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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ULISES BALMACEDA MORALES,

Defendant and Appellant.

F061771

(Fresno Sup. Ct. No. F09904650)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Audrey R. Chavez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On the evening of August 8, 2009, four young men were walking in Parlier. A truck pulled up to the group, words were exchanged between an occupant of the truck and one of the young men, and gunshots were fired. Lazaro Ramirez (Lazaro), a member of the Norteno gang, was the first person shot by the occupant of the truck; he suffered two nonfatal wounds. Jaime Michael Moreno (Jaime), Lazaro's friend, tried to run away, but he was fatally shot in the head. Brian Ramirez (Brian), who was Lazaro's brother, and Orlando Alisea Sanchez (Orlando) also ran away, and they were not injured.¹

After an investigation, appellant/defendant Ulises Morales was identified as the driver of the truck and the gunman. Defendant's friend, Jaime Lopez Martinez (Martinez), had been sitting in the passenger seat. Martinez testified against defendant, and said that defendant had been driving the truck and he exchanged gang slurs with Lazaro, pulled a gun from under the driver's seat, leaned across the truck's front seat, shot Lazaro through the open passenger-side window, and aimed additional shots at Lazaro's friends as they tried to run away.

Defendant was convicted of count I, murder of Jaime (Pen. Code,² § 187, subd. (a)); and counts II, III, and IV, attempted murder of Lazaro, Brian, and Orlando (§§ 664/187, subd. (a)), with special various firearm allegations. He was sentenced to multiple indeterminate life terms.

On appeal, defendant contends there is insufficient evidence to support his convictions in counts III and IV for attempted murder of Brian and Orlando, who were not wounded; the court improperly instructed the jury on transferred intent for attempted murder for counts III and IV; the court improperly allowed the jury to hear gang evidence

¹ We will refer to some of the parties by their first names for the sake of clarity; no disrespect is intended.

² All further statutory citations are to the Penal Code unless otherwise indicated.

and a gang expert witness even though there were no gang charges or enhancements alleged in this case; the prosecutor committed prejudicial misconduct when he introduced the gang evidence and argued about express malice; and defense counsel was prejudicially ineffective for failing to impeach Martinez with a prior misdemeanor conviction, and failing to object to the gang evidence, the transferred intent instruction, and the prosecutor's alleged misquotes about defendant's postarrest statements. We will affirm.

FACTS

Orlando was 17 years old and close friends with his cousins, Brian and Lazaro. The three relatives were also close friends with Jaime. Orlando, Brian, and Jaime were in the same high school class; Lazaro was two years older than Brian. They all lived in Parlier.

Lazaro testified he was a member of the Norteno gang, and the Surenos were their chief rivals. Lazaro testified that there had been conflicts between the Nortenos and Surenos in Parlier.³

Brian testified he hung out with the Nortenos before the shooting, and he knew there were more Nortenos than Surenos in Parlier. After the shooting in this case, however, Brian became more involved with the Norteno gang.

Orlando testified that he knew Lazaro was with the Norteno gang. Orlando was not involved with any gangs. The prosecution did not introduce any evidence as to whether Jaime had any gang affiliation.

³ When he testified at trial, Lazaro admitted that he had recently pleaded to felony assault with force likely to produce great bodily injury, and misdemeanor gang association. The felony assault was based on an incident which had occurred in Parlier about a month before trial. He was in jail but expected to receive probation pursuant to a plea.

The group walks to Costa Avenue

On the afternoon of August 8, 2009, the four young men had been at Brian's house in Parlier. Around sunset, Brian's mother asked them to walk their aunt back to her house. Jaime, Brian, Lazaro, and Orlando walked with the aunt through their neighborhood. It took about 20 minutes to walk from Brian's house to the aunt's house on Costa Avenue. Orlando testified they stayed together as a group, briefly greeted some friends outside of a market, and kept walking to the aunt's house.

However, Brian testified they never spoke to anyone at the market, and said that Lazaro and Jaime broke off and walked to another street. Lazaro and Jaime were gone for about five minutes, and they reunited at the aunt's house.

Lazaro testified that he and Jaime split off from the others and stopped at a bakery on the next street. They rejoined their friends at the aunt's house.

Orlando testified they arrived at the aunt's house around 8:30 p.m., when it was dark. They turned around and started to walk back to Brian's house.

The residential area

The area on Costa Avenue, between Second Street and Parlier Avenue, was described as a relatively quiet, developed residential neighborhood in Parlier. Costa Avenue runs north and south. Both Second Street and Parlier Avenue run east and west and cross Costa Avenue. If someone is traveling south on Costa, that person would first reach the intersection with Second Street; if that person continues south on Costa, he would reach the intersection with Parlier Avenue, which is a major thoroughfare. The block on Costa between Second and Parlier is relatively short, about 130 feet, which is less than a normal city block.

The group begins the return trip

Orlando testified that after escorting Brian's aunt, they took their time walking back to Brian's house. They walked south on Costa Avenue, from the corner of Second Street toward the intersection with Parlier Avenue. Jaime and Orlando walked together

in front of the others. Brian walked behind them, and Lazaro was even further behind the group.

Lazaro testified he was wearing red shorts that day, and he knew red was the color claimed by the Nortenos. Lazaro testified he walked far behind his friends because he was talking to his girlfriend on his cell phone.

The pickup truck

The four young men were still walking south on Costa Avenue when Orlando heard a man talking to Lazaro in Spanish. Orlando did not recognize the man's voice. Orlando testified the man asked Lazaro in Spanish, " 'What do you bang?' " Orlando heard Lazaro reply, " 'Norte,' " in a loud voice.

Orlando testified that he became concerned because he knew the question referred to what gang Lazaro was involved with and could be fighting words from rivals. Orlando knew the Nortenos were primarily in Parlier, the Surenos were rivals of the Nortenos, and the Nortenos claimed the color red.

After hearing the voices, Orlando immediately turned around and saw a truck on Costa Avenue. The truck had been heading south on Costa but stopped, and its headlights were not on even though it was dark. Orlando looked toward the windshield, but he could not see the occupants. The truck had stopped near the west curb on Costa, on the truck's passenger side. Lazaro was standing on that curb, very close to the truck's passenger side. Orlando did not see anything in Lazaro's hands.

Orlando testified that he and Jaime were about 14 to 17 feet in front of Brian on Costa Avenue, and Lazaro was further behind them. Brian thought Lazaro was about five to six feet behind him.

The first two gunshots

Orlando testified things happened very fast. He saw a hand and a wrist extend out of the truck's passenger window, and it was holding a gun. Orlando heard one gunshot, and he saw the spark coming from the gun being pointed out the window. Orlando

testified that he could not tell how many people were in the truck, and he assumed the shooter was sitting in the passenger seat since the gun was being pointed at Lazaro through the passenger-side window.

Brian testified he heard someone yell something in Spanish to Lazaro, but he could not hear the words. Brian then heard a gunshot. Brian looked back and saw a truck without headlights. Brian heard a second shot, and saw “the fire from the barrel” of the gun, out of the truck’s passenger side. Brian saw a person’s hand and arm out of the passenger window. The person was holding a gun. Brian then saw Lazaro fall back and grab his leg, and realized Lazaro had been shot.

Brian testified the truck was about 12 to 14 feet behind him when the shots were fired at Lazaro. Lazaro was standing about four or five feet away from the truck, on the vehicle’s passenger side, when the second shot was fired. Brian could not see who was in the truck.

Lazaro testified that he heard a vehicle turn from Second Street onto southbound Costa Avenue, and then heard the brakes squeal as it stopped behind him. Lazaro was concerned when he heard the vehicle because he was “a Northerner, and we all have rivals.” He turned around and saw the truck, which was traveling southbound on Costa. The truck stopped very close to where Lazaro was standing on the curb, on the truck’s passenger side. He denied that someone in the truck spoke to him or that he said anything in return. He saw a gun pointed at him from the truck’s front passenger window, but he did not see who was in the truck. Lazaro testified that he was shot twice by someone in the truck.⁴

⁴ During trial, Lazaro denied making any statements to officers about whether he exchanged words with the truck’s occupants.

Additional gunshots

Lazaro testified he fell to the pavement in the exact location where he was shot. Lazaro shouted at Brian to run. Lazaro saw the truck take off, heading south on Costa, and he heard more gunshots.

After hearing the first gunshot, Orlando immediately ran away from the truck and looked for someplace to hide. As he ran, he heard additional gunshots being fired. Orlando ran south on Costa toward the intersection of Parlier. Orlando was afraid that he was going to be shot. Orlando ran toward bushes located on the west side of Costa, near the northwest corner of Costa and Parlier. Jaime was running on Orlando's left side.

Orlando testified he jumped into the bushes on the west side of Costa, just north of the intersection with Parlier. Orlando thought Jaime jumped into the same set of bushes with him, but he wasn't sure of Jaime's exact location. Orlando testified that "when we ran into the bushes, [the truck] followed us." Orlando heard the truck accelerate and it was going "fast" on Costa.

Orlando testified the truck "stopped for a moment and—and it started shooting at us." Orlando testified that he was crawling into the bushes when someone in the truck fired three more shots. No one in the truck said anything.

"Q. [H]ow do you know the people in the truck or the person in the truck was shooting at you?

"A. Because I could hear bullets pass through—I could hear the branches break, and I could feel the bullet passing."

Orlando testified the truck stopped on Costa, and the additional shots were fired just before it reached the intersection with Parlier Avenue. Orlando heard the truck drive away, and thought it turned east on Parlier Avenue, toward Reedley.

Brian testified that after he heard the first gunshots, Lazaro told him to run. Brian saw Orlando and Jaime running in front of him, toward the bushes, so he did the same thing. Brian ran and jumped into the bushes to hide. Brian looked back toward Lazaro, and saw the truck going south on Costa. Brian heard more gunshots. He thought the

shots were fired as the truck was at the intersection with Parlier Avenue, after it passed his location in the bushes. Brian wasn't sure if the truck stopped when the additional gunshots were fired, but he saw the truck turn left on Parlier.

After the shooting

Once the truck left the area, Orlando and Brian found Lazaro lying on the pavement, screaming. Lazaro was bleeding extensively from his groin area. Orlando used his shirt to try and stop the bleeding. Brian testified that the neighbors emerged from their houses and said they had called 911.

The initial response

Robert Trejo lived near the corner of Costa and Parlier Avenues, and heard two or three gunshots. Trejo ran outside and saw a "kid," later identified as Lazaro, screaming and lying on the ground on Costa Avenue, near Second Street. Trejo saw a second "kid" who was hysterical; he was running back and forth between Lazaro and the bushes in front of a house. This second person was screaming, " 'He's not moving.' " Trejo later realized that a body was lying in the bushes. Trejo ran into his house and called 911.

Parlier Police Officer Jonathan Pierro was on patrol in the area on an unrelated matter, about 300 yards from the shooting scene. Around 9:00 p.m., he heard four or five gunshots, heard the dispatches, and immediately responded. He found Lazaro lying on the west side of Costa Avenue, just south of Second Street. Lazaro was bleeding profusely from a gunshot wound in the groin area. Brian and Orlando were kneeling next to him, and trying to stop the bleeding. Pierro testified the three young men were "really scared."

The victims' injuries

Lazaro suffered two gunshot wounds to his upper leg and groin. He fell down at the location where he was shot, on Costa Avenue about 24 feet south of Second Street. Lazaro was hospitalized for three or four days, and it took two months for his wounds to heal.

Brian found Jaime's body lying face-down in the bushes on the west side of Costa Avenue, just north of Parlier Avenue (adjacent to the northwest corner of Costa and Parlier). Jaime's body was approximately 77 feet south of the location where Lazaro had been shot on Costa Avenue. Jaime's head was lying to the south, while his feet were to the north.

Jaime was killed by a single gunshot wound to the head. The bullet entered the left side of the head near the ear, continued through his head, fractured his skull, damaged his brain, and exited near the ear on the right side of his head. The bullet went through his head horizontally, left to right. It passed close to the brain stem, and death would have occurred fairly quickly.⁵

The investigation

Later that night, an officer interviewed Lazaro at the hospital. Lazaro said a truck stopped on the street, someone in the truck yelled "13" in Spanish, and then fired shots at him. Lazaro thought the truck's passenger was the gunman, and he was wearing a blue and white striped shirt.

The officers at the shooting scene did not find any spent bullets, cartridges, or ballistic evidence in the area.

As the investigation continued at the shooting scene, a citizen approached Detective Toscano and said that "Jaime," who lived nearby, might have been involved in the shooting. The detectives determined that Jaime Lopez Martinez (Martinez) lived on Third Street, just north of the shooting scene. At 2:00 a.m., the detectives went to Martinez's house and contacted Martinez and his parents. Martinez initially denied any

⁵ As we will explain in sections I and II, *post*, as to the murder and attempted murder convictions, the circumstantial evidence indicated that Jaime died almost instantly, and his body was found in the approximate location where he was shot, which was further down Costa from the location where Lazaro was shot.

knowledge of the shooting. Martinez then admitted he was the passenger in the truck, and said that defendant was the driver and gunman.

Around 5:00 a.m., Martinez directed the detectives to a house in Reedley where defendant's brother lived. The detectives found defendant's pickup truck parked there. They contacted defendant's brother, who denied defendant was in the house but allowed the detectives to enter and search. The detectives found defendant sleeping on the couch. Defendant initially gave a false name, but the detectives confirmed his identity.

Defendant gave his consent to search the truck. A Smith & Wesson revolver was found concealed in the truck's engine compartment. A blue rag was wrapped around the cylinder. The revolver was loaded with four live rounds, and two chambers were empty.

Defendant's statement

Around 9:00 a.m. on August 9, 2009, Detectives Palma and Toscano conducted a videotaped interview with defendant. They advised defendant of the *Miranda*⁶ warnings, and defendant waived his rights and agreed to answer questions. Defendant, who was 22 years old, initially denied any knowledge of the shooting and claimed to be elsewhere at the time. The detectives advised him that witnesses had placed him at the scene, they found a gun hidden in his truck, and they knew he had problems with Nortenos. Defendant then admitted his involvement.

Defendant said that he did not associate with the Surenos or any other gang. About a year earlier, however, he and his brother were driving in Reedley when a group of Nortenos yelled at them. The Nortenos fired a gunshot and hit his car. A few months later, defendant was walking in Parlier when a person in a white SUV fired a gunshot at him. On another occasion, a person broke the windows in defendant's vehicle in Reedley. On yet another occasion, the same person was with a group of men, and they

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

beat him up. Defendant said the same person was responsible for all the incidents against him.

Defendant said that around 8:00 p.m. on the night of the shooting, he was driving his truck in Parlier when he passed by Rancho Market. He saw the same man who had fired shots and beaten him during the previous incidents. The man was wearing red shorts. Defendant said he did not know the man's name, but this man was later identified as Lazaro. Lazaro was with 8 to 10 other men. Lazaro yelled that he was a Norte, and said that defendant was a " 'Scrapa.' " ⁷ Defendant said he did not want any trouble. Defendant kept driving and did not stop at the market. ⁸

Defendant said that he was "up to here with it" after the market incident. He drove back to his residence in Reedley and retrieved his .357-caliber revolver. He had bought the gun "on the street" eight or nine days earlier, "because ... I was already fed up." "I was already tired of it. I was so angry I almost cried and I couldn't take it anymore and I said, 'That's it.' "

Defendant said he drove back to Parlier to look for Lazaro. Defendant saw Lazaro walking with four or five other men. He did not know if these were the same men who had been with Lazaro at the market. Defendant drove past them. Lazaro recognized defendant's truck and yelled at him. Defendant said he turned around even though he "didn't want to do it ... and I remembered about the times that he has shot at me and I said, 'Well, I just have one life and that's it.' "

Defendant said he again drove past Lazaro and the other men. They called him a " 'Scrapa.' " Lazaro yelled that he was " 'Puro Norte' " and used a slur against

⁷ "Scrapa" is a derogatory term which has been used by Nortenos to describe Surenos. (See, e.g., *People v. Stone* (2009) 46 Cal.4th 131, 134; *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1352.)

⁸ The detectives checked the surveillance videotape from Rancho Market, and found no evidence of any type of disturbance in the market or the parking lot on the night of the shooting.

defendant's mother. Defendant said he did not see Lazaro or the other men with guns, but "that person has already tried to shoot me two times."

Defendant said he produced his gun and pulled up to where Lazaro was standing on the truck's passenger side. Defendant leaned toward the passenger side window, which was already open. Defendant thought Lazaro's associates started to walk toward his truck. Defendant said he fired one shot at Lazaro through the passenger window. He thought Lazaro ran, and he kept shooting. Defendant returned to the driver's side of the truck, kept driving, and he continued to fire gunshots. Defendant said he fired at Lazaro's associates who had approached his truck. Defendant was not sure if he was still firing when he reached the intersection.

"Q. Did you know that you shot another guy?"

"A. No. I didn't want to shoot anybody else, just him. Because he was the only one who tried to hit me.

"Q. Just the one who was wearing the red shorts, he's the only one you wanted to hit?"

"A. Yes."

Defendant asked if that person was dead. The detectives replied that one person had been killed and another wounded.

Defendant thought he fired four or five shots. As he drove away from the area, he removed the spent bullet casings from his gun and threw them on the street. He had a box of ammunition in the truck and reloaded with four or five bullets. He drove to Reedley, left his truck at his brother's residence, put his gun in the "engine compartment," and used another car to drive to a party in Orange Cove.

Defendant admitted that he had a passenger in his truck during the shooting, but said that person was not involved and told him not to do it. Defendant said the passenger got into the back seat during the shooting because he did not want any trouble or anyone to see him.

Martinez's trial testimony

Jaime Lopez Martinez (Martinez) testified for the prosecution. Martinez, who was 19 years old, testified he had known defendant for over a year before the homicide. Martinez lived near the scene of the homicide.

Martinez testified that he and defendant were not part of a gang, but they hung out with the Surenos and often wore blue. Martinez testified that he had been present on "a lot" of prior occasions when defendant had problems with Nortenos in Parlier and Reedley. Defendant yelled at Nortenos, and Nortenos yelled back at him. Defendant said he did not like Nortenos because they had broken the windows in his car. Martinez admitted he had been in fights with Nortenos.

Sometime after 7:30 p.m., on the evening of the homicide, defendant and Martinez left Martinez's house in defendant's truck. Defendant drove and Martinez sat in the passenger seat. They were heading to a party in Reedley. Defendant never said anything about being in a disturbance earlier in the day. Defendant drove on Second Street and stopped at the intersection with Costa. Martinez saw several men walking together in one group, south on Costa, toward Parlier Avenue.

Martinez testified that one of the men was wearing red shorts. Martinez recognized that man from high school, and knew that man hung out with the Nortenos.⁹ Martinez claimed he did not know this man's name, but admitted that Lazaro was the man in the red shorts.

Martinez testified that defendant turned south onto Costa Avenue and drove slowly. Defendant did not say anything about the group of men. Defendant pulled up to Lazaro and almost stopped. Martinez thought defendant put the truck in neutral because

⁹ At trial, Martinez initially denied having any problems with Lazaro. He was impeached with his prior statement to the police, when he said that he knew Lazaro, Brian, and Jaime; and that Lazaro previously called him out to fight.

it seemed to slightly roll. Lazaro was standing on the sidewalk, near the truck's open passenger door window, while the other men kept walking.

Martinez testified that defendant asked Lazaro, in Spanish, "[W]hat barrio did he claim[?]" Martinez did not think the question was unusual because defendant always asked that question to someone wearing red. Martinez testified the man replied, in Spanish, "'[w]hat, ass.'" Defendant again asked Lazaro what barrio he claimed. Lazaro replied, "'Norte.'" "

Martinez feared they were going to get into a fight. Defendant and Lazaro continued to exchange words. Defendant repeatedly said, "'[W]hat ass?'" Lazaro again replied, "'norte.'" "

Martinez testified that everything happened very fast. Defendant produced a handgun from under the driver's seat. A blue rag was wrapped around it. Martinez was surprised because he did not know defendant had a gun. Defendant remained in the driver's seat, but he stretched to his right, across the truck's front seat. Defendant extended his arm and the gun toward the open passenger window, while his feet were stretched behind him. Lazaro was still standing by the passenger window. Martinez leaned back and to the left, across the front seat, to get out of defendant's way because the gun was almost in his face.

Martinez testified that defendant fired two gunshots "[t]owards the guy with the red shorts," Lazaro. The other men had continued walking south on Costa when the truck stopped next to Lazaro. After the gunshots were fired, the other men ran away from the truck.

Martinez was not sure if defendant moved the truck after firing the first two shots. However, Martinez testified defendant leaned further across the truck's front seat, and closer toward Martinez on the passenger side. Martinez was practically lying down on his left side, and defendant "kind of ... climbed on top of me." Defendant "turned the

hand and kind of twisted it” out of the passenger window, aimed the gun forward, and “started shooting” at the other men as they ran south on Costa Avenue.

Martinez thought defendant fired three more shots. Martinez testified that defendant aimed the gun in the direction of the men as they kept running. Martinez thought defendant might have moved the truck because the men seemed closer to the vehicle when defendant fired the additional shots. Martinez did not notice if any of the other men fell down. Martinez thought defendant fired a total of five shots during the incident.

Martinez testified that after defendant finished shooting, he drove the truck away from the area and headed back to Reedley. During the drive, defendant slowed down, removed the spent cartridges from the weapon, and threw them out of the window in two different locations. There was one unspent bullet in the weapon. He produced a box of bullets and loaded more bullets into the gun.

Martinez testified that defendant drove to his brother’s house in Reedley and left his truck there. Defendant and Martinez drove away in the brother’s car. Martinez did not know what defendant did with the handgun. Defendant drove to Orange Cove and they went to another party. Martinez did not call the police after the shooting because he was afraid of defendant.

Additional prosecution evidence

While Orlando could not see who was in the truck on the night of the shooting, he was later informed that Martinez was the passenger. Orlando testified that he knew Martinez from high school. Orlando knew that Martinez was a Sureno, and that Lazaro previously had problems with Martinez. Orlando was not very familiar with Martinez’s voice, and he could not tell if Martinez was the person in the truck who spoke to Lazaro just before the shooting. At trial, Lazaro testified that Orlando was mistaken, and he did not know Martinez.

The prosecution's gang expert

Deputy Robert Woodrum testified about the rival Norteno and Sureno gangs, that the Nortenos derived from Nuestra Familia, and the Surenos derived from the Mexican Mafia. The dividing line used to be in Delano or Bakersfield, but the Nortenos were primarily in Reedley and Parlier, while the Surenos were in Sanger and Reedley. The Surenos were “[a]most insignificant” in Parlier. The Nortenos associate with the number 14 and the color red, and the Surenos claim the number 13 and the color blue. Woodrum explained that someone could be a validated member of the gang, or simply an associate who hung around with other gang members and wanted to prove himself. In general, gang members will not cooperate with law enforcement officers, but younger associates are more likely to do so because they lack experience about how to act in those situations.

Woodrum testified that at the time of the shooting, Lazaro and Brian were active Nortenos, and members of the Varrio Colonial Parlier subset. Woodrum did not have any information to indicate that Orlando and Martinez (the passenger in the truck) were gang members. After the shooting, members of the Norteno gang believed that Martinez was a Sureno based on his presence in the truck, and he was the victim of several incidents.¹⁰ There was no evidence introduced as to whether Jaime was associated with any gang.

Woodrum further testified that prior to the shooting, he did not consider defendant to be an active member of the Surenos. Defendant appeared to be nominally affiliated as more of a Sureno associate. Woodrum changed his opinion as a result of the crimes in the case, and concluded that defendant was a Sureno based on “the crime he committed, the things that he said during the commission of the crime, the people, the victims in this case, the people he targeted, what he was wearing that day. The fact that he wrapped the murder weapon up in a blue rap is significant to me,” to indicate that his actions were that

¹⁰ Martinez testified that after the homicide, a Norteno chased Martinez in a car, and called him a “scrap.” Martinez ran to the Parlier Police Department and asked for help.

of a Sureno. When defendant was arrested and booked in this case, he did not admit to being a Sureno, but he was housed in jail with other low-level Surenos.

Deputy Woodrum testified about the meaning of a gang member asking a known rival where that person “bangs.” Such a question was an “absolute” challenge to fight. If there were witnesses to the challenge, and the rival refused to fight, that person would appear weak, and it would affect his status in the gang. If a person shouted “13” as part of the challenge, it would show that he identified with the Surenos, and enhance his gang status by spreading fear to the witnesses. A person who wrapped a gun in a blue rag also showed his involvement with the Surenos.

DEFENSE EVIDENCE

Defendant did not testify at trial. Throughout the trial, the defense sought to show that Martinez, the truck’s passenger, was the gunman, that he was involved with the Surenos, and he had disputes with Nortenos. Defense counsel extensively cross-examined the detectives about whether they thoroughly investigated Martinez’s prior gang affiliation and whether he was the gunman. Defense counsel also cross-examined Brian and Lazaro about their prior knowledge of Martinez, and extensively questioned Martinez about whether he previously had conflicts with Lazaro and/or Nortenos in Parlier.

Joe Vasquez, an employee at Parlier High School, testified for the defense about a fight between Martinez and Nathan Mendez in April 2009. Mendez was associated with the Nortenos while Martinez was associated with the Surenos.

Herbert Crumb, a defense investigator, testified that he sat in defendant’s pickup truck and tried to recreate the shooting. Crumb testified it was impossible to sit in the driver’s seat behind the steering wheel and reach the passenger window. However, Crumb admitted he did not move into the middle of the front seat and try to reach the passenger window, and conceded that it might be possible to do so. Crumb also conceded that he did not know defendant’s height and reach compared to his own.

Detective Palma testified that Martinez said he was wearing a buttoned-down blue shirt at the time of the shooting. Palma collected a blue and white plaid shirt from Martinez. Palma believed that Martinez's plaid shirt did not match Lazaro's description that he gave while in the hospital, that the shooter was wearing a blue and white striped shirt.

THE CONVICTIONS AND SENTENCE

Defendant was charged and convicted of count I, first degree murder of Jaime; and counts II, III, and IV, premeditated attempted murders of, respectively, Lazaro, Brian, and Orlando. As to all counts, the jury found defendant personally used a firearm (§ 12022.5, subd. (a)). As to counts I and II, the jury found defendant personally and intentionally discharged a firearm resulting in death or great bodily injury (§ 12022.53, subd. (d)). As to counts III and IV, the jury found he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)).

Defendant was sentenced to 25 years to life for count I, murder, plus a consecutive term of 25 years to life for the personal discharge enhancement for count I; three consecutive terms of life with the possibility of parole for counts II, III, and IV, attempted murder; a consecutive term of 25 years to life for the personal discharge enhancement for count II; a consecutive term of 20 years for the personal discharge enhancement for count III; and a consecutive term of six years eight months (one-third the midterm of 20 years) for the personal discharge enhancement for count IV.

DISCUSSION

I. Substantial evidence for the attempted murders of Brian and Orlando

Defendant contends that there is insufficient evidence to support his convictions in counts III and IV for the attempted murders of Brian and Orlando. Defendant argues there is no evidence a gun was ever fired toward Brian, or that he had the specific intent and express malice to kill either Brian and/or Orlando. Defendant asserts that Brian ran away from Lazaro and hid in the bushes, and there was no evidence that any gunshots

were fired at Brian’s location in the bushes. Defendant further asserts that it was physically impossible for Brian to have been within the “line of fire” when the additional gunshots were fired, and there is no evidence that he had any conflicts with Brian and/or Orlando which would have supported the inference of his specific intent to kill them.

A. Substantial evidence

When a criminal conviction is challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “The same standard applies when the conviction rests primarily on circumstantial evidence.” (*Ibid.*)

“Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 403.) “Reversal on this ground is unwarranted 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.)

B. Attempted murder

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 177-178.) “ ‘The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require

the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]’ [Citation.] In contrast, ‘[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.] Hence, in order for defendant to be convicted of the attempted murder of the [victim], the prosecution had to prove he acted with specific intent to kill that victim. [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).

Since attempted murder requires specific intent, a defendant’s guilt for attempted murder must be judged separately as to each alleged victim. (*People v. Perez* (2010) 50 Cal.4th 222, 230.) “Malice is express when the killer harbors a deliberate intent to unlawfully take away a human life.” (*People v. Lasko* (2000) 23 Cal.4th 101, 104, italics omitted.) “Intent to unlawfully kill and express malice are, in essence, ‘one and the same.’ [Citation.]” (*Smith, supra*, 37 Cal.4th at p. 739.) “[I]ntent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant’s acts and the circumstances of the crime. [Citation.] ‘There is rarely direct evidence of a defendant’s intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant’s actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range “in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill....” [Citation.]’ [Citations.]” (*Smith, supra*, 37 Cal.4th at p. 741.)

The jury in this case was instructed with CALCRIM No. 600, which has been found to correctly state the law of attempted murder. (See, e.g., *People v. Ramos* (2011) 193 Cal.App.4th 43, 47.) The instruction stated in relevant part that to prove defendant was guilty of attempted murder, the People had to prove the defendant took direct but

ineffective steps toward killing another person, and the defendant intended to kill that person. (CALCRIM No. 600.)¹¹

C. Analysis

Defendant contends there is no evidence of his specific intent to kill either Brian or Orlando to support his convictions in counts III and IV for attempted murder. In support of this argument, defendant points to his pretrial statements to the detectives, when he said that he only wanted to shoot Lazaro, the man in the red shorts, because he believed that Lazaro had previously assaulted him, and he did not want to shoot anyone else.

The focus of the substantial evidence test, however, “is on the *whole* record of evidence presented to the trier of fact, rather than on “isolated bits of evidence.” [Citation.]” (*People v. Cuevas* (1995) 12 Cal.4th 252, 261, italics in original.) Apart from defendant’s self-serving attempt to minimize his culpability, the entirety of the record contains overwhelming evidence to support both the direct but ineffectual acts, and the express malice required to support his convictions for the attempted murders of Brian and Orlando in counts III and IV, separate and apart from defendant’s attempted murder of Lazaro in count II.

Martinez, the truck’s passenger, testified that defendant fired two shots directly at Lazaro, and Lazaro’s friends immediately ran away from the truck. Martinez testified that after defendant shot Lazaro, defendant leaned further out of the passenger-side window, twisted his arm toward Lazaro’s friends, aimed his gun at the fleeing men, and fired at them. According to Martinez, defendant aimed the gun in the direction of the

¹¹ Defendant correctly notes that the jury was not instructed as to either the “kill zone” or “concurrent intent” theories for attempted murder. As we will explain, however, his convictions for attempted murder are supported by substantial evidence of both express malice and his specific intent to kill.

men as they kept running south on Costa Avenue. Martinez believed the truck may have moved closer to Lazaro's friends as defendant fired at them.

Orlando and Brian testified that after the first shots were fired at Lazaro, they immediately ran south on Costa, away from the truck, because they were afraid of being shot. Orlando testified that he looked for some place to hide, and ran for the bushes on the west side of Costa Avenue, just north of Parlier Avenue. Brian testified he saw where Orlando was running, and ran to the same bushes. Brian was not sure when the additional gunshots were fired, and thought the gunman fired the shots after the truck passed his location and reached the intersection with Parlier Avenue. However, Orlando testified the truck accelerated and followed them, the truck stopped on Costa, and additional gunshots were fired into the bushes located on the west curb where they were hiding, before the truck reached the intersection. Orlando could hear "bullets pass through—I could hear the branches break, and I could feel the bullet passing."

"[W]hether a defendant harbored the required intent to kill must be inferred from the circumstances of the act. [Citation.]" (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557.) After defendant fired two shots and wounded Lazaro, he drove south on Costa Avenue and pursued Brian and Orlando as they tried to run away. They were running along the west curb of Costa Avenue, on the truck's passenger side. Defendant made the extra effort to extend his arm out of the passenger-side window, and fired several gunshots directly at them as they attempted to hide in the bushes just off the curb. While Brian and Orlando may not have jumped into the same bush, they ran in the same direction to seek cover from the barrage of gunfire. Defendant's act of firing at them "at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet[s] been on target is sufficient to support an inference of intent to kill...." [Citation.]' [Citations.]" (*Smith, supra*, 37 Cal.4th at p. 741; see, e.g., *People v. Ramos, supra*, 193 Cal.App.4th at p. 48 [attempted murder conviction supported by

substantial evidence where defendant fired seven shots at victim, and victim heard gunshots “ ‘whistling past [him]’ ” as he tried to run away].)

Defendant asserts that even assuming that “shots were fired while Brian and Orlando were running, the evidence does not establish that these were different shots from the two that struck Lazaro, nor does the evidence establish that any shots heard by the running men were fired in their direction.” There are several problems with this argument. First, defendant did not introduce any evidence to contradict the testimony from Brian, Orlando, Lazaro, and Martinez, and defendant’s own pretrial statement, that the first two shots fired from the truck hit Lazaro as he stood near the truck’s passenger window, and that Lazaro immediately fell to the ground. Second, the same witnesses testified that additional shots were fired from the truck after Lazaro fell to the ground; defendant admitted he kept firing his gun after Lazaro fell, and further claimed Lazaro’s friends ran toward his truck. Finally, defendant cannot seriously claim there is no evidence that additional shots were fired, since it is undisputed that Jaime ended up with a bullet in his head at some point after Lazaro fell. The jury was clearly presented with evidence that defendant fired the first two shots at Lazaro; Lazaro was wounded and fell; the truck moved forward on Costa Avenue; and defendant fired additional shots at Brian and Orlando.

II. The transferred intent instruction

Defendant next contends the jury was erroneously instructed on transferred intent as to count I, murder of Jaime, because the instruction was legally and factually inapplicable to this case. Defendant asserts there is no evidence that he intended to kill anyone but Lazaro, and Lazaro survived so he was not charged with the murder of Lazaro. Defendant further asserts that since transferred intent only applies to murder and not attempted murder, the instruction was misleading because the jury could have erroneously applied transferred intent to support his convictions for the attempted murders of Brian and Orlando. As we will explain, the jury was instructed that the

transferred intent instruction only applied to count I, murder of Jaime, and that instruction was both factually and legally correct.

A. Transferred intent, murder, and attempted murder

“A conviction for murder requires the commission of an act that causes death, done with the mental state of malice aforethought (malice). [Citation.] Malice may be either express or implied. [Citation.]” (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.)

“Under the ‘classic formulation’ of the transferred intent doctrine, where a defendant intends to kill a victim but misses and instead kills a bystander, the intent to kill the intended victim is imputed to the resulting death of the bystander and the defendant is liable for murder. [Citations.] However, under the transferred intent doctrine, the defendant’s intent is not actually transferred from the intended victim to the unintended victim. ‘Rather, as applied here, [the transferred intent doctrine] connotes a *policy*—that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark.’ [Citation.]” (*People v. Concha* (2009) 47 Cal.4th 653, 664.)

Thus, “[a] person who acts intending to kill victim A but who accidentally kills victim B instead may be guilty of B’s murder under the doctrine of transferred intent. [Citation.]” (*People v. Gonzalez, supra*, 54 Cal.4th at p. 653, italics omitted.) The defendant “ ‘is subject to the same criminal liability that would have been imposed had “ ‘the fatal blow reached the person for whom intended.’ ” [Citation.] In such a factual setting, the defendant is deemed as culpable as if he had accomplished what he set out to do.’ [Citation.]” (*People v. Bland* (2002) 28 Cal.4th 313, 321.)

As explained in issue I, *ante*, while implied malice murder does not require an intent to kill, attempted murder requires express malice, i.e., the specific intent to kill. (*People v. Gonzalez, supra*, 54 Cal.4th at p. 653.) As a result, the doctrine of transferred intent does not apply to attempted murder. (*People v. Souza* (2012) 54 Cal.4th 90, 120.)

“To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.” (*People v. Bland, supra*, 28 Cal.4th at p. 328.) “Someone who intends to kill only one person and *attempts unsuccessfully to do so*, is guilty of the attempted murder of the intended victim, but not of others.” (*Ibid.*, italics added)

B. The instructions

Defendant contends that while transferred intent may be applicable to a murder charge, the jury in this case may have incorrectly applied transferred intent to the attempted murder charges for Brian and Orlando. The instructions belie this argument.

As to count I, murder of Jaime, the jury was instructed on first and second degree murder, express and implied malice, and premeditation and deliberation. (CALCRIM Nos. 520, 521.) The jury received CALCRIM No. 562 on transferred intent:

“If the defendant *intended to kill* one person, but by mistake or accident *killed someone else instead*, then the crime, if any, is the same ... as if the intended person had been killed.” (Italics added.)

The jury was also instructed on voluntary manslaughter as a lesser included offense of count I, murder. (CALCRIM No. 570.)

After the court finished reading the murder/manslaughter instructions as applied to count I, the court separately instructed the jury as to the attempted murders of Lazaro, Brian, and Orlando, as charged in counts II, III, and IV, together with the definitions of deliberation and premeditation for attempted murder, and attempted voluntary manslaughter as a lesser included offense of attempted murder. (CALCRIM Nos. 600, 601, 603.) The court did not instruct the jury that transferred intent applied to the attempted murder charges.

C. The parties' closing arguments

Defendant further asserts the jury may have believed that he intended to kill Lazaro, the gunshots aimed at Lazaro killed Jaime instead, and Jaime was an unintended murder victim of defendant's attempted murder of Lazaro, such that the jury improperly

applied transferred intent between the attempted murder and murder charges. However, defendant's purported theory of the case was not presented to the jury.

In closing argument, the prosecutor distinguished the evidence in support of the attempted murder of Lazaro, from that which supported the murder of Jaime and the attempted murders of Brian and Orlando. The prosecutor asserted that defendant fired his first two shots directly at Lazaro with the intent to kill him, as Lazaro stood next to the truck's passenger door, based on defendant's belief that Lazaro was the instigator of their alleged prior conflicts. The prosecutor further asserted that after defendant shot Lazaro, he separately fired additional shots at Jaime, Brian, and Orlando as they ran from the truck, either because he wanted to eliminate witnesses or he believed they were also Nortenos.

As to count I, murder of Jaime, the prosecutor cited Martinez's testimony, that when defendant fired the additional gunshots, he leaned further out of the truck's passenger window, turned his hand, and aimed at Lazaro's associates, which resulted in the fatal head wound to Jaime. The prosecutor explained the difference between express and implied malice for murder. The prosecutor argued that defendant demonstrated express malice and the specific intent to kill when he fired the additional shots at Jaime, Brian, and Orlando:

“What were the defendant's actions here? He went from shooting this direction [at Lazaro] to turning the gun and shooting at these three boys who were fleeing. He shot not just once, not just twice, but three times. The description by [Martinez] is that he was aiming the gun at them, shooting at them as they—as they were fleeing.”

The prosecutor argued defendant aimed at the three men, and noted that a very short distance separated the location where defendant shot Lazaro, and where he moved the truck to shoot at Jaime, Brian, and Orlando. The prosecutor argued defendant had the specific intent to kill Jaime because his “actions speak for themselves.” “[I]f you're

aiming at somebody and you really don't want to hit them, you're shooting in the air, but [defendant] wasn't, he was aiming right at them and shooting at them.”

In further support of count I, murder of Jaime, the prosecutor also cited Orlando's testimony, that he heard the truck following them as Orlando, Brian, and Jaime ran away, and then he heard the additional shots fired into their location in the bushes. “So it is consistent with the idea that defendant sees them, he's driving after them and shooting at them once he sees where they're at, gaining the advantage of trying to catch up to where they're at. [T]he defendant was pursuing them, he was shooting at them, he had an intent to kill.”

The prosecutor then turned to transferred intent as related to count I, murder of Jaime:

“Okay. I want to talk about transferred intent. This is something—one of the instructions you were given. The idea being here, if you are back there and go, oh, you know what, *I think he was probably shooting at Brian but he got Jaime—or I think he was shooting, trying to kill—he intended to kill Brian, or he intended to kill Orlando, but he got—but he got, uhm, Jaime; it's still murder.* If the defendant intended to kill one person, but by mistake or accident killed somebody else instead, then the crime, if any, is the same as if the intended person had been killed. You can see the logic of that. I—what you're doing is you're—the question is, what's in that person's mind, what is in that person's heart when they're shooting that—and they—and they miss that person, but because they're a bad shot and they hit the person next to him. Are we going to say that's not murder? No; it's murder. The intent is transferred from that victim to that victim. This all up to now has dealt with express intent, the actual intent to kill.” (Italics added.)

After addressing count I, murder of Jaime, the prosecutor separately addressed counts III and IV, the attempted murder charges for Brian and Orlando. The prosecutor clarified that attempted murder required express malice, and could not be based on implied malice.

“Attempted murder we're actually asking the question, did he intend to kill? Okay. So you look at his actions; as Orlando and as Brian were fleeing, he's turning the gun, pointing, shooting not once, but two, maybe

even three times, or as he drives up, he's shooting at them in the bushes trying to kill them. It's an ineffective step because they lived. If it had been an effective step, they would be dead, and it would be called murder. So this is an attempted murder.... His conduct speaks of what's going on in his mind. You don't take a loaded gun, point it at a person and pull the trigger, unless you intend to kill them. There's no evidence that ... he was shooting the gun in the air as a warning shot; there's no evidence of that. The only evidence that you heard is that he was pointing at them. And Orlando even talked about the fact that he heard the branches breaking as the bullets were going past him."

D. Analysis

Defendant asserts the transferred intent instruction was factually and legally inapplicable to this case because there was no evidence of his express malice toward anyone other than Lazaro, and thus "no specific intent toward Brian that could be transferred to anyone else." Defendant further asserts that Jaime was not an "unintended victim" of defendant's "intent to shoot Lazaro, because it is inconceivable that the second two or three shots that were fired were intended for [Lazaro]. The second group of shots was not fired in Lazaro's vicinity, but in a different direction after the truck had moved nearly a full block away from [Lazaro]."

Defendant also argues that "[e]ven under the factually unsupported scenario in [Martinez's] testimony, that [defendant] fired toward the fleeing men, he could not have been doing so intending to shoot Lazaro, who was not running, and who lay where he fell. Under these factual circumstances, whatever intent [defendant] had toward Jaime..., Orlando..., and Brian ... had to be assessed independently of [defendant's] intent toward Lazaro..., and the doctrine of transferred intent was inapplicable."

To the contrary, the transferred intent instruction was supported by substantial evidence. (See, e.g., *People v. Elize* (1999) 71 Cal.App.4th 605, 615 [instructions must be supported by substantial evidence].) As demonstrated *ante*, the evidence did not show, and the prosecutor never argued that Jaime was murdered by a gunshot intended for Lazaro, and the prosecutor never relied on a transferred intent theory between the attempted murder of Lazaro and the murder of Jaime. In contrast to defendant's appellate

claims, the transferred intent instruction was not based on defendant's shooting of and attempted murder of Lazaro. As the evidence demonstrated, and the prosecutor explained, defendant engaged in separate and distinct acts of firing his gun. He fired the first two shots at Lazaro at almost point-blank range. After Lazaro fell, defendant then moved the truck, reached further out the passenger-side window, twisted his arm and aimed his gun at Brian, Orlando, and Jaime, and fired additional gunshots at them as they tried to flee.

Defendant dismisses Martinez's description of defendant's conduct as "factually unsupported," but the fact that Jaime was found with a fatal bullet wound in his head, lying face-down in bushes that were further south of the scene where Lazaro was shot, makes it undisputed that defendant fired additional gunshots after he had shot and wounded Lazaro on the street. Martinez, Brian, and Orlando testified that after defendant shot Lazaro twice, he fired two to three additional shots as Lazaro's friends tried to run away. Orlando and Brian described how they immediately ran away from the truck and tried to find someplace to hide. Orlando testified that Jaime ran on his left side, and he thought Jaime jumped into the same bushes with him. Brian testified that he saw Jaime and Orlando head for the bushes, and decided to do the same thing. Orlando also described hearing the truck accelerate toward his position in the bushes, and the sensation of hearing and feeling the gunshots as the branches were breaking around him. Jaime was fatally shot in the left side of his head as he tried to hide during this final barrage of gunshots. The entrance wound on the left side corresponds to the gunman leaning out of the truck's passenger window and firing toward the curb and bushes on the west (right) side of the truck toward a person's left side, as that person ran from the truck. Jaime's body was found in the bushes just northwest of the corner of Costa and Parlier Avenues: his head was lying to the south, and his feet were to the north, corresponding with falling face-down after he was shot.

Defendant argues there was no evidence of his intent to kill Brian, Orlando, and/or Jaime, such that transferred intent did not apply to the murder of Jaime. To the contrary, defendant may have believed that Lazaro was once again in the company of the same young men who had been present during Lazaro's alleged prior confrontations with defendant. Defendant may have believed the three men walking with Lazaro were also Nortenos; he claimed that he thought Lazaro's friends were actually heading toward his truck after he shot Lazaro. Indeed, Orlando testified that he regularly associated with Brian, Lazaro, and Jaime. While there was no evidence admitted as to Jaime's possible gang affiliation, Orlando admittedly knew Lazaro was a member of the Nortenos and still hung out with him. Defendant may have believed that Lazaro's associates were also Nortenos and had the specific intent to kill one, two, or all three of the men as they fled from the location where Lazaro was shot.

Based on the entirety of the evidence, particularly the testimony offered by Martinez, Brian, and Orlando, the transferred intent instruction as to count I, murder of Jaime, was supported by substantial evidence; and the jury could have found that defendant had the express malice and specific intent to kill Brian, Orlando, and/or Jaime when he fired the additional two to three shots as they tried to run away from his truck, and that Jaime suffered the fatal wound. The evidence and argument were entirely separate and apart from the attempted murder charges as to Brian and Orlando.¹²

III. Admission of the gang evidence and the expert's testimony

Defendant next raises a series of issues regarding the admissibility of the gang evidence and the gang expert's testimony. First, he asserts the court erroneously permitted the prosecution to introduce Deputy Woodrum's testimony as a gang expert, even though there were no gang charges or enhancements alleged in this case. In

¹² Having found that the jury was properly instructed on transferred intent, we reject defendant's alternate claim that defense counsel was prejudicially ineffective for failing to object to the transferred intent instruction.

response to this argument, the People point out that defendant withdrew the majority of his pretrial objections to the introduction of the Woodrum's testimony and the gang evidence in this case, and that the evidence was relevant to establish intent and motive.

In issues IV and V, *post*, we will address defendant's further contentions that the prosecutor committed prejudicial misconduct by asking the gang expert a hypothetical question in violation of the court's pretrial ruling which limited the admissibility of the expert's testimony; the People's response that defense counsel did not object to this alleged instance of misconduct; and defendant's reply that defense counsel was prejudicially ineffective to the extent his failure to object to the gang expert's testimony about the alleged inadmissible hypothetical questions.

In order to address these issues, we must review the court's extensive pretrial hearing as to the admissibility of the gang evidence, and the parties' arguments on the matter. As we will explain, defendant withdrew most of his objections to the gang evidence because he decided to rely on a gang-related defense in this case.

In this section, we will find the court did not abuse its discretion when it admitted the gang evidence and permitted the expert to testify, because the evidence was relevant to motive and intent. In section IV, we will address defendant's related challenges to the gang evidence—that the prosecutor committed misconduct by asking the expert hypothetical questions which exceeded the scope of the court's evidentiary ruling, and whether defense counsel was prejudicially ineffective for failing to object to these questions.

A. The prosecution's pretrial motion

The information did not charge defendant with the gang substantive offense or any gang enhancements (§ 186.22, subs. (a), (b).) Prior to trial, the court conducted a lengthy hearing as to the prosecution's motion to introduce gang evidence and present Deputy Woodrum as a gang expert.

The prosecutor advised the court that several witnesses would testify about gang activity in this case, and Deputy Woodrum would tie the evidence together. The prosecutor did not intend to introduce evidence that defendant was an active member of the Surenos. However, he argued that gang evidence was admissible in this case “to make understandable to the jury some things that might be incomprehensible to them,” including the significance of words that were exchanged, the meaning of colors, the discovery of the gun in a blue bandana, and the rivalry between the Surenos and the Nortenos, which would establish the motive in this case. The prosecutor stated that the other three victims would also testify about gang-related issues.

The court noted that such evidence also appeared relevant to explain some of the things that defendant told the detectives, such as the problems he had with rival gang members. The prosecutor clarified that the rivals seemed to believe that defendant was an active gang member, and he was repeatedly harassed by them. The court agreed that defendant never admitted he was a gang member.

The court asked whether Martinez, the passenger in the truck, was affiliated with a gang. The prosecutor said that Martinez might have known Lazaro before the shooting, and Martinez was involved in some incidents that occurred after the shooting.

B. Defendant’s initial objections

Defendant was represented by Mr. Martin and Ms. Guerra. In response to the prosecutor’s motion, Mr. Martin argued that evidence about defendant’s possible involvement with a gang should be excluded because it was highly prejudicial and irrelevant. Counsel argued the possible motive for the shooting was a personal dispute between defendant and Lazaro, Lazaro repeatedly harassed defendant, and Lazaro’s gang was not involved. Counsel argued that defendant’s gang activities were very minimal and slight, defendant denied any gang membership, and he was not a validated gang member.

After making his initial objections, however, Mr. Martin also stated:

“That’s not to say that we don’t intend to refer to some of the victims in this group and address their gang conduct, because we think that is distinct from [defendant’s] conduct, and that it goes to—we’ll definitely address [defendant’s] state of mind and the potential—or why he did what he did, and why he reacted, because if he knew about their involvement with the Norteno gangs, then the relevance of the Norteno gang, in general, is—it’s relevant and it can go to state of mind, and it can help a lay jury understand potentially what the [Nortenos’] threat and the level of violence ... and that the People in Parlier know that, specifically, [defendant], having associated with somebody in Parlier, know that they’re dangerous and organized. That’s relevant as to state of mind.” (Italics added.)

The prosecutor replied that he would ask the expert about how defendant and his gang would have benefited from the shootings. The court was concerned about the relevance of whether the shooting resulted in a benefit to the gang, unless there was evidence that defendant was a gang member.

The court reviewed cases which held that gang evidence and expert testimony were relevant to establish motive, intent, mental state, and bias. The court stated the gang evidence was relevant in this case because of defendant’s claim that gang members were harassing him, and the gang-related words exchanged between defendant and Lazaro just before the shooting. However, the court was again concerned about whether an expert could offer an opinion about the possible benefit to defendant and his gang from the shooting, unless the prosecution established that defendant was a gang member.

The prosecutor replied that the expert would testify that defendant had some connection with the Sureno gang, based on the words he used to challenge Lazaro, and the blue rag wrapped around the revolver. Such conduct “suggests he has some connection with the gang.”

The court advised the parties that it would exclude certain evidence unless there was a sufficient foundation established “to say that this person is doing this for this reason, because it will benefit him within the gang,” even if relevant “to a wannabe kind of status.”

C. Defendant's alternate argument

As the court and prosecutor addressed the matter, Mr. Martin, defense counsel, advised the court that he was “changing my objection.”

“I was out at the scene yesterday, and in that little town, and I think I’m not objecting to the idea. *The reality is people I saw either had red or blue, or distinctively neither, and so that context, I think, probably is still relevant and important.* There is no basis for an objection on that, *but I agree with the court, also, that going into this is speculative and prejudicial to say that this is the benefit [defendant] would gain from that, so I think that’s entirely—that would be—I would object to that being admitted. I plan, actually, to address the issue of the colors of clothing, and so that, I would have to probably address some of that stuff anyways. I think my objection goes into—would be on the motive and anything beyond that specific crime’s not relevant to [defendant].*” (Italics added.)

Ms. Guerra, defendant’s other attorney, added that she was troubled about having to address prejudicial gang evidence when the gang enhancement was not even charged in this case. She conceded that gang evidence might be admissible to motive, but argued it was too prejudicial on the benefit aspect, given the absence of gang allegations.

D. The court’s evidentiary ruling

The court tentatively held the gang evidence and the expert witness’s testimony was admissible.

“*It’s going to be relevant to explain the background of where these victims come from, and the defendant comes from, what’s going on in those communities, the rivalries that exist and the tit for tat that goes on with respect to acts of violence between each of those gangs, and then narrow it down to what happened and what was said on this particular date in question and what happened afterwards. Relevant to that would be how the person was dressed, any or all, could have been all of them, whether the rival color is, how the defendant was dressed, what was said, who the passenger was, how he was dressed, all of that is relevant to the gang expert’s testimony.* I’ll have to rule on that at the time, how detailed [the expert] gets as to any opinion as to—you know, he can testify as to what, generally, why people would act in this way. [¶] ... Gun play is often the violence that they resort to. They shoot at each other, do this, do that, and what’s the reason generally why they do that? Because generally, within

the gang community it's the highest form of violence. It's the deadliest, and it just shows that you're a person to be reckoned with." (Italics added.)

The court believed that it was not necessary for the expert to testify in response to specific hypothetical questions since a gang enhancement was not alleged. However, the court was willing to reconsider the issue.

The court concluded:

"[W]itnesses can testify as to what they saw and heard, the gang language, whatever is used, that vernacular, the expert can give the background as to what I described already, and the communities, how they treat each other, exact revenge on each other and the vernacular, as I already said, *but if you get to the point where you want to ask them a hypothetical with regard to these facts, then you need to ask to be heard on that.*" (Italics added.)

The prosecutor asked the court to clarify whether it found that "the generic testimony is fine," but it would exclude a hypothetical about whether certain conduct benefited the gang. The court replied, "Right." The prosecutor asked whether the gang expert could testify about the gang involvement of defendant and the other parties. The court tentatively ruled that such evidence was admissible to corroborate defendant's claim that he was being harassed by the Nortenos.

The court asked the parties if there were any questions about its tentative ruling before it was finalized.

"THE COURT: ... Because I want to allow that type of testimony, because I'm sure it's going to come out on cross with regard to the other side, who were they, what information do you have on them. Because, you know, with regard to the conduct of stepping towards the truck, what do they usually ... do, they exact violence. Do they carry guns, that type of things. I expect that's not going to be a surprise when I hear questions like that, but that type of testimony [the prosecutor] just mentioned, particular observations in the presence of other either gang members or dressing like a gang member, being on gang turf, that type [of] testimony.

"MR. MARTIN [DEFENSE COUNSEL]: I think I'm clear on the court's ruling.

"THE COURT: Okay."

E. The evidence and instructions

As set forth *ante*, Brian and Orlando testified about the gang activities of Lazaro, and the gang-related exchange between Lazaro and the occupant of the truck. Brian admitted his own involvement with the Nortenos. Martinez testified about defendant's problems with the Nortenos, and defendant's statements to Lazaro just before the shooting. In addition, the prosecution introduced evidence about defendant's pretrial statement, where defendant extensively discussed his problems with the Nortenos and his belief that Lazaro was the instigator.

Deputy Woodrum testified as the prosecution's gang expert, and defense counsel did not object to any part of his direct or redirect examination testimony. On cross-examination, defense counsel asked numerous questions about how a Sureno would be outnumbered by Nortenos in Parlier, which could lead to violent assaults against that person. Defense counsel also asked whether Martinez was a Sureno, Martinez's prior conflicts with Nortenos, and the evidence that Brian and Lazaro were Nortenos, in support of the defense theory that Martinez was the gunman and had gang-related problems with Lazaro. Defense counsel also established that defendant did not claim gang membership when he was booked in this case.

Also as set forth *ante*, defense counsel extensively cross-examined Martinez and the other witnesses, and introduced defense evidence, to establish that Martinez was a member of the Surenos and had prior conflicts with Lazaro and other Nortenos, in support of the defense theory that Martinez fired the gunshots from his position in the truck's passenger seat.

At the conclusion of the trial, the jury was instructed as to the limited purpose of the gang evidence:

“You may consider evidence of gang activity only for the limited purpose of deciding whether [¶] One, the defendant had a motive to commit the crimes charged; [¶] Or ... the defendant acted in the heat of passion. [¶] You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information

relied on by ... an expert witness in reaching his or her opinion. [¶] 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 has a disposition to commit crime.” (CALCRIM No. 1403.)

E. Admissibility of gang evidence

We first address the admissibility of gang evidence in case where the gang substantive offense or enhancement has not been charged. “California courts have long recognized the potential prejudicial effect of gang evidence. As a result, our Supreme Court has condemned the introduction of such evidence ‘if only tangentially relevant, given its highly inflammatory impact.’ [Citations.]” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*)). “Gang evidence should not be admitted at trial where its sole relevance is to show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]” (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.)

“Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]” (*Samaniego, supra*, 172 Cal.App.4th at p. 1167.)

“In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, *motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime.* [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049, first italics in original, second italics added.)

“Motive is always relevant in a criminal prosecution.” (*People v. Perez* (1974) 42 Cal.App.3d 760, 767.) “Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] ‘ “[B]ecause a

motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citations.]” (*Samaniego, supra*, 172 Cal.App.4th at pp. 1167-1168.)

It is well settled that expert testimony about gang culture and habits is admissible and the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) The subject matter of the culture and habits of street gangs meets the criteria for the admissibility of expert opinion because such evidence is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Such areas include “testimony about the size, composition or existence of a gang [citations], gang turf or territory [citations], an individual defendant’s membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citation], gang-related tattoos, gang graffiti and hand signs [citations], and gang colors or attire [citations].” (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-657, fns. omitted, disapproved on other grounds in *People v. Vang* (2011) 52 Cal.4th 1038.)

“[E]ven where gang membership is relevant, because it may have a highly inflammatory impact on the jury, trial courts should carefully scrutinize such evidence before admitting it. [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193 (*Avitia*).)

The admission of gang evidence over an Evidence Code section 352 objection will not be disturbed on appeal unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v.*

Brown (2003) 31 Cal.4th 518, 547; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 (*Gonzalez*); *Avitia, supra*, 127 Cal.App.4th at p. 193.)

F. Analysis

On appeal, defendant complains the court improperly permitted Deputy Woodrum to testify as a gang expert, that his testimony was cumulative to that of the lay witnesses, it amounted to highly prejudicial character evidence, and the expert's opinions about defendant's association with the Surenos lacked foundation. Defendant further asserts that Woodrum's opinions were not relevant to "any contested element of the charged crimes, and served no legitimate function but to prejudice [defendant] in the eyes of the jury," and Woodrum's opinion that defendant was a gang member lacked foundation.

As illustrated by the pretrial hearing on this issue, however, defendant withdrew the majority of his objections to Woodrum's testimony and the gang evidence in this case. Indeed, defendant conceded that he intended to delve into many of the same areas as the prosecution, in an attempt to prove the contrary point that Martinez, the truck's passenger, was the gunman because Martinez associated with the Surenos, and he had prior conflicts with Lazaro and other Nortenos. Moreover, defendant never objected to any part of Woodrum's trial testimony. Having failed to object "specifically on the ground he now advances," defendant "deprived the trial court of an opportunity to make a fully informed ruling on the issue[s]. [Citations.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 48.)

Even if defense counsel had objected, however, the court did not abuse its discretion when it permitted Woodrum to testify as the prosecution's expert. Woodrum's testimony and the gang evidence were highly relevant and probative of defendant's motive and intent to kill Lazaro and his friends, based on defendant's own pretrial confession. While defendant later attempted to frame his alleged conflict with Lazaro as a personal matter rather than a gang dispute, he used his pretrial statement to offer a lengthy explanation about how Lazaro and other Nortenos had perceived that he was a

Surenos and repeatedly harassed him on previous occasions. Defendant further said that shortly before the shooting, when he drove past Lazaro and his friends, someone called him a “ ‘Scrapa’ ” and Lazaro identified himself as a “ ‘Puro Norte.’ ”

The gang issues in this case were reinforced by Orlando’s testimony that, immediately before the first shots were fired, he heard someone from the truck ask Lazaro in Spanish, “ ‘What do you bang?’ ” Orlando heard Lazaro reply, “ ‘Norte,’ ” in a loud voice, and he knew that Lazaro was wearing red. In the hours after the shooting, while being treated at the hospital, Lazaro said someone in the truck yelled “13” in Spanish, and then fired shots at him. Martinez similarly testified that defendant asked Lazaro, in Spanish, “ ‘[W]hat barrio did he claim,’ ” and Lazaro replied, “ ‘Norte.’ ” Martinez further testified that defendant often called out Nortenos and had conflicts with them.

Martinez said that he and defendant were not gang members, but admitted that they associated with Surenos and often wore blue. Martinez said that a blue rag was tied around the gun which defendant produced from under the driver’s seat. When the murder weapon was found hidden in the engine compartment of defendant’s truck, it was wrapped in a blue rag.

Based on this evidence, Deputy Woodrum’s expert testimony was highly relevant and probative to explain the nature and meaning of the gang-related phrases, colors, and symbols that triggered, by defendant’s own admission, his decision to retrieve his gun, look for Lazaro, exchange gang-slurs with Lazaro, and shoot at Lazaro and his associates on a quiet residential street at close range. Woodrum’s testimony was not inflammatory or cumulative, but particularly relevant to refute the defense attempt to paint Martinez as the gunman.

Defendant complains that the expert’s testimony was prejudicial because he discussed how the Nortenos and Surenos had derived from the prison gangs, Nuestra Familia and the Mexican Mafia. Defendant never objected to this testimony. While

Woodrum briefly referred to the historical creation of the two gangs, the bulk of his testimony was limited to explaining the significance of the colors and numbers claimed by the gang, as it related to defendant's pretrial attempt to justify his conduct, and further explain the clothing worn and statements made by the relevant parties on the night of the shooting. Woodrum never said that defendant was a member of the prison gangs, and conceded that he did not believe defendant was associated with the Surenos until he learned of the manner in which defendant committed the instant offenses—by exchanging gang slurs with Lazaro and producing a gun wrapped in a blue rag. The instant case is not “one of those rare and unusual occasions where the admission of evidence has violated federal due process and rendered the defendant's trial fundamentally unfair.” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 232.)

IV. Prosecutorial misconduct/ineffective assistance—hypothetical questions

Defendant next contends that to the extent the gang expert's testimony was admissible, the prosecutor committed prejudicial misconduct by asking the gang expert a hypothetical question in violation of the court's pretrial ruling which limited the admissibility of the expert's testimony.

The People respond that defense counsel did not object to this alleged instance of misconduct, and the prosecutor did not exceed the scope of the court's evidentiary ruling. Defendant replies that to the extent that defense counsel should have objected to the hypothetical questions, counsel was prejudicially ineffective for failing to challenge the alleged prosecutorial misconduct.

A. Prosecutorial misconduct/ineffective assistance

“The applicable federal and state standards regarding prosecutorial misconduct are well established. ‘ “A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” ’ [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is

prosecutorial misconduct under state law only if it involves ‘ ‘ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ’ ’ [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

“A defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety. [Citation.]” (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Absent an objection, the claim is only reviewable “if an admonition would not have cured the harm caused by the misconduct. [Citation.]” (*People v. Price* (1991) 1 Cal.4th 324, 447.)

“A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel. The appellate record, however, rarely shows that the failure to object was the result of counsel’s incompetence; generally, such claims are more appropriately litigated on habeas corpus, which allows for an evidentiary hearing where the reasons for defense counsel’s actions or omissions can be explored. [Citation.]” (*People v. Lopez* (2006) 42 Cal.4th 960, 966.)

B. Analysis

Defendant asserts the prosecutor committed prejudicial misconduct because his questions to Deputy Woodrum exceeded the scope of the court’s evidentiary ruling on the admissibility of his expert testimony. Defendant argues the court held that Woodrum could not respond to any hypothetical questions based on the gang issues in this case, and

the prosecutor violated the court's order when he asked Woodrum several hypothetical questions.

The People assert the questions were appropriate and defense counsel never objected. Defendant responds that defense counsel was prejudicially ineffective for failing to object to the prosecutor's alleged violations of the court's ruling.

The entirety of the record refutes defendant's characterization of the court's pretrial evidentiary ruling on the admissibility of the gang expert's testimony. As set forth *ante*, the court was concerned as to whether there was sufficient foundation for Woodrum to testify that defendant committed the instant offenses for the benefit of a criminal street gang. After hearing from both sides, and considering defendant's withdrawal of the majority of his objections, the court ruled:

“[W]itnesses can testify as to what they saw and heard, the gang language, whatever is used, that vernacular, the expert can give the background as to what I described already, and the communities, how they treat each other, exact revenge on each other and the vernacular, as I already said, *but if you get to the point where you want to ask them a hypothetical with regard to these facts, then you need to ask to be heard on that.*” (Italics added.)

The prosecutor asked the court to clarify:

“[THE PROSECUTOR]: Just to be sure that I understand ... the generic testimony is fine, but really, *when it comes down to how would this conduct benefit the gang, that's where the issue lies?*”

“THE COURT: Right.” (Italics added.)

The prosecutor also asked whether the expert could “get specific” as to the basis for his opinion about “the alleged gang involvement by the defendant and by the other parties.... The fact that the defendant was seen in the company of some other people who were dressed in blue, and therefore, that's not necessarily indicative of gang membership, but it does show that he is hanging out or associating with them. I mean, are we allowed to go into that?” The court said yes, because it would corroborate defendant's statements about “why they were picking on him.” The court asked the

parties if there were any questions about its tentative ruling before it was finalized, and defense counsel said he was clear on the ruling.

Thus, the court only limited the use of hypothetical questions to the expert if the topic was whether the charged offenses benefited a gang. The court's concern was obviously based on the fact that defendant was not charged with the criminal street gang enhancement, which would have required the prosecution to prove that (1) the crime was "committed *for the benefit of*, at the direction of, or in association with any criminal street gang," and (2) the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members" (§ 186.22, subd. (b)(1), italics added.)

Hypothetical questions may properly be used to elicit testimony from gang experts, and such questions "must be rooted in the evidence of the case being tried, not some other case." (*People v. Vang, supra*, 52 Cal.4th at p. 1046.)

While the prosecutor posed a few hypothetical questions to Woodrum, he never asked a hypothetical as to whether the charged offenses were committed for the benefit of a gang. For example, the prosecutor asked Woodrum to explain what it meant if a person associated with the Sureños asked someone " 'what they bang?' " the other person replied " 'Norteno,' " and the first person did nothing in response. Woodrum explained the exchange was a challenge, the first person would look weak if he failed to respond, and he would enhance his personal status if he did something to the Norteno.

In response to additional hypothetical questions, Woodrum said that someone who yelled out "13" to a group of people meant that he identified with the Sureños; and a blue rag wrapped around a gun used in a shooting signified the color claimed by the Sureños. Defendant did not object to any of these questions. Even defense counsel asked Woodrum a hypothetical question about whether Martinez, the truck's passenger, could have been the gunman if he had been the person who yelled "13" and shot a Norteno in Parlier. Woodrum said it was possible.

Defendant asserts that Woodrum's response to one of the prosecutor's hypothetical questions violated the court's limitation that the expert could not address whether the charged offenses benefited a gang. Defendant cites the following exchange:

“[THE PROSECUTOR]: [A]ssuming you have a Sureno or somebody who associates with the Surenos, and they pull up and they ask somebody what they bang, and the people respond ‘Norteno,’ and there’s witnesses to this transaction here, *what would be the significance of doing nothing about it, not getting out and engaging in a fight?*”

“[WOODRUM]: It would make you, personally, *as well as your gang, I guess*, look weak or appear weak. It would definitely change the status—your status within the gang.

“Q. And if you do get out and engage in a fight or engage in some kind of dispute, *how does that affect your status within the gang?*”

“A. *It enhances it, it shows your willingness to fight and back up your colors, your—your turf.* These people rely on fear to survive, both from you, the public, and other gang members, for survival. They’re—if they’re feared, it changes, you know, when they’re attacked. If they’re feared by you, it changes, you know, witness testimony, your willingness to come forward and tell—you know, say what you say. It’s very common.”
(Italics added.)

The prosecutor's hypothetical questions did not violate the court's evidentiary ruling because he focused on the impact of the exchange on a person's *individual status and reputation*; he did not ask Woodrum whether the challenge could have benefited the gang. While Woodrum briefly mentioned the resulting impact on that person's gang, he primarily focused on the impact of a person's failure to respond to a challenge from another gang member. Defense counsel did not object to Woodrum's response, and the expert's response did not address the primary concern of the court's evidentiary ruling, as to whether the charged offenses were committed for the benefit of a criminal street gang.

We thus conclude the prosecutor did not commit misconduct when he questioned Woodrum because the court did not prohibit the prosecutor from asking any hypothetical questions, the court only limited the topic to whether the charged offenses could have

benefited the gang, the prosecutor never asked a hypothetical question on that topic, and the prosecutor's hypothetical questions to Woodrum did not exceed the scope.

We further conclude that defense counsel was not prejudicially ineffective for failing to object to the prosecutor's questions to Woodrum, since the questions did not exceed the scope of the court's evidentiary ruling. As for defense counsel's failure to object to Woodrum's response, we cannot say that failure was prejudicial because counsel may have decided not to draw attention to the brief remark.

V. Prosecutorial misconduct—Closing argument

Defendant raises a separate issue of prosecutorial misconduct, based on closing argument. He asserts the prosecutor misstated the evidence because he misquoted a critical portion of defendant's pretrial statement, as to whether he intended to "shoot" or intended to "kill" Lazaro when he opened fire.

A. Background

As explained *ante*, defendant gave an extensive pretrial statement when he was interviewed by detectives about what happened during the shooting. The following exchange occurred toward the end of the interview

"Q. *Did you know that you shot another guy?*

"[Defendant]. *No. I didn't want to shoot anybody else, just him. Because he was the only one who tried to hit me.*

"Q. Just the one who was wearing the red shorts, he's the only one you wanted to hit?

"A. Yes." (Italics added.)

Defendant's prosecutorial misconduct contention is based on the following passage from the prosecutor's closing argument. The prosecutor explained first degree murder and express malice, and cited to defendant's pretrial statements to illustrate these concepts:

"The defendant acted with express malice if he unlawfully intended to kill. What you're looking for is did—did he, when he shot at Jaime ...,

intend to kill him? We have—there’s no question he intended to kill ... he ... had that thought in his mind when he aimed at Lazaro. *Because he said that, that’s the guy I wanted to kill. What does he say in his statement? ‘I wanted to kill him, I didn’t want to kill those guys. I shot at them, but I didn’t want to kill him.’* So what are we left with? Is it that he didn’t intend to kill Jaime ...? Well, as we know, being parents; as we know, being people who are involved in the community, involved in daily life, that our actions speak louder than our words. What were the defendant’s actions here? He went from shooting this direction to turning the gun and shooting at these three boys who were fleeing. He shot not just once, not just twice, but three times. The description by [Martinez] is that he was aiming the gun at them, shooting at them as they—as they were fleeing.” (Italics added.)

When the prosecutor addressed the attempted murder charges, he again defined express malice by referring to defendant’s statement about Lazaro:

“So did the defendant take a direct but ineffective step towards killing Lazaro? Absolutely. He pulled out a gun, he pointed it at him and shot at him and actually struck him ... from 11 feet away and in an area that is near the torso where, you know, the heart, the lungs, everything’s right there. And in fact, in his statement it said, *‘that’s who I wanted to kill, I wanted to kill that guy.’*” (Italics added.)

Defense counsel did not object to this portion of closing argument.

B. Analysis

Defendant contends the prosecutor committed prejudicial misconduct because defendant told the detectives in his pretrial statement he wanted to “shoot” Lazaro, he never said that he wanted to “kill” him, and the prosecutor improperly asserted that defendant said that he wanted to “kill” Lazaro. However, defendant never objected to this portion of closing argument and has waived the issue. (*People v. Price* (1991) 1 Cal.4th 324, 447.)

In the alternative, defendant contends defense counsel was prejudicially ineffective for failing to object to this portion of closing argument. We thus turn to the merits. A prosecutor engages in misconduct by misstating facts or evidence. (*People v. Hamilton* (2009) 45 Cal.4th 863, 928; *People v. Davis* (2005) 36 Cal.4th 510, 550.) However, “[a] prosecutor is given wide latitude to vigorously argue his or her case and to

make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) “At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

Defendant is correct that he never said he wanted to “kill” Lazaro in the particular passage of his pretrial statement cited above. In order to evaluate defendant’s prosecutorial misconduct/ineffective assistance assertions, however, we must consider the entirety of defendant’s pretrial statements to the detectives, because they are susceptible of an interpretation which would render the prosecutor’s statements to have been appropriate argument.

As set forth in the factual statement, *ante*, defendant gave a lengthy explanation to the detectives about his prior problems with the Nortenos in Parlier, that a particular Norteno had fired at defendant and his vehicle on several prior occasions, and he believed Lazaro was the gunman in the prior incidents.

Defendant claimed that on the day of the shooting, he drove past Lazaro and his friends at a market, and Lazaro shouted threats at him. Defendant said that “he tried to kill me” and “I was up to here with it.” He went back to Reedley, retrieved his gun, drove back to Parlier, and looked for Lazaro because “I was so angry I almost cried and I couldn’t take it anymore and I said, ‘That’s it.’ ” Defendant said he found Lazaro and his friends on the street, Lazaro yelled at him, and defendant decided to do something:

“I remembered about the times that he has shot at me and I said, ‘*Well, I just have one life and that’s it.*’” (Italics added.)

Defendant said he pointed the gun at Lazaro and “shot at him and I kept shooting and that was it.” Defendant said Lazaro’s friends rushed at the truck, and he kept firing. He thought he fired four or five shots, and he kept firing as Lazaro’s friends were running. He did not know if he hit anyone. The following exchange then occurred:

“Q. *Did you know that you shot another guy?*

“[Defendant]. *No. I didn’t want to shoot anybody else, just him. Because he was the only one who tried to hit me.*

“Q. Just the one who was wearing the red shorts, he’s the only one you wanted to hit?

“A. Yes.” (Italics added.)

As the interview continued, defendant asked the detectives if he was going to “have to pay for what I did,” since “they were trying to do the same thing to me, what else could I do?”

“Q. Did they have a gun?

“A. All the time. I didn’t see a gun yesterday, but I said that person has already tried to shoot me two times.”

A detective asked defendant why he didn’t report the prior shootings to the police.

Defendant said he did not want any problems.

“Q. But they provoked you.

“A. Well, yes.

“Q. *Because you know it is against the law to kill a person, right?*

“A. *Well, I don’t know very much, but I imagine.*

“Q. But you know about that, right?

“A. Well, yes.

“Q. Killing another person.

“A. And is that person dead?

“Q. Uh, huh (affirmative).

“A. Yes?

“Q. One of them. There were four young men and one of them is dead and the second one has injuries from the shots that he received” (Italics added.)

While defendant did not specifically say that he wanted to “kill” Lazaro, he admitted that he wanted to shoot Lazaro because he was afraid for his life, he asked if he had killed someone, and he knew that killing another person was wrong. The prosecutor’s closing argument relied on reasonable inferences from the entirety of defendant’s pretrial statements, and did not constitute misconduct. Similarly, defense counsel was not prejudicially ineffective for failing to object to the prosecutor’s argument.

VI. Ineffective assistance

Defendant raises several contentions of ineffective assistance. We have already rejected his contentions about defense counsel’s alleged failure to object to the transferred intent instruction (issue II, *ante*), the prosecutor’s questions to the gang expert (issue III, *ante*), and the prosecutor’s closing argument references to defendant’s pretrial confession (issue IV, *ante*).

Defendant’s final issue is that defense counsel was prejudicially ineffective for failing to impeach Martinez, the truck’s passenger, with his prior misdemeanor conviction for theft, in order to undermine his credibility. As applicable to this issue, both defendant and the People agree that during pretrial motions, the court held that Martinez could be impeached with his prior misdemeanor conviction for theft in 2009. While defense counsel extensively cross-examined Martinez as to his version of the shooting and other matters, counsel did not impeach Martinez with the prior misdemeanor conviction even though the court held that it was admissible.

“ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny ...’ and must ‘view and assess the reasonableness of counsel’s acts or omissions ... under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) “If

the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation. [Citations.]” (*Ibid.*)

As explained *ante*, the defense theory of the case was that Martinez, the truck’s passenger, was the gunman who wounded Lazaro, shot at Brian and Orlando, and fired the fatal shot into Jaime’s head. In order to advance this theory, defense counsel extensively cross-examined Martinez about his own connections to the Surenos, his prior conflicts with Nortenos, and that he was wearing blue that night. Martinez sought to downplay his gang connections, but defense counsel introduced evidence about Martinez’s own conflicts with a Norteno on the high school campus. In addition, defense counsel repeatedly pointed to the testimony of the surviving victims, that they saw the gun being pointed out of the truck’s passenger-side window and assumed the gunman was the passenger.

Despite defense counsel’s best efforts, however, he could not surmount the detail provided by defendant in his pretrial statement to the detectives, where defendant corroborated Martinez’s account of how he leaned out of the passenger window and shot Lazaro, and continued to fire gunshots at Lazaro’s associates as they ran down the street.

In the face of this evidence, defense counsel’s apparent decision not to impeach Martinez with his prior misdemeanor conviction for theft was not prejudicial. While the jury would have been instructed on the appropriate consideration of this prior conviction, there was no evidence that the misdemeanor was gang-related or connected to any conflicts between the Surenos and Nortenos in Parlier. Martinez had already been subject to extensive cross-examination regarding his own ties to the Surenos, his failure to stop defendant from shooting at the victims, and his failure to call the police after the incident was over.

Defendant asserts that defense counsel's failure to impeach Martinez with his prior misdemeanor conviction was prejudicial because Martinez was the only witness who explained that defendant fired at the other three men as they ran from the truck. To the contrary, Brian and Orlando testified about hearing the truck accelerate and the bullets being fired as they ran and jumped into the bushes. Moreover, defendant told the detectives that he continued to fire his gun after he shot Lazaro, based on his claim that Lazaro's associates were running toward the truck. The testimony was supported by the physical evidence, that additional shots were fired after Lazaro was wounded, since Lazaro suffered two nonfatal gunshot wounds and fell to the street, and Jaime's body was found further south on Costa Avenue, lying in the bushes with a bullet in his head.

Finally, we note that Martinez suffered the prior misdemeanor conviction on October 26, 2009, over two months after the fatal shooting in this case. While it was admissible for impeachment purposes, it would have had minimal impeachment value given the entirety of the evidence, such as Martinez's admission that he was chased by Nortenos after the shooting because they believed he was involved in it.

We conclude that defense counsel was not prejudicially ineffective for failing to impeach Martinez with his prior misdemeanor conviction for theft.

DISPOSITION

The judgment should be affirmed.

Poochigian, J.

WE CONCUR:

Levy, Acting P.J.

Franson, J.