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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DESMONE DOWNS,

Defendant and Appellant.

E055378

(Super.Ct.No. FVA1001773)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Reversed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Michael P. Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Desmone Downs of first degree murder (count 1—Pen. Code § 187, subd. (a))¹ and active participation in a criminal street gang (count 2—§ 186.22, subd. (a)). The jury additionally found true allegations that in defendant's commission of the count 1 offense he personally used a handgun (§ 12022.53, subd. (b)); personally and intentionally discharged a handgun (§ 12022.53, subd. (c)); personally and intentionally discharged a handgun causing great bodily injury and death (§ 12022.53, subd. (d)); and did so for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced defendant to an indeterminate term of incarceration of 50 years to life.

On appeal defendant raises eight contentions: (1) insufficient evidence supported the jury's conviction of defendant in count 2; (2) the court erred in admitting evidence of defendant's prior conviction for evading police; (3) the court erred in instructing the jury it could consider evidence of defendant's prior offense to prove the primary activities of defendant's gang in the count 2 offense and the gang enhancement attached to count 1; (4) defense counsel below committed constitutionally prejudicial ineffective assistance of counsel (IAC); (5) the expert gang witness improperly expressed an opinion on defendant's guilt; (6) the errors resulted in cumulative prejudice to defendant; (7) insufficient evidence supported the jury's true finding on the gang enhancement attached to count 1; and (8) insufficient evidence supports his conviction on count 1 because no evidence was adduced that he was the perpetrator.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

We hold that, pursuant to the California Supreme Court's decision in *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), which postdated briefing in this matter, insufficient evidence supported defendant's conviction in count 2. We will therefore reverse defendant's conviction in count 2.

We further hold the court erred in admitting evidence of defendant's prior conviction for evading the police and in instructing the jury it could use that evidence to support the primary activities prong of the count 2 offense and the gang enhancement attached to count one. Moreover, we hold defense counsel below rendered ineffective assistance of counsel in neglecting to request sanitization of the evidence used to prove defendant's prior conviction, redaction of prejudicial information in the video recording of defendant's interview played to the jury, and in not requesting a limiting instruction as to how the jury could use such evidence. Furthermore, we hold the expert gang witness improperly expressed an opinion as to defendant's guilt. Although no one of the above enumerated errors may have prejudiced defendant, we hold that the cumulative nature of the errors resulted in reversible error. Therefore, we will reverse and remand the judgment with respect to count 1 and the attached enhancements.

FACTUAL AND PROCEDURAL HISTORY

On November 6, 2010, Ikea Williams had a party at her house, which began at 8:30 p.m. She testified that between 90 to 100 people were in attendance. At some point while she was in the kitchen, she heard a gunshot; people began running and yelling; she ran too.

Christina Hambrick and Keyoshia Hollis testified they went to the party together. They met up with the victim, with whom they spent most of the night.

At some point, Hambrick saw the victim arguing with another man; she separated them from each other, pushing them apart. Hambrick described the man as short, five foot one or two; skinny with a fade haircut; light to caramel complected, and wearing a baggy blue jacket with a logo.² The person with whom the victim argued made gang signs and was saying “Five Times, Five Times.”

Hambrick led the victim to the front yard so they could call to have someone pick him up. The individual with whom the victim had argued was already out in front of the house. That individual kept staring at them. Hambrick told the victim they should move into the house. They went into the living room where they sat on a small couch with the victim between Hambrick and Hollis. Hambrick called someone to pick up the victim.

Hambrick went to use the restroom. When she returned she saw the same individual arguing with the victim again. Hollis testified she saw the victim arguing with someone too;³ the other individual was “banging Five Time”; he made hand gestures. Hambrick broke it up again. Thereafter, Hambrick’s phone rang; she got up and walked away to answer it. She then heard a gunshot;⁴ everyone started running; she ran too. Hollis testified she was sitting next to the victim on the couch when he was shot; she

² Hambrick did not identify defendant at trial.

³ Hollis did not identify defendant at trial.

⁴ She did not see who had the gun because her back was turned.

heard the gunshot and saw the muzzle flash from the side of the couch. The victim died from a gunshot wound to the head.

Hollis described the individual with whom the victim argued as short, brown skinned, with a fade haircut, and wearing a blue or black jacket. Hambrick identified defendant as the individual with whom the victim argued from a six-pack photographic lineup and a video when interviewed later by the police. Hollis identified defendant as the individual with whom the victim was arguing from a six pack photographic lineup thereafter.⁵

Detective Rory Scalf was assigned to investigate the shooting. Hollis informed him the victim was affiliated with Nutty Blocc or the Blocc Boyz gangs in Rialto. Detective Paul Stella obtained video surveillance from the night of the shooting from a nearby liquor store; the video was played to the jury. Williams identified defendant from the video; she told him defendant was at the party.

Detective Scalf interviewed defendant on November 12, 2010. The People played a video recording of the interview at trial. In it, defendant initially denied going to the liquor store until Detective Scalf informed him they had him on video. Defendant then admitted going to the store, but insisted he walked there; however, Detective Scalf then informed him the video showed him arriving in a car. Defendant then maintained he went to the store in an Impala; however the video reflects defendant arrived in a Honda. Defendant denied going to the party.

⁵ Neither Hollis nor Hambrick ever identified defendant as the shooter.

Sergeant Travis Walker of the San Bernardino Police Department testified as the People's expert gang witness. He testified "Five Time Hometown Crips" (5x) is a criminal street gang in the City of San Bernardino. Its common signs or symbols are "5x," "V"; and "2600" or "2700," reflecting the street addresses where the gang is based. Antoine Briggs, a member of 5x, had a prior conviction for carrying a concealed firearm and possession of ammunition by a prohibited person. Kevin Radford, another member of 5x, had a prior conviction for grand theft auto.

Sergeant Walker testified defendant is a member of 5x. Seven field interrogation (FI) cards on defendant dated November 18, 2006; January 6, 2007; February 16, 2007; May 8, 2007; February 23, 2009; April 11, 2009; and April 15, 2010, reflected defendant was a self admitted member of 5x. Defendant had tattoos reading "2700," "HT," "5," and one with five dots. Defendant admitted gang monikers of "Lil Loc" and "Lil Dez"; he had tattoos of the words "LIL" and "LOC." Attached to one FI card was a picture of defendant throwing a 5x gang hand sign. During encounters with law enforcement, defendant was accompanied by Danny Louie, Ricky Johnson and Dalray Andrew, all members of 5x. On another he was with Danny Louie only.

Sergeant Walker determined from interviews that the victim was possibly affiliated with the Nutty Blocc and Blocc Boyz gangs in Rialto. He testified there was a long standing feud between 5x and Crip gangs in Rialto, including Blocc Boyz. Armando Simmons, the victim's brother, was a suspect in the shooting of 5x member Danny Louie. From all this information, Sergeant Walker concluded, "the murder of the

victim in this case was at the direction of, in association with, or for the benefit of the furtherance of Five Time Hometown Crips criminal street gang activity.”

DISCUSSION

A. INSUFFICIENCY OF THE EVIDENCE TO SUPPORT CONVICTION FOR THE SUBSTANTIVE GANG OFFENSE IN COUNT 2

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] ¶ The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ [Citation.]” (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.)

Section 186.22, subdivision (a) states, “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” In *Rodriguez, supra*, 55

Cal.4th 1125, the California Supreme Court recently held that “section 186.22(a) reflects the Legislature’s carefully structured endeavor to punish active participants for commission of criminal acts done *collectively* with gang members.” (*Id.* at p. 1139.) Thus, the court concluded that a gang member who commits an offense alone, whether gang related or not, is not in violation of section 186.22, subdivision (a). (*Ibid.*)

Here, there was no evidence defendant committed murder collectively with any other gang member. Although all the evidence implicating defendant as the perpetrator of the shooting was circumstantial and inferential, it all indicated to the extent he committed the murder, he did so alone. Thus, *Rodriguez* compels the reversal of defendant’s conviction for active gang participation in count 2.

B. ADMISSION OF DEFENDANT’S PRIOR CONVICTION FOR EVADING ARREST

Defendant maintains the court erred in admitting evidence of defendant’s prior conviction for evading police because it is not one of the enumerated qualifying predicate offenses in Penal Code section 186.22, subdivision (e). The People concede defendant’s prior conviction is not a qualifying predicate offense; however, they argue evidence of the conviction was nonetheless admissible under an Evidence Code section 1101, subdivision (b) analysis to show motive and gang affiliation. In any event, the People argue its admission was harmless. We agree with the People that, standing alone, evidence of defendant’s conviction for evading arrest was probably harmless; however, combined with the manner of its presentation, discussed below, as well as other errors, we hold the errors were cumulatively prejudicial.

The People indicated below they intended to use defendant's conviction for evading police "to show a pattern of gang activity for the gang allegation" pursuant to *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*). Defendant's prior conviction also involved the admission of the truth of an attached gang enhancement allegation. Defense counsel objected to the People's use of defendant's evading conviction. Even if admitted, defense counsel requested evidence of the prior conviction be limited, i.e., that the circumstances and facts of the case be omitted. The court ruled that pursuant to *Tran*, it would allow evidence of defendant's prior conviction to prove the requisite predicate offenses: "I believe if you're using it as a predicate, that the facts behind the prior won't be relevant in any instance. It's just the fact of conviction, the actual crime that will be in one of the enumerated statutes, and the date of offense." The court additionally determined, "the probative value of this particular prior conviction outweighs its prejudicial effect and will allow [the People] to present [defendant's] prior conviction . . . that's gang related as a predicate offense."

1. *STATUTORY ADMISSIBILITY OF DEFENDANT'S PRIOR
CONVICTION*

The California Street Terrorism Enforcement and Prevention Act (the STEP Act; § 186.20 et seq.) criminalizes active participation in a criminal street gang and the commission of other crimes for the benefit of, at the direction of, or in association with a criminal street gang. (§ 186.22, subds. (a) & (b).) "A criminal street gang is any ongoing association that has as one of its primary activities the commission of certain criminal offenses and engages through its members in a 'pattern of criminal gang activity.'

[Citations.] A pattern of criminal gang activity is ‘the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more’ specified criminal offenses within a certain time frame, ‘on separate occasions, or by two or more persons’ (the ‘predicate offenses’). [Citations.]” (*Tran, supra*, 51 Cal.4th at p. 1044.) Both the current effective version and prior versions of section 186.22, subdivision (e) list a number of specific offenses which qualify as predicate offenses.

We typically review the admission of evidence for abuse of discretion (*People v. Homick, supra*, 55 Cal.4th at p. 859); however, the current issue is one of statutory construction, i.e., whether section 186.22, subdivision (e) permits admission of prior convictions, which are not therein enumerated. As such, we review the issue de novo. (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.)

Here, as defendant maintains and the People concede, a conviction for evading police is not now, nor never has been a qualifying predicate offense for purpose of proving a substantive offense of active gang participation (§ 186.22, subd. (a)) or the enhancement allegation of committing another offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). (§ 186.22, subd. (e).) In *Tran, supra*, 51 Cal.4th 1040, the basis upon which the trial court permitted evidence of defendant’s prior conviction in this case, the court held that evidence of a defendant’s prior conviction of a predicate offense is admissible even if the People could develop evidence of the requisite number of predicate offenses through the presentation of other gang members’ convictions. (*Id.* at p. 1044.) However, *Tran* in no way stands

for the proposition that a defendant's prior *non-qualifying* conviction may be admitted to prove the predicate offenses prong. Thus, the court erred in admitting evidence of defendant's prior conviction for evading police.

2. FORFEITURE

The People argue that, notwithstanding the error, the evidence would have been admissible pursuant to an Evidence Code section 1101, subdivision (b) analysis, an argument never made by the People below. (*People v. Jones* (2012) 54 Cal.4th 1, 50 [“[A] ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion”].) The People maintain defendant's prior conviction would have been permissible pursuant to such an analysis in order to prove both motive and defendant's gang affiliation. We disagree.

First, we hold the People forfeited any contention the prior conviction was *factually, evidentially* admissible by failing to pose any *factual evidentiary* theory of admissibility below. (See *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1226, fn. 17 [a determination of *factual evidentiary* admissibility must first be made in the trial court which must undertake an analysis of the evidence proffered. An appellate court cannot conduct such an analysis in the first instance]; *People v. Clark* (2011) 52 Cal.4th 856, 889, fn. 7 (*Clark*) [claims regarding the factual admissibility of evidence are forfeited unless it required no action below by the party proposing it or “the new arguments do not invoke facts or legal standards different from those the trial courts was asked to apply”];

People v. Williams (2008) 43 Cal.4th 584, 624-625 [Factual evidentiary claims must first be made in the trial court so that the other party is given an opportunity to respond and the trial court can take steps to prevent any error. A party forfeits a claim where he asks a reviewing court to interpret and apply the law to the facts despite “the circumstance that there is a critical factual dispute that the trial court never was asked to explore or resolve”]; *People v. Johnson* (2003) 30 Cal.4th 1302, 1330, overruled on another point in *Johnson v. California* (2005) 545 U.S. 162 [“The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that “contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented”” below]; *People v. Moses* (1990) 217 Cal.App.3d 1245, 1252 [“It is elementary that a new theory cannot be raised on appeal where, as here, the theory contemplates factual situations the consequences of which are open to controversy and were not put in issue in the lower court”].)

Here, although the court conducted an Evidence Code section 352 analysis with respect to the admissibility of defendant’s prior conviction, it did so only through the purview of its determination of its statutory admissibility via Penal Code section 186.22, subdivision (e) and *Tran*. Thus, the trial court had already determined the prior conviction was statutorily admissible and only evaluated its evidentiary admissibility from that perspective, i.e., whether even statutorily admissible evidence would nonetheless be more prejudicial than probative. The court was never asked to and never did conduct a pure analysis of the prior conviction’s factual evidentiary admissibility

separate and apart from its purported statutory admissibility. Indeed, the reviewing court in *People v. Jones, supra*, 54 Cal.4th 1, only upheld the factual admissibility of certain evidence at that trial on an alternative factual basis where the trial court had already made a *factual* evidentiary determination. (*Id.* at pp. 49-51.)

We are a reviewing court. To the extent we could reach it, the People’s argument that the prior conviction would have been admissible pursuant to Evidence Code section 1101, subdivision (b) would have us “reviewing” a determination that was never made below. In other words, we would be conducting our own independent evidentiary analysis rather than reviewing one conducted by the trial court. Neither is this a situation in which we could review the trial court’s ruling *de novo* because, as discussed above, this is not a legal question. Thus, the People forfeited the contention by failing to posit any factual theory of evidentiary admissibility below.

3. *FACTUAL EVIDENTIARY ADMISSIBILITY OF DEFENDANT’S
PRIOR CONVICTION PURSUANT TO EVIDENCE CODE
SECTION 1101, SUBDIVISION (B)*

Nevertheless, to the extent we could independently address the People’s argument, we would find the evidence more prejudicial than probative. “With certain exceptions not relevant here, Evidence Code section 1101, subdivision (a), provides that ‘evidence of a person’s character’—whether in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct—is inadmissible when offered to prove [the person’s] conduct on a specified occasion.’ This prohibition, however, does not preclude ‘the admission of evidence that a person committed a crime, civil wrong, or other act

when relevant to prove some fact . . . other than [the person's] disposition to commit such an act,' including 'motive, opportunity, intent, preparation, [or] plan.' (Evid. Code, § 1101, subd. (b).)" (*People v. Valdez* (2012) 55 Cal.4th 82, 129.)

When conducting an Evidence Code section 1101, subdivision (b) analysis, courts must additionally determine that "the probative value of the proffered evidence [is] not . . . substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) Evidence sought to prove motive is much closer, with respect to its prejudicial consequences, to prohibited character evidence than any other permitted use under Evidence Code section 1101, subdivision (b). (*People v. Gibson* (1976) 56 Cal.App.3d 119, 129-130 ["In terms of prejudicial consequence, there is very little difference . . . between other-crimes evidence that is introduced to establish a defendant's *motive* and thence to the inference that the charged offense was committed by defendant in accordance with such motive"].) Cumulative evidence may lack probative value and be regarded as more prejudicial than probative if the subject matter is not reasonably subject to dispute. (*People v. Homick, supra*, 55 Cal.4th at pp. 865-866; *Tran, supra*, 51 Cal.4th at p. 1049; *People v. Vines* (2011) 51 Cal.4th 830, 857; *People v. Cardenas* (1982) 31 Cal.3d 897, 904.)

Here, the People posit two theories for the admissibility of defendant's prior conviction pursuant to Evidence Code section 1101, subdivision (b): (1) to prove defendant's motive in committing the killing, revenge for the alleged shooting of defendant's associate Danny Louie by defendant's brother, because the factual context of defendant's arrest for his prior conviction involved being in a car with Louie; and (2) to prove defendant's affiliation with 5x because defendant admitted a gang enhancement attached to the offense.

However, the People already adduced admissible evidence at trial showing that defendant was connected with Louie, a 5x gang member: the People introduced into evidence three FI cards dated May 8, 2007, February 23, 2009, and April 11, 2009, reflecting law enforcement encounters in which defendant was accompanied by Louie. Indeed, the evidence used to prove defendant's prior conviction only tangentially connected defendant with Louie; only the complaint in the packet submitted by the People to prove defendant's prior conviction contains Louie's name. Louie's name is listed in only two places, one of which is blacked out; no other reference to Louie is made throughout the entire packet or in the testimony of Sergeant Walker. Thus, the evidence of defendant's prior conviction was less probative of defendant's association with Louie; was cumulative of other, properly admitted evidence; and touched on defendant's motive, a basis more likely to involve prejudice. Therefore, we conclude the evidence of defendant's prior conviction was more prejudicial than probative on the matter of defendant's purported motive in committing the murder.

Similarly, the People already had overwhelming evidence of defendant's membership in 5x. The People introduced seven FI cards signed by defendant over a period extending from November 18, 2006, to April 15, 2010, in all of which defendant admitted his membership in 5x. Defendant had multiple 5x gang tattoos reading "5," "2700," and one with five dots. Defendant had the gang monikers "Lil Loc" and "Lil Dez"; defendant had a tattoo reading "LIL" and "LOC." Law enforcement had encountered defendant in association with three other members of 5x. One of the FI cards had a picture of defendant throwing a 5x gang hand sign. Sergeant Walker testified he was familiar with defendant, having had personal contact with him between five and six times; he testified defendant was a member of 5x. Indeed, defendant's membership in 5x was not contested below. Thus, while defendant's prior conviction with an attached gang enhancement was probative to establish his membership in 5x, it was also superfluous for that purpose. Therefore, evidence of his prior conviction was cumulative and more prejudicial than probative.

4. *HARMLESS ERROR*

The People contend that even if the admission of evidence of defendant's prior conviction was error, it was harmless. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388-389 [Admission of non-qualifying predicate offense of *another* gang member at trial was harmless where the People adduced evidence of multiple qualifying offenses committed by defendant and other gang members].) Here, the People introduced evidence of two qualifying predicate offenses committed by other members of 5x. Moreover, even the charged offense may serve as a predicate offense. (*Tran, supra*, 51 Cal.4th at p. 1046;

People v. Bragg (2008) 161 Cal.App.4th 1385, 1400; *People v. Gardeley* (1996) 14 Cal.4th 605, 625.) Thus, here the People adduced evidence of at least three qualifying predicate offenses. Under normal circumstances, we would conclude that the trial court's admission of defendant's prior conviction here, in and of itself, would constitute harmless error. However, as we will discuss more fully below, we conclude the contents of the document admitted to prove defendant's prior conviction as well as other errors in this case resulted in prejudicial cumulative error.

C. THE TRIAL COURT'S ERRONEOUS INSTRUCTION OF THE JURY REGARDING DEFENDANT'S PRIOR CONVICTION FOR EVADING POLICE

In a matter related to that discussed above in section B, defendant contends the court erred in instructing the jury it could consider defendant's conviction for evading as proof of one of the primary activities of 5x, another prerequisite to finding the gang enhancement allegation attached to count 1 true and to finding defendant guilty of the count 2 offense. The People concede the trial court erred in so instructing the jury, but maintain the error was harmless.

We independently review claims of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "When the jury is 'misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt.' [Citations.]" (*People v. Wilikins* (2013) 56 Cal.4th 333, 530.) However, where the erroneous instruction relates particular facts to a legal

issue in the case, reversal is only required where it is reasonably probable a result more favorable to the defendant would have been obtained in absence of the error. (*Ibid.*)

As relevant to this issue, a criminal street gang, “means any ongoing organization, association, or group of three or more persons . . . having as one of its primary activities the commission of one or more” of the qualifying offenses enumerated in section 186.22, subdivision (e). (§ 186.22, subd. (f).) “To establish . . . the nature of the gang’s primary activities, the trier of fact may look to both the past and present criminal activities of the gang. [Citation.]” (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611.)

Here, Sergeant Walker testified that a gang injunction had been obtained against 5x “due to the level of violence and criminal activity” that it was causing in the neighborhood. The People introduced solid, unchallenged evidence of two prior offenses committed by two other 5x gang members, Briggs and Radford; both of which qualified as predicate offenses. (§ 186.22, subd. (e).) The time spent on introducing the predicate offenses and laying the foundation for the exhibits in support of them was minimal. Likewise, the time spent on defendant’s predicate offense was no longer than that spent on Briggs’s and Radford’s. Similarly, the exhibit used to substantiate defendant’s prior offense did not vary much in length or substance from those supporting the others.⁶

Thus, we hold the error was, independently, harmless beyond a reasonable doubt because

⁶ We note the normal method of proving the primary activities prong of a gang charge or enhancement is to simply have the gang expert testify the gang’s primary activities involve one or more of the offenses enumerated in section 186.22, subdivision (e). (See *Tran, supra*, 51 Cal.4th at p. 1045; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324; *People v. Gardeley, supra*, 14 Cal.4th at p. 620.) Here, the prosecution never asked Sergeant Walker what were the primary activities of 5x.

jury must necessarily have found all the prior offenses to be the primary activities of 5x when only one was required.

D. IAC

Defendant contends defense counsel below rendered prejudicially IAC on three bases: (1) by failing to request redaction of the recorded interview of defendant in which there were numerous references to defendant's status as a probationer when he committed the instant crimes, in which they discussed the presence of a gun in the car when defendant committed the prior offense, and discussed his previous jail term; (2) by failing to request redaction of the documentary evidence admitted to prove his prior conviction, which contained references to the fact that defendant was previously charged with possession of a firearm, references his sentence to jail on the prior offense, references his status as a probationer, and references he twice had his probation revoked; and (3) by failing to request an instruction limiting the purposes for which the jury could use the evidence of defendant's prior conviction. The People counter that defendant has failed to demonstrate deficient performance of defense counsel below and that the mentions of defendant's probation status and prior charge of gun possession were too inconsequential to result in prejudice. We agree with defendant.

“The law governing defendant's claim is settled. “A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] ‘Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.’” [Citations.] It is defendant's burden to demonstrate the inadequacy of trial counsel. [Citation.] [The

Court has] summarized defendant’s burden as follows: ““In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was “deficient” because his “representation fell below an objective standard of reasonableness . . . under prevailing professional norms.” [Citations.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when 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.”” [Citation.] [¶] 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.” [Citation.] Defendant’s burden is difficult to carry on direct appeal, as we have observed: ““Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.”” [Citation.]’ [Citation.] If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected,”” and the ‘claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.’ [Citation.]” (*People v. Vines, supra*, 51 Cal.4th at pp. 875-876.)

1. *SANITIZATION OF THE VIDEO RECORDING OF THE
INTERVIEW WITH DEFENDANT*

Defense counsel initially objected to the admission of any evidence of defendant's prior conviction; however, to the extent the court intended to admit such evidence, defense counsel requested the court limit its use of the prior to the admission of the gang enhancement allegation and omit evidence of the circumstances and facts of the particular case. The court ruled that admission of the prior conviction evidence would be admissible, but "that the facts behind the prior won't be relevant in any instance. It's just the fact of conviction, the actual crime that will be in one of the enumerated statutes, and the date of offense."

““Only relevant evidence is admissible (Evid.Code, § 350; [citations]),
“Relevant evidence is defined in Evidence Code section 210 as evidence ‘having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.’ The test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]” [Citation.]” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.)

“Evidence Code section 352 accords the trial court broad discretion to exclude even relevant evidence ‘if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ ‘Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable “risk to the

fairness of the proceedings or the reliability of the outcome” [citation].’ [Citation.] We review a trial court’s ruling under Evidence Code section 352 for an abuse of discretion. [Citations.]” (*Clark, supra*, 52 Cal.4th at p. 893.) “There is little doubt exposing a jury to a defendant’s prior criminality presents the possibility of prejudicing a defendant’s case and rendering suspect the outcome of the trial.” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580; See also *People v. Morgan* (1978) 87 Cal.App.3d 59 [error in admitting evidence the defendant was a convicted felon, on parole living in a halfway house], overruled on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498.)

“With certain exceptions not relevant here, Evidence Code section 1101, subdivision (a), provides that ‘evidence of a person’s character’—whether in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct—‘is inadmissible when offered to prove [the person’s] conduct on a specified occasion.’ This prohibition, however, does not preclude ‘the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact . . . other than [the person’s] disposition to commit such an act,’ including ‘motive, opportunity, intent, preparation, [or] plan.’ (Evid. Code, § 1101, subd. (b).)” (*People v. Valdez, supra*, 55 Cal.4th at p. 129.) When conducting an Evidence Code section 1101, subdivision (b) analysis, courts must additionally determine that “the probative value of the proffered evidence [is] not . . . substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.)

We are at a loss to explain what relevance defendant's probationary status, time spent in jail, and the fact that a gun was found in the car when defendant was arrested bore on the issues at trial other than to evidence defendant's bad character. The interview with defendant includes 13 express references to defendant's status on probation. It also contains at least several indirect references to his probation status. It references defendant had been out of jail for only nine months at the time of the interview. Furthermore, the officer discusses the fact that there was a gun in the car when defendant was arrested for evading police.

Contrary to the People's contention, we do not view these facts as inconsequential. The transcript of the recording already contains a number of redactions. We divine no tactical reason for defense counsel to fail to request redaction of the prejudicial portions of the interview or at least object to their inclusion, especially when the court had already ruled that the only evidence of defendant's prior conviction that would be admitted were the fact of the conviction, the crime, and the date of the offense. (*People v. Guizar* (1986) 180 Cal.App.3d 487, 492 [“[I]f the jury properly heard any part of the [recording] at all, it was counsel's responsibility to edit out at least the portion of the [recording] and transcript referring to other [offenses]. Ignoring other possible objections, it is inconceivable to us that defense counsel did not object to the introduction of this portion of the tape and transcript on the ground that it was more prejudicial than probative].)

2. *SANITIZATION OF THE DOCUMENTARY EVIDENCE OF
DEFENDANT'S PRIOR CONVICTION*

The People moved into evidence Exhibit 32, a certified packet of documents regarding defendant's prior conviction.⁷ The packet consists of the complaint, defendant's plea agreement, his probation terms, and a number of minute orders establishing defendant violated, and had his probation revoked, twice. The complaint reflects defendant was originally charged with unlawful possession of a firearm. The plea agreement reflects defendant was sentenced to 180 days in jail and three years of felony probation thereafter.

Again, we can discern no reason why defense counsel would fail to request redaction of the prejudicial portions of the documentary materials when the court had already ruled only the fact of defendant's conviction, the offense, and the date of the offense would be permitted into evidence. We disagree with the People's argument that the jury was unlikely to have read the 47-page document. Indeed, the gun possession charge is on page two of the exhibit.

3. *FAILURE TO REQUEST LIMITING INSTRUCTION*

Defendant contends defense counsel rendered prejudicial IAC by failing to request a limiting instruction on defendant's prior offense, presumably CALCRIM No. 1403.

The People counter defense counsel could have made a tactical decision not to request a

⁷ Contrary to the People's contention on appeal, Exhibit 32 was not entered into evidence during their examination of Sergeant Walker. Rather, Sergeant Walker testified defendant had a prior conviction for evading police, but no mention of Exhibit 32 was made until the People moved it into evidence at the end of their case in chief.

limiting instruction because it would draw undue attention to the evidence of predicate offenses, which the People deem tangential to the issues at trial. We agree with defendant that this was an extraordinary case in which failure to request a limiting instruction prejudiced defendant.

CALCRIM No. 1403, “Limited Purpose of Evidence of Gang Activity”, reads, in pertinent part, as follows: “You may consider evidence of gang activity *only for the limited purpose* of deciding whether: [¶] The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/ [and] enhancement[s]/ [and] special circumstance allegations) charged(;/.) [OR] *You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that (he/she) has a disposition to commit crime.*” (Italics added.)

“Adequate representation requires an attorney to research “‘carefully all defenses of . . . law that may be available to the defendant” [Citations.] . . . “counsel’s duty ‘includes careful preparation of and request for all instructions which in his judgment are necessary to explain all of the legal theories upon which his defense rests.’” (*In re Codero* (1988) 46 Cal.3d 161, 189.) “[A]lthough a court should give a limiting instruction on request, it has no sua sponte duty to give one. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 [court not required to give limiting instruction on its own motion in robbery case with gang enhancement allegation].)

However, there is an “exception to the general rule, . . . for the ‘occasional extraordinary case in which protested evidence of past offenses is a dominant part of the

evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence.' [Citation.]" (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1225; See also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.)

We cannot say in this case the predicate offenses or, in particular, defendant's prior offense, played such a dominant part of the evidence against him that the trial court was required to provide the limiting instruction sua sponte. Nonetheless, the inadmissibility of the evidence of defendant's prior offense on the basis for which it was offered and the multiplicity of prejudicial facts that were admitted to prove defendant's prior offense, and were contained in the recorded interview of defendant, were of such an extraordinarily prejudicial and minimally relevant purpose that there could have been no tactical reason not to request the instruction.⁸ Indeed, without such an instruction, the jury was legally in a position to use all three predicate offenses to prove defendant was a person of bad character with a disposition to commit the murder. Moreover, it could also use the evidence of defendant's short term release from jail, status as a twice revoked probationer when he allegedly committed the instant crimes, and prior charge of gun

⁸ Defendant also notes the court did not instruct, and was not requested to instruct, the jury with CALCRIM No. 375, the standard pattern instruction for the limited admissibility of uncharged offenses.

possession, to prove defendant's bad character and propensity to commit the count 1 offense.⁹

E. GANG EXPERT'S OPINION REGARDING DEFENDANT'S GUILT

Defendant contends the trial court erred in admitting Sergeant Walker's testimony that "the murder of the victim in this case was at the direction of, in association with, or for the benefit of the furtherance of the Five Time Hometown Crips criminal street gang activity." He also maintains defense counsel committed prejudicial IAC in failing to object to Sergeant Walker's testimony. The People argue defendant forfeited the issue by failing to object below and that the evidence was admissible regardless. We agree with the People defendant forfeited any contention the trial court erred in admitting the evidence; however, we hold that defense counsel erred in neglecting to object to the testimony.

⁹ "Under section 6086.8, subdivision (a)(2) of the Business and Professions Code we are required to notify the state bar of a reversal in a judgment if it is the result of "misconduct, incompetent representation, or willful misrepresentation." There is authority indicating that criminal law ineffective assistance of counsel comes within this statute. [Citation.] Accordingly, pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the clerk of this court is ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. Further, pursuant to Business and Professions Code section 6086.7, subdivision (b), the clerk of this court shall notify [defendant's] trial counsel—who need *not* be named in this opinion—that the matter has been referred to the State Bar." (*People v. Pangan* (2013) 213 Cal.App.4th 574, 585, fn. 10) We do note however, that had the trial court properly excluded evidence of defendant's prior offense, defense counsel would not have been in the position to commit the errors she did. Moreover, even had the trial court improperly admitted the evidence of defendant's prior offense, but abided by its ruling that only the fact of conviction and date of offense would be admitted, defense counsel would likewise not have made the errors she did.

“California law permits a person with “special knowledge, skill, experience, training, or education” in a particular field to qualify as an expert witness (Evid. Code, § 720) and to give testimony in the form of an opinion (*id.*, [Evid. Code,] § 801). Under Evidence Code section 801, expert opinion testimony is admissible only if the subject matter of the testimony is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*Id.* at subd. (a).) The subject matter of the culture and habits of criminal street gangs . . . meets this criterion.’ [Citation.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1044 (*Vang*).)

“When expert opinion is offered, much must be left to the trial court’s discretion.’ [Citation.] The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion. [Citations.]” (*People v. McDowell* (2012) 54 Cal.4th 395, 426.) “Generally, an expert may render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citation.]’ [Citation.]” (*Vang, supra*, 52 Cal.4th at p. 1045.) “Use of hypothetical questions is subject to an important requirement. ‘Such a hypothetical question must be rooted in facts shown by the evidence. . . .’” (*Ibid.*)

Failure to object to a gang expert’s testimony at trial forfeits any contention regarding that testimony on appeal. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 818-819.) Here, there is no question the People failed to pose their question to Sergeant Walker in the form of a hypothetical. The normal manner of proceeding in such cases is to ask the expert witness a question based upon a hypothetical situation grounded in the

facts of the case being tried. There is no doubt the better manner of proceeding here would have been to pose the question in the form of a hypothetical that embraced the particular facts of the case, but did not directly refer to defendant. Nevertheless, the admission of such expert evidence is not necessarily error: “[N]o statute prohibits an expert from expressing an opinion regarding whether a crime was gang related. Indeed, [it] is settled that an expert may express such an opinion. To the extent the expert may not express an opinion regarding the actual defendants, that is because the jury can determine what the defendants did as well as an expert, not because of a prohibition against the expert opining on the entire subject. Using hypothetical questions is just as appropriate on this point as on other matters about which an expert may testify.” (*Vang, supra*, 52 Cal.4th at p. 1052.)

At least one court has found the admission of an expert witness’s opinion that the crimes of the particular defendants in question were committed for the benefit of the respective defendants’ gangs, without the use of a hypothetical, was within the trial court’s discretion. (*People v. Valdez* (1997) 58 Cal.App.4th 494, 509.) The court in *People v. Prince* (2007) 40 Cal.4th 1179 approvingly cited *Valdez* for this very point. (*Id.* at p. 1227.) Likewise, the court in *Vang*, albeit in dicta, expressed support for that holding: “It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. [Citations.]” (*Vang, supra*, 52 Cal.4th at p. 1048, fn. 4.) Nonetheless, assuming error, we conclude, based solely on this error, it is not reasonably probable an outcome more favorable to defendant would have resulted in the absence of Sergeant Walker’s testimony. (*Clark, supra*, 52 Cal.4th at pp. 940-941 [error in

admission of prosecution's expert witness testimony subject to *Watson* standard of harmless error]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

However, as discussed above, this is not the only error in this case. Moreover, we can discern no tactical reason for defense counsel to fail to object to Sergeant Walker's testimony on the issue. Sergeant Walker's testimony effectively informed the jury defendant committed the murder because he was the only 5x gang member at the party to which the evidence was inferentially susceptible. Thus, we find defense counsel erred in failing to object.

F. CUMULATIVE ERROR

"Sometimes the cumulative effect of errors that are harmless in themselves can be prejudicial." (*People v. Loy* (2011) 52 Cal.4th 46, 77.) "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. [Citation.]" *People v. Hill* (1998) 17 Cal.4th 800, 844 overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "Under the cumulative error doctrine, the reviewing court must 'review each allegation and assess the cumulative effect of any errors to see if it is reasonably probable the jury would have reached a result more favorable to defendant in their absence.' [Citation.] When the cumulative effect of errors deprives the defendant of a fair trial and due process, reversal is required. [Citation.]" (*People v. Williams* (2009) 170 Cal.App.4th 587, 646.)

Although we might conclude any single error discussed above was harmless standing alone, we cannot ignore the overall prejudice to defendant's fair trial rights.

While, on the basis of the properly admitted evidence alone, we would affirm defendant's conviction of the murder and the attached gang enhancement, we cannot ignore the fact that the evidence of defendant's guilt on the murder offense was weak and "supported only by circumstantial evidence and the inferences one might draw therefrom." (See *People v. Ruiz* (1988) 44 Cal.3d 589, 605-607 [identity of murder perpetrator supported only by prior crimes evidence and victim's prior statements of fear of the defendant].) Indeed, at trial, no one identified defendant as being either the shooter or even someone who was present at the party. The only evidence defendant was present at the party was presented through the prior out of court identifications by Williams, Hambrick, and Hollis, of defendant as being the one who argued with the victim twice at the party. No direct evidence at all was presented that defendant was the shooter.

The conglomeration of improperly admitted evidence including not only the admission of defendant's prior conviction in and of itself, but the circumstances of the underlying offense, despite the court's express ruling that nothing but the nature of the offense and the date of conviction would be admitted, severely prejudiced defendant. Indeed, the jury was informed defendant had a gun in the car when he committed the prior offense, and received documentary evidence defendant was originally charged with weapons possession. In addition, the jury was repeatedly informed defendant had been on probation when he allegedly committed the instant offense. It was given documentary evidence defendant had already twice violated the conditions of that probation after having only been out of jail for nine months.

This evidence was augmented with Sergeant Walker’s improper opinion testimony “the murder of the victim in this case was at the direction of, in association with, or for the benefit of the furtherance of the Five Time Hometown Crips criminal street gang activity.” Because defendant was never identified as the shooter, Sergeant Walker’s opinion effectively instructed the jury defendant was the shooter because he was the only 5x gang member the evidence supported was present at the party. Finally, the court improperly instructed the jury it could consider defendant’s prior offense to establish the gang’s primary activities despite the fact that the statute does not permit evidence of evading police to support that prong of either the gang enhancement or the substantive gang offense. Thus, it is reasonably probable the jury would have reached a result more favorable to defendant in the absence of the errors.

DISPOSITION

We reverse and remand the judgment on the count 1 offense and the attached gang enhancement allegation. We reverse the judgment on count 2.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

KING
Acting P. J.

CODRINGTON
J.