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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CORY TRAVION RUSHING et al., Defendants and Appellants.	B216299 (Los Angeles County Super. Ct. No. TA097346)

APPEAL from judgments of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant Cory Travion Rushing.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Nakia Hubbard.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are those portions enclosed within double brackets, **[[ ]].**

Defendants and appellants, Cory T. Rushing and Nakia Hubbard, appeal the judgments entered following their convictions for first degree murder (Hubbard) and second degree murder (Rushing), with gang enhancements (Pen. Code, §§ 187, 186.22, subd. (b)).[1] Defendants were sentenced to state prison for terms of 25 years to life (Hubbard) and 15 years to life (Rushing).

The judgments are affirmed.

BACKGROUND

1. *Prosecution evidence.*

On the evening of October 5, 2007, Gregory Powe was driving with his 13-year-old foster son, R.R., in the car. Powe was 55 years old and, although retired, he worked part-time as a school crossing guard. R.R. testified some "gang bangers" were blocking their way, so Powe got out and asked them "if they could please move." One of the gang bangers started punching Powe in the chest and the face. Powe tried to defend himself, but the beating continued. Then R.R. saw "a whole bunch of the gang bangers around" and Powe, who was now on the ground. Someone called the police from a nearby house. R.R. saw the paramedics arrive and treat Powe. R.R. could not identify the people who had beaten Powe.

V.S. knew defendants Rushing and Hubbard because she had grown up with them. That evening, she was about 15 feet from the intersection of 105th Street and Lou Dillon Avenue. She was standing on top of a milk crate and looking over a fence. It was 'Hood Day and there were 20 to 25 people in the street. V.S. had been standing on the crate for a while watching the festivities. She saw Powe get out of his car and heard him say, "Could you guys please move out of the way." Within seconds, Hubbard and Rushing started beating Powe with their hands and feet. Hubbard kicked Powe in the head between 10 and 20 times. Powe tried to get back into his car, but Hubbard prevented his retreat. Hubbard

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[1] All further statutory references are to the Penal Code unless otherwise specified.

kicked Powe in the face again. When Hubbard slammed the back of Powe's head onto the street, V.S. heard "a big pop noise."

A.G., who was 14 years old at the time of trial, testified she had been near the intersection of 105th Street and Lou Dillon Avenue that evening while walking to a friend's house. She saw "everyone arguing and then they just started fighting." Powe was being punched in the face and kicked in the face and the stomach. By the second or third time Powe got hit, he fell to the ground. His attackers continued to beat him while he was on the ground. There were two people beating Powe and a lot of other people stood around watching. A.G. testified the fight lasted less than a minute, after which she continued on to her friend's house. A.G. subsequently identified Hubbard and Rushing from photo arrays as the two men who had beaten Powe.

Powe's wife, Estella, saw him at Kaiser Hospital in Bellflower on the night of the beating. He was lying on his stomach as he received stitches to the back of his head. Powe's eyes were open, but he did not speak to her. He stayed at the hospital that night. The next day, he was not speaking, and when he was released from the hospital the day after that he was still unable to speak. Estella was concerned about his condition, but hospital personnel said he was ready to leave so she took him home to Moreno Valley. She helped him into bed and he fell asleep. About 1:45 a.m. that morning, he asked her to help him to the bathroom. When he was unable to urinate, she helped him back to bed. Powe lay down, began shaking, and then he moaned. Estella called 911. He died in the ambulance on the way to the hospital.

Dr. Mark McCormick, a forensic pathologist at the Riverside County Sheriff's Coroner's Office, conducted the autopsy. McCormick concluded the "cause of death was pulmonary thromboemboli due to deep-vein thrombosis, due to immobility, due to blunt impact injuries to the head." In other words: "The combination of the [head] trauma and his immobility [first at the hospital and then at home] led him to form clots around [a filter in his] inferior vena cava . . . .

Subsequently, those clots broke loose . . . ." These formed pulmonary thromboemboli, which caused Powe's death.

Powe had suffered a prior incident of blood clot formation in 1994, when a burn injury immobilized him for a sustained period. At that time, he was treated with the blood thinner Coumadin and a filter was inserted into his inferior vena cava. According to McCormick, the inferior vena cava is "the large vessel that returns blood from the lower part of the body . . . back to the heart and also to the lungs." The filter was intended to catch blood clots that formed in Powe's legs before they could travel to his heart. McCormick explained that Powe's earlier burn injury, like the head trauma he sustained in the beating, released factors into the blood which lowered his threshold for clot formation.[2]

McCormick opined that treating Powe at the hospital with Coumadin to thin his blood would not have been a good idea because there was evidence of internal head bleeding. Although the hospital doctors could have properly recommended semi-mobility as a prophylaxis against the formation of blood clots, given the presence of the vena cava filter it would have been proper to recommend "bed rest over mobility." Asked if "it would have been below the medical standard of care to release Mr. Powe the way they did without any follow-up instructions or care," McCormick testified, "No, I don't believe so." McCormick opined that keeping Powe in the hospital for another day or two "would [not] have changed anything."

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[2] McCormick testified the autopsy revealed the following: "[I]n the pulmonary arteries, which are the vessels that go from the heart out to the lungs, there were pulmonary thromboemboli, or formed clots, blocking both those passages on the right and the left. So there were blood clots blocking the flow of blood from the heart to both lungs." There was another formed blood clot wrapped around the filter in Powe's inferior vena cava. All the clots appeared to have been recent, but they did not form at the trauma sites. According to McCormick, the only source for the pulmonary clots was the clot that had formed in the inferior vena cava.

Los Angeles Police Officer Samuel Marullo testified as a gang expert. He was familiar with the Fudge Town Mafia Crips gang, which had 76 documented members, about 40 of whom were active. The gang's members were predominantly African-American. The gang's primary activities included drug trafficking, robbery, weapons crimes, assault and murder. October 5 was considered 'Hood Day for the Fudge Town Mafia Crips gang: "All gangs have 'Hood Days where they celebrate being gang members of a particular neighborhood. Usually . . . that day is selected based on the street that they affiliate themselves with. In this case it's 105th Street." 'Hood Day was a celebration of gang membership and it typically entailed the commission of violent acts.

The Fudge Town Mafia Crips make their money by selling drugs and committing robberies. Because their revenue is primarily earned by committing crimes against the people who live within their own territory, the gang tried to foster community respect based on fear because fearful victims will not cooperate with the police. If a Fudge Town member committed murder, his status would rise and it would make no difference whether the victim was a rival gang member or an ordinary citizen. In Marullo's opinion, both defendants were members of Fudge Town.

Given a hypothetical based on the facts of this case, Marullo testified Powe's assault had been committed for the benefit of the Fudge Town Mafia Crips. Because the gang's members truly believed the neighborhood belonged to them, having someone ask them to move out of the way on 'Hood Day would have been viewed as extremely disrespectful.

2. *Defense evidence.*

Los Angeles Police Detective Mark Hahn was one of the two investigating officers. He testified A.G. said she had been on her friend's porch, three houses away from the intersection, when she saw people starting to fight. Hahn was unclear if A.G. meant she had been on that porch during the entire incident, but

she did not say she had been walking through the crime scene as the incident occurred.

A defense investigator testified he went to the scene and measured the distance from where V.S. testified she had witnessed the incident to the northwest corner of Lou Dillon Avenue. The investigator testified that distance was 85.4 feet, and the fence V.S. had been standing behind was seven and one-half feet high.

Donnavette Raby testified she knew Hubbard from having grown up in the neighborhood, although she no longer lived there. She was good friends with Hubbard's sister. Raby's grandfather lived near the 105th Street/Lou Dillon Avenue intersection. That day, Raby was visiting her grandfather just after dark. There were 50 or more people out on the street. She parked near Hubbard's car and went to her grandfather's house. Her grandfather's wife introduced Raby to Powe, saying he was a fellow church member. Raby went outside and spoke to Hubbard and his sister. Traffic on 105th Street was backed up in both directions. She heard noise from the corner but couldn't see anything because of the crowd and the traffic congestion. Hubbard said to her, "Them niggers probably down there doing something they don't have no business doing. I'm out of here." He got into his car and left.

Raby then heard a woman screaming, so she walked to the intersection to see what was going on. The crowd was scattering and Raby saw Powe "hit the ground." Raby ran back to her grandfather's house to tell them to call the police. She did not recognize anyone in the crowd. Raby spoke to the police that night and told them what she told the jury. She acknowledged having lied to Detective Hahn when she said she didn't know Hubbard's real name, but that was because she didn't think it was relevant since Hubbard had had nothing to do with assaulting Powe. Raby acknowledged the father of her child was serving a life prison term in connection with his membership in the Fudge Town Mafia Crips.

3. *Rebuttal evidence.*

Detective Hahn testified he measured the distance from the point at which V.S. had been viewing the events to the eastern curb of Lou Dillon Avenue at 105th Street. It was 43 feet, although this measurement did not include the distance across Lou Dillon Avenue to where the incident occurred. Hahn testified the fence was six and one half feet tall.

CONTENTIONS

1. There was *Batson/Wheeler* error.

2. The trial court erred by admitting certain gang evidence.

3. There was insufficient evidence to sustain Hubbard's conviction for first degree murder.

4. There was insufficient evidence to sustain the gang enhancements.

5. The trial court erred by refusing to give a modified version of CALCRIM No. 620.

6. There was prosecutorial misconduct.

7. There was cumulative error.

DISCUSSION

1. *Defendants did not make out a prima facie case of Batson/Wheeler error.*

Defendants contend the trial court erred when it ruled the defense failed to make out a prima facie case of discrimination based on the prosecutor's peremptory challenge of a single African-American prospective juror. This claim is meritless.

a. *Legal principles.*

Under *Batson v. Kentucky* (1986) 476 U.S. 79 (106 S.Ct. 1712), and *People v. Wheeler* (1978) 22 Cal.3d 258, "[a] party may not use peremptory challenges to remove prospective jurors solely on the basis of group bias. Group bias is a presumption that jurors are biased merely because they are members of an

identifiable group distinguished on racial, religious, ethnic, or similar grounds." (*People v. Fuentes* (1991) 54 Cal.3d 707, 713.)

"The United States Supreme Court recently reiterated the applicable legal standards. 'First, the defendant must make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citations.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the [apparently discriminatory] exclusion" by offering permissible . . . justifications for the strikes. [Citations.] Third, "[i]f a [non-discriminatory] explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination." ' [Citations.] [¶] In order to make a prima facie showing, 'a litigant must raise the issue in a timely fashion, make as complete a record as feasible, [and] establish that the persons excluded are members of a cognizable class.' [Citation.]" (*People v. Gray* (2005) 37 Cal.4th 168, 186.)

The analysis begins with the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. (*People v. Wheeler, supra,* 22 Cal.3d at p. 278.) "[T]he law recognizes that a peremptory challenge may be predicated on a broad spectrum of evidence suggestive of juror partiality. The evidence may range from the obviously serious to the apparently trivial, from the virtually certain to the highly speculative. [¶] For example, a prosecutor may fear bias . . . because [a juror's] clothes or hair length suggest an unconventional life-style." (*Id*. at p. 275.)

A trial court's ruling on a *Wheeler* motion is reviewed for substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 196.) "The determination of whether a defendant has established a prima facie case 'is largely within the province of the trial court whose decision is subject only to limited review. [Citations.]' [Citation.] On appeal, we examine the entire record of voir dire for evidence to support the trial court's ruling. [Citation.] Because of the trial judge's knowledge of local conditions and local prosecutors, powers of observation,

understanding of trial techniques, and judicial experience, we must give 'considerable deference' to the determination that appellant failed to establish a prima facie case of improper exclusion. [Citation.]" (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 782.) "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question, we affirm." (*People v. Howard* (1992) 1 Cal.4th 1132, 1155.)

b. *Background.*

Prospective juror no. 9144 (hereafter, "Juror 4") was part of the initial panel of 20 prospective jurors. She told the trial court she was a stay-at-home mother married to a mail carrier. They lived in Downey, where she home-schooled their two children. She had never been the victim of, or a witness to, any crime and she did not have any prior jury experience.

Question #7 on the written juror questionnaire asked: "A party, witness, or attorney may come from a particular national, racial, or religious group or may have a lifestyle different from your own. Would that fact in any way affect your ability to be a fair and impartial juror?"[3] Juror 4 told the trial court she had answered affirmatively to "part" of that question. Asked to elaborate, she said, "I think the religious part" because, "depending on the person's view" of "religion or God, it affects their whole outlook on everything." Asked if that was "going to be an issue for you as a juror?", Juror 4 replied, "Maybe." When the court asked her to explain, she said, "[I]f somebody doesn't believe in God then I think just their whole outlook on everything [*sic*]." When the trial court asked "how does that affect how you would view them as a juror?", she said, "I don't know. I'm not exactly sure. I guess it would just depend." She concurred with the court's assessment that she "disagree[d] with some religions." Juror 4 also said she did

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[3] The written juror questionnaire has not been made part of the record on appeal, but the defendants do not dispute the accuracy of the Attorney General's characterization of question #7.

not believe her views would prevent her from being a fair juror, and that she understood this was not a religious court.

None of the other prospective jurors in the initial 20-person venire responded affirmatively to question #7 of the written questionnaire.

Hubbard's attorney asked Juror 4 why she thought people became gang members, and she replied, "Different reasons. I know a lot because background [*sic*], they had nowhere else to turn to."

After the prosecutor used a peremptory challenge, the defendants jointly used a peremptory challenge against a second prospective juror. The prosecutor then used a peremptory challenge against Juror 4 and Hubbard's counsel made a *Wheeler* motion. The following colloquy occurred:

"[Hubbard's counsel]: Yes, Judge. Three African-Americans on the panel out of the entire 20. I mean, totally unrepresented. This case involves African-American on Hispanic and almost the entire rest of the panel is Hispanic.

"[Rushing's counsel]: African-American on?

"[Hubbard's counsel]: I'm sorry. The witnesses are all Hispanic. The witnesses against the defendant are all Hispanic.

"The Court: But the victim is African-American.

"[Hubbard's counsel]: That's true.[4] My client obviously is African-American. So when the panel is under-represented, I think counsel should give us a plausible reason why he would use a peremptory against one-third of all the African-Americans of the 20.

"The Court: Okay.

"[Rushing's counsel]: Submitted.

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[4] Despite this clarification, Hubbard makes the same mistake on appeal, asserting in his reply brief that Powe was Hispanic.

"The Court: Okay. I don't find that's a prima facie case [defense counsel] has made. And having said that, if you want to state your reason for the record, you may.

"[The prosecutor]: . . . No, thank you."

After the defendants used another peremptory challenge, the trial court continued with the voir dire of a new group of prospective jurors, none of whom had responded affirmatively to question #7. Neither of the two subsequently chosen alternate jurors had answered question #7 affirmatively.

The record does not reflect whether the jury that ultimately heard defendants' case included any African-Americans.

c. *Discussion.*

Hubbard argues Juror 4 "was a person with no recognizable biases" and that a comparative analysis with the other prospective jurors who went unchallenged reveals there was impermissible discrimination.

However, our Supreme Court has said: "As we have explained, '[w]hatever use comparative juror analysis might have in a third-stage case for determining whether a prosecutor's proffered justifications for his [or her] strikes are pretextual, it has little or no use where the analysis does not hinge on the prosecution's actual proffered rationales . . . .' [Citation.]" (*People v. Taylor* (2010) 48 Cal.4th 574, 617.)

Moreover, the record suggests several race-neutral reasons for challenging Juror 4.

Juror 4 expressed some degree of sympathy for gang members when she said she believed people joined gangs because they had no where else to turn. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 191 [that prospective juror might be sympathetic to defendant because of his high school familiarity with Blood gang members warranted peremptory challenge].)

Juror 4's husband worked for the post office. Occupation can be a permissible, non-discriminatory reason for exercising a peremptory challenge.

(See *People v. Trevino* (1997) 55 Cal.App.4th 396, 411 ["it could be hypothesized the People were exercising their challenges based on a belief those members who had some connection with providing [health] care or social services would not be sympathetic to their case"]; *People v. Landry* (1996) 49 Cal.App.4th 785, 790-791 [race-neutral factors included job in youth services agency and background in psychiatry or psychology]; *People v. Perez* (1996) 48 Cal.App.4th 1310, 1315 [no prima facie case where challenged members shared characteristic of being single and working in "social services or caregiving fields"]; *People v. Barber* (1988) 200 Cal.App.3d 378, 394 [proper to challenge kindergarten teacher based on belief teachers are generally liberal and less prosecution-oriented].) The occupation of a prospective juror's spouse may be a legitimate non-discriminatory reason for a peremptory challenge. (See *People v. Trevino, supra,* 55 Cal.App.4th at p. 411 ["each of the [jurors] challenged had a connection [either directly or through a spouse] with an organization that provided health care"].) Courts which have directly addressed the issue of exercising peremptory challenges against postal workers have viewed this as a race-neutral reason.[5]

And, contrary to Hubbard's assertion that Juror 4 was unbiased, she acknowledged a religious prejudice against atheists which might have prevented her from being a fair juror. (Cf. *People v. Mills* (2010) 48 Cal.4th 158, 184 [prospective juror who "believed Satan controls this world and the people in it" was properly challenged for "strident . . . religious views"]; *People v. Martin* (1998) 64 Cal.App.4th 378, 384 [prosecutor properly challenged Jehovah's Witness whose voir dire answers indicated her "religious views might render her

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[5] See, e.g., *Williams v. Groose* (8th Cir. 1996) 77 F.3d 259, 261 ("The prosecutor explained he removed jurors Lacy and Tillman because they are postal workers. This reason is race neutral."); *Johnson v. State* (Ga. 1996) 470 S.E.2d 637, 639 (that prospective juror "was a postal worker, and postal workers, in the prosecutor's experience, do not make good jurors" was legitimate neutral reason); *State v. Hinkle* (Mo.App.E.D. 1999) 987 S.W.2d 11, 13 (that "postal workers are historically bad jurors for the state" was legitimate neutral reason).

uncomfortable with sitting in judgment of a fellow human being"].) Hubbard argues this bias would not matter because "religious beliefs were not an issue in the case nor would the religious beliefs of any of the witnesses or defendants ever become part of the trial." We disagree. The prosecutor could have been legitimately concerned Juror 4 might discover or assume that any one of the trial participants (e.g., witnesses, attorneys, etc.) was a non-believer and, accordingly, view that person in a negative light.

Hubbard argues Juror 4's "responses to further inquiry showed that she would not allow her [religious] beliefs to affect her service." But the prosecution is not required to accept at face value a prospective juror's assurance that, despite an answer indicating the contrary, she would have no problem being neutral. In such cases, the juror's apparent uncertainty is a legitimate reason for exercising a peremptory challenge. (See *People v. Taylor* (2010) 48 Cal.4th 574, 643, fn. 19) [prosecutor legitimately could have believed prospective juror who worked as nurse would be inclined to credit defense mental health experts, despite her questionnaire statement to the contrary]; *People v. Young* (2005) 34 Cal.4th 1149, 1174 [even though prospective juror who worked as therapist "gave assurances she harbored no biases or opinions that would affect her ability to be open-minded and fair, the prosecutor might have reasonably exercised a challenge to excuse [her] on this basis" because there might be evidence of "extreme mental disturbance" at penalty phase].)

In sum, the "record 'suggests grounds upon which the prosecutor might reasonably have challenged" Juror 4 (*People v. Howard, supra,* 1 Cal.4th at p. 1155) because there was evidence "suggestive of juror partiality." (*People v. Wheeler, supra,* 22 Cal.3d at p. 275.) Hence, there was substantial evidence to support the trial courts' ruling that defendants failed to make out a prima facie case of *Batson/Wheeler* error. (See *People v. Alvarez, supra,* 14 Cal.4th at p. 196.)

[[Begin nonpublished portion.]]

[[2. *Gang evidence was properly admitted.*

Defendants contend the trial court committed several errors in connection with the admission of evidence relating to their involvement with the Fudge Town gang. These claims are meritless.

a. *Denial of bifurcation.*

Defendants contend the trial court erred by not bifurcating the gang enhancement allegation[6] from the murder charge. But the trial court properly denied bifurcation on the ground the gang evidence was relevant to the underlying charges.

"[T]he criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense. So less need for bifurcation generally exists with the gang enhancement than with a prior conviction allegation." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048.) "This is not to say that a court should never bifurcate trial of the gang enhancement from trial of guilt. . . . The predicate offenses offered to establish a 'pattern of criminal gang activity' (§ 186.22, subd. (e)) need not be related to the crime, or even the defendant, and evidence of such offenses may be unduly prejudicial, thus warranting bifurcation. Moreover, some of the other gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id.* at p. 1049.) "To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt,

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[6] Under section 186.22, subdivision (b)(1), a person may be punished for an additional term of years if he or she is convicted of a felony that is "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 . . . ."

any inference of prejudice would be dispelled, and bifurcation would not be necessary." (*Id*. at pp. 1049-1050.)

Evidence of gang affiliation and activity is properly introduced when it is relevant to a matter in dispute. "[E]vidence 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, supra,* 33 Cal.4th at p. 1049; see also *People v. Williams, supra,* 16 Cal.4th at p. 193 ["[I]n a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect."]; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192 ["Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative."].)

Here, the gang evidence was relevant to prove defendants' motive for committing an otherwise inexplicable assault on Powe, who had politely asked people to move out of the way so he could get by. Powe's beating was the functional equivalent of the classic, apparently motiveless, drive-by shooting that is given an understandable context by the presentation of gang culture evidence. (See *People v. Ruiz* (1998) 62 Cal.App.4th 234, 239 [notwithstanding potential prejudicial effect of gang evidence, such evidence is admissible "when the very reason for the crime is gang related"]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81 ["where evidence of gang activity or membership is important to the motive, it can be introduced even if prejudicial"].) As explained more fully *post*, the gang expert here testified the Fudge Town Mafia Crips earned most of their revenues from the local neighborhood and therefore were interested in keeping the local residents in a state of fear so they wouldn't interfere with the gang's illegal

activities. Moreover, 'Hood Day was a very special occasion during which the Fudge Town Mafia Crips celebrated and demonstrated their rule over the neighborhood.[7]

In addition, the gang evidence was relevant because it helped explain V.S.'s fear of testifying. It appears from the record she started crying as soon as she took the stand. She explained the reason she had testified at the preliminary hearing that she could not recall who pulled Powe from his vehicle was because she was scared.[8] " ' "Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. (Evid. Code, § 780; *People v. Warren* (1988) 45 Cal.3d 471, 481 . . . .) Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. (*People v. Malone* (1988) 47 Cal.3d 1, 30 . . . .) It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible.

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[7] Citing *People v. Albarran* (2007) 149 Cal.App.4th 214, Hubbard argues the gang expert's testimony should not have been admitted because "there was nothing inherent in the facts of the beating to suggest any specific gang motive." But *Albarran* is inapposite because there the gang expert basically "testified he did not know why the shooting occurred." (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1333.) In *Albarran*, the defendant and a companion fired shots at a house where a party was going on. There was no evidence the gunmen made themselves known by gang signs, announcements or graffiti, and the expert "conceded . . . he did not know the exact reason for the shooting." (*People v. Albarran, supra,* 149 Cal.App.4th at p. 220.) But here, the gang expert testified the Fudge Town Mafia Crips earned most of their revenues from the local neighborhood, and therefore they had an interest in keeping the local residents in a state of fear so as not to interfere with the gang's illegal activities. In addition, the assault occurred while defendants were celebrating their 'Hood Day.

[8] "Q. . . . When you testified July of 2008, you said you didn't . . . remember who it was that pulled Mr. Powe out of the truck; right? [¶] A. I just told you I was scared. [¶] Q. You were scared and that's why you didn't remember? [¶] A. Yes. I was scared and crying and just scared just to be here. Just like I am today."

[Citation.]" [Citation.]' " (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449-1450.)

As for the prejudicial effect of the predicate acts evidence, the gang expert testified one gang member had been convicted of possession of a firearm by a felon, and that another had been convicted of murder in a case in which he had "killed a rival gang member and attempted to kill the witness." We cannot agree with Hubbard's characterization of this evidence as "horrendously inflammatory." It was certainly no more inflammatory that the charged crime of beating Powe to death because he politely asked the defendants to move out of the way. "Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny bifurcation." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1050.)

The trial court did not abuse its discretion by refusing to grant bifurcation. (See *People v. Hernandez*, *supra*, 33 Cal.4th at p. 1051 ["defendants did not meet their burden 'to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' "].)

b. *Alleged Killebrew error*.

Defendants contend Officer Marullo's testimony should not have been admitted because he gave an opinion about their subjective states of mind. This claim is meritless.

(1) *Background*.

The prosecutor asked Marullo, the gang expert, the following hypothetical: "Assume . . . that on October 5th, 2007, members of the Fudge Town Mafia are celebrating 'Hood Day on 105th Street and Lou Dillon Street in Los Angeles. Further assume that a 55-year-old individual is driving down that street and sees these individuals there, asks them if they could please move, whereby he is then assaulted with punches and kicks . . . to the head and torso suffering [*sic*] from head trauma which leads to his death a few days later. [¶] Do you have an opinion as to whether that assault and that murder were committed in association

with or at the direction of or for the benefit of the Fudge Town gang with the specific intent to promote or further assist in criminal conduct by gang members?"

Marullo answered "yes" based on the following factors: "In this hypothetical . . . it's their 'Hood Day and there are several of the members probably celebrating their 'Hood Day in their 'hood which they truly believe . . . is their land. [¶] When in this hypothetical this gentleman can't pass through and then asks if they can move, it's disrespectful for him to interfere in a celebration. Disrespectful not only to the representatives of the gang, in this case *the defendants*, because they truly represent the gang, but it happened in front of the gang, in front of the most celebrated gang members who are willing to celebrate this day in the open. [¶] . . . [¶] As a result in the hypothetical *the defendants* defended the respect of the entire gang in front of the entire gang and in front of the people who live in that area who saw it, and that leads to the fear in that neighborhood. It maintains that. And it shows any youngsters . . . that you're part [of] a hardcore gang [and] we're willing to do this to preserve the respect that we deserve. To me that's the ideal classic example of how that crime benefits the gang in total." (Italics added.)

(2) *Discussion.*

Citing *People v. Killebrew* (2002) 103 Cal.App.4th 644, defendants argue Marullo's testimony was improper. But this reliance on *Killebrew* is misplaced. "A gang expert may render an opinion that facts assumed to be true in a hypothetical question present a 'classic' example of gang-related activity, so long as the hypothetical is rooted in facts shown by the evidence. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) This is true even if the gang expert's opinion in effect answers an ultimate issue in the case. Any "reliance on *Killebrew* for a contrary conclusion is misplaced. In *Killebrew*, in response to hypothetical questions, the People's gang expert exceeded the permissible scope of expert testimony by opining on 'the subjective *knowledge and intent* of each' of the gang members involved in the crime. [Citation.]

Specifically, he testified that each of the individuals in a caravan of three cars knew there was a gun in the Chevrolet and a gun in the Mazda and jointly possessed the gun with everyone else in the three cars for mutual protection. [Citation.] *Killebrew* does not preclude the prosecution from eliciting expert testimony to provide the jury with information from which the jury may infer the motive for a crime or the perpetrator's intent; *Killebrew* prohibits an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial." (*Id.* at pp. 1550-1551.)

As our Supreme Court has noted: "Obviously, there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons. . . . [U]se of hypothetical questions is proper." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946, fn. 3.)

To the extent Marullo mentioned "the defendants" while giving his opinion (see italicized portion, *ante*), his subsequent testimony made it clear he did not purport to know what either defendant's state of mind had been, and that his testimony was merely intended to educate the jury about "gangs in general . . . as opposed to what happened that night."[9]

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[9] Defendants cite *People v. Vang* (2010) 185 Cal.App.4th 309, as a case rejecting such gang expert testimony on the ground the hypothetical question is merely a thinly veiled version of actually disputed facts. However, our Supreme Court granted review in *Vang* on September 15, 2010 (S184212) in order to decide whether the use of such hypotheticals is permissible.

c. *Confrontation clause claims.*

Finally, defendants contend the trial court erred in admitting this evidence because Officer Marullo's testimony included inculpatory hearsay declarations. This claim is meritless.

(1) *Bruton/Aranda claim.*

Defendants contend there was a *Bruton/Aranda* violation.[10] As we explained in *People v. Orozco* (1993) 20 Cal.App.4th 1554, 1564: "The essential holding of *Bruton v. United States* (1968) 391 U.S. 123 . . . , is that a defendant is deprived of the Sixth Amendment right to confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the defendant who made it. . . ."

Hubbard argues, "No one other than appellant and Rushing were identified as being involved in the beating. The proof of Rushing's [gang] membership through his own statements contributed to the jury's finding that appellant acted 'in association' with another gang member." Similarly, Rushing asserts he was incriminated by Hubbard's police statements: "[W]hile Hubbard appears to only implicate himself with his statements, the inferences taken from the admission of gang membership had a great impact on appellant's culpability. . . . [B]oth defendants were alleged to be gang members and the truth of that allegation had to be proved beyond a reasonable doubt by the prosecutor. Thus, a statement by a nontestifying co-defendant directly implicates the requirements for proving the gang enhancement and points a prejudicial finger of blame at appellant."

A similar claim was made and rejected in *People v. Olguin* (1994) 31 Cal.App.4th 1355, where Olguin complained on appeal his rights had been violated by the admission of rap lyrics found in co-defendant Mora's bedroom,

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[10] *Bruton v. United States* (1968) 391 U.S. 123 (88 S.Ct. 1620); *People v. Aranda* (1965) 63 Cal.2d 518.

lyrics which made clear Mora's gang membership. The court of appeal held "the *Bruton-Aranda* rule does not apply here. Even if we assume, arguendo, that these were admissions by Mora, they do not inculpate Olguin any more than they would inculpate any of a hundred other Southside F Troopers. The lyrics do not mention the crime for which Mora and Olguin were on trial, and provide absolutely no information about the crime which could be imputed to Olguin." (*Id*. at pp. 1374-1375, fns. omitted.) Here, the evidence was even more innocuous than in *Olguin* because there was merely each defendant's acknowledgment of gang membership, with no evidence about gang culture.

There was no *Bruton/Aranda* violation.

(2) *Crawford claim*.

Defendants contend a confrontation clause error under *Crawford v. Washington* (2004) 541 U.S. 36 (124 S.Ct. 1354), occurred because Marullo testified he learned they were members of the Fudge Town Mafia Crips either from talking to them himself or from talking to other police officers who had spoken to them.

However, "Expert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions. [Citation.] Thus, *a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies*. [Citations.] Likewise, *an individual's membership in a criminal street gang is a proper subject for expert testimony*. [Citations.]" (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463-1464, italics added; see *In re I. M.* (2005) 125 Cal.App.4th 1195, 1207 [sufficient evidence of predicate offense where officer testified to personal knowledge of person's gang membership and police reports showed person was being investigated in connection with specified crime].)

As *People v. Gardeley* (1996) 14 Cal.4th 605, explained: "Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. . . . [¶] So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*Id*. at p. 618.)

In *People v. Thomas* (2005) 130 Cal.App.4th 1202, the gang expert testified he had learned through casual conversations with other gang members that the defendant belonged to the gang. In the face of defendant's claim this testimony violated *Crawford*, *Thomas* cited *Gardeley* and concluded: "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.] [¶] Here, the conversations with other gang members were mentioned only as a basis for Kwan's opinion that defendant was a gang member. There was no Sixth Amendment violation based on Kwan's reliance on hearsay matters." (*Id*. at p. 1210.)

Other courts of appeal have followed the reasoning of *Thomas*. (See *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154 [out-of-court statements

admitted as basis evidence are not admitted for their truth, but only to assess the weight of the expert's opinion]; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426 [detective could rely on hearsay in forming opinion that predicate crimes had been committed for benefit of gang]; *In re I. M., supra,* 125 Cal.App.4th at p. 1206 [information from police reports sufficiently reliable to support gang expert's testimony as to predicate offense for gang enhancement].)

Defendants complain the jury was not given a limiting instruction, such as CALCRIM No. 1403, with regard to the gang evidence. But they fail to cite any part of the record showing they requested such an instruction, which the trial court is generally not required to give sua sponte. (See *People v. Hernandez, supra,* 33 Cal.4th at p. 1052 ["trial court must give a limiting instruction on evidence admitted to support the gang enhancement only on request"].)

There was no *Crawford* error.

3. *Sufficient evidence of first degree murder.*

Hubbard contends there was insufficient evidence to sustain his conviction for first degree murder. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on

circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

"Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, 'we require either very strong evidence of planning, or some evidence of motive in

conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 . . . , 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) Here, there was some evidence of each *Anderson* factor.

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless 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 on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

b. *Discussion*.

Hubbard contends the prosecution failed to demonstrate the presence of any of the *Anderson* factors. Not so; there was certainly evidence of both motive and planning.

Hubbard argues there was no evidence of planning because Powe was a stranger and Hubbard's encounter with him had been entirely unplanned. However, " '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . . " [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The evidence showed that after Hubbard and Rushing initially pummeled Powe and knocked him to the ground, Powe tried to get back to his vehicle, but Hubbard purposely prevented that retreat

and continued to beat him. This was sufficient evidence to demonstrate the planning factor.

Hubbard complains the only evidence of motive came from the gang expert. But there is nothing wrong with that. (See, e.g., *People v. Olguin, supra*, 31 Cal.App.4th at p. 1384 [affirming use of expert's testimony to establish gang enhancement: "It is difficult to imagine a clearer need for expert explication than that presented by a subculture in which this type of mindless retaliation promotes 'respect.' "].) Marullo explained how the Fudge Town Mafia Crips fostered control of the neighborhood by keeping local residents in fear. He also explained the importance of 'Hood Day to the gang and why Powe's entirely civil behavior could have triggered such a vicious response. This constituted strong motive evidence.

There was sufficient evidence to sustain Hubbard's conviction for first degree murder.

4. *Sufficient evidence of gang enhancement.*

Defendants contend there was insufficient evidence to sustain the gang enhancement findings. This claim is meritless.

Hubbard argues, the "bald assertion" by Marullo, the gang expert, "that Lee and Guillory, who committed the predicate acts, were gang members is unsupported by independent admissible evidence." But the prosecution produced certified conviction records regarding these two predicate crimes. In addition, Marullo testified Lee was well-documented and self-admitted as a Fudge Town Mafia Crips member, and that he personally knew Guillory was a member of the Fudge Town Mafia Crips. This was sufficient evidence.

Hubbard also argues "[t]he expert's opinion provided a possible motive for the beating, but that was not the only possibility," and although Marullo testified "Powe had disrespected the gang, that was not based upon any evidence of disrespect and was merely the speculation of the officer." Not so. Several witnesses testified Powe asked gang members to please move out of the way and

Marullo testified such an inquiry on the gang's 'Hood Day constituted a disrespectful act.

In sum, as the Attorney General asserts: "From the circumstances of the murder, as well as Officer Marullo's properly-admitted testimony, a reasonable jury could infer that appellants committed the murder with the specific intent to promote, further, or assist in the criminal conduct of the Fudge Town Crip gang, rather than for personal gain or simple animosity." There was sufficient evidence to sustain the gang enhancement.

5. *Jury was properly instructed on causation.*

Defendants contend the trial court incorrectly instructed the jury on causation when it declined to use certain alternative language as part of CALCRIM No. 620. This claim is meritless.

a. *Background*.

The jury was instructed on causation with CALCRIM No. 620 as follows:

"There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote fact [*sic*]. However, it does not need to be the only factor that causes the death.

"Gregory Powe may have suffered from an illness or physical condition that made him more likely to die from the injury than the average person. The fact that Gregory Powe may have been more physically vulnerable is not a defense to murder.

"If the defendant's act was a substantial factor causing the death, then the defendant is legally responsible for the death. This is true even if Gregory Powe would have died in a short time as a result of . . . other causes or if another person of average health would not have died as a result of the defendant's actions."

Defendants asked the trial court to add the following language to the causation instruction, taken from a standard alternative paragraph available as part of CALCRIM No. 620:

"<B. Negligence of Medical Personnel>

"[The failure of the (doctor(s)/ [or] medical staff) to use reasonable care in treating <insert name of decedent> may have contributed to the death. But if the injury inflicted by the defendant was a substantial factor causing the death, then the defendant is legally responsible for the death even though the (doctor[s]/ [or] medical staff) may have failed to use reasonable care. On the other hand, if the injury inflicted by the defendant was not a substantial factor causing the death, but the death was caused by grossly improper treatment by the (doctor[s]/[or] medical staff), then the defendant is not legally responsible for the death.]"

The prosecutor opposed this request on the ground there was no evidence the medical staff had been negligent. The trial court agreed, saying the requested language was unwarranted "because there is no testimony that anybody was negligent." Counsel for Rushing argued, "[W]ithout having to go as far as having to show or have evidence of negligence, I think that the language here is the failure of the doctors and medical staff to use reasonable care in treating may have contributed to his death." The trial court pointed out, however, that this alternative language "refers to the failure of the doctors to do something, and there is no testimony that they failed to do anything. [¶] I know counsel pursued it, but the coroner said he can't say that because there was a balancing. If you give him too much blood thinner when he's been injured in the head, he may bleed to death."

b. *Discussion*.

"A trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case." [Citation.] In addition, "a defendant has a right to an instruction that pinpoints the theory of the defense." ' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing [citation], or if it is not supported by substantial evidence.' [Citation.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1021.)

Rushing argues the defense theory was that Powe's death had been caused by unforeseeable medical malpractice, and he asserts there was substantial evidence Powe would not have died "but for the botched medical care." Hubbard argues that, "[a]lthough there was no medical expert testimony regarding [Powe's] treatment, there was substantial evidence of another nature. This, coupled with the testimony of the coroner, provided a basis for the instruction." That "evidence of another nature" was, purportedly, testimony showing Powe should not have been released from the hospital at all, or at least not without instructions to keep him mobile and administer anti-coagulant medication.[11]

These arguments are unpersuasive. "If a person inflicts a dangerous wound on another, it is ordinarily no defense that inadequate medical treatment contributed to the victim's death. [Citations.] To be sure, when medical treatment is grossly improper, it may discharge liability for homicide if the maltreatment is the sole cause of death and hence an unforeseeable intervening cause. [Citations.]" (*People v. Roberts* (1992) 2 Cal.4th 271, 312.) There was no

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[11] Hubbard argues: "Powe's release from the hospital was unwarranted. His wife testified that he was unresponsive and that, although she tried to consult his physician, the doctor was not available and did not recheck Mr. Powe. Even without medical testimony it is patently obvious that release of a non-responsive patient is not medically appropriate, especially without a current medical re-evaluation. [¶] Second, Mrs. Powe was allowed to transport Mr. Powe for an extended trip from Bellflower to Moreno Valley. The coroner testified that immobility could cause the development of clots. [¶] Third, there is no indication that Mrs. Powe was given any instructions about having Mr. Powe move around to avoid clots. She did not testify to any instructions and the medical records reviewed by the coroner apparently did not reflect any such instructions. [¶] Finally, there was testimony from the coroner that anti-coagulant drugs could have prevented the formation of clots. Although he also testified to possible adverse side-effects from such treatment, there was substantial evidence from which the jury could have found that the risk was appropriate, especially in view of the fatal consequences of inaction. The jury could also have found that it was improper to release Powe instead of keeping him under observation at the hospital under an anti-coagulant regimen."

substantial evidence Powe's death had been the result of negligent medical care, let alone grossly improper treatment. As noted, *ante*, the only medical evidence presented at trial indicated treatment with anti-coagulants was contraindicated, and that advising bed rest instead of semi-mobility was not negligent medical care. The evidence showed only that Powe had a pre-existing medical condition which may have contributed to his death. The evidence at trial showed defendants' acts were a substantial factor in Powe's death and there was no evidence tending to show the opposite.

The trial court did not err because the alternative instructional language was not supported by substantial evidence.

6. *There was no prosecutorial misconduct*.

Defendants contend the prosecution committed prejudicial misconduct. This claim is meritless.

a. *Legal principles.*

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights – such as a comment upon the defendant's invocation of the right to remain silent – but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.] [¶] ' "[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.]" ' " (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) A defendant who fails to object at trial "waive[s] any error or misconduct emanating from the

prosecutor's argument that could have been cured by a timely admonition." (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.)

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

"[C]onduct 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." ' " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) "When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 689.)

b. *Discussion*.

(1) *Failure to object.*

The Attorney General asserts there was only one defense objection to all of the alleged instances of prosecutorial misconduct during closing argument, and therefore all the other alleged instances have been waived. However, in the interests of judicial economy and to avert potential ineffective assistance of counsel claims, we will address the merits of defendants' prosecutorial misconduct claims. (See *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 310.)

(2) *Impugning defense counsel's integrity.*

Defendants contend the prosecution committed misconduct during closing argument by impugning defense counsel's integrity.

"Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law [citation] or to resort to personal attacks on the integrity of opposing counsel [citation]." (*People v. Bell* (1989) 49 Cal.3d 502, 538.) "If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) On the other hand, "[a]n argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper." (*Id*. at p. 1302, fn. 47.)

Hubbard complains that, in the opening portion of his closing argument, the prosecutor essentially accused defense counsel of suborning perjury by saying: "We can be grateful . . . that because of their [i.e., V.S. and A.G.'s] testimony, the two perpetrators that day can be brought to justice. [¶] And what do *they* give us in response to these two girls, [V.S.] and [A.G.]? A liar. They bring forth Donnavette Raby. [¶] Two girls who told us what they saw so that those killers could be brought to justice, *their* response is to put up a person . . . to lie so that these killers could go free." (Italics added.)

Hubbard argues these remarks were intended to impugn the integrity of defense counsel: "Since Raby was called by appellant, this attack was specific to appellant's defense team. The plural in 'what do they give us in response' could only be understood by the jury to be referring to appellant and his attorney." We disagree. In this passage, the antecedent for "they" and "their" was "the two perpetrators," not defense counsel. Moreover, these remarks were made near the very beginning of the prosecutor's closing argument, by which point the prosecutor had not yet made *any reference* to defense counsel; the only references

had been to the defendants themselves. We agree with the Attorney General that "[t]here was no assertion, either implied or expressed, that counsel had purposely put a perjurer on the stand."

The defendants contend the prosecution impugned their integrity in a more general way by accusing them of purposely misrepresenting facts to the jury. For instance, they complain that at the commencement of his rebuttal argument the prosecutor told the jury: "Ladies and gentlemen, it's actually quite interesting what the defense does. You know, why do defense lawyers speak about pink lunch bags or long walks with their wives?[12] This is an effort to humanize their own clients through them so that if you like the lawyer, then you subconsciously minimize the atrocities that these . . . defendants have committed. [¶] And then what they do is say, oh, we're . . . just like you. We don't like gangs either. What happened to this man was horrendous. Okay? Because *they want you to think that they're on your side, that they're on your side searching for that truth. When, in fact, they're making sure that you will never get there, that you will never get to the truth, through deliberate misrepresentation, through confusing the witnesses deliberately*." (Italics added.)

Rushing asserts the italicized portion of these remarks impermissibly "told the jurors that defense counsel deliberately lied to them." Hubbard complains about the prosecutor's statement that, faced with the testimony of two

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[12] Hubbard's defense counsel began closing argument by saying: "Good afternoon, everybody. I hope you all had a good lunch. I know I did. My wife made mine. I brought it. She doesn't let me eat in the cafeteria. [¶] Anyway, you might notice I have a dark lunch bag. She used to pack my lunch in a pink lunch bag, and one day I said, 'Listen, I'm not doing this anymore. Get me a different lunch bag.' She said, 'You just tell the other lawyers there that it takes a real man to use a pink lunch bag.' " A little later, while arguing it is sometimes hard to see accurately in the dark, defense counsel said: "Have any of you ever taken a walk in the evening at night? Where I live there's kind of like a park area not far away. My wife and I, we take a walk every night. She makes me do it, even though I would rather watch TV sometimes. But she makes me do it. Bless her."

eyewitnesses who saw the defendants beating Powe, the defense would be forced to resort to obfuscation: "Well, what you do is you pick apart their words. You pick apart their words. You rely on semantics instead of evidence in a deliberate effort to ensure that you will never get to the truth."

We do not think the prosecution's closing argument in this case was likely to have been construed by the jury as an attack on defense counsel's personal integrity. The prosecutor did not suggest defense counsel had suborned perjury or coached witnesses. Rather, the prosecution's remarks were likely interpreted as "an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1002 [referring to prosecutor's permissible argument that defense counsel's " 'job is to create straw men. Their job is to put up smoke, red herrings. And they have done a heck of a good job. And my job is to straighten that out and show you where the truth lies.' "].)

(3) *Arguing defense counsel believed their clients were guilty and trivializing the reasonable doubt standard*.

Defendants complain about the prosecutor's following comments during closing argument: "If you can't convince them, confuse them. But what is very interesting is that notwithstanding all these efforts, none of these attorneys can get in front of you and say that these two are not guilty. Not really. They rely on *not proven* – " (Italics added.) "Two people unrelated to each other, people who didn't know each other – [A.G.] and [V.S.], didn't know each other – they still picked the same men. . . . They could have picked out any of the other five people, but they both picked Mr. Hubbard. Okay? [¶] As [defense counsel] would like you to have it, according to him, [A.G.] wasn't even there. That's how far he goes. But he can't even say to find the client *not guilty*." (Italics added.)

When defense counsel complained this constituted an improper call for defense counsel to personally vouch for the innocence of their clients, the trial court disagreed, saying: "I didn't take it that way at all."

Rushing now argues "the prosecutor implied that in failing to make the statement the prosecutor sought, defense counsel believed that their clients were guilty. While the prosecutor's argument was seemingly nonsensical, it is doubtful that the prosecutor meant it to be so. Surely, the prosecutor could only have meant to imply that defense counsel did not believe their clients." We disagree. It appears the prosecutor was responding to the following portion of Hubbard's closing argument talking about the Canadian legal system: "In Canada juries have three potential verdicts: guilty, not guilty, and not proven. In our system we don't have the three. We just have two. We call them guilty and not guilty, but not guilty really means not proven." Later, Hubbard argued: "So what should the verdict be in this case? Not proven. It's not proven beyond a reasonable doubt."

Although it would have been improper for the prosecutor to argue defense counsel did not believe their clients' defense (see *People v. Thompson* (1988) 45 Cal.3d 86, 112), we agree with the trial court's conclusion that this is not what happened here. Rather, the prosecutor appears to have been arguing the inculpatory evidence was irrefutable, while disputing defense counsel's references to the Canadian concept of "not proven." (See *id.* at p. 113 [prosecutor properly argued "defense counsel would not spend a lot of time asking the jury to believe defendant's version of events, because defendant's version was that he slept through the whole thing. The prosecutor's focus was thus on the evidence and his contention that the defense case was simply unbelievable. Similarly, the prosecutor commented that defendant's inconsistent stories contained lies which defense counsel would not try to justify. Again, the emphasis was on the evidence in the case, particularly evidence of defendant's varying stories both before trial and when he testified in his own defense."].)

Hubbard argues the prosecutor committed misconduct by trivializing the reasonable doubt standard. (See *People v. Marshall* (1996) 13 Cal.4th 799, 831 ["it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to

overcome reasonable doubt on all elements"].) But this complaint again relates to the prosecutor's comments attacking the notion that "not proven" might be a legitimate alternative to the choice between guilty and not guilty.

(5) *Arguing gang expert could prove specific intent.*

Defendants contend the prosecutor committed misconduct by making the following argument: "Specific intent to promote or further criminal conduct by gang members, how is that shown? Well, we show the specific intent through circumstantial evidence. And through the testimony of officer Sam Marullo, he testified that gang members obtain respect . . . through violence." Citing *People v. Killebrew*, *supra*, 103 Cal.App.4th 644, Hubbard argues a gang expert cannot testify that a particular person had specific knowledge or intent. However, as explained *ante*, defendants' reliance on *Killebrew* is misplaced.

(6) *Playing to sympathies of the jury*.

Hubbard complains: "On direct examination of Mrs. Powe, the first questions the prosecutor asked elicited that Mr. Powe was a crossing guard, and ex-marine and ex-corrections officer. That information was not necessary to the jury's adjudication of guilt and was an obvious attempt to inflame the jury and appeal to its passions and sympathy. If there were any doubts as to the motives, that was dispelled in the prosecution closing argument where that information was capitalized upon as follows: 'Now, let's not forget that. We are here today because Gregory Powe died. This was a man who was living on October 5, 2007. They took a life. His children, his widow, the school where he was a school crossing guard, they'll never see him again. And because they took his life, those two, now they're heroes in the gang." Hubbard argues this constituted prosecutorial misconduct because it amounted to: (1) disobeying the trial court's ruling excluding evidence, and (2) making an improper appeal to the passions or prejudices of the jury. We disagree.

At an evidentiary hearing preceding the testimony of Powe's wife, Estella, defense counsel for Rushing argued she should not be allowed to testify about

anything other than what had happened at the hospital and subsequently at their home, saying: "Anything more than that, I think it[ ] just goes to the People trying to develop the sympathy from the jury." The trial court asked the prosecutor: "Are you intending to introduce more than that . . . ?", to which the prosecutor replied, "That's the reason she's being called. That's what she can testify to. I don't see what else she could testify." The following colloquy then occurred:

"[Defense counsel]: Right. But, you know, it's rife for the opportunities of how sad it is and . . . what a wonderful guy he is.

"The Court: I know, which is not relevant. [The prosecutor] is not intending to elicit that kind of information, are you . . . ?

"[The prosecutor]: No."

On appeal, Hubbard contends the prosecutor then disobeyed the trial court, deliberately continued a forbidden line of questioning, and broke his promise to "elicit no more than the facts of the injury." But the prosecutor never made that promise; the prosecutor merely said he was not intending to elicit sympathy evidence.

Generally, "an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, disapproved on another ground in *Stansbury v. California* (1994) 511 U.S. 318.) Appeals to the jury's passions and prejudices are improper during closing argument because they tend to interfere with jury impartiality. (See *People v. Jones* (1970) 7 Cal.App.3d 358, 363 [argument that jurors' sons and their girl friends "dare not ride motorcycles into an area where the appellant is located" was improper appeal to jurors' fears]; *People v. Talle* (1952) 111 Cal.App.2d 650, 676-677 [appeal to passion or prejudice of jury is erroneous and prejudicial].)

Hubbard argues "evidence of the deceased's good character and works was not relevant to any issue in the guilt phase of the instant trial. Even if it were, the danger of inflaming the jury against appellant outweighed any possible relevance." But Estella Powe did not testify her husband had a good character and had done

good works. She merely listed, by way of introductory testimony, what jobs he had held; she did not testify about what a wonderful man he had been and how sad it was that he had been killed. Defendants have not demonstrated, by either case authority or logical argument, why this testimony constituted an improper appeal to the passion or sympathy of the jury. Moreover, R.R. had already testified, without defense objection, that Powe was working as a school crossing guard.

As for the prosecutor's passing remarks about Powe,[13] we find no reasonable likelihood the jury would have interpreted them as inviting it to ignore the evidence and find the defendants guilty on the basis of sympathy or passion. (See *People v. Arias* (1996) 13 Cal.4th 92, 161 [no prejudice where "[r]eferences to murder victim's 'rights' were relatively brief" and "momentary appeal to victim sympathy could have [had] little effect"]; *People v. Medina* (1995) 11 Cal.4th 694, 759-760 [although prosecutor asked jury to " 'do the right thing, to do justice' " for the victim, there was "no reasonable probability [these] brief and isolated comments could have influenced the jury's guilt determination"].)

7. *Cumulative error*.

Defendants contends that, even if harmless individually, the cumulative effect of these claimed trial errors mandates reversal of their convictions. Because we have found no errors, this claim of cumulative error fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.) **]]**

[[End nonpublished portion.]]

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[13] Hubbard points out that, in his opening statement, the prosecutor mentioned Powe had been "a former sharp shooter in the Marines, a devoted foster parent, and an elementary school crossing guard," and that he had been a "pillar of the community." There was no defense objections to these statements.

DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.