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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL CARL WEATHERS, Defendant and Appellant.	B208258 (Los Angeles County Super. Ct. No. MA034044

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas R. White, Judge. Affirmed in part, reversed in part, and remanded.

Doris M. Frizzell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant, Michael Carl Weathers, challenges his conviction for attempted murder, two counts of second degree robbery, and assault with a deadly weapon. A jury found each crime was committed for the benefit of, at the direction of, or in association with a criminal street gang as defined in Penal Code section 186.22, subdivision (b)(1).[1] In this appeal, we conclude the record lacks substantial evidence to support the gang enhancement. Weathers's remaining arguments -- alleged evidentiary error and alleged prosecutorial misconduct -- lack merit. We reverse the gang enhancement and in all other respects affirm the judgment.

PROCEDURAL BACKGROUND

In an amended information, defendant was charged with attempted murder, two counts of second-degree robbery, and assault with a firearm. With respect to each offense, a gang enhancement (§ 186.22, subd. (b)(1)), a personal use enhancement (§ 12022.53, subds. (b) &(c)), prior convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12), and prior prison terms were alleged.

Defendant denied the allegations and was tried by a jury. No witness testified for the defense. The jury found defendant guilty of all substantive charges and found both the personal use and gang enhancement allegations to be true.

Defendant waived his right to a jury trial on the prior conviction allegations. Subsequently, defendant admitted having been convicted of robbery on September 16, 1993 and of first degree burglary on August 12, 1999. The parties "excluded from the court's consideration" four other alleged prior convictions for robbery. The court denied the defense motion to strike the admitted prior convictions.

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[1] Undesignated statutory citations are to the Penal Code.

For the attempted murder conviction, the court imposed an indeterminate term of 45 years to life (15 years tripled because of the Three Strikes law), plus a 30-year determinate term (20 years for the personal use enhancement and 10 years for the prior convictions). For the robbery conviction, the court sentenced defendant to a 45-year determinate term (five years for the robbery, 20 years for the personal use enhancement, 10 years for the gang enhancement, and 10 years for the prior convictions). Pursuant to section 654, the court stayed sentence on the remaining counts.

FACTUAL BACKGROUND

1. *Robbery of the Desert View Liquor Store*

On December 16, 2005, at approximately 7:15 p.m., an armed assailant, whose face was covered with a dark blue or black bandanna, entered the Desert View Liquor Store in the Antelope Valley, announced a robbery, and demanded money.[2] The assailant pointed his gun at a cashier's head and ordered the cashier to open the cash register. The assailant took money from the cash register, at least some of which he later dropped on the floor of the store. When a security guard yelled at the assailant, instructing him to "drop the gun," the assailant fired at the security guard at least twice, with one bullet landing in a can located a foot from the security guard's head. The assailant then ran out of the liquor store into the passenger side of a Ford Taurus, driven by Alicia San Pedro, defendant's next-door neighbor.

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[2] One witness testified that defendant was wearing a blue bandanna. Another witness testified the bandanna was "black or dark."

2. *Evidence that Defendant Was the Assailant*

Because the assailant's face was covered, the victims were unable to identify him. One cashier testified the assailant was a black man and wore his hair braided. The other cashier and the security guard testified that the assailant was black. Defendant is black, and there was evidence that he wore his hair in braids on December 16, 2005.

San Pedro testified that, on December 16, 2005, she agreed to drive defendant, whom she knew well, to the grocery store. En route, defendant asked San Pedro to stop at the Desert View Liquor Store. Before he entered the store, defendant told San Pedro he was going to commit a robbery. He also told San Pedro he was going to "do it Crip style."

As San Pedro was waiting in her car, she heard gunfire, and then saw defendant running towards her car. Defendant entered San Pedro's car and ordered her to drive; she complied. Defendant told San Pedro "he had robbed the liquor store . . . ." After stopping at a park, San Pedro and defendant returned to San Pedro's house. Defendant exited the car and ran next door into his house. San Pedro told her daughter, "I think [defendant] just robbed the store" and shot somebody.

Gregory Mellinger was in the parking lot at the liquor store when he heard gunshots. He saw someone run out of the liquor store and enter San Pedro's car. Mellinger followed the car. After stopping at a park, the car returned to San Pedro's house where Mellinger led police.

A search of defendant's house revealed a blue and white bandanna. A single particle of gunshot residue was found on defendant's hand. A .32-caliber gun was found in San Pedro's car in front of the driver's seat on the floorboard. Tests

revealed that the gun found in San Pedro's car was the one used in the liquor store shooting.

3. *Gang Evidence*

Curt Messerschmidt, a deputy sheriff, testified as a gang expert. According to Messerschmidt, defendant was an admitted member of the Raymond Avenue Crips and was called "Old Man." Defendant had a tattoo on his chest of the Raymond Avenue Crips hand sign and had another tattoo saying "Old Man." Defendant was an older member of the gang, known as an original gangster. Messerschmidt testified that original gangsters usually "call the shots, tell the younger gang members what to do."

Raymond Avenue Crips associate with the color blue. "It is not uncommon to find a Raymond Avenue Crip in all blue, blue pants, blue shirt, blue hat. They'll wear blue shoes." Raymond Avenue Crips are concerned about turf because that is where they sell narcotics and fight with rival gangs. The Raymond Avenue Crips claim a turf in South Central Los Angeles where almost 400 documented members reside, and the gang also has over 30 members in Pasadena. The gang's primary activities include "murder to drunk driving, vehicle theft, narcotics sales, weapons possession, shooting at inhabited dwellings, assault with deadly weapons, burglaries, [and] robberies." "They have been known to take over casinos and commit crimes, doing takeover robberies of casinos, liquor stores, home invasion robberies."

There were no turf battles with respect to the Raymond Avenue Crips in the Antelope Valley. There were two or three members of the Raymond Avenue Crips in the Antelope Valley. Defendant's "closest tie" was to the Pasadena Raymond Avenue Crips.

When defendant was interviewed after the robbery, he was asked if he wanted to talk to Messerschmidt and responded, "'No. You are just going to throw a case on me anyway.'" "'I am going to stay hard, and that is on world famous.'" Messerschmidt understood the term "world famous" to refer to the Raymond Avenue Crips.

Messerschmidt testified that committing a crime "solo" benefits a gang because "that individual is a gang member. The gang is going to benefit from that crime, whether it is by notoriety, bringing himself up within the gang itself, or benefitting him personally." Messerschmidt also opined that the following hypothetical crime would be committed for the benefit of a gang: "the suspect, says, 'I am going to take some,' 'N' word, . . . 'out crip style'; is dropped off at a parking lot; proceeds to enter the liquor store and shows a handgun to the clerks and demands that the clerks open up the cash register; takes the money out of the cash register. A security guard yells out, 'Drop your weapon. I am security.' The suspect shoots at the direction of that voice . . . proceeds to go . . . in front of the cash register and look at the security guard, and then fires at the security guard with his weapon and then leaves the liquor store and then enters back into that car and drives away and is later detained." Messerschmidt reasoned that being armed with a handgun was a "common tool of gang members," that the crime reflected boldness, and that if the defendant escaped or committed another crime it would elevate the name of the gang within the community.

DISCUSSION

We first consider the sufficiency of the evidence for the gang enhancement. We then consider defendant's evidentiary contentions, including his claims (1) that the trial court allowed the gang expert to improperly comment on his invocation of

his right to remain silent, and (2) that the court improperly allowed the prosecutor to admit irrelevant character evidence. Finally, we consider defendant's contention that the prosecutor committed misconduct.[3]

1. *Sufficiency of the Evidence of the Gang Enhancement*

Defendant challenges the sufficiency of the evidence to support the gang enhancement. Section 186.22, subdivision (b)(1) provides an enhanced sentence for any person who is convicted of a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." The jury found the enhancement true with respect to all of the crimes.

"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) The same deferential standard applies to determine the sufficiency of a gang enhancement. (*People v. Ortiz* (1997) 57 Cal.App.4th 480, 484.)

a. *Gang Membership Is Insufficient Evidence of the Enhancement*

Section 186.22, subdivision (b)(1) "does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal

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[3] Because we conclude the record lacks substantial evidence to support the gang enhancement, we need not consider defendant's arguments that (1) the gang expert relied on an incorrect theory or (2) the trial on the enhancement should have been bifurcated from the trial on the substantive counts. Because we find no cumulative error, we need not consider defendant's contention that he suffered prejudice from the cumulative impact of the errors.

conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a group that meets the specific statutory conditions of a 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199.)

Although there was evidence that defendant was a member of the Raymond Avenue Crips, had tattoos, and a moniker, that evidence showed only his gang membership. Defendant's statement to San Pedro that he intended to "do it Crip style," which Messerschmidt understood to mean "that [the] individual associates himself as a Crip . . . , [is] a gang member, and [is] . . . about to commit a crime" also showed defendant's membership in the gang. These facts alone are insufficient to support the gang enhancement.

b. *No Substantial Evidence Supports the Finding That Defendant's Crimes Were Committed for the Benefit of, at the Direction of, or in Association with a Gang*

There was no evidence the crimes were committed at the direction of or in association with a gang.

Messerschmidt opined that crimes described by hypothetical facts similar to those in the present case were for the benefit of a gang because the hypothetical criminal "stated before the crime that he was going to do something Crip style. . . . [T]he fact that that individual went inside the liquor store, armed with a handgun, which is a common tool of gang members; the fact that he committed -- or shot at the security guard, which shows his boldness as a gang member to complete the crime, and/or possibly even murder someone, and the fact that he then left the scene. That to me fits a gang crime criteria." Messerschmidt also testified that a

gang member who commits a crime "solo" benefits the gang because "the fact that he's a gang member that is putting in work, then any type of crime committed, whether or not you are benefitting the gang, or the fact that you are a gang member, it benefits the gang because that individual is a gang member. The gang is going to benefit from that crime, whether it is by notoriety, bringing himself up within the gang itself, or benefitting him personally." He explained that "there is notoriety from him actually committing the crime, telling other gang members from his gang that he committed the crime, and . . . if it actually draws out to where the public is aware of the different kinds of gangs in that area, it also gets notoriety, the gang gets notoriety, from other victims and/or witnesses that live within the gang turf."

Messerschmidt's testimony that "the fact that he's a gang member that is putting in work, then any type of crime committed, whether or not you are benefitting the gang, or the fact that you are a gang member, it benefits the gang because that individual is a gang member" is contrary to the law. (See *People v. Gardeley, supra*, 14 Cal.4th at p. 623.) Therefore it cannot constitute substantial evidence to support the enhancement.

There was no evidence to support Messerschmidt's statement that the gang would benefit from notoriety as a result of defendant's criminal conduct. Notoriety requires dissemination of information about the crime. Here, there was no evidence that defendant communicated with any other member of the Raymond Avenue Crips or with members of any other gang. Messerschmidt testified that there were only "a couple" of Crip members in the Antelope Valley where defendant lived and where the liquor store was located. The crime was not committed in association with any other gang members. (Compare *People v. Williams* (2009) 170 Cal.App.4th 587, 625 [jury could infer crimes were gang

related based on fact that defendant committed crimes in association with fellow gang members].) It was not committed on turf claimed by the Raymond Avenue Crips or by any other gang. (Compare *People v. Leon* (2008) 161 Cal.App.4th 149, 163 [fact that crime was committed on rival gang's turf supported gang enhancement].) Defendant did not announce his gang membership when he committed the crimes. (Compare *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109 [fact that defendant used gang signs while committing crime supported gang enhancement].) There was no evidence that his tattoos were visible or could identify him to the victims as a member of the Raymond Avenue Crips. (Compare *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1333 [defendant's clearly visible tattoos identified him as a gang member and supported gang enhancement].) Nor was there any evidence that defendant was seeking to expand the territory of the Raymond Avenue Crips. Finally, there was no evidence the crime was precipitated by any act of disrespect directed at the Raymond Avenue Crips. (Compare *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382-1383 [fact that shooting was precipitated by victim's act of disrespect directed to defendant's gang supported gang enhancement].)

In short, although Messerschmidt testified that defendant's criminal conduct would benefit a gang because the gang would receive notoriety from defendant's crimes, there was no evidentiary basis for his testimony. (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618 ["'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'"]; *People v. Martinez* (2004) 116 Cal.App.4th 753, 762 ["[T]he record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the *crime* was committed for the benefit of, at the direction of, or in association with a criminal street gang."].)

On appeal respondent emphasizes that defendant wore a blue bandanna during the crime, but cites no record evidence linking that fact to any benefit to the Raymond Avenue Crips.[4] There was no evidence the bandanna identified defendant to anyone in the liquor store as a member of the Raymond Avenue Crips before, during, or after the crime. Indeed, Messerschmidt did not rely on defendant's bandanna when he opined that the Raymond Avenue Crips benefitted from the crime: the fact was not mentioned either in the hypothetical crime considered by Messerschmidt or in his response opining that the hypothetical crime benefitted a gang.[5] Nor did the prosecutor mention the bandanna as evidence supporting the gang allegation. In short, there was no evidence that defendant's criminal conduct benefitted a gang.

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[4] Citing San Pedro's testimony, respondent further asserts that defendant was wearing a dark blue or black hat and dark blue or black pants. However, San Pedro testified the hat and the pants were a dark color. When asked if they were blue, she responded that she did not know if the hat was blue and did not recall if the pants were blue.

[5] Messerschmidt was asked to assume the following facts: "[T]here is a person being driven to a liquor store. On the ride to the liquor store, this person, the suspect, says, 'I am going to take some,' 'N' word, . . . 'out crip style'; is dropped off at a parking lot; proceeds to enter the liquor store and shows a handgun to the clerks and demands that the clerks open up the cash register; takes the money out of the cash register. A security guard yells out, 'drop your weapon. I am security.' The suspect shoots at the direction of that voice of the security guard; proceeds to go behind the cash -- in front of the cash register and look at the security guard, and then fires at the security guard with his weapon and then leaves the liquor store and then enters back into that car and drives away and is later detained."

c. *No Substantial Evidence Supports the Finding Defendant Harbored the Specific Intent to Promote, Further or Assist in Any Criminal Conduct by Gang Members*

For the same reasons, there was insufficient evidence to support the finding that defendant harbored the specific intent to promote, further, or assist in any criminal conduct by gang members. As noted, there is no evidence defendant identified himself to anyone in the liquor store as a gang member, and no evidence he acted in concert with other gang members. The prosecutor's argument that defendant's conduct served to promote the gang because "when the word gets out that a gang member . . . commits a crime . . . it intimidates witnesses, victims, and the community" was, on this record, pure speculation. Nothing in the record suggested that defendant harbored the specific intent to help the Raymond Avenue Crips or any of its distant members in any criminal conduct. (Compare *People v. Romero* (2006) 140 Cal.App.4th 15, 20 [specific intent element of gang enhancement satisfied where the defendant intended to help another gang member commit a drive-by shooting]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 ["Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime"]; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 208 ["a series of assaults and batteries committed to free a gang member . . . from the grasp of an officer effecting a lawful arrest [was] . . . committed with the intent of promoting, furthering *and* assisting in the criminal conduct" of gang members].)

In short, no substantial evidence supported the specific intent element of the gang enhancement. (See *In re Frank S., supra,* 141 Cal.App.4th at p. 1199 [reversing gang enhancement for lack of evidence of requisite intent where gang expert

opined that minor was active gang member based on red bandanna, his affiliation with gang, and stated need for knife he was carrying as protection].)

d. *Prejudice*

The remaining question is whether defendant suffered prejudice from the admission of the gang evidence. We conclude that because the evidence of the substantive offenses was overwhelming, defendant did not suffer prejudice from the erroneous admission of the gang evidence under any standard.[6]

The principal issue in the case was identity. There was no dispute that someone robbed the Desert View Liquor Store and shot at the security guard. Defendant was identified by his next door neighbor, who knew him well and who was waiting for him outside the liquor store. Defendant told her he planned to commit a robbery prior to entering the store and told her he had committed a robbery after leaving the store. San Pedro heard gunshots while defendant was inside the liquor store. San Pedro's testimony was corroborated by Mellinger's testimony. Mellinger heard gunshots, saw someone run into San Pedro's car, and followed San Pedro's vehicle to her house, leading police to San Pedro and defendant. The victims described the assailant as having the same characteristics as defendant even though they were not able to specifically identify him. The gun used to commit the shootings was found in San Pedro's car. Defendant had gunshot residue on his hands.

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[6] The erroneous admission of evidence is considered under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. Where the admission of evidence renders a trial fundamentally unfair it violates an appellant's federal constitutional right to due process and prejudice is evaluated under a harmless beyond a reasonable doubt standard. (*People v. Boyette* (2002) 29 Cal.4th 381, 428.)

Although defendant identifies inconsistencies in San Pedro's testimony, none concern material facts such as whether she drove defendant to the liquor store, heard him tell her he was going to rob someone, or heard gunshots while he was in the store. Defendant states "San Pedro had ample motive to cast blame on appellant, and to exaggerate his culpability, in order to secure her own release." Assuming that to be true, it implicates San Pedro, but does not absolve defendant.[7] Defendant presented no affirmative defense. In short, although the gang enhancement must be reversed, the reversal of that enhancement does not require the reversal of the substantive offenses.

2. *Alleged Evidentiary Errors*

Defendant claims the trial court improperly admitted evidence of his invocation of his right to remain silent, violating *Doyle v. Ohio* (1976) 426 U.S. 610, 611 (*Doyle*). He further asserts that the trial court admitted improper character evidence.

a. *Alleged Doyle Error*

In *Doyle, supra,* 426 U.S. at page 611, the United States Supreme Court held that use of a defendant's post-arrest silence after the defendant received *Miranda* warnings violates due process. "The source of the unfairness was the implicit assurance contained in the *Miranda* warnings 'that silence will carry no penalty.'" (*Wainwright v. Greenfield* (1986) 474 U.S. 284, 289.) "When an arrestee is advised of his right to remain silent and he exercises that right in response to an

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[7] The jury was instructed with CALJIC No. 3.18 that the testimony of an accomplice should be viewed with care and caution. It appears the jury believed San Pedro was an accomplice as it asked the court, "If we consider a witness an accomplice, how do we address it and is there a form to fill out[?]"

official accusation, the doctrine of adoptive admissions does not apply." (*People v. Lopez* (2005) 129 Cal.App.4th 1508, 1526.)

Defendant challenges Messerschmidt's testimony that when asked if he would like to talk, defendant responded, "'No. You are just going to throw a case on me anyway.' [defendant] also stated, 'I am going to stay hard, and that is on world famous.'" Because defendant did not object in the trial court to the testimony based on *Doyle*, the claim is forfeited. (*People v. Hughes* (2002) 27 Cal.4th 287, 332.) Moreover, even assuming defendant's statement constituted an invocation of his right to remain silent, there was no *Doyle* error because the evidence was not offered to show a consciousness of guilt or to suggest an adoptive admission. (*People v. Huggins* (2006) 38 Cal.4th 175, 198 [no *Doyle* error where defendant's request for attorney admitted to show why his interview with police ended]; *People v. Hughes, supra,* 27 Cal.4th at p. 332, fn.4 [no *Doyle* error where evidence offered to demonstrate a plan to destroy evidence].)[8]

b. *Alleged Improper Admission of Character Evidence*

Additional factual background is required to assess defendant's remaining evidentiary challenge -- that the trial court admitted irrelevant character evidence.

i. *Factual Background*

During cross-examination, San Pedro testified that she did not think anything of the statement that defendant intended to "do it Crip style." Defense counsel asked in response: "You did not think anything of a man telling you he was going to rob some -- the 'n' word, and you hear a couple of gunshots, and you

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[8] As we have found no *Doyle* error, defendant's trial counsel was not ineffective for failing to raise the issue in the trial court.

thought nothing of it? Is that your testimony?" Defense counsel again asked her, "Why didn't you pay any mind to that? Was that an unusual thing to hear as you are driving . . . ." San Pedro responded, "[b]ecause to me it was unusual to hear it, but he always talked funny."

The prosecutor subsequently asked San Pedro what she meant by her statement that defendant "talked funny." San Pedro responded, "When he would have conversations with me, I really wouldn't listen to him because he would jump from one conversation to another. And a good example is that I always . . . ." Defense counsel objected on grounds of relevance and lack of foundation. The court overruled the objection. San Pedro continued: "Me and my granny went to church every Sunday, and we had invited him to go to church, and he said he would go. And then later on he said, 'Satan's children don't go.'" The court denied defense counsel's motion to strike the testimony.

Defense counsel moved for a mistrial. The court denied the motion but offered to admonish the jurors that they were not to consider the statement for the truth or for any reason other than to consider why San Pedro did not pay attention to defendant. Defense counsel declined the instruction "for strategic purposes." Defense counsel questioned San Pedro further on her statement that defendant referred to himself as one of Satan's children and raised the issue during his closing argument in an effort to discredit San Pedro.

ii. *Legal Analysis*

First, defendant's character evidence argument is forfeited because he failed to object on this ground. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21 [defendant forfeits argument on appeal by failing to make timely evidentiary objection on specific ground raised on appeal].) Additionally, any error was

forfeited for the separate reason that defense counsel, on "strategic grounds," refused the court's offer to give the jury a limiting instruction. (*People v. Alvarez* (1996) 14 Cal.4th 155, 216, fn. 20 [where limiting instruction could have prevented jury from drawing the forbidden inference and no limiting instruction is requested, defendant cannot raise claim on appeal].)

In any event, there is no merit to defendant's contention that the challenged evidence was irrelevant character evidence. Evidence of why San Pedro believed defendant "talked funny" was relevant because defense counsel asked her several questions concerning her apparent lack of attention to the statement. The evidence was not admitted to prove defendant's conduct on a specific occasion, but instead to explain San Pedro's state of mind in disregarding defendant's statements. (*People v. Alvarez, supra,* 14 Cal.4th at p. 216 [no error in admitting potential character evidence that was not admitted to show conduct on a specific occasion].)[9] Finally, defendant cannot demonstrate prejudice because he relied on the evidence both during his cross-examination and during closing argument.

3. *Alleged Prosecutorial Misconduct*

Defendant argues the following statements made during closing argument constitute prosecutorial misconduct (1) statements that defendant said he was going to take somebody out "Crip style"; (2) argument that defendant said he robbed a store and shot somebody; (3) argument that "[t]here is no evidence about

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[9] Evidence Code section 1101, provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is *inadmissible when offered to prove his or her conduct on a specified occasion*." (Italics added.)

his past criminal history, but there is evidence of his gang history. If a person is an O.G., maybe he's committed some crimes before."[10]

"'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."'" [Citations.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *People v. Carter, supra,* 36 Cal.4th at p. 1263.) Where prosecutorial misconduct is shown, a judgment will be reversed only if there is a miscarriage of justice. (*Hill*, at p. 844.)

As the Attorney General acknowledges, the first two challenged statements were inaccurate. Although San Pedro testified at the preliminary hearing that defendant said he was going to "take people out [Crip] style," at trial she testified defendant said he was going to "do it Crip style." Although San Pedro's daughter testified San Pedro said defendant robbed a liquor store and shot someone, the prosecutor incorrectly attributed the comment to defendant.

The inaccurate references in the prosecutor's argument did not concern critical issues at trial. It was undisputed that defendant said he would do

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[10] By failing to object at all (issues one and two) or on the ground of prosecutorial misconduct (issue three), defendant has forfeited the claims. (*People v. Carter* (2005) 36 Cal.4th 1215, 1264; *People v. Osband* (1996) 13 Cal.4th 622, 704.) Nevertheless, we have considered his claims on the merits because he argues his counsel was ineffective for failing to raise prosecutorial misconduct. (*People v. Osband, supra,* 13 Cal.4th at p. 704.)

something "Crip style." Defense counsel also attributed the phrase "take out" to San Pedro, arguing "why would anybody, if they were a gang member, be telling Alicia San Pedro anything? I am going to do Crip stuff. I am going to *take out* some 'n' word. . . . That kind of defies common sense that would even happen." (Italics added.) There was no dispute that the assailant robbed the liquor store and shot at the security guard, even if defendant did not admit to shooting anyone. The misstatements do not amount to intemperate behavior violating either the state or federal constitution. (*People v. Parson* (2008) 44 Cal.4th 332, 361 [inaccurate comment by prosecutor that was brief and not used in support of critical point did not amount to prosecutorial misconduct].) In addition, the jury was instructed that "[s]tatements made by the attorneys during the trial are not evidence."

The prosecutor's argument, "[i]f a person is an O.G., maybe he's committed some crimes before," was improper. It asked the jury to speculate that defendant committed other crimes based on his status as a gang member. However, the brief remark was not emphasized or repeated and is insufficient to """'infect[] the trial with . . . unfairness'""" or constitute """"'deceptive or reprehensible methods to attempt to persuade . . . the jury.'""""" (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Any harm was cured by the instruction that evidence of criminal acts by gang members "other than the crimes for which defendant is on trial" may not be considered "to prove that defendant is a person of bad character or that he has a disposition to commit crimes." (See *People v. Osband*, *supra*, 13 Cal.4th at p. 717.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*Id.* at p. 717.)

DISPOSITION

The true findings on the section 186.22, subdivision (b)(1) enhancement are reversed. The case is remanded to the trial court. The trial court is directed to strike the section 186.22, subdivision (b)(1) gang enhancement, modify the sentence accordingly, and deliver a certified copy of an amended minute order and abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.