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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.

LUIS ALBERTO CASTRO,

Defendant and Appellant.

E056083

(Super.Ct.Nos. SWF10000617 &  
SWF1100016)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed in part, reversed in part with directions.

Kevin D. Sheehy, 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, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Luis Alberto Castro, guilty of (1) two counts of transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a); Counts 1 & 4); (2) two counts of possessing methamphetamine for sale (Health & Saf. Code, § 11378; Counts 2 & 5); (3) two counts of being an active participant in a criminal street gang (Pen. Code, § 186.22, subd. (a); Counts 3 & 6);<sup>1</sup> and (4) one count of possessing not more than 28.5 grams of marijuana (Health & Saf. Code, § 11357, subd. (b); Count 7).

In regard to the four convictions for selling and possessing methamphetamine, the jury found true the enhancement allegations that defendant committed the crimes to benefit a criminal street gang. (§ 186.22, subd. (b).) The trial court found true the allegations that defendant suffered (1) a prior strike conviction (§§ 667, subds. (c)&(e)(1), 1170.12, subd. (c)(1)); (2) a prior serious felony conviction (§ 667, subd. (a)); and (3) three prior convictions for which he served prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for a term of 22 years.

Defendant raises five issues on appeal. First, defendant asserts his two convictions for being an active participant in a criminal street gang (§ 186.22, subd. (a); Counts 3 & 6) are not supported by substantial evidence. The People concede defendant's first contention is correct. Second, defendant contends the gang enhancement findings (§ 186.22, subd. (b)) are not supported by substantial evidence. Third, defendant asserts the trial court erroneously permitted the prosecution's expert to

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<sup>1</sup> All further statutory references are to the Penal Code unless indicated.

opine about defendant's gang-related conduct and state of mind. Fourth, defendant asserts his marijuana conviction should be dismissed. Fifth, defendant contends there should not be victim restitution in this case. The People concede defendant's fourth and fifth contentions. We affirm in part and reverse in part with directions.

### **FACTUAL AND PROCEDURAL HISTORY**

#### **A. APRIL 2010**

On April 8, 2010, at approximately 5:18 p.m., Hemet Police Corporal Mouat stopped the car defendant was driving because its license plates were expired. Defendant was on active parole, so Mouat searched defendant and the vehicle. Mouat found (1) seven plastic sandwich bags in the center console, (2) a functioning digital gram scale in the center console, (3) three cellular telephones on the passenger seat, (4) \$41 in defendant's left front pocket, (5) \$20 in defendant's right front pocket, and (6) two packages of methamphetamine in the vehicle's air vents. The first bundle of methamphetamine weighed 20.3 grams and the second weighed three grams.

Methamphetamine is typically sold in the amount of 0.1 or 0.2 gram. A usable quantity of methamphetamine is 0.1 gram. The methamphetamine in defendant's car amounted to 233 individual doses. Mouat did not find any paraphernalia in the car for ingesting methamphetamine; however, defendant did appear to be under the influence of a stimulant. Defendant was suffering body tremors, profuse sweating, and rapid eye flutter. Mouat took photographs of defendant. Defendant's head was shaved and the word "Hemet" appeared across his forehead.

B. DECEMBER 2010

On December 31, 2010, Hemet Police Officer McNish stopped a vehicle in which defendant was a passenger because the car was missing its front bumper. McNish discovered there was a felony warrant for defendant. McNish handcuffed defendant and searched him. McNish found a plastic bag in defendant's front pants pocket that contained a substance that appeared to be marijuana.

McNish placed defendant in the back of the patrol car. McNish had cleared the car of any trash or debris prior to her shift. McNish noticed defendant twisting from side to side in the back of the car. It appeared to McNish that defendant "was manipulating something in his waistband." McNish saw a plastic bindle between defendant's feet. The bindle contained methamphetamine. On the way to the police station, defendant continued twisting from side to side. Upon arriving at the police station, McNish found four more bindles underneath the backseat. When McNish searched defendant inside the police station, another bindle fell from defendant's pants leg. All the bindles contained methamphetamine.

McNish also found \$73 in defendant's possession. Defendant said he was unemployed and was unable to explain how he obtained the money. Five of the bindles weighed 0.3 gram. The sixth bindle weighed 2.1 grams. The methamphetamine amounted to 36 individual doses.

C. GANG AFFILIATION

On October 11, 2003, Hemet Police Officer Nishida interviewed defendant and documented the information on a field interview card. Defendant said his moniker or

gang name was “Fat Boy.” Defendant’s tattoos included: (1) “Castro” on his back, and (2) “Raza” on his stomach, which referred to the gang known as La Raza Controla.

Riverside County Senior Correctional Deputy Lemons works at the jail in downtown Riverside. On December 7, 2007, Lemons conducted defendant’s classification interview, in order to determine where defendant could be housed. Defendant told Lemons he served 13 years in prison and 11 of those years were served in a special housing unit. Defendant said he was a member of Hemet 13 or Hemet Trece and used the moniker “Fat Boy.” Hemet Trece has an “off-shoot” gang known as South Side Criminals. South Side Criminals has an off-shoot gang known as La Raza Controla (LRC). In other words, LRC is under the umbrella of South Side Criminals, and South Side Criminals is under the umbrella of Hemet Trece.

On December 11, 2007, Nishida conducted a probation search of the residence of Emilio Garcia (Garcia), a gang member. Garcia was a member of LRC. In the residence, Nishida found two letters from defendant to Garcia. A photograph of defendant showed him using his hands “to throw up an ‘H,’” which is a “common Hemet gang sign.” Mario Coralles, an associate of LRC, known as “Pee Wee,” was in the photograph with defendant. On June 16, 2009, Nishida received a telephone call from Department of Corrections Parole Agent Palacios. Palacios informed Nishida that defendant had been arrested in Oxnard with a gang member.

Riverside County District Attorney’s Office Senior Investigator Hankins reviewed a photograph of defendant’s tattoos. Hankins noted defendant had the word “Sureno,” which is the Spanish word for southerner, tattooed below his neck. The word

is significant because it refers to a Hispanic prison gang. The word “Hemet” on defendant’s forehead reflected the “very common” gang custom of tattooing the name of a person’s hometown on the person’s body. Defendant had “Raza” tattooed above his ears, with the number 13 between the “A,” which relates to the Sureno prison gang. Defendant also had “IE” tattooed on him, which referred to the Inland Empire or insane empire.

On defendant’s back, the words “South Side” were tattooed, indicating the Sureno prison gang. “La Raza” was tattooed on defendant’s lower back, referring to LRC. Also on defendant’s back was the Mayan numeral referring to the number 13, which is associated with southern California Hispanic gangs. On defendant’s abdomen were the words “All bitches rattle,” which is a phrase typically associated with LRC because multiple LRC members have the same tattoo. Defendant also had “IE” tattooed on his chest.

In 2009, defendant was “validated” by Department of Corrections personnel as an associate of the Mexican Mafia. Defendant was validated due to his tattoos, such as the Mayan numeral, and a Ventura County jail report. The jail report reflected defendant was arrested with a validated Mexican Mafia member.

On October 14, 2010, Department of Corrections Parole Agent Moreno searched defendant’s residence in Hemet, while defendant was in jail. Moreno found a box in a closet that contained a letter and card to defendant’s son. The card was initialed “FB,” for Fat Boy, with the Mayan symbol for “13” appearing under the initials. A sheet of lined paper was also in the box. The paper reflected inmate names, Department of

Corrections inmate identification numbers, prison addresses, and notes about sending money or magazines. Two of the names caught Moreno's attention because the individuals were members of the Mexican Mafia.

People who work for the Mexican Mafia outside of prison will send money to the Mexican Mafia members in prison as a "sign of respect," to "prove that they are working out in the community," or as a form of taxation that allows the person outside of prison to work in a particular area. Magazines are sometimes sent to incarcerated individuals who are locked in a special housing unit and need reading material.

During the search of the residence, Moreno also found an address book in defendant's bedroom. Inside the address book, Hankins noticed phone numbers with gang monikers next to them and a list of "pay-owes" for narcotic sales. Hankins concluded defendant was an active member of LRC based upon (1) his "numerous law enforcement gang-related contacts," (2) his tattoos, (3) his association with gang members, (4) handwritten notes communicating with LRC gang members, and (5) his two jail classifications. Hankins opined that defendant possessed the narcotics for sale in order to benefit LRC and the Mexican Mafia. Hankins believed the sales benefitted the gang because "taxation is a part of the gang culture," so the money would be "spread out within the gang, as well as pushed up the gangs to the [Mexican Mafia] prison gang."

The Mexican Mafia's primary activities include murder, assaults, narcotics trafficking, and "taxation." Hankins explained that LRC's "primary activities are narcotics, weapon information, sales, acts of violation, shootings, [and] car[ry]ing

firearms.” LRC started in the southeast area of Hemet, but is now located throughout the city. LRC graffiti can be found in Hemet. LRC identifies itself with acronyms such as (1) LCX, (2) LCLR, (3) LCR, (4) SSLR for South Side La Raza, (5) HMT, (6) H Town, for Hemet town. LRC also identifies with hand signs, such as (1) the hands forming an “L” and an “R” for La Raza, and (2) and “I” and an “E” for Inland Empire or insane empire. LRC members also identify with the Cowboys football team logo because (1) the “C” for the Cowboys is used to refer to “criminal,” as in South Side Criminals, and (2) the color blue “is very consistent with southern Hispanic gangs.”

On April 8, 2010, and December 31, 2010, LRC had approximately 50 members. Joe Alvarez (Alvarez) is a member of LRC and uses the moniker “Sad Boy.” On October 11, 1999, Alvarez was in a car with other gang members when they drove by a victim and shot at him. Alvarez pled guilty to assault with a deadly weapon. (§ 245, subd. (a)(2).) Rafael Florez (Florez) is a member of LRC and uses the moniker “Joker.” On December 8, 2000, Florez stole a car from a woman. Florez pled guilty to carjacking. (§ 215.)

## **DISCUSSION**

### **A. ACTIVE GANG PARTICIPATION**

Defendant contends his convictions for active participation in a criminal street gang (§ 186.22, subd. (a)) must be reversed because substantial evidence does not support a finding that he committed the drug offenses in concert with other gang members. The People concede defendant’s assertion is correct. We agree.

In *People v. Rodriguez* (2012) 55 Cal.4th 1125 (*Rodriguez*), our Supreme Court held section 186.22, subdivision (a) was designed “to punish gang members who acted in concert with other gang members in committing a felony regardless of whether such felony was gang-related. [Citation.]” (*Id.* at p. 1138.) Substantial evidence is evidence “that is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt.” (*People v. Hovarter* (2008) 44 Cal.4th 983, 996, italics omitted.)

In Count 3, defendant was charged with actively participating in a criminal street gang (§ 186.22, subd. (a)) on April 8, 2010—the day he was found with methamphetamine in the car’s air vents. The charge reflected the active participation was connected to the April drug offenses. In Count 6, defendant was charged with actively participating in a criminal street gang (§ 186.22, subd. (a)) on December 31, 2010—the day he was found with methamphetamine in the back of the patrol car. The charge reflected the active participation was related to the charged drug offenses.

The evidence reflects that, in April 2010, defendant was found alone. Defendant could not have been acting in concert with other gang members because there is no evidence reflecting he was in the presence of other gang members or otherwise committing the offense with the active assistance of other gang members. Thus, we conclude defendant’s conviction for Count 3 must be reversed.

In regard to Count 6, the evidence reflects defendant was in a car with two other people at the time they were stopped by police. However, there is nothing indicating the other people in the car were gang members. Additionally, there is no evidence

indicating defendant was somehow actively communicating with other gang members in an attempt to accomplish the drug-related crimes. Thus, we conclude defendant's conviction for Count 6 must be reversed.

When sentencing defendant, the trial court stayed defendant's sentences for Counts 3 and 6 pursuant to section 654. Accordingly, the calculation of defendant's prison term will not need to be modified. However, we will direct the trial court to amend the abstract of judgment to reflect there is no longer a sentence for Counts 3 and 6.

B. GANG ENHANCEMENT

Defendant contends the gang enhancement findings (§ 186.22, subd. (b)) are not supported by substantial evidence. We disagree.

In conducting our review, “we ‘must 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.’ [Citation.] Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom. [Citation.]” (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.)

In 2010, section 186.22, subdivision (b), provided: “[A]ny 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, shall, upon conviction of that felony . . . be punished as follows . . . .”

Defendant does not dispute the element concerning a felony having been committed. Thus, we address the next element: whether the felonies were “committed for the benefit of, at the direction of, or in association with any criminal street gang.” (§ 186.22, subd. (b).) The felonies at issue are defendant’s convictions for possessing and transporting methamphetamine. In both instances, defendant was found with cash in his possession. In December 2010, defendant said he was unemployed and was unable to explain how he obtained the money found by the police. Police found a narcotics pay-owe list in an address book in defendant’s house. From this combined evidence, it can be inferred defendant obtained money from committing the drug-related felonies because there was no other explanation for defendant having the money, and it appears from the cash and pay-owe list that defendant was collecting money.

Defendant had various tattoos indicative of an LRC member. Defendant also associated with people connected to LRC and the Mexican Mafia. Additionally, the Department of Corrections validated defendant as an associate of the Mexican Mafia, and defendant admitted being a member of Hemet 13 or Hemet Trece and using the moniker “Fat Boy.” From this evidence, it can be concluded that defendant is a gang member.

Inside defendant’s bedroom, there was a list of inmates, their mailing addresses, and notes about sending money or magazines. Two of the people on the list were members of the Mexican Mafia. A note next to a Mexican Mafia member’s name reflected money and a subscription should be sent. From this evidence it can be

concluded that defendant was sending money to an incarcerated member of the Mexican Mafia.

Moreno gave the following explanation about gang members sending money to inmates: “[I]f he is going to send money, that’s common for guys that are working on behalf of those individuals or wanting to work on behalf of them to show a sign of respect, or to prove that they are working out in the community, or in the prison setting getting the proceeds from the criminal enterprises . . . whether selling narcotics, wherever, their taxation, and sending it up to the individual.” This testimony supports a finding that money from defendant’s drug-related crimes would have been sent to a member or members of the Mexican Mafia. Thus, defendant’s acts of transporting and possessing the methamphetamine for sale benefitted a gang.

One of the Mexican Mafia’s primary activities is narcotics sales. One of LRC’s primary activities is narcotics sales. From this evidence, it can be inferred that money given to a member of the Mexican Mafia or LRC would be used to further the gangs’ drug sales since that is a primary activity. Accordingly, it can be reasonably inferred from the evidence that defendant is a gang member who committed drug-related felonies for the purpose of providing money to gang members, which the gang members would then use to commit further drug-related crimes. Thus, we conclude substantial evidence supports the finding that defendant committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang.

We now turn to the next element of the offense: “the specific intent to promote, further, or assist in any criminal conduct by gang members[.]” (§ 186.22, subd. (b).)

As set forth *ante*, substantial evidence supports finding that defendant is a gang member. From this it can be inferred defendant understands LRC's and the Mexican Mafia's primary activities are narcotics sales because he is involved in the gangs.

Given that defendant did not appear to have an explanation for the money in his possession, it can be inferred he obtained his money from drug-related crimes.

Defendant appeared to have knowledge that money from his drug-related crimes was being sent to at least one member of the Mexican Mafia because defendant had a note, in what appeared to be his own handwriting, reflecting money should be sent to a member of the Mexican Mafia. As set forth *ante*, it can reasonably be concluded defendant would know a member of the Mexican Mafia or LRC would likely use the money to further the gangs' criminal drug activities. This combination of evidence supports a finding that defendant committed the drug crimes at issue in this case with the specific intent to promote, further, or assist in criminal conduct by gang members. Accordingly, we conclude substantial evidence supports the gang enhancement findings.

Defendant cites this court's opinion in *People v. Ochoa* (2009) 179 Cal.App.4th 650 (Fourth Dist., Div. Two) to support his assertion that the enhancement findings are not supported by substantial evidence. Defendant asserts there is only speculation that he committed the crimes for the benefit of a criminal street gang and with the intent to assist in any criminal conduct by gang members. In *Ochoa*, this court wrote, "A gang expert[']s testimony alone is insufficient to find an offense gang related. [Citation.] '[T]he record must provide some evidentiary support, other than merely the defendant's

record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang.’ [Citation.]” (*Id.* at p. 657.)<sup>2</sup>

Defendant’s reliance on *Ochoa* is not persuasive. The enhancement findings rest on more than expert testimony, defendant’s past offenses, and defendant’s past gang activities. The evidence supporting the enhancement findings includes testimony about two other gang members’ criminal conduct and the taxation system the gangs use to further their criminal activities. It is from this additional evidence that a trier of fact can understand how defendant’s drug crimes benefitted the gangs and helped to further the gang members’ crimes.

Defendant asserts there is not substantial evidence supporting the enhancement findings because there is insufficient evidence defendant “committed a felony with, or aided and abetted the commission of a felony by, or otherwise acted ‘in concert’ with, one or more other gang members.” In *Rodriguez, supra*, 55 Cal.4th at page 1138 our Supreme Court concluded the felony of active gang participation (§ 186.22, subd. (a)) requires evidence that the defendant “acted in concert with other gang members [when] committing a felony.” However, the Supreme Court concluded the gang enhancement

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<sup>2</sup> It appears *Ochoa* was partially overruled by *People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*), in which our Supreme Court held: “‘Expert opinion that particular criminal conduct benefitted a gang’ is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]” Nevertheless, we will address defendant’s argument concerning *Ochoa*.

(§ 186.22, subd. (b)) and the felony of gang participation (§ 186.22, subd. (a)) “strike at different things.” (*Rodriguez*, at p. 1138.)

Our Supreme Court reasoned the gang enhancement concerned felonies that were gang related, and supported that reasoning by reference to the statutory language concerning a defendant’s intent to benefit a gang, while also noting there is not an element of “gang-relatedness” in the gang felony subdivision (§ 186.22, subd. (a)), thus requiring two gang members to act together for purposes of the felony. (*Rodriguez*, *supra*, 55 Cal.4th at p. 1137.) In other words, our Supreme Court has separated the felony from the enhancement. While the felony requires two gang members acting in concert, the enhancement requires only that the crime be gang related. Thus, we are not persuaded by defendant’s assertion because the enhancement does not require two or more gang members to be acting in concert for the enhancement allegation to be found true.

C. EXPERT TESTIMONY

1. *PROCEDURAL HISTORY*

During the prosecutor’s examination of Hankins, the following exchange took place:

“[Prosecutor:] Now, you had a chance to hear Officer McNish and Officer Mouat’s testimony this week?

“[Hankins:] Yes, I did.

“[Prosecutor:] And do you have an opinion as to whether or not the possession of narcotics for sale that they testified to earlier was committed for the benefit of La Raza Controla?

“[Hankins:] I believe it was.

“[Defense Counsel:] Your Honor, I object. Move to strike the response, based on opinion without foundation. And goes to the ultimate fact. Objectionable. I object on those bases.

“The Court: Overruled.

“[Prosecutor:] Do you have an opinion as to whether those crimes were committed for the benefit of La Raza?

“[Hankins:] Yes.

“[Defense Counsel:] Same objection, your Honor.

“The Court: Overrule[d].

“[Prosecutor:] What is that opinion?

“[Hankins:] That those acts of selling narcotics benefited La Raza street gang as well as [the Mexican Mafia].”

## 2. ANALYSIS

Defendant asserts the trial court erred under state law by permitting the prosecution’s expert to give his opinion in response to questions that were not hypothetical. Defendant asserts that because the questions were not hypothetical, the expert was permitted to give an “opinion [that] went directly to [defendant’s] conduct and states of mind on April 8 and December 31 . . . and directly to the jury issue of his

guilt or innocence as to the . . . gang enhancement allegations.” Thus, we consider whether the trial court erred by permitting the expert to respond to non-hypothetical questions. We conclude the trial court did not err.

In *Vang*, our Supreme Court held that it is appropriate for an expert to respond to hypothetical questions, and these questions “must be rooted in the evidence of the case being tried . . . .” (*Vang, supra*, 52 Cal.4th at p. 1046.) The court recognized, however, ““there is a difference between testifying about specific persons and about hypothetical persons.”” (*Id.* at p. 1047.) The general rule remains, ““A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] “Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.”” [Citations.]” (*Id.* at p. 1048.)

Nevertheless, in *Vang*, the court wrote, “It appears that in some circumstances, expert testimony regarding the specific defendants might be proper. [Citation.] The question is not before us. Because the expert here did not testify directly about defendants, but only responded to hypothetical questions, we will assume for present purposes the expert could not properly have testified about defendants themselves.” (*Vang, supra*, 52 Cal.4th at p. 1048, fn. 4.)

“Thus, as referenced in *Vang, supra*, 52 Cal.4th at page 1048, footnote 4, . . . in *People v. Valdez* (1997) 58 Cal.App.4th 494, 509, . . . the court upheld the admission of

expert opinion testimony in a complicated gang enhancement case, about whether certain conduct by the defendant in connection with numerous gangs was done for the benefit of his gang.” (*People v. Spence* (2012) 212 Cal.App.4th 478, 508-509.)

“[A] trial court’s ruling on the admissibility of evidence is reviewed for abuse of discretion. [Citation.] ‘Under this standard, a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*People v. Spence, supra*, 212 Cal.App.4th at p. 509.)

The evidence in this case reflected defendant claimed an affiliation with “Hemet 13 or Hemet Trece.” Hankins testified that he believed defendant was an active member of La Raza Controla. The Department of Corrections “validated” defendant as an associate of the Mexican Mafia. Defendant also appeared connected to the Surenos gang.

Given that the evidence reflected gangs within gangs, and that defendant was committing crimes outside of prison but sending money and goods to people in prison, the trial court could reasonably conclude that the gang evidence was quite complex and confusing. Sorting out exactly how the gang taxation systems work, as well as the hierarchy of the various gangs, could reasonably be seen as a difficult and intricate task. Therefore, we conclude the trial court did not err by permitting Hankins to testify directly about defendant’s gang conduct, because the trial court could reasonably

conclude this was a complex gang enhancement case given the number of gangs connected to defendant's crimes.

Defendant asserts his federal constitutional rights to due process and a jury trial were violated by the trial court permitting the prosecutor's expert to testify about the ultimate issues in the enhancement allegations, because the opinion testimony lowered the prosecutor's burden of proof and usurped the jury's role as fact finder. The cases defendant relies upon are primarily the same as those used in his is state law analysis, such as *Vang, supra*. Defendant's federal contentions appear to be a mere constitutional "gloss" on his state evidentiary claim. (*People v. Boyer* (2006) 38 Cal.4th 412, 441, fn. 17.) Since we concluded there was no evidentiary error, we find defendant's federal assertions to be unpersuasive.

D. COUNT 7

Defendant contends the trial court erred by sentencing defendant for Count 7, which was the marijuana conviction, because the count had already been dismissed. The People concede defendant is correct. We agree.

After the jury returned its verdicts, the prosecutor moved to "dismiss the misdemeanor," which was Count 7. The trial court granted the prosecutor's motion. While the motion and ruling appear in the reporter's transcript, they do not appear in the clerk's minute order. When such conflicts occur, we presume the reporter's transcript is correct. (*In re A.C.* (2011) 197 Cal.App.4th 796, 799-800.) At sentencing, the trial court imposed credit for time served on Count 7. Given that Count 7 was dismissed, the trial court should not have imposed a sentence on the count. (See generally *People v.*

*Cates* (2009) 170 Cal.App.4th 545, 552 [unauthorized sentence].) Thus, we conclude the trial court erred. We will direct the trial court to strike the sentence imposed on Count 7 and to amend the October 19, 2011, minute order to reflect Count 7 was dismissed on the prosecutor's motion.

E. VICTIM RESTITUTION

Defendant contends the minute order from defendant's sentencing hearing incorrectly reflects victim restitution was awarded. The People support defendant's contention. We agree.

The minute order from defendant's sentencing hearing reads, "Pay V-Victim Restitution [Victim] in amount determined by Probation [1202.4 (f) PC]. Div of Adult Inst to collect obligation (2085.5 PC)[.] Any disputes as to amount to be resolved in court hearing." The reporter's transcript does not reflect the imposition of a victim restitution fine. The Probation Officer's report reflects there was not a victim in this case and lists the amount of victim restitution as "not applicable." As set forth *ante*, we resolve conflicts between the reporter's and clerk's transcripts in favor of the reporter's transcript. (*In re A.C.*, *supra*, 197 Cal.App.4th at pp. 799-800.) Accordingly, we conclude the minute order is incorrect in regard to the victim restitution fine. We will direct the trial court to strike the victim restitution fine from the April 13, 2012, minute order. We will also direct the trial court to amend the abstract of judgment to reflect victim restitution was not ordered.

## DISPOSITION

Defendant's convictions for Counts 3 and 6 are reversed. The trial court is directed to amend (1) the abstract of judgment to reflect (a) defendant no longer has sentences for Counts 3 and 6, and (b) a victim restitution fine was not imposed; (2) the October 19, 2011, minute order to reflect Count 7 was dismissed on the prosecutor's motion; and (3) the April 13, 2012, minute order to reflect (a) victim restitution was not ordered, and (b) Count 7 was dismissed on the prosecutor's motion. The trial court is further directed to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER

J.

We concur:

HOLLENHORST

Acting P. J.

McKINSTER

J.