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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN DAVEILO DUKE, Defendant and Appellant.	B264579 (Los Angeles County Super. Ct. No. MA057733)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Reversed with directions.

Fay Arfa for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Colleen M. Tiedermann and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jonathan Duke challenges his first degree murder conviction for his role in the killing of Victor Enriquez. The People alleged that Duke helped Alfred Crowder corner Enriquez at the security gate of an apartment complex in Palmdale, where Crowder stabbed him repeatedly. Duke raises several challenges to his conviction. We reverse Duke's conviction based on *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), decided after the trial but while this matter was pending.[1]

FACTS AND PROCEEDINGS BELOW

On October 17, 2012, Enriquez was stabbed to death inside the security gate of an apartment complex in Palmdale. Los Angeles County Sheriff's Department deputies arrested Crowder and Duke. An information charged Duke with one count of murder (Pen. Code, § 187, subd. (a))[2], and alleged that Duke had committed the offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(4).) The two defendants were tried separately.[3] They had different defense attorneys, but the prosecutor was the same in both trials.

Evidence indicated that virtually all those involved in the case—the victim, the perpetrators, and the most important witnesses—were members of, or associated with, various street gangs. According to a sheriff's deputy who testified as an expert witness, members of many different gangs reside in close proximity to one another in Palmdale. Gang members typically arrive in Palmdale when their families relocate from other areas of Los Angeles County. Because most gang members are transplants from other areas, gangs in Palmdale generally have less clearly defined territories than elsewhere.

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[1] Duke has also filed a petition for a writ of habeas corpus, which we address in a separate order.

[2] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[3] We decide Crowder's appeal (B256412) in a separate opinion.

Enriquez, the victim in this case, and Duke were both members of the Rollin' 60's, a gang associated with the Crips. Crowder, Duke's codefendant who played the lead role in the stabbing, was a member of the Fruit Town Piru gang, which is associated with the Blood Nation. Terrence Dorsey, Enriquez's friend who testified against Duke, was affiliated with the Kitchen Crips gang but he testified that he had not been active in the gang for many years. Three other key witnesses, Anthony Palmer, Deon Tatum, and Kenneth Thomas, were all members of Dime Block, a small gang that started in the area near where the murder took place. In other areas of Los Angeles County, members of these different gangs might be enemies, but because of the lack of well-defined gang territories in Palmdale, members of the gangs in the Palmdale area often associate with and ally with one another.

Palmer testified that, although they were both members of the same gang, Duke and Enriquez had disliked one another since at least June 2012, when they got into a fistfight after Enriquez told people that Duke was not a true member of the Rollin' 60's because he had not been jumped into the gang.

According to Palmer, in the months prior to the shooting, rumors spread among gang members in the area that Enriquez was a snitch, and that when police had discovered a gun that might have belonged to him, he blamed his own brother, another member of the Rollin' 60's. Palmer heard that Enriquez might have provided the police with information that led to Palmer's conviction for felony theft. Detective Richard O'Neal, a sheriff's deputy assigned to the gang detail, confirmed these rumors, testifying that Enriquez had been a police informant for a couple of months, and that his information led to the arrest of a drug dealer named Kevin Hart on the same day that Enriquez was later murdered.

The prosecution presented four accounts from witnesses who either testified or told police that they witnessed the stabbing or the events immediately before and afterward. Two of these witnesses, Palmer and Dorsey, testified at trial. The other two, Tatum and Thomas, testified that they did not know or could not remember anything about the murder, but

the court admitted their prior statements made to the police in which they described what happened immediately before and after the stabbing.

Palmer testified that, on the night of the stabbing, Duke, Crowder, and several other gang members congregated outside Duke's home, which was located across the street from the apartment complex where Enriquez was located. Upon seeing Enriquez inside the gate of the apartment complex, the group talked about retaliating against him for his snitching. Crowder and Duke said they "got to do something to" Enriquez. Duke encouraged Palmer to shoot Enriquez in retaliation for Enriquez's role in securing Palmer's conviction for felony theft. According to Palmer, Duke offered to obtain a gun for Palmer to use, but Palmer said they should wait until later, when fewer people were around.

Palmer left the group but returned approximately 30 minutes later. When he returned, he saw Duke and Crowder walking across the street toward the security gate of the apartment complex where Enriquez and Dorsey were located. He saw Crowder punch Enriquez, and Duke joined in, hitting Enriquez once or twice. Enriquez tried to run away, but Crowder pursued Enriquez and fell on top of him. At this point, Palmer saw that Crowder had a knife in his hand. Duke did not help Crowder chase down Enriquez, but stayed at the gate. Afterward, Duke and Crowder walked back across the street, and Palmer and the others ran away.

Tatum, another member of the Dime Block gang and an associate of Palmer, testified that he did not see the stabbing and said he could remember nothing in relation to it. The prosecution played a recording of Tatum's police interview made shortly after Enriquez was killed in which Tatum described events shortly before and after the stabbing consistent in most respects with Palmer's testimony and adding details of events that occurred when Palmer was not present. Tatum told police that while the group was congregated outside Duke's house, he saw Duke and Crowder get "big ass knives" and start jumping around and displaying them. According to Tatum, Crowder's knife looked like "brass knuckles," while Duke's was a large kitchen knife. Tatum saw the two holding the knives as they walked across the street toward the gate to the apartment complex

where Enriquez was located. Tatum then left the scene, explaining that he did not believe anything would happen and that he did not want to witness a stabbing. Tatum identified Duke and Crowder from a photo array as the people he saw holding the knives.

Dorsey was a member of the same gang as Duke and Enriquez, the Rollin' 60's, a gang affiliated with the Crips. Dorsey testified that he and Enriquez spent the evening in an outdoor area of the apartment complex smoking marijuana. He saw Duke and Crowder approaching the security gate together. Enriquez asked Duke and Crowder if they wanted to enter, and held the door open for them. According to Dorsey, Crowder pulled Enriquez toward him and stabbed him. Dorsey then ran away.

Kenneth Thomas, a member of a local unaffiliated gang, and one of the group that gathered near Enriquez's building, testified that he had never seen Duke before, and that the police were trying to get him to lie about witnessing the stabbing. Detective Brandt House, a deputy in the Los Angeles County Sheriff's Department, testified that he interviewed Thomas a few days after the stabbing, and that on that occasion, Thomas told him that he saw the stabbing. According to Detective House, Thomas told him that he saw Enriquez on the ground with two men standing over him. One of the men was bent over and appeared to be striking Enriquez with a knife. Thomas said that the other attacker was "posted up," standing at the ready to assist the primary attacker. Thomas told Detective House that he believed the second attacker also had a knife, and that he had struck Enriquez. Thomas also remembered Dorsey being present with Enriquez, but said that Dorsey was not one of the attackers. The primary attacker then got into a car. Thomas refused to identify the attackers from a photographic lineup.

A prosecution medical expert who performed an autopsy on Enriquez testified that Enriquez had been stabbed 15 times, and that more than half of the stab wounds could have been fatal.

Deputies arrested Crowder two days later, on October 19. They discovered Crowder had a cut and a scrape on his right knee, which was consistent with an injury he might have suffered when, according to Palmer's testimony, Crowder tripped and fell over Enriquez during the

attack. Deputies searched Crowder's home and found a shoe with dried blood on it. Lab tests revealed the blood contained DNA from Enriquez, as well as from an unknown person, but not from Crowder or Duke. Acting on information from an anonymous caller, deputies discovered two knives in an abandoned mattress near the stabbing location. One of the knives had finger holes and appeared to have blood on it. Lab tests showed that the blood contained Enriquez's DNA and DNA from an unknown party. The other knife was a serrated kitchen knife that did not appear to have blood on it. According to the prosecution's medical expert, the knife with finger holes could have caused all of Enriquez's wounds, and the kitchen knife would not have caused wounds like those Enriquez suffered.

Sheriff's department deputies testified as expert witnesses regarding gangs. Detective Daniel Welle, the investigating officer in the case, was of the opinion that Crowder was a member of the Fruit Town Pirus, relying on Crowder's tattoos and field identification card (FI card).[4] The same deputy testified that he believed Duke was a member of the Rollin' 60's. He relied on Duke's tattoos, photographs of Duke flashing gang signs, and an FI card in which Duke identified himself as a member of the Rollin' 60's. The same deputy testified that a crime like the one Duke and Crowder were accused of committing would have been for the benefit of their gangs. Detective O'Neal testified that the stabbing was for the benefit of the Rollin' 60's because it eliminated a snitch from the gang, and also benefited the Fruit Town Piru, Crowder's gang, to a lesser extent by eliminating a snitch and displaying the gang's capacity for violence.

Palmer and Duke both had tattoos reading "BOPK," standing for Bloods on Point Killer. This indicated that they were both opposed to the Bloods on Point gang.

The defense attempted to show that others had motive to kill Enriquez. According to Palmer, a gang member known as Take Down broke Enriquez's jaw after Enriquez hit Take Down's pregnant girlfriend. Palmer had heard that Enriquez had snitched on Enriquez's own brother

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[4] Witnesses in the record referred to these cards as both field interview and field identification cards.

for illegal gun possession. Palmer also heard that Enriquez had snitched on him, leading to a conviction for receiving stolen property. In addition, Palmer and Enriquez had once dated the same woman. Palmer admitted he would retaliate against a snitch, but claimed he would not have done so in this case because he did not have proof that Enriquez was a snitch.

Saquena Monroe, Enriquez's former partner and the mother of two of his children, testified that Enriquez had fought with members of the Dime Block gang, including Palmer. According to Monroe, Enriquez had told her that members of Dime Block had threatened him. The mother of Enriquez's other child told Monroe that Enriquez had fought with someone from his neighborhood because Enriquez had been messing around with a woman who dated someone in Dime Block.

A jury found Duke guilty of first degree murder, and found true the allegation that he committed the crime for the benefit of a criminal street gang. The trial court sentenced Duke to 25 years to life in prison.

DISCUSSION

Duke raises several contentions on appeal. He contends that (1) the prosecution committed *Brady*[5] error by failing to disclose impeaching evidence regarding relocation payments made to Palmer and Dorsey; (2) there was insufficient evidence to support his conviction; (3) the trial court committed reversible error by erroneously instructing the jury regarding the natural-and-probable-consequences doctrine for first degree murder; (4) the trial court violated his *Miranda*[6] rights by admitting information from an FI card obtained after Duke was in custody; the prosecutor erred by: (5) eliciting evidence of Duke's uncharged bad acts, (6) asking a gang expert improper hypothetical questions, and (7) arguing improperly during closing arguments; (8) his trial counsel rendered ineffective assistance by failing to present exculpatory evidence of alibi witnesses; (9) there was insufficient evidence to support the gang enhancement; and (10) the trial court allowed improper testimony regarding gang members' mental processes and

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[5] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

[6] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

actions. We reverse Duke's conviction because after the trial was over but while the case was still pending, our Supreme Court disapproved the jury instruction regarding the natural-and-probable-consequences doctrine. (See *Chiu*, *supra*, 59 Cal.4th at pp. 158-159.)

I. *Disclosure Of Cooperation Agreements With Prosecution Witnesses*

Duke contends that the trial court erred by denying Duke's motion for a new trial on the ground that the prosecution failed to disclose to the defense cooperation agreements prosecutors had made with Palmer and Dorsey. We disagree.

On December 11, 2012, the Los Angeles County Sheriff's Department applied for Palmer and Dorsey to obtain support from the California Witness Relocation and Assistance Program (CalWRAP). The next day, Palmer and Dorsey signed agreements promising to testify truthfully, among other requirements, as a condition for their participation in the program. The agreements did not contain any provision for payment to Palmer and Dorsey in exchange for their testimony, but they contemplated that Palmer and Dorsey would receive relocation assistance through CalWRAP. As part of the applications, the sheriff's department requested $10,050 to pay Palmer for his relocation expenses, and $9,225 for Dorsey's expenses. Duke's trial took place during October 2013. In November and December 2013, the CalWRAP program paid $8,385 for plane tickets, moving expenses, utilities, rent, and incidentals for Palmer and his family. The record indicates that the program paid approximately $1,100 for Dorsey's relocation expenses.

The prosecution did not disclose the relocation agreements to the defense during trial. In his cross-examination, Palmer testified that on one occasion, sheriff's deputies came to his house so that he could "sign[] some papers for relocation." Defense counsel asked, "What do you mean by 'relocation'?" Palmer replied, "That I move out of the area, and basically notifying me that I was moving out of the area." Palmer clarified later that he had moved to Las Vegas. On redirect, the prosecutor asked, "Did the detective help you with moving out to Las Vegas?" Palmer

answered, "I think he did. Him and my mother was talking to conversate [*sic*]."

Duke argues that the agreements to join the CalWRAP program constituted impeaching evidence, which the prosecution was required to disclose under *Brady*. In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady*, *supra*, 373 U.S. at p. 87.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043.) To establish prejudice, or the materiality of evidence, "[a] defendant . . . 'must show a "reasonable probability of a different result" ' " of his trial if the evidence had not been suppressed. (*Ibid.*)

In *People v. Verdugo* (2010) 50 Cal.4th 263 (*Verdugo*), a case with facts similar to those at issue in this case, our Supreme Court rejected a claim of a *Brady* violation on the basis of nondisclosure of relocation assistance. (*Id.* at pp. 284-285.) In *Verdugo*, the prosecutor obtained an ex parte order for up to $1,318 for relocation expenses on behalf of a witness who was under threat of retaliation. (*Id.* at p. 284.) The Court held that the prosecutor's failure to disclose this information to the defense was not a *Brady* error because "there is no 'reasonable probability its disclosure would have altered the trial result.' " (*Id.* at p. 285.) The Court noted that, even if the defense could use the existence of the payments to impeach the witness, the prosecution could have responded by showing that the witness relocated only because she was under threat. (*Ibid.*) If anything, the witness's "willingness to testify against defendant despite justifiable concerns about [the witness's] safety arguably would have enhanced [the witness's] credibility." (*Ibid.*)

Duke points out that this case differs from *Verdugo* in that the prosecution had already presented evidence that witnesses testified in spite of threats of retaliation. Consequently, Duke argues, the defense could have used the cooperation agreements to impeach Palmer and Dorsey without fear of the potential negative consequences the Court described in *Verdugo*. We are not persuaded. Evidence of the relocation agreements would not have merely been cumulative of the other evidence of potential retaliation against witnesses. It would have shown that the witnesses were so afraid of testifying that they were willing to leave their homes behind and move to a new state. Furthermore, both Dorsey and Palmer made statements to sheriff's deputies shortly after the killing, before they received any offer of relocation assistance. If Duke had introduced evidence of the relocation agreements at trial, the prosecution could have used those earlier statements to rehabilitate Dorsey and Palmer. (See Evid. Code, § 791, subd. (b).) At best, the impeachment value of the payment to move would have balanced the prejudicial effect. Or worse, developing the evidence that Palmer and Dorsey moved out of state out of fear of retaliation would have further supported their credibility. Indeed, Palmer testified about receiving assistance in moving out of Palmdale, but Duke's counsel did not pursue the matter. This suggests that Duke's attorney recognized that asking about the details of the relocation agreement would have most likely done his client more harm than good. We are not convinced that there is a reasonable probability that Duke would have obtained a better result in the trial if the jurors had known more about the cooperation agreements.[7]

[7] This is not to say that we approve of the sheriff's department's failure to turn over the cooperation agreements to Duke's defense counsel, or even apparently to inform the prosecution about the existence of the agreements, until after the trial when defense counsel requested them.

II. *Sufficiency Of The Evidence*

Duke contends that the prosecution failed to present sufficient evidence to support his conviction for first degree murder. We disagree.

In reviewing a claim for sufficiency of the evidence, "[w]e 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578 . . . .) In determining whether a reasonable trier of fact could have found [the defendant] guilty beyond a reasonable doubt, we presume in support of the judgment ' "the existence of every fact the trier could reasonably deduce from the evidence." ' (*People v. Catlin* (2001) 26 Cal.4th 81, 139 . . . .)" (*People v. Nelson* (2016) 1 Cal.5th 513, 550.)

In this case, eyewitnesses testified that they saw Duke take part in the murder of Enriquez. Duke argues that this evidence was insufficient because the witnesses were biased, had motives to lie, and were themselves criminals. But the credibility of witness testimony is a question for the jury. "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) "The inherently improbable standard addresses the basic content of the testimony itself—i.e., could that have happened?—rather than the apparent credibility of the person testifying." (*People v. Ennis* (2010) 190 Cal.App.4th 721, 729.)

III. *Jury Instruction On Natural And Probable Consequences*

Duke contends that the trial court erred by instructing the jury that he could be guilty of first degree murder as an aider and abettor under a theory of natural and probable consequences. We agree, and accordingly reverse his conviction for first degree murder.

Generally, a defendant may be guilty as an aider and abettor either directly or through a theory of natural and probable consequences. In this case, the trial court instructed the jury with respect to both theories,

pursuant to CALCRIM Nos. 401 and 403. Direct liability applies when a person "acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' " (*Chiu*, *supra*, 59 Cal.4th at p. 161.) But a defendant may be guilty of aiding and abetting even if he did not intend to aid a perpetrator in committing that specific offense. " ' "A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime." ' " (*Ibid.*)

In *Chiu*, decided after the trial in this case, our Supreme Court, rejected the natural-and-probable-consequences theory of aiding and abetting for first degree murder. "[A]n aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu*, *supra*, 59 Cal.4th at pp. 158-159.) The Court reasoned that the mental state required for first degree murder "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." (*Id.* at p. 166.) The Court accordingly held that when a defendant was guilty of "aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine," he could be convicted only of second degree murder. (*Ibid.*)

Duke's trial took place before the Supreme Court rendered its decision in *Chiu*, and the trial court's instructions regarding natural and probable consequences in this case were virtually identical to those the Supreme Court rejected.[8] Thus, as the Attorney General concedes, the trial court's instructions were erroneous.

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[8] The trial court told the jury that "[t]o prove that the defendant is guilty of murder, the People must prove that:

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.] Defendant's first degree murder conviction must be reversed unless we conclude *beyond a reasonable doubt* that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Chiu*, *supra*, 59 Cal.4th at p. 167, italics added.) " '[T]his test does not depend on proof that the jury *actually* rested its verdict on the proper ground [citation], but rather on proof beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " (*People v. Concha* (2010) 182 Cal.App.4th 1072, 1087.)

Under this strict standard, reversal of Duke's conviction is required. In closing arguments, the prosecutor explained the law of natural and probable consequences and argued that it was an appropriate basis for convicting Duke. In his final words to the jury, the prosecutor reiterated this point, arguing that Duke "helped Alfred Crowder. And because Alfred Crowder *ended up killing him* with your help, you are guilty of murder" (italics added). With this argument, the prosecutor implied that the jurors could convict Duke of first degree murder so long as they believed he meant to help Crowder commit some kind of crime against Enriquez, even if the murder was an unintended consequence. That standard is viable for the natural-and-probable-consequences doctrine, but not for direct aiding and abetting.

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1. The defendant is guilty of assault and/or assault with a deadly weapon;

2. During the commission of assault and/or assault with a deadly weapon a coparticipant in that assault and/or assault with a deadly weapon committed the crime of murder;

AND

3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault and/or assault with a deadly weapon." See *Chiu*, *supra*, 59 Cal.4th at p. 160, for the almost identical instructions.

In addition, the evidence did not unequivocally show that Duke intended for Enriquez to die. Palmer testified that he overheard either Duke or Crowder say, "we got to do something to" Enriquez, but they did not say that they planned to kill him. Tatum told police that, based on the conversation he overheard involving Duke and others, he did not expect anyone to kill Enriquez. At first, Tatum thought the intended victim was another gangster named Kloc, and "they really wasn't talking about killing or nothing, they was talking about beating the shit [out] of him." Tatum said that even when he saw Duke and Crowder armed with knives and walking across the street toward Enriquez, he "didn't think they was going to do nothing." The jurors asked a series of questions indicating that they were unsure about whether Duke himself had personally struck or stabbed Enriquez. Consequently, we cannot conclude beyond a reasonable doubt that a rational jury would have found Duke guilty on a theory of direct liability. A reasonable jury could have concluded that Duke went across the street with the expectation that he and Crowder would only scare Enriquez, or assault him, and that Crowder alone decided to kill.

Because the instructional error prejudiced Duke, his conviction for first degree murder cannot stand. A conviction for second degree murder, however, may properly be based on a theory of natural and probable consequences. (*Chiu*, *supra*, 59 Cal.4th at p. 166.) " ' "An appellate court is not restricted to the remedies of affirming or reversing a judgment. Where the prejudicial error goes only to the degree of the offense for which the defendant was convicted, the appellate court may reduce the conviction to a lesser degree and affirm the judgment as modified, thereby obviating the necessity for a retrial." ' " (*People v. Thomas* (2013) 218 Cal.App.4th 630, 647.) On remand, therefore, the prosecution shall have the option to retry Duke for first degree murder, or to accept a modification of the judgment to reflect a conviction for second degree murder. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Duke in accordance with the modified judgment.

IV. *Use Of Information From FI Card*

Duke contends that the trial court erred by admitting evidence from an FI card containing information that a sheriff's deputy obtained after interviewing Duke without reading him his *Miranda* warnings. We agree, but we hold that the error was harmless.[9]

Detective Welle, who works in the gang unit of the Los Angeles County Sheriff's Department, testified for the prosecution as an expert on gangs in Palmdale. He identified Duke as a member of the Rollin' 60's gang primarily on the basis of an FI card prepared by another sheriff's deputy, named Nemeth. The card stated that Duke identified himself as a member of the Rollin' 60's. Detective Welle testified that Duke's "BOPK" tattoo, which indicated that he was an enemy of the Bloods on Point gang, assisted him in identifying Duke as a gang member, but Detective Welle stated that the FI card allowed him to identify Duke as a member of the Rollin' 60's specifically. Deputy Nemeth created the FI card on December 12, 2012, nearly two months after the shooting, and while Duke and Crowder had already been in custody for some time. There is no indication in the record that Deputy Nemeth read Duke his *Miranda* rights before questioning him about his gang affiliation.[10] Deputy Nemeth did not testify at trial.

After Duke's trial had ended, our Supreme Court held in *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*) that routine questioning by jail officials of a defendant's gang affiliation does not fall within the booking

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[9] Duke filed a supplemental brief in which he argues that the admission of evidence from the FI card also violated his rights under the confrontation clause of the Sixth Amendment to the United States Constitution. If the trial court did err on this basis, the error was harmless for the same reasons articulated here.

[10] The prosecution bears the burden of proving that authorities advised a defendant of his *Miranda* rights prior to questioning him. (*United States v. Barone* (1st Cir. 1992) 968 F.2d 1378, 1384; *Tague v. Louisiana* (1980) 444 U.S. 469, 470-471.) Because there is no evidence in the record regarding this, we must conclude that Deputy Nemeth did not read Duke a *Miranda* warning prior to questioning.

exception to *Miranda*. (*Id.* at p. 538.) Because these are "questions the police should know are 'reasonably likely to elicit an incriminating response,' " they are a form of interrogation, and are subject to the protections of *Miranda*. (*Ibid.*) Although jail officials may ask arrestees about their gang affiliation during the booking process, in the absence of a valid *Miranda* waiver the arrestees' answers are "inadmissible in the prosecution's case-in-chief." (*Id.* at p. 541.)

Deputy Nemeth's questioning of Duke was indistinguishable from the questioning that occurred in *Elizalde*. Moreover, we reject the Attorney General's argument that Duke forfeited the issue by failing to object at trial to the admission of the FI card. Because the Supreme Court had not yet decided *Elizalde* at the time of Duke's trial, Duke's attorney had no reason to believe an objection would have been successful.

Nevertheless, we hold that the trial court's error in admitting the FI card was harmless beyond a reasonable doubt. (See *Elizalde*, *supra*, 61 Cal.4th at p. 542.) Although Detective Welle relied primarily on the FI card to conclude that Duke was a member of the Rollin' 60's gang, there was other strong evidence to support Duke's gang enhancement. Palmer testified that Duke was a member of the Rollin' 60's and that he had fought with Enriquez because Enriquez had been telling people that Duke was not a true member of the gang. Moreover, in order to prove the gang enhancement, it was not necessary for the prosecution to show that Duke was a member of the Rollin' 60's or any other specific gang. (See *People v. Valdez* (2012) 55 Cal.4th 82, 132.) The prosecution needed to prove only that Duke committed the murder "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(4).) Duke's "BOPK" tattoo was evidence that he was a member, if not of a specific gang, then at least some gang aligned against the Bloods on Point. Palmer testified that, just a half hour before the murder occurred, Duke had encouraged him to kill Enriquez as retaliation for snitching. The prosecution's expert witnesses testified extensively on the seriousness with which gangs treat snitching, and how they are willing to kill to eliminate snitches within their ranks. It is

difficult to understand the murder of Enriquez as anything other than a gang-directed killing to eliminate a snitch. Even without the FI card, no reasonable juror would have found otherwise. Duke argues that the error was prejudicial because the prosecution used his membership in the Rollin' 60's to establish his identity and motivation for killing, but three different eyewitnesses identified Duke as taking part in the attack on Enriquez, and his motive for killing did not depend on being a member of the Rollin' 60's specifically, but rather part of the community of gang members in the neighborhood.

V. *Bad Acts Evidence*

Duke contends that the prosecution committed misconduct by asking a defense character witness about whether the witness knew about specific bad acts that Duke allegedly committed. Duke failed to object to these questions, and, consequently, the issue is forfeited. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Even if we consider the argument on its merits, we perceive no prejudicial misconduct by the prosecutor.

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) "The standards governing review of [prosecutorial] misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . ; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . . .) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 . . . .) 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' (*Ibid.*) When a claim of misconduct is based on the

prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To establish a claim of misconduct, "bad faith on the prosecutor's part is not required. (*Hill*, [*supra*, 17 Cal.4th] at pp. 822-823 . . . .) '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

Duke called his employer Emmett Murrell, to testify about Duke's character. Murrell stated that Duke was "[c]alm" and "[r]eserved," and said that he had never seen him act violently. On cross-examination, the prosecutor asked whether Murrell was aware that Duke might have been in a fight with a Rollin' 60's gang member and that he had gang tattoos. The prosecutor also asked Murrell if he would have hired Duke had he known about his gang tattoos.

Under Evidence Code section 1101, subdivision (a), in most instances, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Under Evidence Code section 1102, however, the defendant may introduce "evidence of the defendant's character or a trait of his character in the form of an opinion or evidence of his reputation." If he does so, the prosecution may offer the same kind of evidence to rebut the defendant's evidence. (*Id.*, subd. (b).) This has been interpreted to mean that when the defendant offers character evidence, " ' "the prosecution may inquire of the witness whether he has heard of acts or conduct by the defendant inconsistent with the witness' testimony." ' " (*People v. Ramos* (1997) 15 Cal.4th 1133, 1173.)

Here, the defense opened the door for questioning about Duke's bad acts by asking whether he had ever observed instances in which Duke had acted violently. Nevertheless, Duke argues that the prosecutor erred by asking Burrell, "[a]re you aware" of Duke's bad acts, rather than asking

whether Burrell had heard about the bad acts. By phrasing the questions in this manner, Duke contends that the prosecutor impermissibly assumed that Duke was guilty. In *People v. Marsh* (1962) 58 Cal.2d 732 (*Marsh*), our Supreme Court noted that "[i]t is generally accepted that although the district attorney can ask the character witness, 'Have you heard . . .' he cannot ask of the witness, 'Did you know . . . ?' [Citations.] The witness is testifying to the defendant's reputation in the community. The district attorney may ask the witness whether he has heard of some act of defendant's misconduct to test the witness's knowledge of defendant's reputation and how truthfully it has been reported to the court. But, '[t]here is a vast difference between inquiring about reports, rumors and the like, of a character witness and questions as to what the witness *knows* of defendant.' " (*Id.* at pp. 745-746.)

If the prosecutor's questioning was improper under *Marsh*, it did not prejudice Duke. Murrell was not a witness to the murder of Enriquez, and his testimony regarding Duke's character was not of primary importance in determining Duke's guilt. Moreover, the small alleged error in the wording of the prosecutor's questions—"are you aware" rather than "have you heard" could not have made a meaningful difference to the jury. As we describe elsewhere in this opinion (see Discussion part VII.C, *post*), the evidence of Duke's involvement in the stabbing was strong, and the character evidence would have made no difference in the outcome of the trial.

We disagree with Duke's contention that the prosecutor's questions included guilt-assuming hypotheticals. Duke cites *United States v. Candelaria-Gonzalez* (5th Cir. 1977) 547 F.2d 291, in which the Fifth Circuit overturned a defendant's conviction after "[g]overnment counsel asked if [the defendant]'s reputation would be affected if he were convicted of the alleged crime." (*Id.* at p. 294, italics omitted.) In this case, by contrast, the prosecutor did not ask Burrell how he would respond if Duke were convicted, but rather whether he was aware of specific facts—that Duke had been in a fight with a gang member and had a gang tattoo. There was evidence in the record of both of those facts.

VI. *Questioning Of Expert Witnesses*

Duke raises two contentions regarding the prosecutor's questioning of expert witnesses. First, he contends that the prosecutor committed misconduct by deliberately eliciting inadmissible hearsay while cross-examining the defense's gang expert. Second, he contends that the prosecutor erred by asking experts to comment on the veracity of other witnesses.

A. *Eliciting Hearsay from Defense Expert*

Duke argues that the prosecutor erred by deliberately and repeatedly eliciting inadmissible hearsay in questioning the defense gang expert. In one instance, Duke objected to the expert's testimony, and the trial court overruled the objection. We need not decide whether this was sufficient to preserve Duke's claim regarding all of the prosecutor's questioning because Duke's argument fails on the merits.

During cross-examination, the prosecutor asked the defense gang expert a series of questions regarding the facts of the case. For example, the prosecutor asked, "[D]id you know [Enriquez's killing] was done by at least two people with knives? At least – there were at least two people with knives at that location?" The expert answered, "That's what I read." The prosecutor continued, "Okay. And those knives were eventually recovered in a mattress. You know that?" The expert answered, "Correct." Duke argues that these questions were improper because "[t]he prosecutor failed to follow the procedure outlined in [*People v.*] *Vang*[(2011)] 52 Cal.4th [1038,] 1048-1049 [(*Vang*)]. The prosecutor did not use a hypothetical format when questioning the gang expert."

In *Vang*, our Supreme Court held that an expert witness may not usurp the role of the jury and express an opinion regarding the defendant's guilt. (*Vang*, *supra*, 52 Cal.4th at p. 1048.) Instead, an expert witness may "express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Ibid.*) In this case, however, the prosecutor did not ask the defense's expert if he thought Duke was guilty. Instead, he asked the expert about what he understood

about the underlying facts of the case. Nothing in *Vang* bars this kind of questioning. Under Evidence Code section 721, subdivision (a), "a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to . . . the matter upon which his or her opinion is based and the reasons for his or her opinion." Courts have interpreted this provision to allow for a broad range of inquiry, "includ[ing] questions about whether the expert sufficiently considered matters inconsistent with the opinion." (*People v. Doolin* (2009) 45 Cal.4th 390, 434.) This allows a party to ask an expert witness about the underlying facts of a case, if the witness relied on those facts to form his or her opinion. (See *id.* at pp. 434-435.) We do not see how the prosecutor's questioning fell outside these bounds.[11]

B. *Questions on the Veracity of Other Witnesses*

Duke also contends that the prosecutor erred by asking expert witnesses to state their opinions on the veracity of the testimony of other witnesses. Duke failed to raise an objection to any of the prosecutor's allegedly improper questions at trial, and consequently, he forfeited any objection. (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1328.) Regardless, Duke's argument also fails on the merits because any error was harmless.

"The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.)

There were several instances in which the prosecutor asked expert witnesses questions that, at least by implication, asked the witnesses to

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[11] Duke also alleges that the prosecutor's questions were argumentative, in that they were not designed to obtain information from the witness, but rather, to allow the prosecutor to argue to the jury that Duke was guilty. We disagree. Although the prosecutor of course attempted to present the facts in a way favorable to his side, the questions were designed to obtain answers from the defense's expert regarding his understanding of the facts at issue.

opine on other witnesses' credibility. The prosecutor asked Detective Welle, who was the investigating officer in the case and who also testified as an expert witness regarding gangs, the following question: "In your opinion, would a gang member from one gang, after their gang has committed a crime, come to court and lie and say that it was a different gang who actually committed the crime?" The prosecutor clarified, "From gang one. All right, they and their gang have committed, for example, a homicide. They then come to court and blame gang 2 and say: Hey, it wasn't us. It was this other gang. They are the ones who committed that crime and killed this, a particular snitch or another gang member, and so forth?"

We are not convinced that these questions violated the rule that a witness may not opine on another witness's credibility. The prosecutor did not ask directly if any particular witness had fabricated testimony. Instead, he asked whether Detective Welle believed a gang in general would be willing to use the court system to accuse someone falsely of a crime. Expert testimony is admissible to the extent that it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801.) Even if judging credibility is generally part of common experience (*People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 82), the practices of a gang are not: "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1384, disapproved on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.)

The next instance in which Duke alleges that the prosecutor asked a witness to opine on the credibility of another witness occurred during cross-examination of the defense's gang expert. The expert had testified during direct examination that gang members often lie to police officers in order to implicate a rival gang in the hope of misdirecting attention away from their own friends and fellow gang members. The prosecutor attempted to test this assertion by asking if the expert had read a police report in which a detective wrote that Dorsey had accused Crowder and

Duke of killing Enriquez. The prosecutor asked, "And in reading that particular police report where Terrance Dorsey said that to Detective House, what information do you have that Terrance Dorsey misdirected the detective as to who the true killers were?" The expert answered, "I don't have that information." Later, after the expert opined that he did not believe that Duke was a member of the Rollin' 60's gang, the prosecutor asked the same gang expert whether he had any reason to believe Detective House made up or fabricated evidence in the police reports he filed in which Detective House identified Duke as a member of the Rollin' 60's. Finally, the prosecutor asked the same witness if he had any reason to believe any information on the FI cards was "made up or incorrect." The expert answered, "No." On subsequent redirect questioning, defense counsel attempted to rehabilitate the expert by asking him about specific facts that supported his conclusions on these issues.

In these instances, the prosecutor did not ask the witness if he believed Dorsey or Detective House were lying when they testified, but rather whether he had any information that would cause him to disbelieve either witness. The purpose of these questions was to test the bases of the expert's conclusions regarding the behavior of gang members. The prosecutor was attempting to question "whether the expert sufficiently considered matters inconsistent with the opinion." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 434.) As we have seen above (see Discussion part VI.A, *ante*), this form of cross-examination of an expert is permissible.

If there had been any error here, it would have been harmless under any standard. The jurors had several other ways of judging the credibility of the witnesses—most notably, they could listen to the witnesses speaking, compare the content of the statements against one another, and judge the probability of what each witness described and any bias he might have had. The court correctly instructed the jury that "[y]ou alone[] must judge the credibility or believability of the witnesses," and the defense argued vigorously that there were reasons to disbelieve the prosecution's eyewitnesses. "In the absence of evidence to the

contrary, we presume the jury understood and followed the court's instructions." (*People v. Williams* (2009) 170 Cal.App.4th 587, 635.)

VII. *Prosecution Closing Argument*

Duke contends that the prosecutor committed several instances of error in closing arguments. Duke failed to object to any of these instances of alleged error at trial, and consequently, he forfeited any objection. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1328.) Nevertheless, we address each of his contentions on the merits, and we hold that even if the arguments were properly preserved, they would not entitle Duke to relief.

A. *Guilt By Association*

Duke contends that the prosecutor impermissibly argued that he could be guilty by association with Crowder. It is improper to argue guilt by association: "[E]very defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile." (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072.)

During closing argument, the prosecutor stated as follows: "If [Palmer, Tatum, Thomas, and Dorsey] rightfully identified [Crowder as] the guy who stabbed and killed Victor Enriquez, then you can believe them when they say, hey, look, it was [Duke] who was there also." In so arguing, the prosecution did not attempt to persuade the jury to convict Duke because he was associated with a murderer. Instead, the prosecution argued that if the jurors found the witnesses were credible and accurate with respect to their identification of Crowder, they should find the same witnesses equally reliable with respect to Duke.

In another instance, the prosecution argued about how the jury should interpret the lack of a signature on Duke's FI card. The prosecutor noted that Crowder had not signed his FI card either, in spite of overwhelming evidence that Crowder was a member of the Fruit Town Piru gang. In light of this, the prosecutor argued that the jury should infer that Duke refused to sign the FI card simply because it was common practice to refuse, not because the FI card contained false information. In making this argument, the prosecutor was not attempting to convince

the jury that Duke was a member of a gang because he associated with Crowder, but rather that it could infer that Duke's motivation for signing was similar to Crowder's.

B. *Defense Expert's Failure to Contact Witnesses*

Duke contends that the prosecutor misled the jury by arguing that the defense gang expert should have attempted to contact Crowder and the prosecution's witnesses in order to form an opinion regarding Duke's membership in the Rollin' 60's gang. Duke argues that it would have been impermissible under the California State Bar's rules for the defense's expert to have contacted Crowder without the consent of his attorney. (See Rules of Professional Conduct, rule 2-100(A).) He further argues that it would have been impossible for the expert to contact two of the other witnesses, as they had already been relocated by the defense.

We need not decide whether this constituted prosecutorial error because any error was harmless. The prosecutor's intention in this portion of the rebuttal argument was to challenge the credibility of the defense's expert by pointing out that he had little specific knowledge of gangs in Palmdale. The prosecutor argued as follows: "What [the defense expert] says is, look, I am a sociologist. I know how they exist down in L.A. So because that's how they exist down in L.A., they must exist like that up here in the Antelope Valley. That is not true. . . . What hasn't he done? He hasn't made any calls to any of the local gang patrol deputies regarding these gangs. He's admitted that those guys are the ones who would have the most knowledge . . . . He hasn't made a call or contacted any gang members from any of these gangs up here in the Antelope Valley." After pointing out other research that the defense expert had not done, the prosecutor added, "How about just getting your nose out of the binders, making a call. Call the defendant. Call Crowder. Call Crowder and say, hey, you know what? I am not here on your case. I want to know about the guy who people allege are saying helped you. Is he a Rollin' 60's gang member? Just maybe it wouldn't work, but at least one call. . . . He didn't call or contact any of the witnesses on this case. Again, remember they are Dime Block gang members. Couldn't he have verified that?"

The references to Crowder and the two witnesses who had been relocated in this case formed a relatively small portion of the prosecutor's argument. Duke does not argue that the overall thrust of the argument—to challenge the expert's authority by pointing out his lack of knowledge and research into specific conditions of gangs in Palmdale—was improper. Nor does Duke contend that it was improper for the prosecutor to argue that the defense expert should have attempted to contact other witnesses, police officers, or other figures in the neighborhood. Even if we assume for the sake of argument that it was improper for the prosecutor to suggest that the defense expert should have contacted Crowder, this error was too insignificant to prejudice Duke.

C. *Implication Regarding the Attack on Dorsey*

Duke contends that the prosecutor committed error or misconduct by referring to unproven and uncharged offenses, and by referring to facts not in evidence, when he argued regarding a drive-by shooting that targeted Dorsey. Because Duke failed to object to this argument, it is forfeited. In any case, even if Duke had preserved the argument, the prosecutor's misconduct did not sufficiently prejudice Duke to require overturning his conviction.

Dorsey testified that, after he testified against Crowder and Duke in preliminary hearings, his house was the target of a drive-by shooting. The prosecution produced no testimony or physical evidence linking Duke to this attack.

In closing arguments, the prosecutor argued that the Dime Block gang had no reason to commit this act because none of their members were on trial. Instead, "[t]he only ones who have any motive to kill [Dorsey] at this point is Fruit Town Piru or Rollin' 60's. Why? Because he is snitching on Crowder [a member of Fruit Town Piru] and Duke [a member of the Rollin' 60's]. They are the only ones with the motive to try to kill Terrance Dorsey."

We agree with Duke that the prosecutor committed misconduct by making this argument. Dorsey's testimony regarding the drive-by shooting was relevant and admissible because "evidence that a witness is afraid to testify is relevant to the credibility of that witness and therefore

admissible." (*People v. Warren* (1988) 45 Cal.3d 471, 481.) During closing argument, however, the prosecutor encouraged the jury to infer that Duke and his gang or Crowder and his gang were responsible for the shooting. This was improper: "[E]vidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." (*Ibid.*) Here, there was no substantiation of Duke's link to the attack on Dorsey. Although Duke had a motive to try to silence Dorsey, Crowder did as well. Furthermore, either Duke or Crowder's gang, or any other gang members in Palmdale, might have attacked Dorsey without Duke's knowledge or assent in an attempt to protect their friends, or simply to obtain revenge against a snitch. Yet it would be difficult for a jury to hear the evidence and fail to make the connection that Duke himself had been involved with the shooting of Dorsey's house out of a consciousness of guilt for killing Enriquez.

The prosecutor's error does not require reversal of Duke's conviction, however. As we have noted above (see Discussion part V, *ante*), in order to preserve an argument of prosecutorial error or misconduct on appeal, a defendant must make a timely objection at trial. Here, Duke failed to do so. Furthermore, even if Duke had preserved the argument of prosecutorial misconduct by objecting at trial, his claim would fail because the error did not prejudice him. The prosecutor's behavior does not rise to the federal level of misconduct because it was not " ' " 'so egregious that it infect[ed] the trial with such unfairness as to make the conviction a denial of due process' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841). Nor would his claim establish prejudice under the state law standard because "it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of any alleged misconduct." (*People v. Turner* (1994) 8 Cal.4th 137, 194, abrogated on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Although it was improper for the prosecutor to imply a link between Duke and the drive-by shooting of Dorsey's house, that was an ancillary aspect of the case. The evidence that Duke was guilty of at least second degree murder was strong. Four different witnesses said that they saw Duke participate

in the killing of Enriquez. Tatum heard Duke and Crowder talk about harming or killing Enriquez, and saw them playing with knives in preparation. Palmer and Dorsey stated that they saw Duke at least assisting Crowder in the murder. The prosecutor's misconduct would not have affected the jury's conclusion that these witnesses were credible.

D. *Commenting on the Thomas Recording*

After Tatum testified that he did not remember any relevant information regarding the stabbing, the prosecutor impeached him by playing a recording of Tatum's interview in which he told sheriff's deputies about the shooting. When Thomas also testified that he could not remember anything about the stabbing, the prosecutor did not play his recorded police interview. Instead, the prosecutor called Detective House, who recounted the contents of the interview to the jury.

In closing argument, defense counsel pointed out that the jury had not heard the recording of Thomas's interview. He argued as follows: "And what was interesting was that the detective, you notice they played you Deon Tatum's tape, but they didn't play you Kenneth Thomas's tape. So what had to be done is I had to ask each and every time that Kenneth Thomas made a statement that was significant, I had to ask the detective line by line." During rebuttal, the prosecutor told the jury that the rules of evidence barred him from playing the recording at trial. He said, "[t]he fact that I didn't play Kenneth Thomas's tape, a couple of things. First of all, there is something called the rules of evidence. There are certain things you can and cannot do; even though you have an audiotape recording, you can and cannot [play it] in certain instances. That's why Deon Tatum, his tape is in and that's why Kenneth Thomas's is not. If it was admissible and if [defense counsel] wanted to, because that's the other item of evidence, it is called reciprocal discovery. Everything I have, I am obligated to give to him. I must. It is the law. And if I don't, that's a violation of my canon of ethics and that's a violation of law. So he's been given the tape of Kenneth Thomas. And if he wanted to, because he says that for some reason I wasn't playing it and there was something in there that clearly showed something favorable to his client, he had the opportunity to play it."

Duke contends that the prosecutor committed error by making this argument. As with the issues of prosecutorial misconduct described above, Duke forfeited this argument by failing to object. Even if the argument was preserved for appeal, Duke forfeited it again by providing only a bare assertion of misconduct in his opening brief, with no legal argument or citation to authority to support his contention. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) On the merits, we agree with Duke's contention that it was prosecutorial misconduct to argue the rules of evidence and to explain to the jury why certain evidence had not been introduced. Nevertheless, we do not see, and Duke does not explain, how the prosecutor's statements prejudiced him.

E. *Reasonable Doubt Standard*

Duke contends that the prosecution erred by misleading the jury regarding the standard of proof beyond a reasonable doubt. The prosecution argued as follows: "We have given you two theories. Okay? Dime Block did it. Rollin' 60's did it. What– one is reasonable. One is unreasonable. If one is unreasonable, you throw it out because it is unreasonable, and then you are left with the reasonable interpretation." Later, the prosecutor continued: "What is reasonable? . . . Rollin' 60's . . . has the obligation. They have the obligation. It is not just a desire. It is an obligation in gang life to take out one of their own. This isn't—that video, that is not—that doesn't show that Anthony Palmer committed the crime. I guess that's it. It is dead."

Duke argues that this argument diluted the burden of proof by suggesting that the jury could convict him as long as the prosecution's account of the evidence was reasonable. We disagree. Although the prosecutor's explanation was not entirely clear, we interpret his argument as positing that there were only two possible theories of who was responsible for Enriquez's murder, and that only the prosecution's theory was reasonable. A prosecutor is allowed to argue that the jury should " 'accept the reasonable and reject the unreasonable' " in evaluating the evidence. (*People v. Romero* (2008) 44 Cal.4th 386, 416.) The prosecutor did not imply that he had satisfied his burden because

his theory was reasonable, but rather because it was the only reasonable theory of what happened.

F. *Addressing Individual Jurors*

Duke contends that the prosecutor erred by addressing an individual juror, rather than the jury as a whole. The prosecutor created a hypothetical argument to demonstrate the concept of implied malice, as follows: "Sorry, Juror Number 2. I am going to pick you. I don't like Juror Number 2 . . . . [B]ecause of that, . . . I shoot near him. I just want to scare the guy. I don't want to kill him; I just want to scare him. So I shoot near him thinking I am going to miss. But what happened is, accidentally, that bullet ends up ricocheting and ends up hitting Juror Number 2 and actually kills him. That is implied malice murder. . . . And I apologize, Juror Number 2." Although it is true that a prosecutor should argue to the jury as a whole, rather than to individual jurors (see *People v. Wein* (1958) 50 Cal.2d 383, 395-396, overruled on other grounds by *People v. Daniels* (1969) 71 Cal.2d 1119, 1140), we do not see, and Duke does not explain, how the prosecutor's method of argument prejudiced him in this case.

VIII. *Failure To Present Exculpatory Evidence*

Duke contends that he received ineffective assistance of counsel because his trial attorney failed to present exculpatory evidence from potential alibi witnesses. We disagree.

In his opening statement, Duke's trial attorney told the jury that Duke's girlfriend Danielle Williams would testify that she and Duke's friend Avram Peters were with Duke at the time of the murder. Ultimately, the defense called neither Williams nor Peters to testify. In a motion for a new trial, Duke argued that this constituted ineffective assistance of counsel. In a statement, Duke's trial attorney explained that his investigator had interviewed Peters and concluded that "he would make a weak witness and could be tripped up easily." Duke's attorney initially intended to call Williams but decided that the trial was going so well for the defense that "I did not want to risk putting up anyone that I didn't have to. If I had put her[] up and she had diverted from

her previously recorded statement then the prosecution would use that against the defense."

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish, first, that his attorney's performance was deficient, and second, that those errors prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) " ' "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " ' " (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.)

Duke's claim fails because his attorney's decision not to call Williams or Peters was exactly the type of tactical decision that we are not in a position to second guess. Duke cites three Ninth Circuit cases in which courts overturned a defendant's conviction on the basis of ineffective assistance of counsel after trial counsel failed to call potential alibi witnesses: *Luna v. Cambra* (9th Cir. 2002) 306 F.3d 954, 961-962, *Brown v. Myers* (9th Cir. 1998) 137 F.3d 1154, 1157-1158, and *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 870. In each of these cases, however, trial counsel failed to contact the potential witnesses. (See *Brown v. Myers*, *supra*, 137 F.3d at p. 1157 ["[a]ll of these witnesses testified that they had not been contacted by defense counsel, and would have testified at trial if asked"]; *Luna v. Cambra*, *supra*, 306 F.3d at p. 961 ["trial counsel failed to contact" alibi witnesses]; *Alcala v. Woodford*, *supra*, 334 F.3d at p. 871 [trial counsel "reaffirmed that 'we fully intended to call [the alibi witness],' but could not recall why she was not called"].) Here, the record shows that Duke's trial counsel did contact Peters, by means of his investigator. Trial counsel stated that he spoke with Williams in person and had heard her previously recorded statement. Thus, trial counsel appears to have made a judgment call not to call these

alibi witnesses. We cannot conclude that the performance of Duke's counsel fell below reasonable professional standards.

IX. *Sufficiency of the Evidence of the Gang Enhancement*

Duke contends that the prosecution failed to present sufficient evidence to prove that he committed the offense to benefit a criminal street gang. (§ 186.22, subd. (b).) In particular, he argues that the evidence failed to establish that the organizations he was accused of benefiting fell within the statutory definition of a criminal street gang. We review the sufficiency of the evidence of a gang enhancement under the same standard as the sufficiency of the evidence of any criminal conviction. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 614.) We conclude that there was sufficient evidence in this case to support the gang enhancement.

Section 186.22, subdivision (f) defines a criminal street gang as "any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in [certain paragraphs of section 186.22,] subdivision (e)." The criminal acts enumerated in section 186.22, subdivision (e) are known as predicate offenses, and they include, among others, assault with a deadly weapon, robbery, unlawful homicide, the sale of narcotics, and threats to commit crimes resulting in death or great bodily injury. (See § 186.22, subd. (e)(1), (2), (3), (4) & (24).) To satisfy this definition, the prosecution must show that the members of the group commit enumerated crimes as "one of the group's 'chief' or 'principal' occupations," rather than doing so only occasionally. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) Expert testimony regarding the gang's activities may be sufficient to meet this standard. (*Id.* at p. 324.)

Here, the evidence showed that Duke aided and abetted Crowder in committing the murder, and that Crowder was a member of the Fruit Town Piru gang. The prosecution presented testimony from two expert witnesses, Detectives Welle and O'Neal. They both testified that the crime benefitted the Fruit Town Piru gang, and further, that the

primary activities of the Fruit Town Piru gang included narcotics sales and assaults.

We disagree with Duke's assertion that this evidence was insufficient because it was conclusory. Unlike in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611, where the court held that there was insufficient evidence of a gang's primary activities, in this case, Detective Welle testified that he had personal knowledge of specific cases that formed the basis of his opinion of the Fruit Town Piru gang.

Duke filed a supplemental brief arguing that Detective Welle's testimony should have been excluded because it was introduced in violation of the Sixth Amendment's confrontation clause. Although Duke did not object to the testimony at trial, he now argues that this was not necessary to preserve his claim because the validity of his confrontation clause argument was not established until after his trial, when our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

We need not decide whether Duke's claim was forfeited because it fails on the merits. In *Sanchez*, the Court held that when an expert testifies regarding hearsay that formed the basis of his opinion, the hearsay is inadmissible unless it both falls within an established exception to the hearsay rule and does not violate the confrontation clause. (*Sanchez*, *supra*, 63 Cal.4th at p. 684.) Duke contends that Detective Welle's testimony violated his rights under the confrontation clause. But the confrontation clause bars the admission only of hearsay statements that are testimonial in nature. (*Id.* at p. 685.) These are statements that " 'are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.' " (*Ibid.*, quoting *People v. Cage* (2007) 40 Cal.4th 965, 984.) Although the United States Supreme Court has not fully delineated what statements are testimonial for purposes of the confrontation clause (see *id.* at p. 687), the doctrine is clear enough for us to conclude that the statements Detective Welle made about other cases involving Fruit Town Piru are not testimonial hearsay. Detective Welle described minute orders of the two earlier cases, stated the names of the investigators in those cases, and briefly described the circumstances involving those crimes. At no point did he purport to quote from a hearsay

declaration that was testimonial for purposes of the confrontation clause. Consequently, the introduction of these statements did not violate Duke's rights under the confrontation clause.

X. *Prosecution Gang Expert Testimony*

Duke contends that the trial court erred by allowing prosecution gang experts to speculate about gang members' mental processes during their testimony. Duke failed to raise an objection at trial, and consequently, he forfeited the claim on appeal. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1328.) In any case, Duke's claim is without merit.

On numerous occasions, the prosecution's gang experts testified that the gangs at issue in this case had a motive to attack a snitch either within their own ranks or in another gang, and that they would likely do so. Duke contends that this testimony was improper because it involved speculation about gang members' mental processes. He cites *People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*), disapproved of on another point by *Vang*, *supra*, 52 Cal.4th at p. 1048, in which the court held that it was improper for an expert witness to testify about the subjective knowledge and intent of gang members in a particular situation. In *Killebrew*, police officers stopped a car and observed one of its four occupants put a handgun under the front seat. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 648.) An expert witness testified that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id.* at p. 652.) The court held that this testimony was improper because it was "not the type of culture and habit testimony" appropriate for a gang expert. (*Id.* at p. 654.) By stating what he believed about what the passengers in the car subjectively believed, the expert went beyond the appropriate role for expert testimony and usurped the role of the jury. (*Id.* at p. 658.)

In this case, the prosecution's experts did not testify as to their opinions about what Duke and Crowder actually believed. Instead, they testified about the attitudes of gang members toward snitches and how they would likely respond upon finding a snitch in their community. This testimony was very different from what the court in *Killebrew* found

objectionable. The expert testimony in this case was nothing more than the typical "culture and habit testimony" that is perfectly appropriate for a gang expert. (*Killebrew*, *supra*, 103 Cal.App.4th at p. 654.) Consequently, the trial court did not err by admitting this testimony.

XI. *Cumulative Prejudice*

Duke contends that, even if no individual error in this case was sufficiently severe to warrant overturning his conviction, the cumulative effect of the errors deprived him of a fair trial. We disagree. Duke's conviction was based primarily on the statements of four eyewitnesses. There was strong evidence of his guilt of at least second degree murder. The errors that occurred in this case were not pervasive. This was not a case where a large collection of errors "created a negative synergistic effect, rendering the degree of overall unfairness to defendant more than that flowing from the sum of the individual errors." (*People v. Hill*, *supra*, 17 Cal.4th at p. 847, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Except for the instruction on the probable and reasonable consequences doctrine, the errors discussed above, considered separately or together, were not sufficiently prejudicial to call that verdict into doubt.

DISPOSITION

The judgment of the trial court is reversed. On remand, the prosecution shall have the option to retry Duke for first degree murder, or to accept a modification of the judgment to reflect a conviction for second degree murder. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Duke in accordance with the modified judgment.

In light of the concerns stated above regarding the prosecutor's conduct in this case, the clerk of this court is directed to forward a copy of this opinion to the prosecutor and to the State Bar of California.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.