

**CERTIFIED FOR PARTIAL PUBLICATION\***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH A. SISNEROS,

Defendant and Appellant.

B205535

(Los Angeles County  
Super. Ct. No. BA311657)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael E. Pastor, Judge. Affirmed as modified.

Jeralyn B. Keller, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, 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 publication with the exception of parts II. thru VI. of the Discussion.

The jury found defendant Joseph Sisneros guilty of the first degree murder of Luis Charles (Pen. Code, § 187, subd. (a))<sup>1</sup> by intentionally and personally discharging a firearm (§ 12022.53, subds. (b)-(d)). He was also convicted of being a felon in possession of a firearm (§ 12021, subd. (a)(1)) and actively participating in felonious criminal conduct to benefit a criminal street gang (§ 186.22, subd. (a)).<sup>2</sup> Defendant admitted the truth of recidivist enhancement allegations, which included two “strikes.” The trial court imposed a 10-year determinate term for the two section 667 recidivism enhancements, plus indeterminate terms of 75 years to life pursuant to the three strikes law, and 25 years to life for the firearm enhancement. Upper terms of three years were imposed for the felon in possession and the gang participation convictions; both were stayed pursuant to section 654.

In his timely appeal, defendant raises various contentions of error arising out of the trial court’s decision to permit the prosecution to call Gloria Luna as a witness with the knowledge that she would refuse to be sworn and submit to questioning: (1) In violation of Evidence Code section 600, there was no admissible, nonspeculative inference that could be drawn from Luna’s refusal; (2) the jury’s consideration of her refusal violated defendant’s right to confront adverse witnesses under the Sixth Amendment; (3) the jury’s consideration of Luna’s silent conduct also violated Evidence Code section 710 and defendant’s right to due process under the state and federal Constitutions because convictions cannot be based on unsworn testimony; and (4) the court abused its discretion under Evidence Code section 352 in permitting Luna to be called as a witness. Defendant also raises two interrelated arguments arising out of Agent Daniel Evanilla’s expert testimony<sup>3</sup> as to defendant’s status as a Mexican Mafia

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> The jury separately found defendant committed the murder and weapons offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

<sup>3</sup> The prosecution’s gang expert from the California Department of Corrections and Rehabilitation (the Department).

associate, contending first, the gang expert's reliance on hearsay reports resulted in the expert's passing off the opinions of nontestifying experts as his own in violation of Evidence Code section 801, and second, the hearsay materials on which Agent Evanilla relied were improperly admitted for their truth, in violation of his constitutional rights to confront adverse witnesses under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). Additionally, defendant contends (1) his trial counsel rendered constitutionally ineffective assistance by effectively alerting the prosecution of the availability of recidivist enhancements against defendant; (2) the court improperly admitted unduly suggestive and unreliable identification evidence through the testimony of prosecution witness Victor Davila, thereby violating his constitutional due process rights; and (3) the above issues, if not prejudicial singly, amounted to a miscarriage of justice when considered cumulatively. Finally, defendant contends the imposition of a state court construction penalty was improper under Government Code section 70372. We agree with the final contention, but otherwise affirm.

### **STATEMENT OF FACTS**

It was stipulated for purposes of the felon in possession count that defendant had suffered a prior felony conviction.

On January 25, 2005, Paul "Pelon" Morales was staying with his friend Alfie, who lived on Buelah Avenue in the territory claimed by the Geraghty Loma gang. Morales is a member of that gang. At approximately 4:00 p.m., Morales was working on Alfie's car, which was parked on Buelah. He saw a familiar black Mitsubishi Gallant drive past him with defendant in the front passenger seat. Gloria Luna was driving. Morales often saw the Gallant parked in front of Luna's house, nearby on Buelah Circle, and he had seen Luna driving the car many times in the neighborhood, sometimes with defendant as her passenger. Morales knew defendant as "Joe-Joe." Morales waived at Luna and defendant as they drove past him slowly, travelling from the direction of Luna's house

toward Geraghty Avenue. It was a narrow street with room only for one car to pass when, as at that time, there were cars parked on both sides.

Morales's friend "Pirate" stopped his van next to Morales with the engine running. Within a few minutes after the Gallant passed by, Morales heard two or three gunshots from the direction of Geraghty. Morales turned and saw defendant shooting Luis "Stranger" Charles, a Geraghty Loma gang member, who was lying on his back at the corner of Buelah and Geraghty.<sup>4</sup> Defendant fired another two shots at Charles before running to the Gallant. He got into the passenger seat and the car drove away.

Morales asked Pirate to drive him to the corner where the shooting took place. Pirate dropped him off at the intersection. Charles's girlfriend, "Sola," was on the front porch of Paul "Spider" Ortega's house. Morales approached Charles and asked if he was "all right." Charles was bleeding from his arm and calling to the people in Ortega's house to alert 9-1-1. Morales told him, "Hold on. Help is on the way." Charles did not answer when Morales asked who shot him.

Firefighter Victor Davila lived on Geraghty near the shooting location. He was at home at the time and heard five gunshots fired in quick succession. After waiting to make sure the shooting had stopped, Davila walked to his front gate and saw Luna's Gallant driving slowly northbound on Geraghty. From a distance of 10 feet, Davila saw the driver was a woman with dark, "wavy mousey hair"; the passenger was a bald male with a dark "chopped style moustache." They appeared to be "[o]lder type gangsters." There were no other cars driving on the street. Davila turned his attention to Charles, who was lying on his back and screaming in pain. Davila went back to his house for his medical bag, returning to give first aid to Charles. Charles told Davila he was having trouble breathing. There were four or five visible gunshot wounds, some of which had entered Charles's chest. Charles was taken away in an ambulance.

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<sup>4</sup> Detective Gary Sica went to the crime scene and verified that a person would have a clear view from the location described by Morales.

Morales got along with Charles and considered him a “home boy.” Morales got along with defendant too; they were “cool” with each other. Morales was aware of the prison gang called the Mexican Mafia or the “*Eme*.” At the time of the shooting, Morales assumed defendant was a member of that gang. If anyone testified against such a gang member, he or she was likely to suffer violent retribution. Snitching on a Mexican Mafia associate would be extremely dangerous. Morales would not go back to the neighborhood of the shooting because he would risk being shot or beaten.<sup>5</sup> Morales received no deal in return for his testimony. He was on parole at the time of the trial. Even with defendant in custody, Morales was in danger of retribution for being a snitch.

Ortega lived on Geraghty for approximately 10 years, but moved away several months after the shooting incident. Ortega was a member of the Cantaranas gang, based in Santa Fe Springs. By the time of the shooting, however, Ortega had become friends with all his neighbors, including those from Geraghty Loma. His home had become a hangout for Geraghty Loma members. He was friends with Charles. Ortega was also acquainted with defendant, whom he knew as “Joe-Joe.” On the day of the shooting, Charles and his girlfriend Marlene (whose gang moniker was “Sola”) were visiting Ortega’s house. Ortega was cooking. At approximately 4:00 p.m., Ortega heard four or five gunshots in front of his house. A few minutes later, he left the house alone and approached Charles, who was standing in front of his house; Charles had suffered bullet wounds to his stomach and left arm.

Charles eventually died from complications arising out of the multiple gunshot wounds he received.

Agent Evanilla, a gang expert, had monitored the activities of the Mexican Mafia since 1995. The prison gang was comprised of approximately 165 members and 1,200 “validated associates.” The gang’s primary activities are committing murders, robberies,

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<sup>5</sup> On cross-examination, he admitted being arrested at Luna’s house on Buelah after his first interview with the police. He was arrested for a narcotics offense.

extortion, and other crimes to raise money for the gang.<sup>6</sup> As part of the Mexican Mafia's creed, members and associates neither admit their affiliation with the prison gang nor cooperate with the police by informing on other members and associates.

Agent Evanilla's knowledge of the Mexican Mafia came from various sources, including his interviews with gang members and associates either when they are arrested, after being released, or when they attempt to leave the gang. The latter instance involves a lengthy process of debriefing, including the inmate's written confession to all criminal activities committed, a detailed interview, and exhaustive investigation. Agent Evanilla had arrested more than 1,000 Hispanic street gang members, nearly 100 Mexican Mafia members, and approximately 300 gang associates. He also conducted four debriefings, including one of a Mexican Mafia associate.

The Department relies on a "validation system" to classify an inmate as a member or associate of the Mexican Mafia. An associate is an aspiring member who commits criminal activities on behalf of the gang as a necessary prerequisite for membership. A Mexican Mafia member will sponsor a person identified as "a good earner" for the gang—someone who obtains money for the gang by "taxation" of drug dealers on the street and drug sellers in prison. The aspiring member must also accept gang assignments to assault other inmates in the interest of the *Eme*. If the aspirant does well in these matters and receives the necessary sponsorship, his membership will be put up to a vote by the existing members. In addition, full-fledged membership requires the commission of a stabbing or killing on behalf of the gang. Leaving the gang will subject a member to being targeted for killing by the gang. Prison investigators monitor the prison activities, mail, and telephone calls of all Hispanic inmates from Southern California gangs to determine their status vis-a-vis the Mexican Mafia. If three independent investigators uncover a direct link between an inmate and a previously

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<sup>6</sup> The expert testified as to two predicate criminal offenses to support the gang allegation and count. The court instructed that the evidence could be considered only to prove the gang allegation and count, and not to show defendant had a bad character or criminal disposition.

validated member or associate, the inmate will be deemed a validated member or associate. The Department reviews and updates its validations every six years.

While on the streets, members of Hispanic gangs in Southern California will attack members of rival Hispanic gangs. However, once in prison, all such gang members must eschew such rivalries in favor of allegiance to the Mexican Mafia and its rivals. At the same time, the Mexican Mafia exercises a supervisory role over Hispanic street gangs in Southern California by designating a representative in each street gang who is responsible for remitting a portion of the gang's criminal proceeds to the Mexican Mafia. Failure to cooperate with the Mexican Mafia in that regard or in refusing assignments will result in being put on a "green light" list, whereby they are targeted for killing by Mexican Mafia members and associates.

The expert believed defendant was an *Eme* associate based on his being validated by the Department in the early 1990's when he was incarcerated at Folsom Prison. In connection with his six-year review in 2000, defendant did not dispute his *Eme* affiliation. The agent's opinion was bolstered by two recent incidents in county jail that showed defendant being treated as an Mexican Mafia associate. According to Agent Evanilla, victim Charles was a Geraghty Loma gang member. At the time he was released from Pelican Bay prison in 2000, however, he was also a validated associate of the Mexican Mafia.

Based on a hypothetical set of facts that recapitulated the prosecution case for murder, Agent Evanilla opined the killing of Charles would have been committed to benefit the Mexican Mafia. The expert explained that the manner of the killing was not typical of a street gang drive-by shooting in which the shooters would remain in the car and try to avoid being seen and identified. Here, the shooter got out of the car in broad daylight and committed the shooting with no regard to witness identification. This was consistent with the Mexican Mafia's reputation for witness intimidation. The manner of shooting was also consistent with Mexican Mafia protocol—and contrary to a street gang drive-by—in that the shooter was careful to avoid shooting innocent bystanders.

## DISCUSSION

### I. Luna's Refusal to Take the Witness Oath

Defendant raises four interrelated claims of state law evidentiary error and federal and state constitutional violations arising out of the trial court's decision to permit the prosecution to call Luna as a witness, knowing she intended to remain silent and refuse the testimonial oath at the risk of being cited for contempt. To place those claims in context, we summarize the relevant trial court proceedings.

#### A. Background

On the fifth day of trial, Luna was taken out of custody and brought to court for a hearing outside the jury's presence. She was represented by her own counsel. The prosecution was aware of Luna's strong disinclination to testify, but argued she was subject to being called as a witness because she lacked a Fifth Amendment right against self-incrimination. Luna had been charged with murder along with defendant, but she entered a plea to being an accessory to the Charles murder and admitted the gang allegation. She received a seven-year term and did not appeal within the jurisdictional time period. Luna's counsel agreed that she had no constitutional right to remain silent, but informed the trial court that Luna would nevertheless refuse to be sworn as a witness and would refuse to answer any questions, despite the risk of being held in contempt. When the court asked Luna to confirm her attorney's representation, Luna refused to acknowledge the court.

Based on *People v. Lopez* (1999) 71 Cal.App.4th 1550 (*Lopez*), the prosecutor requested that the trial court order her to testify in front of the jury, allowing the jury to draw negative inferences from her refusal. The court advised Luna that she had no Fifth Amendment right to refuse to testify or to take the oath. Lacking any constitutional right to silence, the court would hold her in contempt of court if she refused the oath or refused

to answer questions. Contempt was punishable by a jail term and a fine, which might affect her release date from prison. Luna refused to acknowledge the court.

The defense objected to Luna's being placed in front of the jury for any purpose. Her status as a prior codefendant "would raise certain issues about the right to confront and cross-examine a witness being called by the People." The defense argued that allowing the jury to draw a negative inference from her refusal would be improper because any inference would be purely speculative as to her motivation (e.g., love for defendant or fear of retribution).<sup>7</sup> Relying on *Lopez*, the trial court expressed its belief that the gang expert could properly rely on her refusal in support of the opinion that gang culture inculcates fear of retaliation for testifying against gang members to intimidate potential witnesses.

The trial court ruled that Luna would be called and administered the oath. If she refused, she would be ordered to do so and advised her failure would result in a contempt citation. Contrary to the prosecution's position, the court ruled the prosecution would not be permitted to question Luna if she refused to be sworn.

Luna was called as a prosecution witness. When the clerk attempted to administer the oath, Luna made no response. The trial court asked whether she understood the clerk's request. Again, she made no response. The court advised Luna that she had no constitutional right to refuse the oath or to testify. When she made no response, the court ordered her to be sworn as a witness. In the face of Luna's continued silence, the court advised her that further refusals would merit a finding of contempt of court. Given "one last opportunity," Luna persisted in her silence. The court found her in contempt because she "refused to answer any questions of the court or to take the oath, in direct violation of lawful order of this court, in the presence of the court." The court added that her punishment would be determined at a later date. Following Luna's excusal, the court

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<sup>7</sup> The prosecutor pointed out that, as documented in an interview of Luna provided to the defense, Luna told Detective Sica she was afraid of deadly gang retribution if she testified against defendant. That information was never presented to the jury, but used only at the hearing to show the prosecution's good faith.

instructed the jury that “the appearance of the last individual and anything as a result of it is received for a limited purpose only. It is received only for [the] limited purpose as it may relate to any expert opinion offered by Agent Evanilla and for the basis of any expert opinion.”

Detective Sica testified as to Luna’s identity: She was Gloria Luna and he had interviewed her on May 10, 2005. At that time, she volunteered her name and talked to the detective. In comparison with her appearance in court, at the time of their prior discussion, Luna’s complexion was paler and her hair was not in a pony tail, but “a little more moussed up.”

## **B. Analysis**

In the first aspect of his claim, defendant argues the trial court’s ruling violated Evidence Code section 600, subdivision (b),<sup>8</sup> because there was no admissible, nonspeculative inference that could be drawn from Luna’s refusal of the oath. We review such evidentiary claims for abuse of discretion. (*People v. Weaver* (2001) 26 Cal.4th 876, 933; *People v. Siripongs* (1988) 45 Cal.3d 548, 574.) “A trial court abuses its discretion when its ruling ‘fall[s] “outside the bounds of reason.”’ [Citations.]” (*People v. Waidla* (2000) 22 Cal.4th 690, 714.) “‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) “No evidence is admissible except relevant evidence.” (*Id.*, § 350.) “[T]he trial court “has broad discretion in determining the relevance of evidence [citations], but lacks discretion to admit irrelevant evidence” [citation].” (*People v. Weaver, supra*, at p. 933.)

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<sup>8</sup> That section of the Evidence Code defines a permissible inference as “a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.” (Evid. Code, § 600, subd. (b).)

The trial court did not abuse its discretion. There was solid, credible evidence that Luna drove defendant to the murder scene, witnessed the shooting, and facilitated defendant's flight. As is well established (and conceded below and on appeal), Luna had no Fifth Amendment privilege to remain silent: "When a defendant has already pled guilty to a charge, and time to appeal the conviction has run without an appeal being filed, the defendant's privilege to avoid compelled self-incrimination with regard to the facts underlying the conviction no longer exists." (*Lopez, supra*, 71 Cal.App.4th at p. 1554.) Moreover, generally speaking, "[n]o person other than a defendant has a right to refuse to be sworn as a witness [citations]." (*Id.* at p. 1555; see also *id.* at p. 1556 ["A witness may not employ the privilege to avoid giving testimony that he simply would prefer not to give,"] quoting *Roberts v. United States* (1980) 445 U.S. 552, 560, fn. 7].) As such, the prosecution was entitled to call her as a witness.

Our review of the record confirms the reasonableness of the trial court's admission of Luna's courtroom conduct for the limited purpose of providing support for the gang expert's opinion. Agent Evanilla testified that defendant was an active associate of the Mexican Mafia. The expert opined that the Charles killing bore the hallmarks of a Mexican Mafia mission. The *Eme* typically targeted for violent retribution those who cooperated with law enforcement by informing or testifying against the gang's members and associates. In addition, the prosecution adduced evidence that witness Ortega believed defendant was affiliated with the Mexican Mafia and feared his testimony against defendant would subject him to gang retribution. Similarly, Agent Evanilla believed witness Morales, as a member of a Hispanic street gang, would have reason to know he risked Mexican Mafia retribution because of his testimony. With regard to Luna, the expert testified that although she was in custody in a women's facility, she remained a target for gang retribution if she were to cooperate with authorities by testifying.

Thus, evidence of the Mexican Mafia's penchant for witness intimidation was relevant to the prosecution case both as to the credibility of eyewitness testimony and as substantive evidence supporting the gang allegations. Luna's refusal to take the oath and

testify provided strong support for the expert's opinion that the *Eme* engaged in witness intimidation. As the foregoing summary makes plain, the inference that Luna's refusal was motivated, at least in significant part, by fear of gang retribution cannot be dismissed as mere speculation. While it may not have been the only possible motivation, it was by far the most plausible one available to the jurors. The trial court's ruling was well within the bounds of reason. As in *Lopez*, "the jury was entitled to consider [Luna's] improper claim of privilege against [her] as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members." (*Lopez, supra*, 71 Cal.App.4th at pp. 1555-1556.)

Nor do we perceive a reasonable likelihood of impermissible prejudice. Not only did the trial court specially instruct the jury that Luna's conduct was to be considered solely as support for the gang expert's opinion, but it also instructed more generally that evidence admitted for a limited purpose could be considered only for that purpose. Further, the jury was not to speculate as to why "a person other than defendant was or may have been involved in" the charged offenses was not being prosecuted, and the jury was not bound to accept an expert opinion, but "must consider the strengths and weaknesses of the reasons" supporting the opinion. "[It is] the almost invariable assumption of the law that jurors follow their instructions." [Citation.] "[We] presume that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 740; *People v. Romo* (1975) 14 Cal.3d 189, 195.) In addition and contrary to defendant's assertion, the prosecution did not argue that Luna's silence should be considered as substantive evidence of guilt. To the extent one might possibly read such an improper insinuation into the prosecutor's statements, we note that the jury was instructed that the attorney's statements were not to be considered as evidence. Moreover, any misunderstanding on that score could have been easily remedied by a timely objection and request for a curative instruction.

Defendant's attempt to frame the issue in terms of a violation of defendant's right to confront adverse witnesses under the Sixth Amendment fares no better. The federal Supreme Court has made it clear that a defendant's confrontation rights apply to testimonial statements offered for their truth. (*Tennessee v. Street* (1985) 471 U.S. 409, 413-414; *Crawford, supra*, 541 U.S. at p. 59, fn. 9 ["The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]"].) The high court recently reiterated its longstanding teaching: "The [Sixth] Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." (*Giles v. California* (2008) \_\_\_ U.S. \_\_\_, \_\_\_ [128 S.Ct. 2678, 2682].) Here, of course, Luna never testified as a witness and never offered any statement, much less a testimonial statement.

As our appellate courts have repeatedly found consistent with the Supreme Court's Sixth Amendment precedent: "Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned." (*People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1427, citing *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) "The rule is long established in California that experts may testify as to their opinions on relevant matters and, if questioned, may relate the information and sources on which they relied in forming those opinions. Such sources may include hearsay. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619; Evid. Code, § 801, subd. (b) [an expert's opinion may be based on matter 'whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates'.])" (*People v. Thomas, supra*, at pp. 1209-1210.) As our colleagues in the Fourth District explain, admission of expert testimony based on hearsay will typically not offend Confrontation Clause protections 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.” (*Id.* at p. 1210.)

Defendant also argues the trial court's ruling violated Evidence Code section 710 and his right to due process under the state and federal Constitutions because convictions cannot be based on unsworn testimony. Under California law, it is generally the case that “[e]very witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law . . . .” (Evid. Code, § 710.) However, there was no statutory error or due process violation because, as the trial court carefully instructed, Luna was not a witness and did not testify.

Finally, by failing to interpose a timely and specific objection based on Evidence Code section 352, defendant forfeited his contention that the trial court abused its discretion under that provision in permitting Luna to be called as a witness in the jury's presence. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1130.) In any event, were the issue properly before us, it would fail on the merits. Luna's appearance was admitted for a single, narrow purpose—to support the gang expert's opinion that the Mexican Mafia typically engaged in efforts of witness intimidation. Her refusal to be sworn as a witness was highly probative in that regard and there is no basis in the record to find the jury considered it for any other purpose.

In sum, there was no state law evidentiary error or constitutional violation arising out of Luna's refusal. In addition, any error would have been harmless whether assessed in terms of *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether it is reasonably probable defendant would have achieved a more favorable result if the court had ruled for the defense, or the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24, applicable to constitutional claims of error.

## II. Improper Expert Opinion Claim

With regard to Agent Evanilla’s expert testimony as to defendant’s status as a Mexican Mafia associate, defendant argues the gang expert improperly relied on hearsay reports by the Department that classified defendant as a “validated” Mexican Mafia associate. According to defendant, by relying on reports he did not author, Agent Evanilla effectively passed off the opinions of nontestifying experts as his own in violation of Evidence Code section 801. He additionally contends the hearsay materials on which Agent Evanilla relied—statements in the validation reports and in two reports of defendant’s conduct in jail—were improperly admitted for their truth, in violation of his constitutional rights to confront adverse witnesses and to due process and a fair trial under *Crawford, supra*, 541 U.S. 36. Both aspects of this claim fail.

Generally speaking, testimony regarding the culture and habits of criminal street gangs meets Evidence Code section 801, subdivision (a)’s criterion that expert opinion testimony is admissible when the subject matter is “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) Defendant acknowledges that testimony by a qualified specialist in criminal gangs as to “an individual defendant’s membership in, or association with, a gang” falls within the proper scope for expert testimony under California evidence law. (E.g., *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657.) He contends, however, that Agent Evanilla did not reach an independent determination as to defendant’s gang affiliation, but rather offered the opinions of the authors of the hearsay reports on which he relied as his own opinion.

It is well established that expert witnesses may consider reliable hearsay in forming their opinions. Our Supreme Court has made it clear that 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.” (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) “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." (*Ibid.*, citing *In re Fields* (1990) 51 Cal.3d 1063, 1070 [expert witness can base "an opinion on reliable hearsay, including out-of-court declarations of other persons"].) "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." (*People v. Gardeley, supra*, at p. 618; *People v. Geier* (2007) 41 Cal.4th 555, 608, fn. 13 ["As an expert witness, Dr. Cotton was free to rely on Yates's report in forming her own opinions regarding the DNA match"]; *People v. Campos* (1995) 32 Cal.App.4th 304, 308 ["On direct examination, the expert witness may state the reasons for his or her opinion, and testify that reports prepared by other experts were a basis for that opinion."].) We review the trial court's determination of whether to allow such testimony for abuse of discretion. (See *People v. Gardeley, supra*, 14 Cal.4th at p. 619.)

Our review of the record confirms the reasonableness of the trial court's ruling. Agent Evanilla did not rely entirely on the Department's validation report, nor did he attempt to pass off the Department's finding as his own. Although Agent Evanilla testified as to his reliance on the Department's validation of defendant as an associate, he did not quote from any report, detail its contents, or identify its authors. This was in keeping with the trial court's ruling in connection with defendant's pretrial Evidence Code section 352 motion to limit the scope of Agent Evanilla's proposed testimony. At that time, the court ruled that the Department's written reports would not be admitted in evidence. Rather, the expert would be permitted to identify those materials on which he relied in reaching his opinions. Any statements in those materials would be admissible solely to show the basis for the expert's opinion and not for their truth. The prosecution complied with that ruling. Accordingly, there was no violation of the rule that "[a]n expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts." (*People v. Campos, supra*, 32 Cal.App.4th at p. 308.)

Nor did Agent Evanilla invoke the Department's determination of defendant's *Eme* classification as the expert's own opinion. Rather, as one of the factors informing his opinion, the expert relied on the Department's validation of defendant as a Mexican Mafia associate in approximately 1994, when defendant was incarcerated at Folsom Prison. Agent Evanilla also noted that defendant did not dispute his *Eme* affiliation when the Department conducted its six-year review in 2000. When the agent referred to defendant's having been "validated" by the Department, the trial court instructed the jury that those materials were not offered for their truth, but solely to explain the expert's opinion. Thus, contrary to defendant's assertion, this was not a case in which the prosecution expert merely "summarize[d] out-of-court statements made by others." (*United States v. Lawson* (7th Cir. 1981) 653 F.2d 299, 302, fn. omitted.)<sup>9</sup>

Agent Evanilla also based his opinion as to defendant's active association with the Mexican Mafia on reports of two events in 2006, when defendant was in custody. Another Hispanic inmate housed in the gang unit asked defendant for permission to comply with an order from a deputy sheriff. In so doing, the inmate followed Mexican Mafia protocol. Moreover, the inmate addressed defendant with a Spanish term used to refer to Mexican Mafia associates. The second event occurred approximately one month later, when a jail inmate was caught holding a message for defendant from an *Eme* member with gang-related information to be relayed to "Joe-Joe," defendant's gang moniker. Again both reports were subject to the trial court's limiting instruction and neither report was admitted in evidence.

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<sup>9</sup> Defendant's reliance on *United States v. Lawson, supra*, 653 F.2d 299 is also misplaced for other reasons. Not only was the federal appellate court interpreting the Federal Rules of Evidence, but in the section of the opinion defendant quotes, the court was discussing a potential violation of the defendant's right to effective cross-examination under the Sixth Amendment. (*Id.* at p. 302.) As we explain *infra*, defendant forfeited that claim by failing to object on that ground below. "In any event, we are not bound by the decisions of lower federal courts." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 99, citing *People v. Avena* (1996) 13 Cal.4th 394, 431.)

Defendant is mistaken in his assertion that the trial court's ruling unfairly prevented him from testing the reliability of the Department reports on which the expert relied in formulating his opinion as to gang affiliation. Agent Evanilla testified in detail and from personal knowledge as to the manner in which the Department validated inmates as being Mexican Mafia members and associates. Among other things, investigators monitor the prison activities and outside communications of all Southern California Hispanic inmates to determine their relationship with the Mexican Mafia. If three independent investigators uncover a direct link between an inmate and a previously validated member or associate, the inmate will be deemed a validated member or associate. The Department reviews and updates its validations every six years. This is the very same kind of reliance the Supreme Court has approved in materially indistinguishable circumstances. (*People v. Gardeley, supra*, 14 Cal.4th at p. 620 [gang expert properly based his opinion on hearsay sources including "information from his colleagues and various law enforcement agencies"].) Moreover, in ruling that the expert could rely on the hearsay reports, the trial court did not prevent defendant from challenging the reliability of those reports directly by examining the authors of those reports. From the preliminary hearing and discovery, defendant had access to the hearsay documents themselves, but apparently made no effort to call the authors as witnesses.

Defendant's claim fares no better under the Confrontation Clause rubric. Most fundamentally, defendant made no timely and specific objection on that ground and thereby failed to preserve the issue for appellate review. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Defendant's objections on grounds of lack of reliability and foundation, relevance, speculation, and "outside the scope expert witness testimony" did not reasonably alert the trial court of a potential violation of defendant's Sixth Amendment right to confront adverse witnesses under *Crawford, supra*, 541 U.S. 36. In any event, neither the reports concerning the two jailhouse incidents nor the validation report were admitted in evidence, and the court unambiguously instructed the jury that statements in those reports were not to be considered for their truth, but only to support

Agent Evanilla's expert opinion.<sup>10</sup> As discussed *supra*, an expert's reliance on hearsay statements not offered for their truth does not run afoul of *Crawford*. (*People v. Ramirez, supra*, 153 Cal.App.4th at p. 1427; *People v. Thomas, supra*, 130 Cal.App.4th at p. 1210; see also *Tennessee v. Street, supra*, 471 U.S. at pp. 413-414; *Crawford, supra*, 541 U.S. at p. 59, fn. 9.) Again, in light of the trial court's unambiguous instructions as to the limited admissibility of the challenged testimony, there is no reasonable basis to find prejudice under the standard set forth in *Chapman v. California, supra*, 386 U.S. at page 24.

### **III. Ineffective Assistance of Counsel Claim**

Defendant argues his trial counsel rendered constitutionally ineffective assistance by effectively alerting the prosecution of the availability of recidivist enhancements against defendant. On the first day of trial, the defense moved to bifurcate the recidivism allegations under sections 667 and 1170.12, the three strikes law. In so doing, as the trial court pointed out, defense counsel overlooked the fact that the information contained no such allegations. The prosecutor said the omission was her oversight and moved to amend the information to include the allegations. The two prior serious or violent convictions at issue were the same ones already alleged in the information for purposes of the felon in possession of a firearm count. Trial counsel admitted that he had assumed they were separately alleged as strikes, and sought to convert his bifurcation motion into an opposition to the prosecution's motion to amend. The court granted the prosecution

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<sup>10</sup> In arguing the jury was required to consider the hearsay reports for their truth, defendant cites to language in the expert witness pattern instruction by the Judicial Council of California Criminal Jury Instructions (2006-2007), CALCRIM No. 332, which provides in part that jurors considering an expert opinion "must decide whether information on which the expert relied was true and accurate." That instruction, however, was not given in defendant's trial. Instead, the trial court gave CALJIC No. 2.80, which is not framed in terms of assessing the truth of the information relied upon.

motion, finding no unfair surprise to the defense. Defendant would later admit the truth of the recidivism allegations.

“To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel’s performance fell below an objective standard of reasonableness, i.e., that counsel’s performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 (*Strickland*).) “‘A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” (*Ibid.*) It is well settled that a reviewing court need not determine whether counsel’s performance was deficient before examining whether the defendant suffered prejudice as a result of alleged deficiencies: “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland, supra*, at p. 697.) Mere speculation does not meet the Sixth Amendment standard for demonstrating prejudice. (E.g., *In re Clark* (1993) 5 Cal.4th 750, 766.)

From the record, it is clear that the prosecution was well aware of the strike priors, having alleged them in the context of one of the counts in the original information. We therefore have no reason to doubt the prosecutor’s representation that her omission was a mere oversight that would have been corrected in any event. Of course, the defense was just as knowledgeable of the convictions, their legal significance, and the likelihood of their being alleged as strikes. Nor does it appear that defendant had any defense to the allegations. Accordingly, it would be a matter of pure speculation to find a reasonable likelihood that, but for trial counsel’s intervention, defendant would not have received a three strikes sentence. Alternatively, even assuming defendant’s failure to capitalize on the prosecutor’s oversight was outcome determinative, it is highly dubious whether defendant satisfied the prejudice prong of the *Strickland* test. The federal Supreme Court has identified “situations in which it would be unjust to characterize the likelihood of a

different outcome as legitimate ‘prejudice.’” (*Williams v. Taylor* (2000) 529 U.S. 362, 391-392.) In *Williams*, the high court recognized *Lockhart v. Fretwell* (1993) 506 U.S. 364 as a case in which “we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential ‘windfall’ to the defendant rather than the legitimate ‘prejudice’ contemplated by our opinion in *Strickland*.” (*Williams v. Taylor, supra*, 529 U.S. at p. 392.) That would seem to be the situation here as well.

#### **IV. Witness Davilla’s Identification**

Defendant argues his constitutional due process rights were violated by the trial court’s denial of his pretrial motion to exclude firefighter Davila’s tentative eyewitness identification testimony. We disagree.

The defense moved to exclude Davila’s identification testimony, arguing it was the product of an unduly suggestive photographic lineup because defendant’s photograph was the only one with the characteristics Davila had mentioned to the investigating officers—a bushy mustache and a completely bald head. The trial court found nothing unduly suggestive after examining the photospread and finding that all the persons depicted had moustaches, three or four of which were “heavy.” In addition, all of them had “varying degrees of hair or lack of hair.”

In *Manson v. Brathwaite* (1977) 432 U.S. 98, 114, the United States Supreme Court held: “[R]eliability is the linchpin in determining the admissibility of identification testimony . . . . The factors to be considered are set out in [*Neil v. Biggers* (1972)] 409 U.S. [188,] 199-200. These include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.” (See also *People v. Huggins* (2006) 38 Cal.4th 175, 243; *People v. Cunningham, supra*, 25 Cal.4th at p. 989.) In

*People v. Huggins, supra*, at page 243, the California Supreme Court held: ““In order to determine whether the admission of identification evidence violates a defendant’s right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances . . . . [¶] The defendant bears the burden of demonstrating the existence of an unreliable identification procedure.”” (*Ibid.*, quoting *People v. Cunningham, supra*, at p. 989; see also *Stovall v. Denno* (1967) 388 U.S. 293, 302.)

Defendant fails to carry his burden of showing the identification procedure was unduly suggestive. Our review of the record shows the trial court carefully reviewed the photographic lineup and assessed each of the aspects the defense raised as unfairly singling out defendant’s photograph. Defendant points to nothing in the record that undercuts the trial court’s findings. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217 [“All of the photographs were of Black males, generally of the same age, complexion, and build, and generally resembling each other. Thus, defendant’s photograph did not stand out, and the identification procedure was sufficiently neutral. [Citations.] Minor differences in facial hair among the participants did not make the lineup suggestive.”]; *People v. Cunningham, supra*, 25 Cal.4th at p. 990 [“All of the men have a mustache and some have other facial hair. Several have a hairstyle similar to that of defendant. Defendant was not the tallest, shortest, oldest, or youngest of the participants. His photograph was similar to that of the others”].)

Nor does defendant demonstrate Davila’s tentative identification was unreliable under the totality of the circumstances. At trial, Davila unambiguously identified Luna’s Gallant as the car that passed by him at a distance of 10 feet. It was not dark out at the time of Davila’s observations. The firefighter made a tentative identification of defendant as the Gallant’s passenger from a photographic lineup, writing it “almost looks like the man.” In court, Davila testified that defendant looked similar to the person in the passenger seat. Morales provided corroboration for Davila’s identification of the

getaway vehicle and defendant.<sup>11</sup> Additionally, the firefighter’s description of Luna was consistent with that offered by Detective Sica. There was no evidence that Davila was pressured to make an identification. Davila viewed multiple photospreads before choosing defendant’s photograph. These circumstances, combined with the fact that Davila candidly refused to make an unqualified identification from the photospread or in court, preclude a finding that “the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” (*Simmons v. United States* (1968) 390 U.S. 377, 384.)

## **V. Cumulative Error Claim**

Defendant argues that even if his claims of trial error were not sufficient singly to merit reversal of the judgment, the cumulative effect of the asserted trial errors requires reversal. “We disagree. We have either rejected his claims or concluded any assumed error to be nonprejudicial on an individual basis. The assumed errors are no more compelling when considered together.” (*People v. Avila* (2006) 38 Cal.4th 491, 615.)

## **VI. State Construction Penalty**

Government Code section 70372 provides that “there shall be levied a state court construction penalty, in the amount of five dollars (\$5) for every ten dollars (\$10) . . . upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses.” (Gov. Code, § 70372, subd. (a)(1).) That provision, however, exempts all restitution fines from the construction penalty calculation. (Gov. Code, § 70372, subd. (a)(3)(A).) At sentencing, the trial court imposed a restitution fine of \$10,000 under

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<sup>11</sup> We are aware that there was some inconsistency between the descriptions offered by Morales and Davila. The former told detectives that defendant wore a black sweater, not a white Oakland Raiders jersey, as Davila testified. However, Morales later clarified that he was not sure what defendant wore.

section 1202.4, along with three \$20 court security fees under section 1465.8, for a total of \$10,060. Based on that amount, the court assessed a Government Code section 70372 state court construction penalty of \$5,030. Defendant contends that only the \$60 court security fees were subject to the court construction penalty. The Attorney General concedes that the restitution fines were not subject to the construction penalty, but goes a step farther and argues the same is true for the court security fee. We agree with the latter position.

Recently enacted Legislative amendments exempt restitution fines from the construction penalty. (*People v. Walz* (2008) 160 Cal.App.4th 1364, 1372, citing, *inter alia*, Gov. Code, § 70372, subd. (a)(3)(A).) Those amendments “operate retroactively, and apply to this case.” (*People v. Walz, supra*, at p. 1372.) Read in concert, the 2007 amendments to Government Code section 70372 and section 1465.8 make it clear that the construction penalty does not apply to the security fee. Government Code section 70372 exempts “[a]ny penalty authorized by Section 1464 of the Penal Code” from the construction penalty. (Gov. Code, § 70372, subd. (a)(3)(B).) Section 1465.8 provides that the security fee “shall be in addition to the state penalty assessed pursuant to Section 1464 and may not be included in the base fine to calculate the state penalty assessment as specified in subdivision (a) of Section 1464.” (§ 1465.8, subd. (b).) Accordingly, the \$5,030 court construction penalty was erroneously imposed and must be stricken.

## DISPOSITION

The judgment is corrected to delete reference to the \$5,030 state construction penalty. The clerk of the superior court is to forward a copy of the amended abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.