

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ISAAC ANTHONY DELGADO,

Defendant and Appellant.

G036754

(Super. Ct. No. 04WF1875)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Richard M. King, Judge. Affirmed and remanded for resentencing.

Paul R. Ward, under appointment by the Court of Appeal, for Defendant
and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo
Graves and Dane R. Gillette, Chief Assistant Attorneys General, Gary W. Schons,
Assistant Attorney General, Ronald A. Jakob and Jennifer A. Jadovitz, Deputy Attorneys
General, for Plaintiff and Respondent.

*

*

*

INTRODUCTION

Defendant Isaac Anthony Delgado appeals from a judgment entered after a jury found him guilty of carrying a concealed dirk or dagger, street terrorism, and assault with a deadly weapon. The jury found true the enhancement allegations that defendant personally used a knife and inflicted great bodily injury in the commission of the assault with a deadly weapon offense, and committed that crime for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by members of that gang.

Defendant contends the enhancement finding that he committed the assault with a deadly weapon for the benefit of a criminal street gang must be stricken because (1) the trial court erroneously admitted an expert witness's testimony regarding defendant's specific intent, and (2) defendant received ineffective assistance of counsel. Defendant also contends the trial court erred by imposing the upper term for each count based on aggravating factors found true by the trial court, not by a jury.

We affirm. The trial court did not err in admitting the prosecution's expert witness testimony because the expert did not testify defendant specifically intended to benefit a criminal street gang in the commission of the assault with a deadly weapon offense.

As discussed in detail *post*, even if defendant's legal representation had been deficient in the manner asserted by defendant, it is not reasonably probable the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) Defendant's ineffective assistance of counsel claim therefore fails.

In light of the United States Supreme Court's recent decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*), we remand for resentencing on the sole ground the trial court imposed an upper term sentence based on aggravating factors found true by the court rather than by a jury beyond a reasonable doubt.

FACTS

On June 29, 2004, Antonio B. was walking down a street in Garden Grove after school with his friends, Irvin G. and Danny C., when he noticed defendant staring at him. Various accounts of what happened next were presented at trial. All accounts, however, agree that Antonio's confrontation with defendant resulted in defendant stabbing Antonio in the chest.

Douglas Pluard, a Garden Grove police officer, testified he interviewed Antonio in the hospital after the incident. Pluard tape-recorded his interview with Antonio, but did not tell Antonio the interview was being taped. Antonio told Pluard that after defendant stared at him, defendant, who was sitting on a bicycle, said something to the effect of "hey, this is Santana." Antonio "just turned away," and walked away from defendant and a second man who was also sitting on a bicycle.

Antonio said defendant got off his bike and walked up behind him. Defendant grabbed his arm, "kind of spun him around," and said "what's up?" Antonio said defendant struck him in the chest. After Antonio felt "some extreme pain" in his chest, he saw defendant was holding a knife. Antonio "took a fighting stance to try and defend himself"; he punched defendant in the face. After defendant tried to stab Antonio again, Antonio ran across the street. Defendant gave chase. While running, Antonio saw blood on his chest and realized he had been stabbed. He reached the other side of the street, and lay down on the sidewalk. Defendant stopped pursuing Antonio, ran back to his bicycle, and rode away.

Officer Pete Arrellano of the Garden Grove Police Department interviewed Irvin later that afternoon; this interview was tape-recorded without Irvin's knowledge. Irvin told Arrellano that there had been a "hit up" that afternoon. Irvin explained that as he, Antonio, and Danny walked by defendant and a second person, who were both sitting on bicycles, the latter one asked them where they were from. Antonio said something in

response, but Irvin did not hear what was said. Defendant got off his bicycle and said, “this is Santa Nita.” Irvin then saw Antonio and defendant involved in some kind of altercation. He saw a knife in defendant’s hand; defendant attempted to stab Antonio. Antonio threw punches at defendant and then ran to the other side of the street where he leaned up against a chain link fence and fell to the ground. Irvin said defendant initially chased after Antonio but then stopped, ran back to his bicycle, and rode away. Irvin told Arrellano that he had not been more forthcoming with information at the crime scene because he thought the police officers were jerks and also because he was concerned about being looked upon as a “rat.”

Antonio and Irvin testified at trial, but described a sequence of events different from what they had described in their interviews with Pluard and Arrellano, respectively.

Antonio testified that after he and defendant made eye contact, defendant started walking behind Antonio, Irvin and Danny. Antonio testified he turned around and asked something to the effect of “you know me?” or “[w]hy you staring at me?” Defendant asked Antonio whether he was going out with his “lady” from Santa Ana. Antonio testified he truthfully told defendant he was going out with defendant’s lady, but could not remember her name. Antonio testified he then struck defendant in the eye, and Irvin and Danny joined in by hitting defendant as well. Defendant then stabbed Antonio in the chest.

Antonio testified he has never heard of the Santa Nita criminal street gang and did not hear defendant say, “this is Santa Ana.” Antonio also testified that it is not a good thing to be classified as a “rat”—meaning one who provides information to the police.

Irvin similarly testified at trial that Antonio struck the first blow against defendant, and that he and Danny joined in by hitting defendant. Irvin admitted having heard of Santa Nita, but denied telling Arrellano that defendant said, “this is Santa Nita”

at the time of the incident. He testified he did not recognize defendant, and stated he did not see defendant on a bicycle. He denied identifying defendant to the police.

Defendant testified at trial that he was attacked by Antonio, Danny, and Irvin, and that he was fearful and tried to defend himself. Defendant stated he had a knife in his possession for self-protection and admitted he stabbed Antonio. He denied being a gang member.

Officer Jonathan Wainwright of the Garden Grove Police Department testified as an expert witness. He testified that Santa Nita is a criminal street gang and one of its rival gangs is the Darkside criminal street gang. He opined that defendant was an active participant of Santa Nita on June 29, 2004. His opinion was based on, inter alia, defendant's own prior statements claiming Santa Nita. Wainwright also opined Antonio was an active participant of the Darkside criminal street gang on June 29, 2004.

During direct examination, the prosecutor posed a hypothetical question to Wainwright, which assumed as true the circumstances first described by Antonio and Irvin to the police. Wainwright testified that based on those assumed facts, the offense of assault with a knife would have been committed for the benefit of Santa Nita. Wainwright explained that the incident was "a classic gang hit up." He stated that a hit-up involves a gang member encountering someone who "looks like a gang member" and then asking that person where he or she is from. If that person responds with the name of a rival gang, the common outcome is violence "anywhere from a simple assault and battery or using their hands and fists, all the way up to using handguns to a homicide." If the person does not respond and tries to ignore the question, he or she will also be met with violence. Successful hit-ups enhance the perpetrator's reputation within the gang and the gang's reputation with other gangs. They also assist the perpetrator's gang in its recruiting efforts.

PROCEDURAL BACKGROUND

Defendant was charged in an amended information with (1) attempted murder in violation of Penal Code sections 664 and 187, subdivision (a) (count 1); (2) carrying a concealed dirk or dagger in violation of section 12020, subdivision (a)(4) (count 2); (3) street terrorism in violation of section 186.22, subdivision (a) (count 3); and (4) assault with a deadly weapon in violation of section 245, subdivision (a)(1) (count 4). (All further statutory references are to the Penal Code.)

The amended information contained multiple conduct enhancement allegations: (1) as to counts 1 and 4, pursuant to section 12022, subdivision (b)(1), defendant personally used a deadly weapon (a knife) within the meaning of section 1192.7, in the commission of those crimes; (2) as to counts 1 and 4, pursuant to section 12022.7, subdivision (a), and within the meaning of sections 1192.7 and 667.5, defendant personally inflicted great bodily injury; and (3) as to counts 1, 2, and 4, pursuant to section 186.22, subdivision (b)(1), defendant committed those offenses “for the benefit of, at the direction of, and in association with SANTA NITA, a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by members of that gang.”

The jury found defendant guilty of counts 2, 3, and 4. The jury found true the conduct enhancement allegation that defendant committed count 4 for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by members of that gang. The jury also found true that defendant personally used a deadly or dangerous weapon (a knife) and personally inflicted great bodily injury during the commission of count 4. The trial court declared a mistrial as to count 1, and ultimately granted the prosecution’s motion to dismiss count 1.

The trial court sentenced defendant to a total prison term of 17 years by imposing: (1) the upper term of four years on count 4; (2) a consecutive three-year term

for the infliction of great bodily injury enhancement; (3) a consecutive 10-year term for the gang enhancement; (4) the upper term of three years on count 2, to run concurrently with the term imposed for count 4; and (5) the upper term of three years on count 3, to run concurrently with the term imposed for count 4.¹ The court stated on the record that it imposed the upper term sentences based on findings (1) defendant's crimes involved great violence, (2) defendant engaged in violent conduct that indicates a serious danger to society, (3) his prior sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness, and (4) his prior performance on probation was unsatisfactory.

Defendant appealed.

DISCUSSION

I.

WAINWRIGHT DID NOT OFFER EXPERT OPINION TESTIMONY ON DEFENDANT'S SPECIFIC INTENT.

The jury found true that defendant committed the crime of assault with a deadly weapon “for the benefit of, at the direction of, or in association with any criminal street gang, to wit: SANTA NITA, with the specific intent to promote, further or assist in any criminal conduct by members of that gang.” Defendant contends the trial court erred by allowing Wainwright to provide expert witness testimony on the issue of defendant's specific intent.²

¹ The trial court struck the personal use of a deadly weapon enhancement “for purposes of sentencing only.”

² The Attorney General contends defendant has waived this argument because he failed to raise this objection to Wainwright's expert testimony during trial. Defendant argues any such objection would have been futile in light of the trial court's earlier comments which generally described its view of the admissibility of expert testimony. Defendant further argues that if an objection to Wainwright's expert testimony would not have been futile, defendant's counsel provided ineffective assistance of counsel by failing to so

“As a general rule, a trial court has wide discretion to admit or exclude expert testimony. [Citations.] An appellate court may not interfere with the exercise of that discretion unless it is clearly abused. [Citation.]” (*People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) In cases where a gang enhancement is alleged, expert testimony regarding the “culture, habits, and psychology of gangs” is generally permissible because these subjects are “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*Ibid.*) For example, an expert may properly testify about the size, composition, or existence of a gang; “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, 656-658; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 [“Expert testimony repeatedly 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. Valdez, supra*, 58 Cal.App.4th at pp. 507-509 [holding expert opinion concerning whether the defendant acted for the benefit of a gang was admissible under the circumstances of the case].)

An expert, however, may not testify that a specific individual had specific knowledge or possessed a specific intent. (*People v. Killebrew, supra*, 103 Cal.App.4th at p. 658.) In *People v. Killebrew*, the appellate court held an expert’s opinion testimony was improper: “Through the use of hypothetical questions, [the expert] testified that each of the individuals in the three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. In other words, [the expert] testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action. [¶]

object. We do not need to decide whether defendant has waived this argument because, in any event, as discussed in detail *post*, defendant’s argument is meritless.

[The expert]’s testimony was the only evidence offered by the People to establish the elements of the crime. As such, it is the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided. It was an improper opinion on the ultimate issue and should have been excluded.” (*Ibid.*)

In *People v. Gonzalez* (2006) 38 Cal.4th 932, 946-947, the California Supreme Court stated, “[a]s did the court in *People v. Gonzalez, supra*, 126 Cal.App.4th 1539, we read [*People v.*] *Killebrew*[, *supra*, 103 Cal.App.4th 644] as merely ‘prohibit[ing] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.’ [Citations.] [Fn. omitted.] Even if we assume, without deciding, that [*People v.*] *Killebrew* is correct in this respect, it has no relevance here. [The expert witness] merely answered hypothetical questions based on other evidence the prosecution presented, which is a proper way of presenting expert testimony. ‘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.”’ [Citations.]” The Supreme Court further stated, “there is a difference between testifying about specific persons and about hypothetical persons. It would be incorrect to read [*People v.*] *Killebrew* as barring the questioning of expert witnesses through the use of hypothetical questions regarding hypothetical persons.” (*Id.* at p. 946, fn. 3.)

Here, Wainwright never testified as to defendant’s specific intent in the commission of the assault with a deadly weapon offense, or any other offense. Instead, in response to a hypothetical question (which was generally based on the same circumstances of the incident as first described by Antonio and Irvin to the police), Wainwright testified the crime of assault with a deadly weapon under such circumstances would be committed to benefit a criminal street gang. Wainwright testified as follows.

“[The prosecutor]: I’m going to ask you to assume that—we’ll call person 1 ‘victim’—that victim is an active participant in a criminal street gang, and the name of the gang is Darkside.

“As the victim is walking away from school with two other males, he noticed two males up ahead straddling their bicycles. As they approached and the victim walked by the two males on their bicycles, one of the two males on the bikes in front of them asked the victim where he was from.

“I’m going to ask you to assume that one of the two individuals that are straddling the bikes, that one of them is a documented gang member with the gang Santa Nita.

“Now, after the one individual on the bicycle up ahead asks the victim where he’s from, I’m going to ask you to assume that that Santa Nita gang member who is on his bicycle claims his gang back by saying something to the effect of, ‘this is Santa Nita.’ Words are exchanged and the victim starts to walk away.

“I’m going to ask you to assume that the Santa Nita gang member follows that victim, grabs the victim, turns him around and starts to make stabbing motions toward the victim and toward his chest.

“I’m going to ask you to assume that the victim tries to get away by pushing, by kicking the Santa Nita gang member, and that the Santa Nita gang member successfully stabs the victim with a knife in the upper chest or sternum area, actually causing the knife to go through the skin causing an injury.

“I’m going to ask you to assume that the victim then ran across the street and that the Santa Nita gang member chases that victim across the street. There is another physical altercation between the two on the second side of the street once they’ve crossed, and the Santa Nita gang member fled the area.

“I’m going to ask you to assume that the Santa Nita gang member was later caught at his residence with a knife in his pocket that had blood on the blade, and that at the time of the incident, the Darkside gang and Santa Nita gang were considered rival gangs.

“I’m further going to ask you to assume that the victim ultimately fell on the ground and was bleeding from the chest and required medical assistance.

“Assuming those facts, do you have an opinion as to whether the crime of attempted murder with the stabbing of a knife through the victim’s chest was committed for the benefit of or in association with the criminal street gang Santa Nita?

“A. Yes, I do.

“Q. What is your opinion?

“A. That it was committed for the benefit of the gang Santa Nita.

“Q. And what is that opinion based on?

“A. That opinion is based on—based on my years as a law enforcement officer, my experience dealing with gang members, reviewing this entire case, everyone’s history. And also on this, with your hypothetical, it’s a classic gang hit up.

“Q. Okay. What do you mean when you say that?

“A. The classic gang hit up. The individual started it off where you—from throwing out his gang name. The other guy didn’t want anything to do with it. Basically, that’s a form of disrespect between the two gangs when nobody answers back. Felt disrespected, went after that individual with a knife, attempted to kill him by shoving a knife in his chest.

“Q. How would the attempted murder in the hypothetical I’ve given you, how would that actually benefit his gang, Santa Nita?

“A. It would give the gang—within gang culture, make them one step higher on the rung knowing that these guys actually back up what they say. They’re going to inflict pain on another gang if they’re disrespected.

“Q. When you say, ‘one step higher on the rung,’ would that give them respect within the gang community?

“A. Yes.”

The expert witness further testified:

“Q. And similarly, with the same set of facts, I’m going to ask you about the crime of assault with a deadly weapon, assault with a knife.

“Do you have an opinion as to whether or not that crime was committed for the benefit of the gang in our hypothetical?

“A. Yes, I do.

“Q. What is that opinion?

“A. It was committed for the benefit of the gang.

“Q. And what is that opinion based on?

“A. Again, the whole respect with the knife, the hit up, and the actual him being the aggressor against the rival gang. It’s all about the respect.”

The prosecutor asked:

“Q. Okay. And also with what’s—let’s just take the crime, same facts, assault with a deadly weapon. Asking you the similar question. How does that promote, further or assist the gang, if it does?

“A. Again, the same reason. I mean, you have an individual that was promoting the gang by calling out the gang’s name, committing the crime, promoting the gang, and giving that gang more respect.”

Wainwright’s opinion in response to a hypothetical question based on circumstances similar to the instant case, that the crime of assault with a deadly weapon was committed to benefit a criminal street gang constitutes admissible expert testimony. (See, e.g., *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1197 [expert testimony about the motivation for a particular crime and “whether and how a crime was committed to benefit or promote a gang” is permissible]; *People v. Killebrew, supra*, 103 Cal.App.4th at pp. 656-657 [same].)

We find no error.

II.

THE RECORD DOES NOT SHOW DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO DEFENDING AGAINST THE 10-YEAR ENHANCEMENT ALLEGATION TERM FOR COMMITTING ASSAULT WITH A DEADLY WEAPON FOR THE BENEFIT OF A CRIMINAL STREET GANG.

Defendant contends he received ineffective assistance of counsel with regard to his defense against the gang enhancement allegation because his trial counsel (1) had difficulty cross-examining Wainwright; (2) failed to object to portions of Pluard's and Arrellano's testimony; (3) failed to adequately cross-examine Pluard and Arrellano; and (4) failed to argue to the jury that Antonio's and Irvin's statements to Pluard and Arrellano, respectively, were less reliable than Antonio's and Irvin's trial testimony.

A.

STANDARD OF REVIEW

To prevail on a claim of ineffective assistance of counsel, the defendant must prove: (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his or her attorney's deficient representation subjected him or her to prejudice. (*Strickland v. Washington, supra*, 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Prejudice means a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

B.

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS TO WAINWRIGHT'S TESTIMONY FAILS.

Defendant contends he received ineffective assistance of counsel because the record shows "defense counsel completely lacked the ability to cross examine the expert witness," which resulted in defendant being "left with no representation as to the expert witness." Specifically, defendant argues effective representation by his trial

counsel would have included a cross-examination of Wainwright that elicited testimony establishing (1) Wainwright’s opinion depended entirely on the facts assumed by the prosecution, and other assumptions (e.g., that Antonio struck defendant first, defendant never mentioned any gang affiliation, and the fight started after comments about a girl), would have produced different expert opinions; and (2) Wainwright could not offer an expert opinion about “who initiated the conflict based solely on how the conflict ended” (e.g., Antonio having been stabbed), thereby “emphasiz[ing] for the jury that the officer’s opinion about the intent to benefit a street gang depended entirely on the facts of the hypothetical.”

We do not need to determine whether defendant’s trial counsel’s representation was deficient because the record fails to support a reasonable probability the result would have been different had counsel’s cross-examination of Wainwright elicited such testimony. Before the prosecutor posed the hypothetical question to Wainwright, the trial court instructed the jury: “In examining an expert witness, counsel may ask hypothetical questions. This is a question in which the witness is asked to assume the truth of a set of facts and to give an opinion based on that assumption. [¶] In permitting this type of question, the court does not rule and does not necessarily find that all of the assumed facts have been proved. It only determines that those assumed facts are within the possible range of the evidence. It is for you to decide from all the evidence whether or not the facts assumed in a hypothetical question have been proved. [¶] If you should decide that any assumption in a question has not been proved, you are to determine the effect of that failure of proof on the value and weight of the expert’s opinion based on the assumed facts.”

As discussed *ante*, the prosecutor’s hypothetical question expressly assumed that defendant was the aggressor. Antonio and Irvin testified at trial that it was Antonio—not defendant—who threw the first punch. The jury was instructed to weigh the conflicting evidence and determine whether the hypothetical question’s express

assumption that defendant was the aggressor was true in assigning the proper weight to give the expert witness's testimony.

Defendant contends his trial counsel was ineffective because he was unable to formulate proper questions during his cross-examination of Wainwright, which would have elicited information about Antonio's past. Even assuming trial counsel's representation with regard to Wainwright's cross-examination was deficient, the record does not show what information such questioning would have yielded. In *People v. Bolin* (1998) 18 Cal.4th 297, 334, the California Supreme Court rejected a defendant's argument his counsel was ineffective for failure to engage in more extensive cross-examination of a witness, stating: "Defendant identifies no exculpatory or impeachment evidence that counsel could have revealed by further questioning of prosecution witnesses [or examination of defense experts] and that would have produced a more favorable result at trial. [¶] . . . Such claims must be supported by declarations or other proffered testimony establishing both the substance of the omitted evidence and its likelihood for exonerating the accused. [Citations.] We cannot evaluate alleged deficiencies in counsel's representation solely on defendant's unsubstantiated speculation."

On this record, we therefore cannot conclude that it is reasonably probable such information would have changed the result.

C.

DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS AS TO PLUARD'S AND ARRELLANO'S TESTIMONY.

During trial, Pluard testified that he interviewed Antonio at the hospital later in the day after the stabbing. Pluard testified he tape-recorded the interview, but did not tell Antonio the interview was being tape-recorded because he learned from experience that "sometimes, oftentimes, if you do tell somebody that you're tape recording, they're going to—they won't tell you the full truth. They'll know that it may

come back to maybe haunt them later and we'll have it on record." Antonio told Pluard that defendant initiated their confrontation by staring at Antonio and then stating something to the effect of "hey, this is Santana." Antonio said that after he turned and walked away, defendant got off his bike, walked up behind Antonio, grabbed Antonio's arm, spun him around, and said "what's up?" Defendant then stabbed Antonio.

Arrellano testified that he tape-recorded his interview of Irvin, but did not tell Irvin the interview was being tape-recorded. Arrellano testified he did not tell Irvin he was taping the interview because he felt Irvin would be more truthful and more forthcoming with information if he did not know the interview was being tape-recorded. Irvin told Arrellano that as he, Antonio, and Danny walked past defendant, and a second individual with defendant asked where they were from and defendant said something to the effect of "this is Santa Nita." Irvin saw that Antonio and defendant were involved in some kind of an altercation where defendant had a knife in his right hand and was attempting to stab Antonio.

At trial, both Antonio and Irvin described a version of the incident different from what each had previously reported to police. Each testified that after Antonio asked defendant why he was staring at him, defendant asked Antonio something about why or whether Antonio was going out with defendant's lady. Antonio and Irvin further testified Antonio told defendant that Antonio was going out with defendant's lady. Antonio and Irvin also testified that Antonio threw the first punch at defendant, and that Irvin and Danny assisted Antonio by hitting defendant.

Defendant contends he received ineffective assistance of counsel because his trial attorney failed to object to Pluard's and Arrellano's testimony "as improper vouching for a particular version of conflicting evidence or as a comment on the credibility of witnesses." He also contends, "to the extent that the officers sought to apply their general opinions about the effectiveness of their interviewing techniques to these particular interviews, the opinions were based entirely on speculation as to whether

the interviewees had something to hide. And, to the extent that the officers' opinions did not relate to these particular interviews, they were irrelevant." Defendant further contends the prosecutor committed misconduct by soliciting such testimony.

The record shows Pluard and Arrellano merely explained the reason why they decided to secretly tape-record their interviews. They did not opine on credibility issues and did not weigh in on whether Antonio's or Irvin's statements during the interviews or their trial testimony was more truthful or reliable. Nor did the prosecutor attempt to elicit improper "vouching" testimony from the officers. Defendant's trial attorney, therefore, was not ineffective for failing to object to the officers' testimony on this ground.

Defendant further contends, "effective counsel would have brought out on cross examination and in argument that the officers' belief that people are less likely to tell the 'full truth' when a microphone is visible applies only to perpetrators of crimes, not to people who are purely victims of or witnesses to crimes, because nothing a completely innocent victim or witness could say to an officer falls into the category of '[t]hey'll know that it may come back to maybe haunt them later and we'll have it on the record.'" But there is no evidence that the officers would have testified that they had such a belief. (See *People v. Bolin*, *supra*, 18 Cal.4th at p. 334 [defendant failed to identify exculpatory or impeachment evidence that could have been revealed by counsel through further questioning of prosecution witnesses and that would have produced a more favorable result at trial].)

If anything, the record shows it is unlikely the officers would have so testified in light of Wainwright's expert testimony that in gang culture, witnesses to criminal offenses are often reluctant to provide information to the police because they fear being characterized as a "rat" and subjected to retaliation.

Therefore, defendant's ineffective assistance of counsel claim as to Pluard's and Arrellano's testimony fails.

III.

IN LIGHT OF *CUNNINGHAM*, *SUPRA*, 549 U.S. __ [127 S.Ct. 856], WE REMAND FOR RESENTENCING.

In his supplemental opening brief, defendant cites *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856], arguing defendant's upper term sentence, which was imposed based on facts determined by the trial court, violated his constitutional rights to due process and a jury trial. The United States Supreme Court has held California's determinate sentencing law violates a defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution to a jury trial to the extent it permits a trial court to impose an upper term sentence based on facts found by the court instead of by a jury beyond a reasonable doubt. (*Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856].)

Here, the trial court imposed the upper term sentence, citing several aggravating factors relating to defendant. (Cal. Rules of Court, rule 4.421(a)(1) [the crime involved great violence]; *id.*, rule 4.421(b)(1) [defendant has engaged in violent conduct that indicates a serious danger to society]; *id.*, rule 4.421(b)(2) [defendant's prior sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness]; *id.*, rule 4.421(b)(5) [defendant's prior performance on probation was unsatisfactory].)

Currently before the California Supreme Court, in *People v. Black* (2005) 35 Cal.4th 1238, judgment vacated and cause remanded *sub nom. Black v. California* (2007) __ U.S. __ [127 S.Ct. 1210], is the issue whether there is "any violation of the defendant's Sixth Amendment rights under *Cunningham* if the defendant is eligible for the upper term based upon a single aggravating factor that has been established by means that satisfy the governing Sixth Amendment authorities . . . even if the trial judge relies on other aggravating factors (not established by such means) in exercising his or her discretion to select among the three sentences for which the defendant is eligible." (Supreme Ct. dock. entry, Feb. 21, 2007.)

Because the trial court here imposed an upper term sentence based on several aggravating factors that were not tried to and found by a jury, in light of *Cunningham*, we remand for resentencing.

DISPOSITION

The judgment is affirmed and remanded for resentencing.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.