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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL HURTADO,

Defendant and Appellant.

B265955

(Los Angeles County
Super. Ct. No. MA060452)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Daviann L. Mitchell, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant
Attorney General, Lance E. Winters, Assistant Attorney General,
Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for
Plaintiff and Respondent.

Defendant Michael Hurtado appeals following his conviction for two counts of carjacking (Pen. Code, § 215).¹ The jury found true the allegations that defendant committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)) and personally used a handgun in the commission of the offenses (§ 12022.53, subd. (a)). The jury also found true the allegation that a principal personally used a firearm in the commission of the offenses.² (§ 12022.53, subds. (b) & (e)(1)). Defendant admitted he had suffered a prior serious felony conviction (§ 667, subd. (a)) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12) and had served a prison term for that conviction (§ 667.5, subd. (b)). He also admitted that he had served three other prior prison terms (§ 667.5, subd. (b)).

The trial court sentenced defendant to a total term of 81 years and four months to life in state prison. On count 1, the court imposed a sentence of 15 years to life for the carjacking conviction (§ 186.22, subd. (b)(4)(B)), doubled to 30 years to life pursuant to the Three Strikes law, plus a 10-year term for the personal firearm use (§ 12022.53, subd. (a)) plus a five-year term for the prior serious felony conviction (§ 667, subd. (a)), plus three 1-year prison terms for three prior prison terms (§ 667.5, subd. (b)). On count 2, the court imposed a consecutive term of 15 years to life for the carjacking conviction (§ 186.22, subd. (b)(4)(B)), doubled pursuant to the Three Strikes law, plus three years and four months for the personal firearm use enhancement (§ 12022.53, subd. (a)). The court struck one of the section 667.5 allegations

¹ Further undesignated statutory references are to the Penal Code.

² Defendant was tried with Edwin Perez. Perez is not a party to this appeal.

and stayed the enhancements for a principal's firearm use pursuant to section 654. The court imposed the requisite fines and fees.

Defendant's contentions on appeal relate primarily to the gang evidence offered at trial. He contends the court erred in admitting a note he attempted to send to codefendant Perez during pretrial proceedings (referred to as a "kite" in gang parlance) because the note was irrelevant but highly prejudicial. Defendant also contends the trial court abused its discretion in denying his motion to bifurcate the trial of the gang enhancement allegation from the trial on the substantive offenses and erred in failing to follow through on its ruling striking a portion of the gang expert's testimony. In addition, defendant asserts the prosecutor committed misconduct and defense counsel was constitutionally ineffective when they failed to remind the court to strike the expert's testimony. Finally, defendant contends there is insufficient evidence to support the true finding on the gang allegation.

The trial court did not abuse its discretion in admitting the note, which contained relevant statements showing consciousness of guilt of the charged offenses. Defendant has forfeited his claim that a section of the note was highly inflammatory. Evidence of codefendant Perez's gang membership was intertwined with evidence of the substantive crime and was relevant to assessing witness credibility, and so the trial court did not abuse its discretion denying the motion to bifurcate the trial of the gang enhancement. The challenged expert testimony was ambiguous, but the ambiguity was clarified by further questioning by the prosecutor and defense counsel, and the court's failure to strike the challenged testimony was harmless. There is substantial evidence to support the gang allegation.

BACKGROUND

A. Prosecution evidence

On July 18, 2013, Brandon Monroy and Orby Garcia drove to Brandon Orozco's house in Lancaster to hang out. Monroy parked his 1998 Honda Civic on the street. Monroy and Garcia spoke with Orozco's mother, learned that he would be home in five or 10 minutes, and returned to the Civic to wait.

As the men sat in the car, a Chrysler 300 pulled up behind them and blocked them in. Defendant got out of the Chrysler and walked up to Monroy, who was in the driver's seat of the Civic. According to Monroy, defendant asked him if he wanted to buy "stuff." Monroy understood the term to mean drugs and he declined. Defendant returned to the Chrysler.

Codefendant Perez then walked up to Monroy, with defendant following behind. Perez poked his head into the car and asked Monroy to drive him to the store. Monroy noticed that Perez had a "P" tattoo on the top of his head. Monroy recognized that tattoo and others on Perez as Pacas 13 gang tattoos. Monroy testified that he first became concerned about the encounter "when [Perez] poked his head in the car." Garcia also noticed that Perez had a big "P" on his head and some "818" tattoos. Garcia believed the tattoos referred to the Pacas Trece (13) gang. The gang tattoos caused Garcia concern. Monroy nevertheless declined to drive Perez to the store.

Perez then pulled out a handgun from his waistband, pointed it at Monroy and said, "Get out of the fuckin' car, I need it." Garcia noticed that defendant was standing by his window with a handgun. Defendant initially tapped the gun against the frame of the car, then pointed it at Garcia. Monroy and Garcia got out of the car.

Perez got into the driver's seat of the Civic. Defendant returned to the Chrysler. They both drove off. Monroy called the police, who arrived quickly. Monroy described Perez's numerous tattoos to police. He did not notice any distinctive tattoos on defendant. Garcia also spoke with police.

Los Angeles County Sheriff's Department Detective Richard O'Neal investigated the carjacking. Detective O'Neal identified Perez and defendant as suspects, prepared a six-pack photographic lineup for each suspect and showed the lineups to Monroy and Garcia. Garcia identified Perez immediately, but did not identify defendant the first time he viewed the lineups. About a week later, Garcia looked at the lineups again, and identified defendant. Monroy identified defendant and Perez in the photographic lineups. At the time, he was 30 percent sure of his identification of defendant and 100 percent sure of his identification of Perez.

Detective O'Neal found a car at defendant's brother's place of business, and took photographs of it. He did not impound the car. The photographs were marked as People's exhibit 1 at trial. Monroy identified the vehicle in People's exhibit 1 as looking like the car that pulled up behind him at the Orozco house. Monroy earlier described that car as a dark-colored older model Chrysler 300.³

Detective O'Neal testified at trial as a gang expert. He explained that "Pacas" is a general term for all Hispanic gangs in Pacoima. Pacas Trece is a Hispanic gang in Pacoima, as is Pacoima Criminals. Both gangs would be considered "Pacas." The parties stipulated that "Pacas, also known as Pacas 13," is a criminal street gang, as that term is used in section 186.22 and CALCRIM No. 1401 and that Pacas is an ongoing association of three or more

³ Respondent describes the car shown in People's exhibit 1 as Monroy's stolen Honda Civic. Respondent is mistaken.

people which has a common identifying name and sign or symbol, has as its primary activities crimes listed in section 186.22, and whose members engage in a pattern of criminal activity as defined in section 186.22 and CALCRIM No. 1401. Detective O'Neal testified that tattoos with a "P" design and "818" were used by Pacas.

In Detective O'Neal's opinion, Perez was a member of the Pacoima Criminals gang. His opinion was based on Perez's tattoos and on field identification cards for Perez. Defendant did not have any gang tattoos. Detective O'Neal could not find any documentation showing defendant was a gang member. As far as the detective knew, defendant was not a gang member. In Detective O'Neal's opinion, defendant was an associate of the Pacoima Criminals gang. His opinion was based on his investigation of this case.

There were Pacas gang members in the Antelope Valley, but "very, very few." Pacas, and members of various other gangs, had migrated to the area for family or other reasons. They were fewer in number and at a distance from their original gangs and so they tended to "clique up" with each other. They often joined together based on friendship.

Detective O'Neal also explained the role of tattoos in gangs. Only members of a gang are permitted by the gang to have tattoos related to the gang. Gang tattoos are an advertisement of gang membership. The average person who does not know much about gangs can look at a distinctive gang tattoo and know that person wearing it is a gang member. Often, residents of communities with a gang presence are in such fear of gang members that they will not call the authorities about gang crimes. Thus, it is common for gang members to display their tattoos for the purpose of intimidating their victims or the community.

The display of gang tattoos during the commission of a crime benefits the gang in several ways. It creates or increases fear of that gang, assists in the commission of the crime and decreases the likelihood that the crime will be reported. This empowers the gang as a whole, not merely the individual gang member.

In response to a hypothetical based on the facts of this case, Detective O'Neal opined the carjackings were committed for the benefit of the Pacas gang and in association with it. The detective explained that if a gang member displayed his tattoos to identify his gang affiliation and to attempt to intimidate his victims, he was using the power of the gang to commit the crimes. The display would also benefit the gang because it would strike fear into the community and further empower the gang.

On cross-examination, Detective O'Neal agreed state prison records showed defendant as a "gang drop out," which was consistent with being debriefed from a gang and green-lighted by the gang. A person who is green-lighted is "free game" to be hunted down and beaten or killed. Detective O'Neal also agreed that it would not benefit a Hispanic gang if a gang member committed a crime with someone who had been green-lighted by the Mexican Mafia, assuming the gang was aware of the green light. If the green light came from the person's own gang, "you can't expect . . . other gangs to really respect that one particular gang's green light."

Also at trial, the prosecution introduced evidence that defendant tried to pass a note to codefendant Perez during pretrial proceedings. Defendant was housed separately from other inmates, including Perez, for his own protection because he was a "green light." The note was intercepted by a courtroom bailiff, Los Angeles County Sheriff's Deputy Jon Dutcher. In pertinent part, the note read, "I'm thinking [Juan the informant is] the one

who told on us cause Carmen told him everything. I'm not trippin on getting life I just want to get it over with so I can go upstate." The note was offered to show consciousness of guilt.

B. Defense evidence

Defendant testified on his own behalf. He became a member of the Hawthorne Little Watts gang when he was 13 years old. When defendant went to prison in 2002, the Mexican Mafia considered him a kind of member. In 2004, defendant decided he no longer wanted to be a gang member. He "debriefed" with prison officials and provided information to them about the Mexican Mafia. As a result, the Mexican Mafia put out a "green light" on him.

Defendant was addicted to crystal methamphetamine and sold the drug to support his habit. He met Perez at a drug house in Palmdale in 2013, and they began to buy, sell and use drugs together. At some point, defendant became aware that Perez was a Pacas 13 gang member. Defendant considered Perez a friend and told him about being green-lighted by the Mexican Mafia. Defendant also knew Brandon Orozco through mutual drug use. Occasionally, defendant sold drugs to Orozco or bought drugs from him.

On July 18, Orozco called defendant and asked for drugs. Defendant and Perez drove to Orozco's house to sell him drugs. Defendant saw Monroy and Garcia sitting in a car and recognized Monroy as a fellow drug user. Defendant went up to Monroy, asked him if Orozco was at home and learned he was on his way home. Defendant then asked Monroy if he wanted to buy "stuff," meaning drugs. Monroy said that he wanted drugs but did not have any money. Defendant returned to his car and recounted the conversation to Perez. Perez walked to Monroy's car, spoke with him, returned to defendant's car and told defendant that he was going to use Monroy's car for

a few hours in exchange for drugs. Defendant drove away. He did not see Perez pull a gun and did not know if Perez carjacked Monroy. Defendant did not have a gun and did not carjack anybody. He did not know of any reason Monroy or Garcia would falsely accuse him of carjacking.

Defendant also discussed the note he sent to Perez. When he wrote in that note that he was not tripping on getting life, he was just tired of being in county jail, of the arrangements there and the bus rides. It was not an admission that he had committed the carjackings. He was just depressed at the time. Defendant wrote that Juan “told on us” to try to make it “comfortable” for Perez to say that he did the carjacking alone.

DISCUSSION

A. The Trial Court Properly Admitted Defendant’s Note to Perez

Defendant contends the trial court abused its discretion under Evidence Code section 352 in admitting the note because it was too vague to be reasonably understood as referring to this case and was full of inflammatory references to criminals and a gang not involved in this case. He maintains the erroneous admission of the note rendered the trial fundamentally unfair and so violated his state and federal constitutional rights to due process.

1. The note

Defendant’s note read in full: “Puppet, [¶] What’s up Fu? I came on Tuesday but they didn’t bring you. *I tried to fire my lawyer but they didn’t let me.* I just saw Dee Dee here today she’s busted again. When I came on Tuesday I saw Ruben the one that Dora used to live with he said he’s facing an attempt murder. They killed Juan the one with the white honda. They shot him in front of his pad in Sylmar. The foo’s from Sanfer because they said Juan was an informant so I’m thinking he’s the one who told on us cause

Carmen told him everything. I'm not trippin on getting life I just want to get it over with so I can go upstate. *Fuck the county.* [¶] Mike” The italicized sentences were later redacted.

2. *Motions in limine*

Before trial, the prosecutor moved to admit the note as containing inculpatory evidence. The prosecutor asserted two statements in the note acknowledged guilt: (1) “I’m thinking [Juan the informant is] the one who told on us” and (2) “I’m not trippin on getting life I just want to get it over with so I can go upstate.” Defendant filed a written motion to exclude the note, arguing it was vague because it lacked detailed information about Juan’s identity and his alleged statement. The motion also contained a broad general statement that the note was irrelevant.

At the Evidence Code section 402 hearing on the motion, argument focused on the two statements identified by the prosecutor in his motion. Defendant’s counsel did not argue that other statements in the note should be excluded or redacted.

Defendant’s counsel “submitted” on the first statement “as sort of ‘the people that told on us.’” He agreed “the part where it says, ‘this person told on us,’ I think is fair game. By inference, you can argue, ‘you did something wrong to be told on.’”

Defendant’s counsel argued the second statement about a life sentence was simply defendant “speculating as to what a potential sentence would be if the jury found him guilty” and did not show defendant considered himself guilty. The prosecutor responded that the sentence “indicates the person knows they’ve been caught, knows that this is the likely result, because they know they were there and did it.”

The trial court found that under Evidence Code section 352, the probative value of the statements outweighed any prejudicial effect. The court ruled the life sentence statement did tie defendant to the crimes and tended to prove his guilt, “in the broadest sense.”

3. *Law*

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

A trial court’s decision under Evidence Code section 352 will not be disturbed on appeal unless the court exercised its discretion in “an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citations.]” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

A timely and specific objection is required to preserve a claim that a trial court abused its discretion in not excluding evidence under Evidence Code section 352. (*People v. Harrison* (2005) 35 Cal.4th 208, 230-231.) “A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct.” (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

4. *Analysis*

Defendant contends that, given the note’s lack of specific references to this case, it is likely the note is referring to drug sales, which he admitted. Defendant also contends the references to his criminal friends, Juan’s killing and the Sanfer gang were highly inflammatory because they implied he was a criminal and a gang member. Defendant did not make this latter claim in the trial court.

a. The note refers to the carjackings

Defendant wrote the note to his codefendant in the current matter, attempted to pass the note during a pretrial proceeding in this matter and was facing a life sentence in this matter for the carjackings pursuant to section 186.22, subdivision (b)(4)(B). Defendant was not charged with any crimes other than carjacking in this case and there is nothing in the record to show that he had any other pending cases. These circumstances are more than enough to show that the note was referring to the carjacking charges in this case, and not to narcotics sales or some other offense.

Defendant argues Detective O'Neal's trial testimony shows he relied on "witnesses" from "around the area" in this case and so Juan must have informed on defendant in some other case. There is no reason an informant could not be described as a witness from around the area and nothing to suggest another case was pending against defendant. The trial court did not abuse its discretion in admitting the "told on us" statement. There was no violation of defendant's state and federal constitutional rights to due process.

b. Defendant's "guilt by association" claim is forfeited

Defendant contends the references in the note to friends in jail were highly inflammatory because they showed him as a criminal who associated with other criminals such as Dee Dee, Dora and Ruben, and lived a life of crime. He further contends the note's references to the Sanfer gang and Juan's killing implied that he associated with gang members and therefore must be a gang member himself. Defendant argues these references had no probative value.

In the trial court, defendant argued broadly that nothing in the note had any probative value, but he did not contend references in the note implied guilt by association and so were inflammatory, and did not request

any references be redacted for that reason.⁴ Accordingly, he has forfeited this claim. (*People v. Harrison, supra*, 35 Cal.4th at pp. 230-231 [specific objection required to preserve Evid. Code, § 352 claim]; see *People v. Solomon* (2010) 49 Cal.4th 792, 821 [defendant forfeited claim that a particular passage in his postarrest statements was prejudicial; he did not identify that passage in his initial motion to exclude his postarrest statements pursuant to Evid. Code, § 352 or argue its purported prejudicial effect and did not object to an edited version of the postarrest statements which still contained that particular passage].)

Defendant contends an objection would have been futile because the trial court rejected every argument defense counsel made. None of those arguments were remotely similar to the “guilt by association” argument made on this appeal. The mere fact that a court overruled an objection made on one ground does not mean that it would have overruled all objections on other grounds. There must be some indication the court would have rejected the specific omitted argument. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 820-821 [objection to continued prosecutorial misconduct would have been futile where multiple prior objections had been overruled]; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649 [objection would have been futile where judge committed same error he had committed in previous case; judge had repeatedly refused to acknowledge error in previous case].)

Defendant contends his counsel’s failure to preserve this issue constitutes ineffective assistance of counsel. Defendant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23

⁴ Defense counsel did object later that the Sanfer gang had nothing to do with the case and the reference should be redacted. He did not argue it showed guilt by association.

Cal.3d 412, 425.) In order to establish such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

“When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for the counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) We presume that counsel's conduct falls within the broad range of reasonable professional assistance. Defendant must overcome the presumption that counsel's action might be considered sound trial strategy under the circumstances of the case. (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

Defense counsel used the note's references to Dee Dee, Dora, Ruben and Juan's killing to argue in closing that “the flavor of this note” was “friends just sharing information. Hey, what's going on, I don't know? Dee Dee got busted again.” Ruben, who used to live with Dora, is facing an attempted murder charge. “So that's what's going on with this guy Ruben.” Juan was killed. “So he's telling you about Juan.” Counsel then argued, “This isn't an admission of anything. This is him speculating how his name got put into the mix.”⁵ Thus, counsel could have made a reasonable tactical decision not to object to these references, but to use them to minimize the seriousness

⁵ Defendant similarly argues on appeal that a “fair reading of the note demonstrates that it was conversational in style and tone, contained jail ‘gossip’ and the latest news about mutual friends. It was not, as the prosecutor argued, an admission of guilt.” He also argues the note is “a gossipy letter and nothing more.”

and significance of the properly admitted statements in the note showing a consciousness of guilt.

Defense counsel did not evince a similar tactical purpose for failing to object to the reference to the Sanfer gang, but there is no reasonable probability defendant would have obtained a more favorable result if the reference had been redacted. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1126 [court need not determine whether counsel’s performance was deficient before examining prejudice from claimed deficiencies].) The reference in the note to the Sanfer gang does not suggest any relationship between defendant and that gang. There was other highly relevant evidence that defendant was close friends with Perez, a known Pacas gang member.

B. The Trial Court Did Not Abuse Its Discretion by Denying Bifurcation

Defendant contends the trial court abused its discretion in denying his request to bifurcate the trial on the gang allegation because the gang evidence was not relevant to the charged offenses and was unduly prejudicial. He further contends that the denial violated his federal constitutional rights to due process and a fair trial.

1. Law

The denial of a motion to bifurcate the trial of a gang enhancement is reviewed for an abuse of discretion. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1050.)

A “criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense.” (*People v. Hernandez, supra*, 33 Cal.4th at p. 1048.) Evidence of gang membership is often relevant to the charged offense and admissible to help prove issues pertinent to guilt of that offense, such as identity, motive, modus

operandi, specific intent, or means of applying force or fear. When the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice is dispelled, and bifurcation is not necessary. (*Id.* at pp. 1049-1050.)

Evidence that a defendant is a gang member may also be relevant to a witness's state of mind when testifying about the charged offense. A witness's fear is relevant to his or her credibility and is therefore admissible. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony." (*Ibid.*) The jury should be informed of any facts which would enable it to evaluate the witness's fear. "A witness who expresses fear of testifying because he is afraid of being shunned by a rich uncle who disapproves of lawyers would have to be evaluated quite differently than one whose fear of testifying is based upon bullets having been fired into her house the night before the trial." (*Id.* at p. 1369.)

"Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*People v. Hernandez, supra*, 33 Cal.4th at p. 1050.) Other factors may favor a single trial. Such a trial usually avoids the increased expenditure of funds and judicial resources which may result if the enhancement was tried separately. (*Ibid.*) Thus, the trial court's discretion to deny bifurcation of a charged gang enhancement is "broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Ibid.*) The defendant has the burden of persuading the court that

considerations of judicial economy are outweighed by a substantial danger of undue prejudice. (*Ibid.*)

2. Analysis

The offense of carjacking requires proof of a felonious taking by fear or force. (*People v. Capistrano* (2014) 59 Cal.4th 830, 886.) Defendant contends the victims were afraid of the men's guns, not Perez's gang affiliation. A jury could reasonably infer that Perez's gang membership contributed to the victims' fear, and so the evidence is relevant to prove an element of that offense.

When Perez first approached the victims, he did not display his gun. Perez "poked his head in the car" when he asked Monroy to give him a ride, thereby displaying the gang tattoo on the top of head. Monroy recognized the tattoo. He testified that this is when he first became concerned about the encounter. Garcia also noticed Perez's tattoos, and they caused him concern. Nevertheless, Monroy did not agree to Perez's request for a ride.

Perez and defendant then displayed guns and ordered Monroy and Garcia to get out of the car. They complied. There is no doubt that fear of the guns strongly motivated the victims, but guns by themselves are normally incapable of hurting anyone. It is the person holding the gun who determines if the gun will be fired and cause injury or death. Thus, a jury could reasonably to infer the "concern" provoked by Perez's gang tattoos worked together with the display of the guns to accomplish the taking of Monroy's car by fear.

The gang evidence was also relevant to the victims' credibility. Garcia testified that he was scared to testify at trial. He was concerned in part because Perez had gang tattoos. Monroy testified that he was nervous about testifying and did not want to see the men from the carjacking again because

he did not want any harm to come to him or his friends. A jury could reasonably infer that at least some of this fear was related to the concern Monroy felt upon initially seeing Perez's gang tattoos.

Since the gang evidence was relevant to both an element of the substantive offense and to the victims' state of mind, it would have been admissible at a trial of the substantive offenses alone. This is ordinarily sufficient to dispel any inference of prejudice from the gang evidence. (*People v. Hernandez, supra*, 33 Cal.4th at pp. 1049-1050.) In some cases, the gang evidence may be so "extraordinarily prejudicial" and of so little relevance to guilt that bifurcation is nevertheless warranted. (*Id.* at p. 1049.) Nothing about the gang evidence in this case is out of the ordinary. Significantly, the parties stipulated that Pacas was a criminal street gang within the meaning of section 186.22. Thus, the jury did not hear evidence of the gang's predicate offenses, which are generally not related to the charged crimes or the defendant and which can be unduly prejudicial. (See *People v. Hernandez, supra*, 33 Cal.4th at p. 1049 [noting that such evidence could warrant bifurcation of a gang enhancement].)

The trial court did not abuse its discretion in denying bifurcation. There was no violation of defendant's federal constitutional rights to due process and a fair trial.

C. The Gang Expert's Testimony Was Not Improper or Prejudicial

Detective O'Neal testified he believed defendant was an associate of the Pacoima Criminals gang "[b]ecause I identified him as committing a crime with Edwin Perez, so the association there." Defense counsel objected and argued that Detective O'Neal was improperly expressing an opinion about guilt. Although the trial court did not agree with this characterization, the

trial court ultimately ruled, “Well, we’ll clarify that and I’ll strike the answer, and we’ll just have him rephrase it.” Court was then adjourned for the day. The next day, the trial court did not strike the testimony, and none of the attorneys brought this omission to the court’s attention.

Defendant contends the trial court’s inaction showed bias toward the prosecution, the prosecutor committed misconduct in failing to remind the court to strike the testimony and defense counsel was constitutionally ineffective in failing to remind the court to strike the testimony. Defendant further contends the trial court’s failure to follow through and strike the testimony violated his state and federal constitutional rights to due process and a fair trial because the testimony was a direct opinion as to his guilt and usurped the jury’s role in determining guilt or innocence.

1. *Law*

A witness may not express an opinion about a defendant’s guilt or innocence. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.) The reason for this bar is not that guilt is the ultimate issue of fact for the jury. (*Ibid.*)

“Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.” (Evid. Code, § 805.) Opinions on guilt are inadmissible because they do not assist the trier of fact. The trier of fact can weigh the evidence and draw a conclusion on the issue of guilt as well as any witness can. (*People v. Vang, supra*, 52 Cal.4th at p. 1048.)

“The determination whether an expert witness’s opinion bears upon or decides an ultimate issue in the case is sometimes a difficult decision, and “a large element of judicial discretion [is] involved.” (*People v. Wilson* (1944) 25 Cal.2d 341, 349.)” (*People v. Frederick* (2006) 142 Cal.App.4th 400, 412.) Any error in admitting an expert witness’s “unhelpful comments” concerning a

defendant's guilt or innocence is reviewed under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 493-494.)

2. Trial court proceedings

After defense counsel argued that Detective O'Neal's testimony amounted to an opinion on guilt, the court responded, "Well, I think that *if* he was drawing a legal conclusion, you're absolutely right." (Italics added.) The court then clarified, "No, he's not reaching the conclusion that your client committed any crime. He's saying they were involved." The court explained, "He can say, I investigated this crime and based on my investigation these people were involved." The court added that the prosecutor was not asking, "Do you have an opinion that Mr. Perez or Mr. Hurtado committed this crime. He's not being asked that question." Defendant's counsel protested, "That's what he said." The court replied, "Okay. Well, we'll clarify that and I'll strike the answer, and we'll just have him rephrase it." The prosecutor stated, "I think I can fix it tomorrow."

The next day, the court apologized to the jury for some unexpected delays in starting, and the prosecutor immediately resumed his questioning of Detective O'Neal. The prosecutor went over the testimony from the end of the previous day, reminding the detective that they had been talking about Perez being a gang member and defendant a gang associate. He continued, "So let me just ask the question, again. I ended on which is why you say that [defendant] is an associate?" Detective O'Neal replied, "Quite simply because he's associating with a member from that gang Pacas." The prosecutor asked, "Based on this investigation of the case?" Detective O'Neal replied, "That's correct."

Defendant's counsel also covered this topic during cross-examination of Detective O'Neal. He asked, "You mentioned that you called [defendant] an associate. Is that just because based on what you know he was together with Mr. Perez on a particular occasion?" The detective responded, "Together during the suspected commission of the crime, yes." Defense counsel asked, "Based on your understanding from what the alleged victims said?" The detective agreed. Defense counsel repeated, "That's what you're going off from?" Detective O'Neal replied, "I'm going from the information obtained from the witnesses." Defendant's counsel continued, "And whether or not that information is true, you're not making a judgment call, you're making based on the information that you heard?" The detective replied, "Exactly."

There was no further discussion of this topic. The trial court excused the detective from the stand without striking his earlier testimony.

3. Analysis

The trial court found Detective O'Neal did not express an opinion or conclusion about defendant's guilt. The trial court did not abuse its discretion in reaching this conclusion. Detective O'Neal stated that he had "identified" defendant as committing the crimes. Detective O'Neal had previously testified at some length about the process he used to "identify" Perez and defendant as suspects, first by using physical descriptions and information from witnesses, then by showing photographs of defendant and Perez to the two victims. Thus, Detective O'Neal's statement that he had "identified [defendant] as committing a crime with Edwin Perez" is most reasonably understood as referring back to the detective's investigation and his identification of them as suspects.

Since Detective O'Neal did not offer a direct opinion about defendant's guilt, his testimony did not remove the decision on guilt or innocence from

the jury. There was no violation of defendant's state and federal constitutional rights to due process and a fair trial. At most, as the trial court found, there was some ambiguity in the testimony which should be "clarified." Both the prosecutor and defendant's counsel then asked questions designed to do just that.

Defendant characterizes his counsel's questioning as an "attack" which suggested that the earlier testimony had merit and so strengthened that testimony. Defense counsel's questioning was not adversarial, and Detective O'Neal readily agreed with the questions. The prosecutor also asked questions about the detective's earlier testimony. Such "bipartisan" questioning indicates that the testimony was flawed, not meritorious.

The questioning was effective. Detective O'Neal agreed that he believed defendant was a gang associate based on information that he had obtained from witnesses, but was not making a judgment call about whether the information he received from witnesses was true. In other words, Detective O'Neal believed that, if what the witnesses said was accurate, defendant was a gang associate.

The jury was instructed pursuant to CALCRIM No. 200 that "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." The jury was instructed pursuant to CALCRIM No. 332 that it was not required to accept an expert's opinion as "true or correct." This instruction also reminded the jury that it "must decide whether information on which the expert relied was true and accurate." Thus, the jury was aware not only that it was free to reject any opinion by Detective O'Neal, but also that it had a duty to decide whether the information on which he was relied was "true and accurate." That duty required the jury to assess the credibility

and the accuracy of the victims' testimony and thereby make an independent conclusion of whether defendant and Perez carjacked the victims.

The evidence against defendant was strong. Garcia, who was closest to defendant during the crimes, identified defendant in a six-pack photographic lineup. Monroy selected defendant from a six-pack photographic lineup and was about 30 percent sure of his identification. Defendant had access to a car like the one used to commit the crimes and made statements in his note to Perez that showed consciousness of guilt.

There is no reasonable probability that defendant would have received a more favorable result if Detective O'Neal's initial testimony had been stricken. (See *People v. Leonard, supra*, 228 Cal.App.4th at pp. 493-494 [applying *Watson* standard of review].)

4. *Misconduct*

The failure of the trial court, the prosecutor and defense counsel to mention striking Detective O'Neal's testimony at any time after the detective resumed testifying is puzzling. There is, however, nothing in the record to support defendant's claim that this failure shows trial court bias or prosecutorial misconduct.

The court gave defense counsel an opportunity to speak at the conclusion of the prosecutor's redirect examination of Detective O'Neal, which is inconsistent with a deliberate intent to avoid striking the testimony, favor the prosecution or thwart due process. Defense counsel replied that they had nothing further.

The prosecutor, as promised, attempted to clean up Detective O'Neal's testimony. Thus, he was not attempting to preserve any improper impression that Detective O'Neal had concluded defendant committed the carjacking. He did not engage in any deceptive or reprehensible methods to influence the

jury. (See *People v. Gionis* (1995) 9 Cal.4th 1196, 1215 [prosecutor commits misconduct under state law if he uses deceptive or reprehensible methods].)

Defendant has similarly failed to show he received ineffective assistance of counsel. Defendant suffered no prejudice from the earlier testimony and so there is no reasonable probability defendant would have obtained a more favorable result if the earlier testimony had been stricken. (See *People v. Rodrigues, supra*, 8 Cal.4th at p. 1126 [court need not determine whether counsel’s performance was deficient before examining prejudice from claimed deficiencies].) Absent such a probability, his claim fails.

D. There Is Substantial Evidence to Support the Gang Enhancement

Defendant contends there is insufficient evidence to show that he committed the carjacking for the benefit of a criminal street gang. He maintains that a true finding unsupported by substantial evidence violates his state and federal constitutional rights to due process.

1. Law

In evaluating a claim the evidence is insufficient to support a true finding on an allegation, we review the entire record in the light most favorable to the judgment 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.’ [Citation.]” (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) “We draw all reasonable inferences in support of the judgment. [Citation.]” (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears “that upon no hypothesis whatever is there

sufficient substantial evidence to support [the conviction].’ [Citation.]”
(*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (b)(1) applies to “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The subdivision does not require that a defendant be a member of a gang. (*People v. Albillar* (2010) 51 Cal.4th 47, 67-68.)

2. Analysis

Section 186.22, subdivision (b)(1) has two prongs. The first prong requires the crime to be “committed for the benefit of, at the direction of, or in association with any criminal street gang.” This prong is intended to make it clear the enhancement applies only if the crime is “gang related.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 622, overruled on other grounds by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) Because the first prong is written in the disjunctive, a gang enhancement may be imposed without evidence of any benefit to the gang so long as the crime was committed in association with or at the direction of the gang. (See, e.g., *People v. Leon* (2008) 161 Cal.App.4th 149, 162; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Here, there is evidence that defendant committed the carjackings in association with the Pacas gang.

Defendant committed the crimes with Perez, a Pacas gang member. Perez displayed his Pacas gang tattoos during the commission of the carjackings. Detective O’Neal testified that it is common for gang members to display their tattoos for the purpose of intimidating their victims or the community. The detective also explained that when a gang member uses his gang tattoos to intimidate his victims, he is using the power of the gang to

effect the crime. A jury could reasonably infer that defendant and Perez, acting together, relied on the power of the Pacas gang to commit the crime. Thus, defendant committed the carjackings in association with the Pacas. (See *People v. Albillar*, *supra*, 51 Cal.4th at pp. 60-62 [gang members who relied on gang apparatus, such as intimidation, to commit crimes were acting in association with the gang].)

The second prong requires “the specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) Generally, if a defendant commits a crime with a known gang member, that is sufficient evidence to support an inference that the defendant acted with the requisite specific intent. (*People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.) Here, there is no dispute that defendant knew Perez was a member of the Pacas gang. The jury found defendant committed the carjackings with Perez. That is substantial evidence to support the second prong.

Defendant cites several cases in which appellate courts found the evidence insufficient to support a gang enhancement. Reviewing the sufficiency of evidence, however, necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)

Defendant argues the crime could not be gang related because he had been green-lighted. A jury could reasonably infer that defendant and Perez acted in the belief that defendant’s identity and status would never become known.

Since we have determined that “a rational trier of fact could have found the essential elements of the [allegation] proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation],

as is the due process clause of article I, section 15, of the California Constitution.” (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.