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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEJOHN LEE CRAIG, Defendant and Appellant.	B214894 (Los Angeles County Super. Ct. No. TA091166)

APPEAL from a judgment of the Superior Court of Los Angeles County. David Sotelo, Judge. Affirmed.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant DeJohn Lee Craig appeals from a judgment entered after a jury convicted him of first degree murder. (Pen. Code, § 187, subd. (a).)[1] The jury found true the allegations that appellant personally and intentionally discharged a firearm which proximately caused great bodily injury and death (§ 12022.53, subds. (b)–(d)); and the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1) (C)).

The trial court sentenced appellant to state prison as follows: 25 years to life for first degree murder, plus an additional 25 years to life for the section 12022.53, subdivision (d) allegation. The trial court stayed imposition of sentence on the additional firearm enhancements pursuant to section 1170.1, subdivision (f). The trial court also stayed imposition of sentence for the section 186.22, subdivision (B)(1)(C) gang enhancement.

We affirm.

CONTENTIONS

Appellant contends that: (1) the trial court erred in denying appellant's motion for new trial; (2) the gang expert's testimony usurped the jury's function; (3) the trial court erred in refusing to instruct the jury on untimely disclosure of evidence; and (4) cumulative errors require reversal.

FACTS AND PROCEDURAL HISTORY

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138–1139), the evidence established the following. On April 27, 2006, 17-year-old Anthony McKeithan was shot to death. He sustained a gunshot wound to the back of the head, a wound to the chest, and a wound to the left side of the thigh, any of which was fatal. McKeithan was not a known gang member. At the time of the shooting, Alejandra C., Nikoshee J., and others heard multiple gunshots. Alejandra C.'s sister, Cynthia C., was the only one in the group who

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

did not hear the gunshots because she was listening to music on her iPod. Immediately after they heard the shots, appellant ran toward them and asked to use a cell phone to call someone for a ride. Appellant told the girls there had been a shooting, but before they could hand over the cell phone, they heard sirens and he ran away. The sisters described appellant as tall and slim, between 5 feet 9 inches and 5 feet 11 inches. Alejandra C. told detectives that there were gaps in appellant's upper front teeth. Nikoshee J. identified appellant from a photographic six-pack as the man who ran up to them. She testified at the preliminary hearing that she recognized appellant from school. The sisters were unable to identify appellant from a photographic six-pack as the man who ran up to them. Appellant has gaps in his teeth.

On the day of the shooting, Norman Fletcher, a resident of the neighborhood, saw appellant "flying" around the corner, looking crazy like "somebody had just done something." Fletcher knew appellant as DJ. Fletcher told police that appellant was "sweating like a bull" and his "eyes were big and he could see the whites of them." Fletcher told police that appellant was with two other men who told him to "get in the house." Fletcher identified appellant from a photographic six-pack as the man he saw running. Fletcher told police that the day after he saw appellant running, appellant's stepfather, Keith Jefferson told him "You need to lay low and keep your mouth shut." Fletcher felt threatened by Jefferson's size, facial expressions, intensity, and by the fact that he lived nearby. At trial, Fletcher recanted the statements he made to the police. He also denied that he had been threatened.

Kevin Smith, a resident of the neighborhood, heard multiple gunshots. Right before the gunshots he heard a "kid" plead "don't shoot." He saw a black male, about 5 feet 10 inches to 5 feet 11 inches tall running away with a revolver in his hand. Smith then saw the victim bleeding on the ground and shouted out for somebody to call the paramedics.

Leonel Lopez looked out his bedroom window and saw two African-American males walking down the street. He heard a shot and saw one man on the ground. The

shooter stood over the victim, shot him twice more, and then ran away holding a gun. He described the shooter as tall and slim. The shooter stopped to talk to a group of people, then ran, covering his face with his jacket, and putting the gun in his sweater pocket. He was unable to identify the shooter from a photographic six-pack. Lopez admitted that he felt threatened and was afraid to testify because of the gangs in his neighborhood.

Shavon Thomas, a member of the Nutty Block Crips gang, was convicted in September 2007 of two counts of premeditated attempted murder in another case. The Los Angeles County District Attorney's office agreed to strike the premeditated and deliberate allegation and to recommend a term of 24 years in her case in exchange for Thomas's testimony in this matter. Thomas testified that she had dated Koran Willborn, a deceased leader of the Nutty Block Crips gang, who had been feared and respected while he was alive. Thomas had status and influence with the gang because of her relationship with Willborn. Appellant, known as "Infant No Good" and his older brother, Reggie Davis, known as "No Good" were members of the Nutty Block Crips gang. Older gang members will give younger members variations of their monikers as a sign of honor if they think the younger members are capable of putting in work by shooting, killing, robbing, stealing, and committing acts of retaliation against rival gangs. If the younger gang members do not fulfill their responsibility of retaliating for actions committed against the gang they will get disciplined. On the night of the shooting, Thomas received a call from "Deshawn Wood Williams," a fellow gang member, who told her that she "better get the little homies out of her car because they just did something stupid." After they spoke, Thomas called Albert Fegan, a younger gang member who lived with her and who used her car. Thomas told Fegan to meet her at her house with appellant. The three met at around 9:00 p.m. that evening. When Thomas accused Fegan of doing something "stupid out of [her] car" appellant interjected that he had done "it." He explained that he shot someone in retaliation for the murder of his cousin "Little" or "Tiny" "No Good," and that Fegan was the driver. Thomas told both

men to clean out her car. Two weeks later, Thomas found bullet shells in the back seat of her car. At trial, Thomas identified appellant as the confessed murderer.

Los Angeles Sheriff's Department Detective John Duncan testified as a gang expert that the Nutty Block Crips gang is a rival to the Tragniew Crips gang. He testified that Thomas gained some of Willborn's status by dating him. Thomas became a shot caller who planned robberies, assaults, attempted murders, thefts, and shootings, which is unusual for a female gang member. He testified that the gangs thrive on fear and respect and that retaliation is important for their reputations. Older gang members sponsor younger gang members, and pass down their gang monikers to them. If a gang member does not commit an act of retaliation on request, he will suffer consequences ranging from a beating to being killed.

Detective Duncan testified that he had multiple contacts with appellant who was a gang member. On January 2, 2006, appellant admitted his gang membership to two detectives who filled out a field identification card on him. He was with another Nutty Block Crip known as C-Crazy. At that time, he gave his moniker as DJ. On April 4, 2006, Detective Duncan contacted appellant in front of his house and filled out a field identification card. In 2006 when Detective Duncan executed a search warrant on appellant's house, he found two handguns in the garage. Appellant also hung out at gang houses where guns were stored.

Detective Duncan testified that Donte Smith, known as "Tiny No Good," was killed by Clarence McKeithan, a rival gang member. Clarence was the older brother of Anthony McKeithan, the victim here. Reggie Davis, known as "Big No Good," told Detective Duncan that he had been beaten up and ousted from the gang because he had not retaliated for the murder of Smith. It was the responsibility of others within the "No Good" family to retaliate on the deceased's behalf. Detective Duncan testified that hypothetically, if Davis did not fulfill his responsibility of retaliating against Tragniew Park gang for killing Smith, the responsibility would fall on the next person in line. Based on a hypothetical murder with the same facts, Detective Duncan opined that the

murder of Anthony McKeithan was committed for the benefit of the Nutty Block Crips. He opined that because Davis had not retaliated for Smith's murder and had been punished for failing to retaliate, it would be "common" for appellant to try to make his reputation by taking on work that Smith had failed to attempt. He opined that the murder benefited the Nutty Block Crips gang because a rival gang member's brother was shot in retaliation for a previous murder of a Nutty Block Crips gang member, Fegan was also a Nutty Block Crip gang member, Thomas testified that the murder was committed in retaliation on behalf of the gang, and the murder was committed in an execution-style manner.

Detective Duncan also identified the graffiti defacing a banner placed at a middle school in tribute to Anthony McKeithan. Detective Duncan testified that only a gang member would use the initials "FUCC," which means "Fuck Compton Crip." The banner also was sprayed with the word "Fragniew," which is derogatory toward the Tragniew gang, and the letters were crossed out, showing disrespect. References to McKeithan's family were crossed out as well as the letters "NBCC" (Nutty Block Compton Crip), in a sign of disrespect.

The jury found appellant guilty as noted above and the enhancement allegations were found true. The trial court denied appellant's motion for new trial.

DISCUSSION

I. The trial court did not abuse its discretion in denying appellant's motion for new trial

Appellant contends that the trial court abused its discretion in denying his motion for new trial because it did not give adequate consideration to the newly obtained evidence or its impact on the verdict. We disagree.

""'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.'" [Citations.] "'[I]n determining whether there has

been a proper exercise of discretion on such motion, each case must be judged from its own factual background.'" [Citations.] [¶] In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: "'1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) "In addition, 'the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable.'" (*Id.* at p. 329.) "A motion for new trial on the ground of newly discovered evidence is looked upon with disfavor. [Citation.] The granting or denial of such a motion is within the sound discretion of the trial court and, absent a clear showing of abuse of discretion, will not be reversed on appeal." (*People v. Hernandez* (1971) 19 Cal.App.3d 411, 416.)

Appellant's motion for new trial was based on the following purportedly newly discovered evidence: a declaration by Shawn Williams stating that he did not call Thomas on the night of the shooting and school records showing that appellant was at school on the day Detective Duncan said he contacted appellant and prepared a field identification card. In his motion for new trial, appellant also requested a continuance to investigate a potential new witness named McCloud and to investigate Detective Duncan's testimony in another matter.

On appeal, appellant contends that the evidence that Shawn Williams, not his son Deshawn Williams, had called Thomas, was newly discovered and his counsel could not have with due diligence discovered and produced it at trial. Appellant argues that Thomas testified that "Deshawn Wood Williams" had called her to warn her about the shooting. He contends that after she testified, appellant's counsel believed that Thomas was referring to Deshawn Williams. Appellant's counsel "planned to impeach

Ms. Thomas's testimony with the fact that 'Deshawn Williams' was in custody on the day of the shooting." Appellant now contends that he had no reason to investigate Shawn Williams prior to trial, because his importance "did not become apparent until [Detective Duncan's] testimony" clarified that Deshawn Williams's father Shawn Williams, had called Thomas.

We are not persuaded that the evidence that Shawn Williams, rather than his son Deshawn Williams, called Thomas was newly discovered or could not with reasonable diligence have been discovered and produced at trial. The record shows that Thomas testified that she received a warning call from Deshawn Williams, whose gang name was "Wood." Detective Duncan testified that Shawn Williams was in an intimate relationship with Thomas and had called her to warn her of the shooting. Detective Duncan further testified that Shawn Williams, also known as "Wood" or "Little Woody," was the father of Desmond Deshawn Williams, who was incarcerated. Thomas was recalled by the prosecutor for the purpose of clarifying who called her. She testified that in the Nutty Block Crips gang, three members are known as "Big Wood," "Little Wood," and "Baby Wood." Thomas stated that she was in a relationship with Deshawn Williams, known as "Little Wood," who had called her. She testified that Deshawn Williams had a son, known as "Baby Wood." One theme in the trial was that gang members adopt variations of monikers of older gang members, and must uphold the reputation of the members whose monikers they adopt. Therefore, had appellant's counsel exercised due diligence, he would have discovered that there were three "Woods" in the gang. He would have discovered that one was Shawn Williams, and one was his son Deshawn Williams. Appellant's counsel has not shown that he exercised reasonable diligence to determine the differences between the gang members with similar monikers and the same last names or that it was truly newly discovered.

In any event, even if we found that appellant could not with reasonable diligence have discovered the purported newly discovered evidence, we cannot conclude that it was probable that there would have been a different result had the proffered evidence been

admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Shawn Williams's declaration in support of the motion for new trial, stated that Thomas's testimony "regarding statements that I allegedly made to her, are untrue in [regards] to anything to do with the murder of [McKeithan] on [April 27, 2006]" and that "I never called or talked to her on that date or told her anything, about anyone, using her vehicle on the day in question." Appellant contends that if "Shawn Williams testified that he never called Thomas on the day of the shooting and never told her about anyone using her vehicle that day, the jury may have concluded that Thomas was lying about the incident as a whole and about appellant's confession." But, the proffered evidence would have been useful only as impeachment. (*People v. Moten* (1962) 207 Cal.App.2d 692, 698 ["newly discovered evidence which would merely impeach or discredit a witness does not compel the granting of a new trial"].) The substance of Thomas's testimony related to her conversations with Fegan and appellant after the challenged telephone call. She testified that appellant confessed to the murder. Furthermore, in addition to Thomas's testimony, the evidence against appellant was compelling. Eyewitnesses described the shooter as a tall, slim African-American. Appellant was identified as the man fleeing the scene of the crime shortly after the shooting who ran when he heard sirens. A witness saw appellant running around the corner, sweating like a bull, with wide eyes. That witness was subsequently warned by appellant's stepfather to say nothing. Finally, expert testimony as well as Thomas's testimony explained that appellant had a motive for committing the murder.

Appellant also contends on appeal that "the relevance and importance of appellant's school records could not have been discovered prior to trial and produced at trial" because his counsel did not see the field identification card prepared by Detective Duncan until shortly before the detective was set to testify. Regardless of whether appellant has shown that his attorney exercised reasonable diligence to find records of his school attendance at the time of trial, he has failed to show a reasonable probability that the purported newly discovered evidence would change the result. As the trial court

noted, the school charts "may show [appellant] may have attended school that day," putting the date of the field identification of appellant as a Nutty Block Crips gang member in doubt. But the evidence of appellant's membership in the Nutty Block Crips gang was strong. Detective Duncan testified that he had multiple contacts with appellant who was a member of the Nutty Block Crips gang, appellant admitted to his gang membership on January 2, 2006, to other detectives, appellant was known to hang out at gang houses, and appellant was identified by Thomas as a Nutty Block Crips gang member. Both Detective Duncan and Thomas testified that appellant was known as "Infant No Good."

We are satisfied that the trial court's denial of the motion for new trial was not an abuse of discretion.

II. The testimony of Detective Duncan in response to the hypothetical questions posed by the prosecutor was not prejudicial

Appellant contends that because the hypothetical questions posed to Detective Duncan specifically identified the parties including appellant, Davis, Smith, McKeithan, and his brother Clarence, Detective Duncan's testimony was "tantamount to offering an opinion on appellant's guilt on the premeditated murder charge and the allegation that the offense was committed for the benefit of the Nutty Block Crips [gang]." We find that the testimony of Detective Duncan in response to the hypothetical questions posed by the prosecutor was not prejudicial.

Evidence Code section 352 provides that a trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. Expert testimony concerning the culture, habits, and psychology of gangs is admissible as subject matter which is sufficiently beyond common experience so that the opinion of an expert would assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 616–617.) "'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.]' [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224.) Expert opinion may form the basis from which a jury can find that the crime comes within the ambit of a section 186.22 gang enhancement pursuant to which the People must prove that the defendant committed a crime for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Gardeley, supra,* at pp. 616–617.)

Expert testimony has been offered to show the "motivation for a particular crime, generally retaliation or intimidation" and "whether and how a crime was committed to benefit or promote a gang[.]" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.)

"Generally, an expert may render opinion testimony on the basis of facts given 'in a hypothetical question that asks the expert to assume their truth.' [Citation.] Such a hypothetical question must be rooted in facts shown by the evidence, however. [Citations.] [¶] Expert testimony may also 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. (Evid. Code, § 801, subd. (b); [citations].) Of course, any material that forms the basis of an expert's opinion testimony must be reliable. [Citation.] For 'the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based.' [Citation.]" (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.)

Appellant cites *People v. Vang* (2010) 185 Cal.App.4th 309, 320, for the proposition that "the prosecution may not use a hypothetical question to conceal an expert's improper testimony on the real defendants' subjective knowledge and intent." In that case, the court found the trial court had abused its discretion in permitting an expert witness to offer an opinion as to what a particular defendant was thinking. (*Id.* at p. 319.) The court also noted that a prosecutor cannot circumvent the rule by asking an expert a hypothetical question that thinly disguises the defendant's identity. (*Ibid.*)

People v. Phillips (1981) 122 Cal.App.3d 69 also offers guidance. In that case, the prosecutor posed hypothetical questions which named the defendant and the victims. He stated: '"I'll ask . . . that you *assume* the following facts: Number one, that *the defendant, Priscilla E. Phillips*, did repeatedly and surreptitiously administer doses of a cathartic sodium-type compound over a period of approximately 12 months to first one *adopted Korean orphan, Tia Phillips*, . . . and then engaged in similar conduct with a second *adopted Korean orphan, Mindy Phillips*, over a period of approximately one month until this *poisoning* was discovered by hospital officials.'" (*Id*. at p. 82.) The defendant's objections that the hypothetical assumed the defendant was guilty, was argumentative, and assumed facts not in evidence, were overruled. But, on a subsequent objection to the use of the defendant's name, the trial court admonished the jury to disregard the prosecutor's use of the defendant's name and instructed the prosecutor to substitute the word "defendant" for the defendant's name. (*Id*. at pp. 82–83.) The Court of Appeal rejected the defendant's argument that the hypothetical may have led the jury to believe that the expert was expressing an opinion about the defendant's mental condition. (*Id*. at p. 83.) It concluded that any impropriety in the form of the question could not have misled the jurors because the expert doctor explained he had never examined the defendant and the trial court read CALJIC No. 2.82 which instructs the jury to determine from all the evidence whether or not the facts assumed in a hypothetical question have been proved.

Here, the prosecutor posed hypothetical questions to Detective Duncan using the names of specific actors. For instance, the prosecutor asked: "Well, hypothetically, speaking, in order of sponsoring someone, assume the following facts: That a person by the name of Reggie Davis, his moniker is Big No Good. And there is a Donte Smith whose moniker is Tiny No Good; and DeJohn Craig whose moniker is Infant No Good. Assuming those facts and with respect to the definition of sponsoring that you provided earlier, would Infant No Good be a person that was capable of carrying, holding down Big No Good's name?" In response to the hypothetical question, Detective Duncan

replied, "In my opinion, yes. Reputable and Nutty Block Crip gang member of the No Good's status would not bring on someone with his name if he didn't think they would be an active member of the gang." [2]

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[2] The prosecutor also asked: "And hypothetically assume the following facts: that it is the responsibility of Big No Good, Reggie Smith, to retaliate against the Tragniew Park for killing Donte Smith, Tiny No Good, and he does not retaliate. Does that responsibility then fall upon someone next in line?"

Detective Duncan answered: "Inside Nutty Block Crip, the way it is done, to answer your question, Ma'am, it becomes the responsibility of the individuals that are in his family, that sponsored him, the older members that brought him on or the individual on. And then it comes right after that the closest individuals inside his group within the gang. It is the responsibility on them to lead the retaliation or to plan the retaliation. And then after that, it is the gang's responsibility to retaliate. But foremost, it is the responsibility of the individuals that are named after or named with the individual that was killed."

Finally, the prosecutor asked: "Sir, assume the following facts: Assume that on May 24, 2005, somewhere on Central and Reeve bordering the territory of Nutty Block Crips and Tragniew Park Crips, Donte Smith, aka Tiny No Good, was in that area and he was walking; ? [*sic*] A rival gang member by the name of Clarence McKeithan, aka Little T-Bone from Tragniew Park, approached him and approached him with a gun and shot Donte Smith while Donte was walking; Clarence McKeithan shot Donte Smith in the head, and Donte Smith fell on the ground; Once he fell on the ground, Clarence McKeithan stood over Donte Smith striking him several times and once in the thigh; and that was around May 24, 2005; ? [*sic*] and between that period and April 27 of 2006, there was some type of heated animosity in the Nutty Block Community, their gang territory, because Reggie Davis, aka No Good, did not retaliate, revenge Donte Smith's, aka Tiny No Good, death since he was killed by a Tragniew Park; Then on April 27, 2006, a member of Nutty Block Crips by the name of DJ, aka Infant No Good, who is family with both Reggie Davis, aka No Good, and also family with Donte Smith, aka Tiny No Good, of Nutty Block Crips sees Anthony McKeithan walking down the street on Caldwell going westbound towards Grandee between—Anthony McKeithan is walking eastbound between Dwight and Grandee and walking towards Grandee in the Nutty Block territory; ? [*sic*] Infant No Good, the defendant, sees Anthony McKeithan, who is the brother of Clarence McKeithan, Little T-Bone from Tragniew Park. He sees Anthony McKeithan and walks side by side with him; ? [*sic*] And at one point, it is heard that Anthony McKeithan shouts something like 'please don't shoot me'; And at a certain point immediately after that, DJ, Infant No Good from Nutty Block Crips, steps back, points a gun—points a gun at Anthony McKeithan's head, fires, and shoots him in the

Appellant contends that Detective Duncan's response to the above and other hypothetical questions were inadmissible opinions on the specific intent of appellant and other people. Appellant cites *People v. Killebrew, supra*, 103 Cal.App.4th at page 651, for the proposition that the jury must decide whether a specific individual has specific knowledge or possesses a specific intent. "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

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head. And Anthony McKeithan falls over onto the ground; ? [*sic*] And the defendant, DJ, Infant No Good from Nutty Block Crips, fires that gun several more times striking Mr. McKeithan in the chest and one time in the thigh. Based on the totality of those circumstances, based on those facts, was this crime committed for the benefit of, in association with, or to promote the criminal street gang Nutty Block Crips?"

Detective Duncan replied: "Yes, it was. . . . My opinion is based on, number one, when Donte Smith was murdered on Central and Reeve, he was Tiny No Good. My opinion is also based on having conversations with Reggie Davis, Big No Good, as well as Lavelle Smith. Those individuals told me that they both had problems inside the neighborhood with Nutty Block Crip because there was no retaliation for Tiny No Good being killed. And also it is common for DJ, Infant No Good, coming into the gang trying to make his own reputation to take on the work that wasn't done by No Good. Based on those conversations, the way the murder—the way Tiny No Good was killed and the way that this murder happened, which was a walk-up, it was an execution style murder, my opinion is that this was a retaliation murder and this was for the benefit of Nutty Block Crip. And where it benefits Nutty Block Crip, when you retaliated against Tragniew Park, you not only retaliated just shooting someone from Tragniew you shot the individual's brother. Also, it is in association with because the driver was with another Nutty Block Crip, Albert Fegan. So my opinion is that this was in retaliation."

of the knowledge or intent of a defendant on trial. [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550–1551.)

Here, the trial court overruled appellant's objection to the Detective's testimony that based on the hypothetical, the murder was committed in retaliation for the benefit of the gang. The trial court stated, "I think the testimony here there is sufficient testimony to draw that inference for purposes of that hypothetical." In accordance with *People v. Phillips, supra,* 122 Cal.App.3d at page 82, *People v. Vang, supra,* 185 Cal.App.4th at page 320, and *People v. Killebrew, supra*, 103 Cal.App.4th at page 651, however, we conclude that it was error to permit the use of the defendant's name and the names of the other actors in the hypothetical. Use of such specifics in the hypothetic may lead the jury to believe that the expert witness is expressing his opinion on the specific actors' intent rather than the expectations of gang members in general when confronted with a specific action. (*People v. Killebrew, supra*, at p. 658.) Thus, the trial court improperly admitted the expert witness's testimony which went far beyond responding to a hypothetical rooted in facts shown by the evidence. (*People v. Gardeley, supra*, 14 Cal.4th at p. 618 [expert opinion testimony that a violent assault was a classic example of gang-related activity to frighten residents of an area where gang members sell drugs was properly admitted to show the attack was committed for the benefit of the gang].)

But, any error in admitting the hypothetical questions was harmless because there was other strong evidence supporting the premeditated nature of the shooting and appellant's intent to benefit the gang. (*People v. Watson, supra,* 46 Cal.2d at p. 836; *People v. Vang, supra,* 185 Cal.App.4th at p. 322 [prejudicial error does not result in every case in which a gang expert offers testimony on an ultimate issue such as knowledge or intent, at least not in cases where there is other evidence to support an inference that the alleged crime was committed for the benefit of the gang].) Evidence of premeditation was supported by witness testimony that the shooter pointed the gun at McKeithan's head, shot him, then shot him again as he lay bleeding on the sidewalk. Any of the three wounds was fatal. Thomas testified that younger gang members are

responsible to retaliate for killings committed by rival gangs. Appellant, a Nutty Block Crips gang member, confessed to Thomas that he committed the murder in retaliation for the shooting of his cousin "Little" or "Tiny" "No Good," who had been a more senior Nutty Block Crips gang member. In addition to his response to the hypotheticals, Detective Duncan testified that gangs must retaliate against other gangs for offenses committed against them in order to maintain respect in the community. He testified that an individual responsible for retaliating would be beaten up, shot, or killed if he did not fulfill his responsibility. Moreover, he testified that Davis had problems because he did not retaliate against "Tiny No Good." Other witnesses placed appellant running away from the scene of the crime, though some recanted their testimony in fear of retribution from the neighborhood gangs. Furthermore, gang graffiti was sprayed over a banner placed in tribute to McKeithan.

We find that the testimony of Detective Duncan in response to the hypothetical questions posed by the prosecutor was not prejudicial.

III. The trial court did not err in refusing to instruct the jury on the untimely disclosure of evidence

Appellant contends that the prosecutor repeatedly failed to turn over information to defense counsel in a timely manner and that the trial court committed reversible error in refusing to instruct the jury on the untimely disclosure of evidence. We disagree.

Section 1054.1 provides: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or

reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Section 1054.5, subdivision (b) provides in part: "Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." Pursuant to section 1054.7, disclosure of materials must be made at least 30 days before trial unless good cause is shown why a disclosure should be denied, restricted or deferred. Section 1054.7 also provides that if material is discovered within 30 days of trial, disclosure must be made immediately.

"[N]ot every nondisclosure of favorable evidence denies due process. '[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial. Consistent with "our overriding concern with the justice of the finding of guilt," [citation] a constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.' (*United States v. Bagley* (1985) 473 U.S. 667, 678.)" (*In re Brown* (1998) 17 Cal.4th 873, 884.) A trial court's ruling on matters regarding discovery is reviewed for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 299.)

Appellant contends that the prosecutor violated section 1054.1 subdivision (f), which requires the prosecutor to disclose all "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case,

including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

Appellant contends that late discovery was provided to him with respect to Fletcher, Thomas, Lopez and Katz. As to Fletcher, the record shows that on June 17, 2008, the second day of trial, defense counsel complained that he had just learned that Fletcher was to testify as a witness and just received a transcript of a recorded interview with Fletcher. The prosecutor explained to the trial court that Fletcher was named in the discovery as an "Informant," his statements were contained in the police report as "Informant #2," and his name was listed on his six-pack photo identification statement that was previously provided to defense counsel. The record also shows that Fletcher had been identified by name on a diagram he had drawn in the police report that was provided to defense counsel before trial. The prosecutor represented that Fletcher had initially been afraid to come forward, but once he was willing to testify, the prosecutor added his true name to the witness list and provided discovery to defense counsel.

Also, on the second day of trial, defense counsel argued that he had not received all discovery related to Thomas, including notes related to two out of three interviews, and a videotape of her interview on November 1, 2007. The prosecutor stated that the detectives had not taken notes at the two interviews, she had provided defense counsel with a transcription of the videotaped interview, and that she would obtain a copy of the videotaped interview for defense counsel.

On June 19, 2008, the fourth day of trial, the prosecutor questioned Lopez during lunch time why he did not want a tape of his interview with police played. Defense counsel objected on the basis that he had not been informed that the prosecutor and Detective Katz had interviewed Lopez during the lunch hour break and played a tape of his interview with police officers to him. The prosecutor explained that Lopez had told her and the detective that he did not want the tape played because he was afraid he had described his residence and his room during the interview. The prosecutor also stated that Lopez had denied making a 911 call during their discussion. The trial court ordered

the prosecutor to prepare notes of the meeting, and she represented that the detective would do so.

On June 23, 2008, the sixth day of trial, the prosecutor gave defense counsel notes that Detective Katz took on November 1, 2007, during a recorded interview with Thomas. She explained that she had just received the notes from Detective Katz. The prosecutor stated that she had asked the investigator to provide a photographic six-pack containing a photo of appellant and a photograph of Fegan that were shown to Thomas during an interview on October 25, 2007. The trial court ordered Detective Katz to make copies of his notes and turn them over to defense counsel during the lunch hour. Detective Katz represented that he was still trying to find the photographic six-pack that was shown to Thomas. Defense counsel also received a copy of the photographic six-pack on June 23, 2008. Detective Katz testified that defense counsel had received discovery prior to trial that Thomas had identified appellant and Fegan from a photographic six-pack.

We are satisfied that the trial court did not commit reversible error in refusing to instruct with CALCRIM No. 306[3] regarding the untimely disclosure of evidence as requested by defense counsel. The record shows the discovery regarding Fletcher was made available to defense counsel and he was identified as a witness as soon as possible, and that the photographic six-pack was provided to defense counsel before Thomas testified. Also, the trial court questioned the prosecutor regarding missing notes and ordered that she either immediately prepare notes or disclose notes of Detective Katz.

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[3] CALCRIM No. 306 provides "[b]oth the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to allow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the (People/defense) failed to disclose: <describe evidence that was not disclosed> [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure. [¶] [However, the fact that the defendant's attorney failed to disclose evidence [within the legal time period] is not evidence that the defendant committed a crime.]"

While the trial court had the ability to advise the jury of any failure or refusal to disclose and of any untimely disclosure pursuant to section 1054.5, it was not required to do so.

We conclude that even if the trial court had erred in failing to give the instruction, it is not reasonably probable that a result more favorable to appellant would have been reached had the instruction been given. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) The evidence in support of the jury's verdict was very strong. The evidence showed that appellant, a Nutty Block Crips gang member, had the motive to kill McKeithan in retaliation for the shooting of his cousin "Little" or "Tiny" "No Good," who had been a more senior Nutty Block Crips gang member. Other witnesses placed appellant running away from the scene of the crime. Appellant confessed to Thomas that he had murdered McKeithan in retaliation for the murder of his cousin.

In light of our foregoing conclusions, we find that cumulative error did not deprive appellant of a fair trial. (*People v. Hines* (1997) 15 Cal.4th 997, 1075.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

________________________, Acting P. J.

DOI TODD

We concur:

________________________, J.

ASHMANN-GERST

________________________, J.

CHAVEZ