueva and Sergeant Rodriguez which "strongly suggested to the jury that [Sergeant] Rodriguez was monitoring Villanueva's honesty and credibility, and that Villanueva's story had been independently confirmed by an experienced Sheriff's deputy." We see nothing in the testimony and argument to support defendant's claim. Sergeant Rodriguez testified as to Villanueva's demeanor while testifying at the preliminary hearing. While he testified that he told Villanueva to be honest, he did not testify that after their talk, Villanueva *was* honest. And the prosecutor told the jury to look at the totality of the circumstances in determining whether Villanueva testified truthfully. He never told the jury to rely on Sergeant Rodriguez's assessment of Villanueva's credibility.

This case is distinguishable from *U.S. v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, on which defendant relies. In *Rudberg*, an F.B.I. agent testified that the witnesses had received reduced sentences in exchange for their cooperation. The prosecutor then asked whether "the statement [the witnesses] gave you with regard to their supplier prove[d] out to be accurate." The agent responded, "Very much so." The court found that this testimony invited the trier of fact "to infer that witnesses who are given [reduced sentences in exchange for their cooperation] receive them because their stories have been independently confirmed by experienced F.B.I. agents." (*Id*. at pp. 1201-1202.) In argument, the prosecutor stated as part of their sentence reduction deal, the witnesses came to court to tell the truth about the drug conspiracy. This comment, combined with the testimony, constituted vouching for the witnesses' credibility. (*Id*. at p. 1204.)

Here, Sergeant Rodriguez did not testify as to the truthfulness of Villanueva's testimony, only that he exhorted Villanueva to be honest. The prosecutor argued Villanueva's credibility based on the evidence, not on Sergeant Rodriguez's extra-judicial verification of Villanueva's testimony. Hence, there was no improper vouching. (*People v. Turner, supra*, 34 Cal.4th at pp. 432-433.)

As to Cervantes, defense counsel asked him on cross-examination whether he was testifying under a grant of immunity. He said he was not. Defense counsel asked if he had ever been granted immunity in this case. He responded, "It comes with the subpoena, no?" After further questioning, he testified he "got it one time," in "[t]he first proceedings."

In the prosecutor's argument, he was talking about the fact that no one mentioned the birthday party on August 21 after defendant was arrested in December. He argued, "Why is this corroboration important? One of the things [Cervantes] testified to, [defense counsel] asked, 'Aren't you testifying under a grant of immunity?' That's why we have this document here in court for you to look at. [¶] It's use immunity. We've heard about immunity all the time. You hear about it every time there's more than one person involved in anything. The agreement is between the People, and the witness believed Omar Jimenez shot and killed Arturo Saenz. The witness is required to testify truthfully."

After explanation of use and transactional immunity, the prosecutor stated, "The limitation of this agreement is we made an agreement with 'em, and remember this agreement was made in 2007. What is significant is when [Cervantes] testified, he forgot about this. So long ago, he forgot all about it, and when [defense counsel] asked him about it, what did he say? 'No.' Why? Because you can see it was signed in '07, not in '09."

The prosecutor went on to discuss liability as an aider and abettor and the lack of evidence that Cervantes aided and abetted defendant. He did not return to the significance of the immunity agreement.

Defendant contends the prosecutor improperly vouched for Cervantes' credibility by stating that he was required to testify truthfully. Unlike the situation in *U.S. v. Rudberg*, *supra*, 122 F.3d 1199, there was no law enforcement testimony verifying the accuracy of Cervantes's statements. Additionally, the prosecutor did not state that Cervantes testified truthfully, only that the immunity agreement required him to do so. Therefore, there was no impermissible vouching. (*Id*. at p. 1204.)

Defendant further contends that the prosecutor argued facts not in evidence when he stated that Cervantes "forgot" about the immunity agreement, since Cervantes never testified that he forgot about the agreement. That Cervantes forgot about the agreement is a reasonable inference from the evidence of the agreement and his testimony that he was not testifying under a grant of immunity. The prosecutor may argue reasonable inferences drawn from the evidence. (*People v. Bonilla* (2007) 41 Cal.4th 313, 337; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1047.)

Defendant's claim that the prosecutor's explanation of the differences between use and transactional immunity amounted to arguing facts not in evidence has some merit. While argument generally is limited to matters in evidence, the prosecutor also may argue matters based on common knowledge or experience. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) We do not believe the differences between use and transactional immunity are matters of common knowledge or experience. However, we see nothing prejudicial in the prosecutor's discussion of these differences, since it was brief and was not used to make any particular point with respect to the case. Any misconduct in this regard therefore does not require reversal. (*People v. Fierro*, *supra*, 1 Cal.4th at p. 209.)

5. Villanueva's Church Attendance and Prayers for Defendant

On cross-examination, defense counsel questioned Villanueva about his previous statements that he felt bad that defendant did not go to jail and he wanted to see somebody pay for the crime.

On redirect examination, the following colloquy took place:

"Q [Prosecutor] [Defense counsel] asked whether you are angry . . . . Do you have any anger towards the defendant right now?

"A [Villanueva] No.

"Q How is that? He shot and killed your friend. He almost killed you.

"A Yes.

"Q How can you not be angry at a man who does that?

"A I'm—I'm not angry at 'em.

"Q How did you get over your anger?

"A Praying. I pray for him too.

"Q How often do you pray? [¶] . . .[¶]

"A Every day.

"[Defense counsel]: Objection. Irrelevant.

"The Court: Overruled.

"Q [Prosecutor]: How often do you go to church?

"A Every day.

"Q Do you pray for the defendant all the time?

"A Yes.

"Q The oath you took when you walked into this courtroom to be honest in front of the jury, was that an important oath to you?

"A Yes."

Further questioning elicited testimony that Villanueva had no reason to lie to the jury, and he would not want an innocent person to go to jail. Villanueva also was "a hundred percent" certain that defendant shot and killed Saenz.

In argument, defense counsel argued that "[a]t the preliminary hearing the judge . . . bullied [Villanueva] into changing his story when he kept saying 'I didn't see who it was. I didn't see 'em, but that's not the shooter." Then in "[t]he first proceedings after that, [Villanueva] testified he didn't see [defendant] in the car. That's under oath, the same oath he was testifying [under] in this court. I don't know if an oath means anything

to him." Counsel also reminded the jury of Villanueva's earlier testimony that he wanted to see someone pay for the crime.

In closing argument, the prosecutor pointed out to the jury Villanueva's testimony that he initially was not cooperating with law enforcement. The prosecutor then argued: "Again, do you think he is a practiced liar because, if you do, that's your right and your privilege and I respect that, but I ask you, in fairness, did he strike you like that type of person?

"Remember what he said when [defense counsel] asked him, 'Well, don't you want vengeance, want somebody to pay for this?' He said, 'I have been going to church virtually every day. I'm praying for that man.' Do you think he was lying about that? It's your call.

"If you find that you think Luis Villanueva was lying, then don't listen to what he said, but have a reason. Everything is based on the reasons why. If you choose not to believe Luis Villanueva, when you go back to the jury room, you state your reason why, and what I request and I ask of you to look at the totality of this case. Don't go in there with blinders on and focus on one little detail. . . ."

Evidence Code section 789 provides: "Evidence of his religious belief or lack thereof is inadmissible to attack or support the credibility of a witness." Based on this provision, defendant claims that "[t]he evidence of Villanueva's prayers and his daily church attendance was clearly inadmissible."

While superficially it appears that the prosecutor was using evidence of Villanueva's religious belief to support his credibility, on closer examination we conclude this was not the case. Defense counsel introduced evidence that Villanueva was angry about Saenz's death and wanted someone to pay for it, implying that Villanueva was lying in order to make someone—defendant—pay for the crime. In response, the prosecutor introduced evidence of Villanueva's churchgoing and prayer to explain why he was no longer angry and no longer wanted to make someone pay regardless of guilt or innocence. The point was not that Villanueva was telling the truth because of his religious beliefs but that Villanueva was telling the truth because he had no motive to lie.

This point was brought home in the prosecutor's closing argument. The prosecutor emphasized that in order to determine whether or not Villanueva was lying, the jury should look at the totality of the circumstances and not any particular detail. Accordingly, there was no violation of Evidence Code section 789.

Defendant also cites cases which stand for the proposition that "[a]ppeals to racial, ethnic, or religious prejudice during the course of a trial violate a defendant's Fifth Amendment right to a fair trial." (*U.S. v. Cabrera* (9th Cir. 2000) 222 F.3d 590, 594.) The brief reference to Villanueva's religious practices, followed in argument by an exhortation to judge his credibility by the totality of the circumstances, did not amount to a denial of defendant's right to a fair trial. (See *U.S. v. Amlani* (9th Cir. 1997) 111 F.3d 705, 714.)

6. Gang Evidence

Defendant contends that the prosecutor elicited inadmissible gang testimony, vouched for the credibility of his gang experts, misstated the gang evidence, improperly suggested that the hearsay the gang experts relied upon could be considered for its truth, and argued facts not in evidence regarding the gang issue.

First, defendant claims the prosecutor committed misconduct by eliciting testimony from Detective Silva that Espinosa and Pacheco were gang members, "based on incompetent hearsay." Defendant relies on *People v. Killebrew* (2002) 103 Cal.App.4th 644, disapproved on another ground in *Vang*, *supra*, 52 Cal.4th at page 1049. In *Killebrew*, the court expressed the principle that "[a]n expert may not testify to incompetent hearsay under the guise of stating reasons for an opinion. [Citations.]" (*Killebrew*, *supra*, at p. 659.) The "incompetent hearsay in that case included criminal records, photographs of the purported gang members, the color of their clothing and who they associated with, the officer's training and experience, and his conversations with gang members and non-gang members in the community. "This testimony varied from convictions, to arrests without convictions, to pure speculation." (*Ibid*.)

A gang expert "may give opinion testimony that is based upon hearsay, including conversations with gang members . . . . [Citations.] Such opinions may also be based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) The expert may rely on inadmissible hearsay so long as it is of a type reasonably relied upon by experts. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.)

Detective Silva based his opinion as to Espinosa's and Pacheco's gang membership on his contacts and familiarity with them and their criminal histories. This was a proper basis for his opinion testimony. (*People v. Vy*, *supra*, 122 Cal.App.4th at p. 1223, fn. 9; see, e.g., *People v. Gardeley*, *supra*, 14 Cal.4th at pp. 619-620.)

Defendant also complains of the prosecutor's argument with respect to the question whether Cervantes was an aider and abettor as a fellow gang member of defendant's. The prosecutor argued that if Cervantes were a fellow gang member, he would not testify against defendant, which "corroborates Deputy Morales and Sergeant Detective Silva['s]" testimony that Cervantes was not a gang member. The prosecutor stated: "Think about the gang member that gang members [Espinosa and Pacheco] did testify against. The only person they identified as a gang member, aside from the obvious, is Emmanuel Cervantes, and they both denied being gang members, and they are the ones that Detective Silva and Deputy Morales told you these guys are definitely gang members.

"That's why I call this the bizarre defense. The people that know, the detectives on the street that work Temple Station, they know what they are doing. Michael Pacheco and Gabriel Espinosa are the only ones who know who the gang members were. Does that make sense? The two people [the defense is] asking you to rely on are the two people who insist they aren't in that gang."

It is prosecutorial misconduct to argue facts not admitted into evidence. (*People v. Benson* (1990) 52 Cal.3d 754, 794-795.) It is true that Deputy Morales and Detective Silva testified that they had no information which would lead them to believe Cervantes

was a gang member, not that he was not a gang member. To the extent the prosecutor misstated their testimony, defendant cites no authority to suggest that this amounts to prosecutorial misconduct in the form of arguing facts not in evidence.

As to the comment that the detectives on the street know what they are doing, in context it is clear that the prosecutor was not personally vouching for the credibility of Detective Silva and Deputy Morales. (*People v. Turner*, *supra*, 34 Cal.4th at pp. 432-433.) He was comparing the knowledge of the law enforcement officers in the community against the contrary testimony of Espinosa and Pacheco, and asking the jury to find the law enforcement officers more credible. Hence, there was no prosecutorial misconduct in the form of vouching.

7. Methamphetamine Evidence

After stating that Villanueva's testimony was "the best evidence of Emmanuel Cervantes' role in this incident," the prosecutor launched into a story about a friend of his who was a recovering alcoholic. He then stated: "I don't know where the evidence in this trial that suggests to you that somebody on methamphetamine becomes like incapable of comprehension. You know, if you listen to the horror of World War II, they say part of the reason Hitler's troops were able to get past the Frenchmen, a non-line, because he gave them methamphetamine. If you look to our own military history, we have used methamphetamine with fighter pilots, with truckers."

At this point, defense counsel objected that "[w]e have no evidence that was used whatsoever." The trial court sustained the objection.

As previously stated, "[t]o preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm." (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 618.) Here, the defense objected but failed to seek an admonition that the jury was to ignore the prosecutor's unsupported discussion of the use of methamphetamine by the military. Hence, the claim of prosecutorial misconduct is forfeited.

In any event, there is no reasonable probability that the prosecutor's rather pointless musings affected the jury's verdict. Therefore, reversal for prosecutorial misconduct would not have been required. (*People v. Hill*, *supra*, 17 Cal.4th at p. 844; *People v. Fierro*, *supra*, 1 Cal.4th at p. 209.)

D. *Pitchess Motion*

Prior to trial, defendant made a *Pitchess* motion to discover accusations of dishonesty against three sheriff's deputies, Shaughnessy, Moltmann and Zabata. The motion concerned alleged falsification of information on field identification cards of Lomas gang members. Following a hearing, the trial court concluded there was no discoverable evidence to turn over to the defense.

Defendant has requested that we review the transcript of the in camera hearing on defendant's *Pitchess* motion to determine whether the trial court's ruling was correct. We have reviewed the transcript of the hearing and are satisfied that no discoverable material was withheld from defendant. The trial court did not abuse its discretion in denying defendant's motion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

E. *Correction of Abstract of Judgment*

The trial court sentenced defendant to consecutive terms on counts 2 and 4, attempted murder and shooting at an occupied motor vehicle. However, the abstract of judgment reflects concurrent sentences on those two counts. It therefore must be corrected to reflect the sentence imposed. (*People v. Olmsted* (2000) 84 Cal.App.4th 270, 278; accord, *In re Candelario* (1970) 3 Cal.3d 702, 705.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to reflect consecutive sentences imposed on counts 2 and 4 and to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.