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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC GARZA CORDERO,

Defendant and Appellant.

G046211

(Super. Ct. No. 07NF4480)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
James Edward Rogan, Judge. Affirmed as modified.

Athena Shudde, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and
Laura A. Glennon, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Isaac Garza Cordero was convicted of attempted premeditated murder and street terrorism. He was sentenced to 32 years to life in prison. On appeal, defendant argues the trial court prejudicially erred by failing to instruct the jury on accomplice testimony. While we agree that the court erred by failing to give such an instruction, the error was harmless because there was sufficient evidence to corroborate the testimony of the alleged accomplice.

Defendant also argues his trial counsel was ineffective for failing to object to the admission of testimony regarding defendant's prior arrests. Having reviewed the record, we conclude that, in one instance, counsel did object to the testimony. In two other instances, assuming for purposes of this appeal that counsel should have objected to the testimony, there was no prejudice to defendant. Therefore, he did not receive ineffective assistance of counsel.

Defendant also claims the trial court erred by denying his three mistrial motions. We conclude there was no error in the denial of the motions, individually or collectively.

Finally, defendant argues, and the Attorney General concedes, that the trial court improperly sentenced him on the street terrorism count. We direct the trial court to modify defendant's sentence but, in all other respects, affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 20, 2007, Kevin G. was at his home in Placentia with defendant and defendant's brother. Kevin was aware that defendant was a member of the Plas criminal street gang, but defendant never did or said anything gang related when he was with Kevin. Defendant borrowed his brother's car keys and asked Kevin to drive him to a supermarket. On the way, defendant told Kevin to drive to defendant's

girlfriend's house in Anaheim. When they neared his girlfriend's house, defendant told Kevin to drive back to Placentia.

In Placentia, defendant and Kevin stopped at an apartment building. Defendant got out of the car and went into an apartment for about 15 minutes. When defendant returned, he was with Jose Bello and Angel Ramos, both Plas gang members. Bello and Ramos got into the backseat of the car, and defendant told Kevin to drive back to his girlfriend's house.

Kevin drove around the girlfriend's neighborhood, believing defendant was spying on his girlfriend. Kevin was aware the area was claimed as territory of the Anaheim Folks criminal street gang. Defendant told Kevin to stop the car on Onondaga Avenue. Kevin turned off the car, but was told to turn the engine back on.

Emilio Dominguez was standing on the grass at the side of the street. Ramos, who was sitting in the right rear passenger seat, rolled down his window and asked Dominguez, "where are you from?" Dominguez responded, "Anaheim Folks." Ramos exited the car, pointed a long-barreled weapon at Dominguez, and fired three times, striking Dominguez in the head and leg. Ramos got back into the car, instructed Kevin to drive away, and said, "I got him." Dominguez survived.

Kevin drove back to the apartment where he and defendant had picked up Bello and Ramos. Defendant got out of the car with Bello and Ramos; Kevin assumed they took the gun with them. Defendant returned alone to the car 10 to 15 minutes later, and Kevin drove back to his house. He was scared and angry with defendant for placing him in that situation. Defendant told Kevin he shared liability for what had happened. Defendant's brother became angry when defendant told him his car had been used during the shooting.

The next day at school, Kevin told two teachers what had happened. Kevin was interviewed by the police, and showed them where he had picked up Bello and Ramos. Pursuant to a warrant, a .22-caliber cartridge was found during a search of

defendant's brother's car, and a .22-caliber rifle was found at the residence of Franklin Ortega, which was in the apartment complex where Kevin had picked up and dropped off Bello and Ramos.

Defendant was arrested and then interviewed by a gang investigator. After initially denying any involvement in the shooting, defendant eventually acknowledged the shooting was not for any specific purpose, but rather was for the purpose of "put[ting] in work" for the Plas gang, which means committing crimes. Defendant told the investigator the Plas and Anaheim Folks gangs were generally enemies. Defendant said Ramos "hit up" Dominguez before shooting him; to hit up someone means to ask what gang he or she is from, and is a challenge.

The gang investigator testified that Hispanic criminal street gangs in Southern California operate under rules and orders established by the Mexican Mafia. The Mexican Mafia has prohibited "classic" driveby shootings, in which innocent bystanders were often killed or injured. The Mexican Mafia therefore ordered that a gang member must exit his or her vehicle before committing a shooting. Also, a shooter must inform other gang members that he or she is in possession of a gun to notify those gang members who might have criminal records; such a statement also ensures that the gang members know what type of weapon is available, and that they will protect the firearm from law enforcement. During his interview, defendant admitted he was aware of these gang rules.

Additionally, the gang investigator testified that guns are prized possessions among gang members, as gang members get their power from guns and use them to protect themselves. If an individual were to commit a crime in the name of a gang, although he or she was not a member of that gang, there would be severe consequences, including physical assault.

Placentia Police Sergeant Brian Perry testified as a gang expert. Perry testified that the Plas gang is a Southern California Hispanic criminal street gang in

Placentia, with 150 members as of December 2007. The goal of Plas gang members is to achieve respect; one way to achieve respect for the individual and the gang is by driving into the neighborhood claimed by a rival gang and shooting a member of that rival gang. In Perry's opinion, a gang member would not permit a nongang member to participate in a gang shooting.

Perry opined that defendant was an active Plas gang member on December 20, 2007; that the shooting of Dominguez assisted in, furthered, and promoted criminal conduct by the Plas gang because it enhanced the reputation of the gang and of the individual gang members involved; and that defendant committed the crime in association with Plas gang members.

Defendant was charged in a second amended information with attempted premeditated murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)), and street terrorism (*id.*, § 186.22, subd. (a)). The information alleged, as sentencing enhancements, that the attempted murder was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by members of that gang (*id.*, § 186.22, subd. (b)(1)); a gang member vicariously discharged a firearm (*id.*, § 12022.53, subs. (c), (e)(1)); and the discharge of a firearm caused great bodily injury (*id.*, § 12022.53, subs. (d), (e)(1)).

A jury found defendant guilty of both counts, and found true all the sentencing enhancement allegations. The trial court sentenced defendant to a total of 32 years to life in prison. On the attempted murder count, defendant was sentenced to life in prison with the possibility of parole, with a mandatory minimum parole eligibility of seven years. The court also sentenced defendant to 25 years for the Penal Code section 12022.53, subdivisions (d) and (e)(1) sentencing enhancement, to be served consecutively to the mandatory minimum sentence on the attempted murder count. Execution of sentence was stayed on the sentencing enhancements under Penal Code sections 186.22, subdivision (b)(1) and 12022.53, subdivisions (c) and (e)(1). The court

also imposed the low term of one year, four months for street terrorism, to be served concurrently.

DISCUSSION

I.

ACCOMPLICE INSTRUCTION

Defendant argues the trial court prejudicially erred by failing to instruct the jury that Kevin was a possible accomplice, or defendant's trial counsel was ineffective for having failed to request such an instruction. The Attorney General argues Kevin was not an accomplice, meaning no instruction was needed. Alternatively, the Attorney General argues there was no prejudice.

“If there is evidence that a witness against the defendant is an accomplice, the trial court must give jury instructions defining ‘accomplice.’ [Citations.] It also must instruct that an accomplice’s incriminating testimony must be viewed with caution [citation] and must be corroborated [citations]. If the evidence establishes that the witness is an accomplice as a matter of law, it must so instruct the jury [citation]; otherwise, it must instruct the jury to determine whether the witness is an accomplice [citation]. [Citations.]” (*People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)¹

¹ CALCRIM No. 334 is the instruction on accomplice testimony. It reads, in relevant part: “Before you may consider the (statement/ [or] testimony) of _____ <insert name[s] of witness[es]> as evidence against (the defendant/_____ <insert names of defendants>) [regarding the crime[s] of _____ <insert name[s] of crime[s] if corroboration only required for some crime[s]>], you must decide whether _____ <insert name[s] of witness[es]>) (was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if: [¶] 1. He or she personally committed the crime; [¶] OR [¶] 2. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 3. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime). [¶] The burden is on the defendant to prove that it is more likely than not that

When the trial court fails to instruct the jury on an issue, we determine whether there was a reasonable likelihood the jury was misled. (*People v. Streeter* (2012) 54 Cal.4th 205, 258.) In doing so, we consider the instructions as a whole. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Any error in failing to instruct the jury is not reversible unless a result more favorable to the defendant would have occurred if the instruction had been given. (*People v. Epperson* (1985) 168 Cal.App.3d 856, 862.) The failure to instruct the jury on accomplice testimony is harmless if there is sufficient corroborating evidence in the record. (*People v. Avila* (2006) 38 Cal.4th 491, 562-563.)

_____ <insert name[s] of witness[es]> (was/were) [an] accomplice[s]. [¶] [An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.] [¶] [A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.] [¶] [A person may be an accomplice even if he or she is not actually prosecuted for the crime.] [¶] . . . [¶] If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness. [¶] If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ <insert charged crime[s]> based on his or her (statement/ [or] testimony) alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if: [¶] 1. The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's (statement/ [or] testimony); [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime[s]. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] . . . [¶] Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.” (CALCRIM No. 334, boldface omitted.)

“An ‘accomplice’ is one who knowingly, voluntarily, and with common intent with the principal offender unites in the commission of the crime. [Citations.] To be an accomplice whose testimony must be corroborated by other evidence tending to connect defendant with the commission of the offense, one must be liable to prosecution for the identical offense with which the defendant has been charged at the time when the testimony of the accomplice is given. [Citation.]” (*People v. Jones* (1967) 254 Cal.App.2d 200, 213.)

“Whether a person is an accomplice within the meaning of [Penal Code] section 1111 presents a factual question for the jury “unless the evidence presents only a single inference.” [Citation.] Thus, a court can decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness’s criminal culpability are “clear and undisputed.” [Citations.]’ [Citation.]” (*People v. Carrington* (2009) 47 Cal.4th 145, 191.)

Does the evidence in this case permit a single inference that Kevin was not an accomplice in the shooting of Dominguez? No. Kevin, knowing that defendant was a member of the Plas criminal street gang, drove defendant and two other men to an area claimed by the Anaheim Folks criminal street gang, a rival of the Plas gang. After Kevin parked the car, one of the backseat passengers issued a common gang challenge to Dominguez, who was standing nearby, before shooting him. The gang expert testified that gang members will notify the other occupants of a car in which they are riding that they are in possession of a gun, and that gang members do not permit nongang members to participate in gang shootings. Although there was also evidence that would tend to indicate Kevin was not an accomplice, that evidence was not clear and undisputed; therefore, the issue whether Kevin was an accomplice should have been presented to the jury.

Had the issue been presented to the jury, defendant would have borne “the burden of both producing evidence raising that issue and of proving the accomplice status

by a preponderance of the evidence. [Citation.]” (*People v. Belton* (1979) 23 Cal.3d 516, 523, fn. omitted.) Assuming defendant would have been able to prove Kevin’s accomplice status by a preponderance of the evidence, we conclude the trial court erred by failing to instruct the jury that it could not convict defendant based solely on Kevin’s testimony. We next determine whether there was sufficient corroborating evidence to support defendant’s conviction. If there was such corroborating evidence, any error would be harmless.

“A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is insufficient if it merely shows the commission of the offense or the circumstances thereof. [Citation.] ‘In order to corroborate the testimony of an accomplice, the prosecution must introduce independent evidence which of itself connects the defendant with the crime without any aid from the testimony of the accomplice. The amount and type of evidence necessary to produce such corroboration obviously differs according to the circumstances of each case.’ [Citation.] Corroborating evidence must tend to connect the defendant with the commission of the offense for the purpose of satisfying the jury that the accomplice is telling the truth. [Citations.] Thus, corroborating evidence must tend to implicate the defendant [citations], and must therefore relate to some act or fact which is an element of the crime, but it is not necessary that the corroborative evidence be sufficient of itself to establish every element of the offense charged. [Citations.] Consequently, corroborating evidence may be slight and entitled to little consideration when standing alone. [Citations.]” (*People v. Jones, supra*, 254 Cal.App.2d at p. 213.)

In this case, there was sufficient evidence to corroborate Kevin’s testimony. Casings from the firearm used to shoot Dominguez were found in defendant’s brother’s car, which Kevin admitted driving to the scene of the shooting. The firearm used in the shooting was found at the location where Kevin told the investigators he picked up and

dropped off the two other men involved in the shooting. Dominguez told the police he was shot by four Hispanic males with short hair, driving a white car; the descriptions of the car and the assailants were consistent with Kevin's testimony. Finally, defendant admitted to the gang investigator his involvement in the shooting, further corroborating Kevin's testimony. Therefore, the trial court's error in failing to instruct the jury that it must determine whether Kevin was an accomplice in committing the crime, and that it could not base a conviction on Kevin's testimony alone if it found Kevin was an accomplice, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)²

II.

ADMISSION OF EVIDENCE OF DEFENDANT'S PRIOR ARRESTS

Defendant argues his trial counsel was ineffective for failing to object to the admission of evidence regarding defendant's prior arrests. In reaching his opinion that defendant was an active member of the Plas criminal street gang on December 20, 2007, Perry relied, in part, on defendant's contacts with law enforcement when he was with other gang members, and defendant's criminal activity. Defendant contends he was prejudiced by the admission of Perry's testimony regarding three such incidents: (1) defendant's discussion of a prior burglary arrest when he was stopped by law enforcement in June 2006; (2) his arrest for possession of a knife on school grounds in June 2002; and (3) his arrest for automobile burglary when he was with other Plas gang members in July 2007.

To prevail on a claim of ineffective assistance of counsel, the defendant must prove (1) the attorney's representation was deficient in that it fell below an

² Defendant also argues that he was denied effective assistance of counsel because his trial counsel failed to request the trial court instruct the jury with CALCRIM No. 334. Because we conclude the error in failing to instruct the jury with CALCRIM No. 334 was harmless, this claim fails.

objective standard of reasonableness under prevailing professional standards; and (2) the attorney's deficient representation subjected the defendant to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.)

Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington*, *supra*, at p. 694.)

As to the first instance of claimed ineffective assistance of counsel, defendant's trial counsel *did* object on grounds of relevance to the testimony that during a contact with law enforcement, defendant talked about a prior arrest for burglary. The trial court sustained the objection and struck Perry's answer. The court then admonished the jurors to disregard the answer, and polled each juror to obtain his or her agreement to follow the admonition. As to this part of Perry's testimony, there was no ineffective assistance of counsel. We reject defendant's argument that this is a situation in which the admonition was insufficient to correct any prejudice caused to defendant.

As to the second and third instances of claimed ineffective assistance of counsel, Perry's testimony regarding defendant's arrest for possession of a knife and arrest for automobile burglary was admitted because, in each case, defendant told the police his actions were related to the gang or he was with Plas gang members. Evidence of defendant's contacts with Plas gang members was proper as the basis of the gang expert's opinion that defendant was an active gang member on December 20, 2007. Therefore, it is only the testimony that defendant had been previously arrested that could be objectionable. "Generally, evidence of mere arrests that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character." (*People v. Williams* (2009) 170 Cal.App.4th 587, 609.)

Assuming for purposes of this opinion only that defendant's trial counsel's failure to object to the evidence of defendant's arrests for being in possession of a knife and for automobile burglary was deficient, we conclude it did not prejudice defendant.

The evidence of defendant's involvement in Dominguez's shooting was overwhelming. Defendant's contention on appeal is that admission of the evidence of his prior arrests prejudicially undercut his character defense of nonviolence. The character defense was based on the testimony of one of defendant's brothers, who testified defendant was "quiet, reserved," regularly attended church, spent time with his daughters, and enjoyed playing video games, football, and soccer. Defendant's brother did not remember anything about defendant's arrest for possession of a knife, or the circumstances surrounding it. When he learned about Dominguez's shooting, defendant's brother was surprised, shocked, disappointed, "[a] little pissed," and angry. Defendant's brother testified on cross-examination that he would be surprised to learn that defendant was hanging out with Plas gang members, had tagged "Plas" on a wall in Placentia, had admitted to the police on multiple occasions that he had a gang moniker and that he would "back up Plas," and had committed a burglary with Plas gang members. Defendant's brother further testified that knowing all those things would not change his opinion that his brother was not a violent person.

There is no reasonable probability that the jury would have reached a different result in the absence of evidence that defendant had been arrested for possession of a knife and for automobile burglary. Therefore, defendant did not receive ineffective assistance of counsel.

III.

MISTRIAL MOTIONS

Defendant argues the trial court erred in denying his three mistrial motions, individually and collectively. We review the trial court's denials of defendant's motions for abuse of discretion: "A motion for mistrial is directed to the sound discretion of the trial court. We have explained that '[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the

trial court is vested with considerable discretion in ruling on mistrial motions.’
[Citation.]” (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.)

All three of defendant’s mistrial motions were made during the testimony of the prosecution’s gang expert, Perry.

A. The First Mistrial Motion

First, defendant moved for a mistrial based on Perry’s testimony that defendant was arrested in 2002 for possession of a knife at school, and that defendant talked about being arrested for burglary during a June 2006 field interview. Defendant’s trial counsel argued that Perry’s testimony made it sound like defendant had the knife in order to commit an assault, when he was really just trying to protect himself from others. The trial court disagreed with counsel’s interpretation of the testimony, but stated any confusion could be cleared up on cross-examination. The court denied the motion for mistrial because “[t]he court doesn’t feel that there has been any level of prejudice to the defendant that would merit a motion for a mistrial,” but offered to entertain any requests for admonitions or instructions. The trial court did not abuse its discretion because Perry’s testimony was not incurably prejudicial.

B. The Second Mistrial Motion

The second mistrial motion was based on Perry’s testimony in violation of *People v. Killebrew* (2002) 103 Cal.App.4th 644. Perry testified as follows:

“Q. [The prosecutor:] Did you have a chance to watch Isaac Cordero’s interview?

“A. Yes, I did.

“Q. Okay. Did you notice if he seemed to be aware of the rules about everyone knows about the strap?^[3]

“A. Absolutely.

³ “Strap” is slang for gun.

“Q. Did he seem to be aware of the rules about getting taxed?^{4]}

“A. Yes.

“Q. About exiting the vehicle rather than doing a drive by?

“A. Yes.”

Defendant’s counsel did not object to this testimony. Shortly thereafter, the following exchange occurred:

“Q. [The prosecutor:] Did you see the part of the video where Detective Ciscel asks Isaac Cordero, ‘so what’s the beef with Plas?’ [¶] He says, ‘Plas and Folks are just enemies.’ [¶] And Detective Ciscel says, ‘so what was this? Just, you know, put in some work, got a strap type deal’? [¶] And Isaac Cordero says, ‘Yeah.’ [¶] Did you see that part of the video?

“A. Yes, I did.

“Q. What is that? What does that tell you as a gang detective?

“A. That he’s continuing to put in work for the Plas gang.

“Q. . . . What does that kind of quote tell you about what kind of act was going to occur?

“[Defense counsel]: Objection, vague. Calls for speculation.

“The Court: Sustained.

“Q. By [the prosecutor]: Okay. As to whether or not this crime is committed for the benefit of Plas or whether Isaac Cordero was actively participating in Plas during this crime, what is that statement that this is just putting in work, have a strap type deal when it’s in rival gang territory? [¶] What does that statement tell you?

“[Defense counsel]: Objection. Compound, vague, and lacks foundation.

“[The prosecutor]: I can rephrase, actually.

“The Court: Very well. The question is withdrawn.

⁴ To be “taxed” means a person is assaulted for claiming to be in a gang when he or she is not in that gang.

“Q. By [the prosecutor]: Is that statement significant to you?

“A. Yes.

“Q. Why?

“A. Because it is telling me that he’s going . . . with other gang members driving to a rival neighborhood, and shoot somebody. For the benefit of, at the direction of, Plas criminal street gang.

“[Defense counsel]: Objection, calls for a legal conclusion and lacks foundation.”

At that point, the trial court conducted a sidebar in which the court expressed its opinion that Perry’s testimony “could possibly invoke shades of *Killebrew* error.” The court also invited defendant’s counsel to renew his motion for a mistrial, but denied the motion; the court instead decided to admonish the jury that Perry could not testify to defendant’s state of mind. The court gave the following admonishment to the jury:

“The Court: Ladies and gentlemen, the reason I wanted to meet with counsel at the side bench and discuss an issue with them is this. The officer has testified to a number of things over the last couple of hours. My concern from the last answer is that you [m]ight have interpreted that the officer was giving competent evidence as to what Mr. Cordero’s particular state of mind was and what he personally intended.

“Obviously, none of us are mind readers. You have to form your own opinion based upon the evidence. I’m going to strike that portion of the officer’s testimony and order you to disregard it.

“Again, you will be bound by the court’s instructions and you are specifically ordered to disregard the portion of the officer’s testimony where he stated what the defendant intended to do, going into that particular area.

“Again, that’s a decision you will have to make based upon the direct and circumstantial evidence. And there is no evidence that this officer is able to render an opinion as to Mr. Cordero’s particular state of mind.”

Following this admonition, the trial court polled each juror, and each confirmed he or she would follow the admonition.

The Attorney General concedes that Perry’s testimony was not an opinion based on hypothetical facts, but rather was an opinion as to defendant’s subjective knowledge and intent, and thus was improper under *People v. Killebrew, supra*, 103 Cal.App.4th at page 658. We find no abuse of discretion in the trial court’s decision to deny the second mistrial motion. The court believed the error was curable by its admonition, and the court was in the best position to make that decision.

C. The Third Mistrial Motion

The third mistrial motion was made in response to Perry’s opinion testimony, which was based on a hypothetical set of facts. The testimony, which defendant contends is incurably prejudicial, was as follows:

“Q. [The prosecutor:] . . . [¶] Officer, I would like you to assume that there are two gang members who are active participants. And at least another member or associate in that same gang. They drive in a vehicle into rival gang territory. When they see a rival gang member, one of them . . . hits up this person, asks where are you from. [¶] When the rival gang member responds . . . their rival gang’s name, an individual, one of the members of the gang that are in the car that drove by, gets out and shoots this person three times in rival gang territory. [¶] Do you have an opinion as to whether this type of crime would be committed for the benefit of, at the direction of, or in association with a criminal street gang?

“A. Yes, I do.

“Q. And which one, benefit, direction or association?

“A. All three.

“[Defense counsel]: Objection. Calls for improper—it is an improper hypothetical and calls for a legal conclusion and calls for speculation.

“The Court: Overruled.

“Q. By [the prosecutor]: And what do you base—can you tell us, you said all three. Can you go through each one and tell us the basis of your opinion for each one?

“A. Yes. Based on the hypothetical that you have given me, the benefit would be the rival gang or the gang going into the rival gang’s neighborhood and hitting up the rival gang member and getting out. That would benefit the gang that’s conducting the shooting, because it is going to show them how fierce they are and that they are not afraid to do the crimes. [¶] It is also going to benefit that subject who is doing the [shooting] within the gang, because it is going to bolster his reputation. And it is also going to promote the gang and their reputation. And the association with the two—I believe you said two gang members and one associate gang member in your hypothetical?

“Q. Yes.

“A. That’s the association, where it comes into the association. You have two or more members going into a neighborhood in a vehicle. So it looks like you have three—is that what you said?

“Q. I said two members and at least, at a minimum, another associate.

“A. There is where your association comes in. That’s why all three, in my opinion, based on that hypothetical, all three apply.

“Q. And would that kind of crime assist, further, or promote further criminal conduct by gang members?

“A. Yes.”

The trial court denied the third mistrial motion, finding that Perry’s testimony, set forth *ante*, was admissible under *People v. Vang* (2011) 52 Cal.4th 1038. Defendant contends that Perry’s opinion “went beyond ultimate fact and trespassed

repeatedly into areas the law has long recognized as improper and unduly prejudicial,” and that “the hypothetical questions . . . merely provided a legal disguise for the otherwise improper state of mind and knowledge opinions previously tendered by the expert and allowed the expert to offer his opinion on [defendant]’s guilt.” We disagree. Perry’s answers to the prosecutor’s hypothetical questions were based on what the evidence showed defendant and the others in the car did, and therefore “were directed to helping the jury determine whether [*this*] defendant[], not someone else, committed a crime for a gang purpose.” (*People v. Vang, supra*, at p. 1046.) An expert witness may answer hypothetical questions regarding the knowledge and intent of hypothetical persons, as long as he or she does not opine on the knowledge or intent of the defendant actually on trial. (*Id.* at pp. 1047-1048.)

IV.

SENTENCING

Defendant argues, and the Attorney General concedes, he was improperly sentenced on the street terrorism count. We concur, and will direct the trial court to modify defendant’s sentence accordingly.

Penal Code section 654 bars multiple punishment for a single physical act. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-21.) In *People v. Mesa* (2012) 54 Cal.4th 191, 197-198, the California Supreme Court held that section 654 precludes punishment for both the crime of active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a)), and the underlying felony used to satisfy the “willfully promotes, furthers, or assists in any felonious criminal conduct” element of the active participation count.

In this case, the jury was instructed that “[f]elonious criminal conduct means committing or attempting to commit the crime of attempted murder.” Because defendant’s aiding and abetting the attempted murder was used as the evidence of the felonious criminal conduct prong of the street terrorism count, defendant could not be

punished for both crimes. We direct the trial court to stay execution of the 16-month sentence on the street terrorism count, which was ordered to be served concurrently with the 25-year-to-life term on the attempted murder count.

DISPOSITION

We direct the trial court to modify the judgment by staying execution of the 16-month sentence on the street terrorism count, to prepare an amended abstract of judgment, and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.