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Court of Appeal, Second District, Division 2, California.

The PEOPLE, Plaintiff and Respondent,

v.

Luis GARCIA, Defendant and Appellant.

No. B211042.

(Los Angeles County Super. Ct. No. TA092382).

Aug. 12, 2009.

APPEAL from a judgment of the Superior Court of Los Angeles County. [Arthur M. Lew](#), Judge. Affirmed as modified.

[Richard A. Levy](#), 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, Susan Sullivan Pithey and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

[ASHMANN-GERST](#), J.

*1 A jury convicted appellant Luis Garcia of first-degree murder ([Pen.Code § 187](#), subd. (a)),^{FNL} and found true allegations that appellant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)), and personally and intentionally discharged a firearm, which proximately caused death (§ 12022.53, subds.(b-d)). Appellant was 16 years old at the time the charged offense occurred and was tried as an adult.

[FNL](#). All further statutory references are to the Penal Code unless otherwise indicated.

The trial court sentenced appellant to state prison for a term of 50 years to life: 25 years to life for the murder count, and 25 years to life for the firearm enhancement. The trial court imposed, but stayed, a sentence of 10 years on the gang enhancement.

Appellant contends the following on appeal: (1) the admission of appellant's confession to law enforcement officers violated his Fourteenth Amendment right to due process of law; (2) the trial court committed prejudicial error when it denied appellant's request for a continuance to locate a witness; (3) the trial court erred by denying appellant's motion for new trial, which appellant based on the prosecution's alleged refusal to assist appellant in locating a witness; (4) the prosecutor committed prejudicial misconduct during closing argument; (5) insufficient evidence supported the gang allegation; (6) the trial court committed prejudicial error when it failed to instruct on the element of specific intent for the gang allegation; and (7) the trial court imposed an unauthorized \$20 DNA collection fee. The Attorney General points out the trial court should have stricken the 10-year gang enhancement pursuant to [People v. Lopez](#), (2005) 34 Cal.4th 1002.

We modify the judgment to strike the 10-year gang enhancement and the \$20 DNA collection fee. We affirm the judgment in all other respects.

FACTS

I. Prosecution Evidence

On August 19, 2007, at approximately 3:00 p.m., Rene Leira (Leira) was brutally assaulted at Wilson Park in the City of Compton. Leira is a member of the Compton Varrio Vatos Lokos gang.

An hour later, Tramaine Thomas (Thomas) was shot six times in front of the apartment complex where his family lived, which was located on Spring Avenue, one block away from Wilson Park.^{FN2} Thomas, who lived in Arizona, was not affiliated with any gang.

^{FN2}. Thomas later died of multiple gunshot wounds. The medical examiner identified three gunshots to his chest, one to his back, and one to each arm.

Two witnesses testified to the circumstances surrounding the shooting. Melvin Barber (Barber), who lived on Willow Avenue (one block away from Spring Avenue), testified that he saw a white van pull up near the front of his house. He described the driver as a Latino man with a heavysset build. The driver sat in the van looking in the direction of Spring Avenue. Three to four minutes later, Barber heard two gunshots and then saw another man run from the direction of Spring Avenue, across a nearby field, and toward the white van, which drove off after he entered it. Barber described the second man as Latino, five feet five inches to five feet seven inches in height, and in his late teens or early twenties. At trial, Barber could not identify appellant as the second man, but testified that appellant had the same build as that man.

*2 Cecilia Washington (Washington) testified that as she was walking on Spring Avenue, she noticed a Hispanic man walking on the other side of the street in the same direction. After seeing the man stop in front of a building, she continued walking down Spring Avenue toward a grocery store. Shortly after she arrived at the store, she heard five gunshots. She looked through the store's front door, which was open, and saw the same man she had observed earlier run from the building he had stopped in front of and into a nearby field toward Willow Avenue. Washington testified that the man she saw running into the field was five feet three inches to five feet four inches in height, had short hair, and had the same general build as appellant. At trial, Washington could not identify appellant as the man she saw running, but testified appellant had the same build as that man.

On the same day, at approximately 9:00 p.m., Ramon Santana (Santana), a member of the Vatos Lokos gang, was standing near a vehicle parked in front of Wilson Park. As law enforcement officers approached Santana, he removed a pistol from his waistband and threw it into the backseat of the vehicle. The officers arrested Santana and found live rounds inside Santana's pockets. Santana and Leira, the person who was assaulted earlier in the day, were roommates.

The next morning, at approximately 1:00 a.m., law enforcement officers arrested appellant and appellant's brother Raul Garcia.^{FN3} At appellant's home, officers found six empty casings, various items bearing the Vatos Lokos gang name, and a white van parked in the driveway. The forensic identification deputy determined that the bullets lodged in the victim's body, the bullets recovered from the homicide scene, and the six expended casings found at appellant's home, were all fired from the same gun that officers recovered from Santana. Additionally, detectives found Raul's prints in the van.

^{FN3}. At the time of their booking, appellant was five feet five inches tall and weighed 140 pounds, and his brother was five feet six inches tall and weighed 210 pounds. Because appellant and his brother share the same last name, we will refer to appellant's brother as "Raul" in order to avoid confusion.

At approximately 9:00 a.m., appellant confessed to the murder of Thomas during a recorded interview. Over objection from the defense, the prosecution played the recording for the jury. During the interview, appellant made the following statements: On August 19, 2007, appellant was walking through Wilson Park

when appellant encountered his friend Leira, who had been assaulted so severely that he could not speak. Appellant was angry and obtained a gun and live rounds from Santana's home. Appellant walked on Spring Avenue until he encountered Thomas standing in the front yard of an apartment. Believing that Thomas was involved in Leira's assault, appellant shot Thomas. Appellant ran from the scene and toward a burger stand. At one point, Raul picked him up in a van. Appellant stated during the interview that he had "buddies" in the Vatos Lokos, but was not a member.

Officer Peter Hecht testified as the prosecution's expert on gangs. Officer Hecht testified that the Vatos Lokos gang originated in Compton some time ago and that the gang had approximately 20 members at the time of trial. Vatos Lokos territory included Glencoe Avenue, the street on which appellant lived. Some members of a rival gang, the Grape Street Crips, lived on Spring Avenue, the street on which the homicide occurred.

*3 Officer Hecht testified that the items found in appellant's home were "typical things [that] you see at a gang member's house" and that appellant was a member of the Vatos Lokos gang. Officer Hecht testified that the primary activities of the Vatos Lokos gang included robberies, carjackings, armed assaults, murders, and rapes. Officer Hecht opined that appellant's act of killing Thomas benefitted the Vatos Lokos because it bolstered the gang's reputation of being violent and quick to respond to any challenge against their members.

II. Defense Evidence

Appellant did not testify.

DISCUSSION

I. Admission of Appellant's Statements to Police

A. Appellant's Argument

Appellant contends the trial court should have suppressed his confession because it was involuntary, thereby violating his Fourteenth Amendment right to due process. According to appellant, his confession was the direct result of the interrogating officers' false promises of leniency and misleading statements about the strength of evidence the prosecution had against appellant. Appellant maintains that absent these inducements and misrepresentations, he would not have confessed to killing Thomas.

B. Relevant Authority

"The litmus test of a valid waiver or confession is voluntariness. 'The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.' [Citation.]" ([People v. Kelly \(1990\) 51 Cal.3d 931, 950.](#)) "In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" ([People v. Massie \(1998\) 19 Cal.4th 550, 576](#) (*Massie*).)

A confession is involuntary if it was motivated by a promise of leniency or benefit to the defendant, whether express or implied. ([In re Shawn D. \(1993\) 20 Cal.App.4th 200, 210](#) (*Shawn D.*).) "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]" ([People v. Jimenez \(1978\) 21 Cal.3d 595, 611](#) (*Jimenez*), overruled on other grounds in [People v. Cahill \(1993\) 5 Cal.4th 478, 509-510, fn. 17.](#))

The prosecution must establish the voluntariness of a confession by a preponderance of the evidence. ([Massie, supra, 19 Cal.4th at p. 576.](#)) "[T]he burden is greater in the case of a juvenile than the case of an adult." ([In re Anthony J. \(1980\) 107 Cal.App.3d 962, 971.](#)) The "general rule" is that "a minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." ([People v. Lara \(1967\) 67 Cal.2d 365, 383](#); see also [Massie, supra, 19 Cal.4th at p. 576](#)["[u]nder both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession"].)

*4 “On appeal, we view independently the trial court's determination on the ultimate legal issue of voluntariness.” (*People v. Williams (1997) 16 Cal.4th 635, 659-660.*) “But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including ‘the characteristics of the accused and the details of the interrogation’ [citation] are subject to review under the deferential substantial evidence standard.” (*Id. at p. 660.*)

C. Summary of Interview and Proceedings Below

The record shows that two officers interviewed appellant on August 20, 2007 from 8:57 a.m. to 9:50 a.m. After reading appellant his *Miranda*^{FN4} rights, the officers asked appellant whether he was willing to speak with them without an attorney present, and appellant agreed to do so. The officers began by telling appellant that an African-American man had been killed on Spring Street and that authorities had located the weapon used in the homicide. They asked appellant: “What do you know about that?” Appellant replied: “Nothing.”

[FN4. *Miranda v. Arizona \(1966\) 384 U.S. 436* \(*Miranda* \).](#)

The officers told appellant that they believed he was involved in the homicide based on the following evidence: a van owned by appellant's parents was used in the homicide, appellant's brother was driving the van, and appellant and his brother stopped at a friend's house to pick up a gun before the homicide. Appellant made an inaudible response, and the officers continued with: “Okay. All right. But you need to look in your heart and be honest about this. Okay? Because you could be tried as an adult here because you meet that age criteria. You need to show remorse. In other words, do you feel bad about what happened, that you killed a man.” Appellant began shaking his head and the officers told him: “You know why there's two different laws, there's juvenile laws and there's adult law? It's so that when people who are under the age of 18 get in trouble they want to find out if this person can be rehabilitated or they don't care.... You can do things that are different. Now, this—we're talking about murder. This is a very, very serious charge. Okay? Serious.” After appellant informed the officers that he had never committed an act of violence before, the officers went on to say: “Okay. So, you made a terrible mistake here. You made a terrible mistake here. It's-how old are you, 16-years-old? You're 16-years-old. If you get tried as an adult for this you could go away for a-for your life. I can't make you any promises and I wouldn't do that but we need to know the truth and we need to know what you were thinking in your heart.”

The officers went on to tell appellant that witnesses had identified appellant as walking up to the victim, shooting the victim, and running into a van driven by his brother. The officers said to appellant: “I know you want to tell us. You can't—I don't think anybody should be killed but-but they were-kept screwing with you guys. They kept screwing with your brother. Okay? You sent a message-it was the wrong message but-but I could see where you, especially a young kid like you, could think that that's the answer. Okay?” The officers urged appellant: “Now we need an explanation. You need to be honest. You do. So, what happened? What happened? What ...”

*5 Appellant interrupted and asked the officers: “What will happen to me?” The officers replied: “Well, you-and that's why I -got-you're going to be charged with it. You're going to be charged with the murder. Okay? When I-when we-right now we have to—we'll present it to the juvenile system but they'll make a decision whether or not they're going to try you as an adult or not. And, they'll want to know do you feel bad about what happened. If you don't show any remorse I can tell you now that won't look good for you.”

Appellant then told the officers that he was angry when he saw Leira had been assaulted, that he picked up a gun and live rounds from a friend's house, and that he shot the victim in the front yard of an apartment building. Appellant revealed details of how he obtained the gun, where he went after he shot the victim, and what he did with the weapon and his clothing after the shooting. During the interview, appellant denied being a member of the Vatos Lokos gang but acknowledged that he had “buddies” in that gang.

Prior to trial, appellant moved to suppress his confession on the ground that it was involuntary. After listening to a recording of the interview and reading a transcript of the interview, the trial court denied the

motion. Based on the totality of the circumstances, the trial court found that the interview “was not coercive at all.” The court explained: “I’ve heard a lot of recordings, and this probably—this probably shows two of the nicer detectives interviewing an individual, and I was quite impressed with it from that standpoint. They were very friendly and warm toward him.” The court acknowledged that appellant was 16 years old at the time of the interview, but noted “16 is enough to know what’s going on and understand what Miranda rights are and to knowingly, intelligently give them up.”

D. Statement Properly Admitted

As stated in [People v. Cahill \(1994\) 22 Cal.App.4th 296](#), “[t]he application of the axiom that involuntary confessions are not admissible is not always a simple matter; the concept of voluntariness is multifaceted and has been described as a ‘potential morass.’ [Citation.]” (*Id.* at p. 310.) Based upon the totality of circumstances here, we conclude that this is not a case where the defendant’s confession was a result of coercion.

The record negates appellant’s contention that the officers made an implied promise of leniency in charging or punishing appellant. During the interview, one of the officers explained to appellant that he could be tried as a juvenile or as an adult, but added: “*I can’t make you any promises and I wouldn’t do that but we need to know the truth and we need to know what you were thinking in your heart.*” (Italics added.) When appellant asked the officers what would happen to him, the officers told him: “You’re going to be charged with the murder.” They went on to tell him that although they would present his case to the juvenile system, someone other than the officers would make a decision whether he would be tried as an adult. In our view, there was no express or implied promise of leniency.

*6 The officers certainly urged appellant to tell the truth and represented to appellant that it could be in his benefit to do so. These exhortations, however, were within the permissible bounds of telling appellant that it would be in his advantage to be truthful because the officers did not attach a promise of leniency with the exhortations. ([Jimenez, supra, 21 Cal.3d at p. 611](#) [“mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary”]; [People v. Hill \(1967\) 66 Cal.2d 536, 549](#) [“w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity”]; [In re Anthony J., supra, 107 Cal.App.3d at p. 969](#) [15 year old defendant’s confession held voluntary where officers told defendant that if he told the truth, the officers would tell the court that defendant was cooperative and would play the taped confession to the court “to show how cooperative the minor had been”].)

Appellant likens the circumstances of his case to [In re Roger G. \(1975\) 53 Cal.App.3d 198](#) (*Roger G.*), and [Shawn D., supra, 20 Cal.App.4th 200](#), two cases where courts have found confessions by minors involuntary. *Roger G.* and *Shawn D.*, however, are distinguishable.

In *Roger G.*, the defendant persistently refused to confess to the crime he was charged with. ([Roger G., supra, 53 Cal.App.3d at p. 200.](#)) Faced with his persistent refusal, the officers told him if he was tried as an adult, he could receive a life sentence. (*Ibid.*) When the defendant asked to speak to other minors implicated in the crime, the officers told the defendant that if he “‘want[ed] to be that way,’” the officer would see to it that defendant would be tried as an adult. (*Ibid.*) The officers went on to tell defendant that if he was not truthful and instead acted “hard-nosed and just lie and, try to cover up, do you think *we’d* give you a chance at probation or parole? No way.” (*Id.* at p. 201, italics added.) Defendant subsequently confessed.

The Court of Appeal held that the confession was involuntary because “the uncontradicted facts establish[ed] that the interrogating police officers threatened Roger with certification to the adult court if he did not talk and promised him that they would help him to secure parole if he did.” ([Roger G., supra, 53 Cal.App.3d at p. 203.](#)) The Court of Appeal found particularly problematic the fact that “the interrogators sought to convey to the juvenile that as police, they had the power to determine whether he would be tried as an adult ... and that they would exercise the power if he did not admit his part in the crime.” ([Id.](#) at p. 204.)

Here, unlike in *Roger G.*, the officers did not represent to appellant that they had the power to determine whether he would be tried as a juvenile or an adult. Nor did they threaten appellant that he would be tried as an adult if he did not confess. The record shows that the officers informed appellant they would not make any promises about whether he would be tried as a juvenile or an adult, and that someone other than the officers would make that decision.

*7 The case of *Shawn D.*, [supra](#), 20 Cal.App.4th 200 is likewise inapposite. In that case, the defendant was arrested, along with his friend, for a home burglary. ([Id. at p. 203.](#)) The interrogating officer, in the face of defendant's consistent denials of wrongdoing, represented to the defendant that if defendant was truthful, the officer would let him go home to see his girlfriend and baby and that if defendant assisted the officer in recovering the stolen property, the officer would “personally talk to the D.A. or persons who do the juvenile.” ([Id. at 207.](#)) The Court of Appeal held that the defendant's confession was involuntary, because “[t]he promise of leniency in exchange for a confession permeated the entire interrogation.” ([Id. at p. 216.](#))

Here, the officers did not permeate their interrogation with a promise of leniency in exchange for cooperation. When appellant asked them “What will happen to me,” the officers truthfully told him that he would be charged with murder. Moreover, unlike in *Shawn D.*, the officers did not represent to appellant that they would let him return home if he was truthful, nor did they misrepresent the nature and extent of his possible culpability. At most, they explained to him that if he told the truth and showed remorse, it was possible that a court might look upon that favorably. As explained above, such exhortations were entirely permissible.

It is true, as appellant points out, that the officers in this case exaggerated the nature of the eyewitness testimony against appellant. During the interrogation, the officers told appellant that witnesses had identified appellant as walking up to the victim, shooting the victim, running toward a van driven by his brother and leaving in that van. In fact, the two eyewitnesses for the prosecution testified only that the person they saw running after the gunshots shared the same physical build as appellant. “Numerous California decisions confirm that deception does not necessarily invalidate a confession.” ([People v. Thompson \(1990\) 50 Cal.3d 134, 167.](#)) Courts have upheld the admission of a confession where the officer's “ ‘deception was not of a type reasonably likely to procure an untrue statement.’ [Citations.]” ([Ibid.](#), citing [In re Walker \(1974\) 10 Cal.3d 764](#) [upholding confession where officers deceptively told defendant that he would die before he reached the hospital]; [People v. Watkins \(1970\) 6 Cal.App.3d 119](#) [upholding confession where officers deceptively told defendant that his fingerprints were found on the getaway car].)

In our view, the deceptions employed by the officers in this case were not of the type reasonably likely to procure an untrue statement from appellant. [People v. Watkins, supra, 6 Cal.App.3d 119](#) is instructive. In that case, the defendant was arrested for robbing a liquor store with two other individuals. The interrogating officer informed the defendant that his fingerprints were found on the getaway vehicle, when in fact no such prints were found. ([Id. at p. 124.](#)) The Court of Appeal held that the officer's deception would not likely procure a false confession because it “was not of the type to induce an innocent man to implicate himself in the crime.” ([Id. at p. 125.](#)) Likewise, the officers' statements in this case that witnesses had seen defendant commit the crime would not have prompted an innocent person to implicate himself. The shooting happened on a public street that could have been accessed by anyone and an innocent person would more likely challenge the veracity of the eyewitness accounts rather than implicate himself in a homicide he did not commit.

*8 Finally, other circumstances militate against coercion in this case. The transcript of the confession reveals no harsh language on the part of the officers reflecting coercion, which comports with the trial court's assessment of how the officers conducted the interview. Furthermore, the officers finished the interview in about an hour, a duration that falls within the permissible scope of interrogation times. (Compare [In re Anthony J., supra, 107 Cal.App.3d at p. 968, fn. 5](#) [interrogation of 15 year old for three and half hours held not coercive] with [People v. Alfieri \(1979\) 95 Cal.App.3d 533, 545](#) [interrogation of 17 year old for over 20 hours held coercive].) While it is true that defendant had no prior experience with the criminal justice system and was in high school, these factors alone do not necessitate a finding of

involuntariness. Under the totality of circumstances, we conclude that none of the interrogation techniques used by the officers were so coercive as to result in a statement that was involuntary. ([People v. Ray \(1996\) 13 Cal.4th 313, 340](#) [“The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable”].)

II. Denial of Continuance A. Appellant's Argument

Appellant contends the trial court committed prejudicial error when it denied his motion to continue the trial in order to locate Perla Montes (Montes), a witness who appellant claims could have provided exculpatory evidence.

B. Relevant Authority

A trial court may grant a continuance in a criminal case only for good cause. (§ 1050, subd. (e).) “To establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.” ([People v. Howard \(1992\) 1 Cal.4th 1132, 1171 \(Howard\)](#)). “The granting or denial of a continuance during trial traditionally rests within the sound discretion of the trial judge.” (*Ibid.*)

C. Summary of Proceedings Below

On Friday, May 30, 2008, two days before the start of trial, defense counsel informed the trial court that he had been attempting to locate Montes. Counsel explained that the district attorney gave him Montes's last known address, but that Montes was no longer at that address and was on probation. Counsel requested that the trial court enter an order requiring the probation department to cooperate with the defense investigator. The trial court granted the request and signed the order that day.

On Monday, June 2, 2008, during the morning session, defense counsel requested that the trial court issue a bench warrant for Montes, but not release the warrant until the next morning. The trial court granted counsel's request.

*9 On Tuesday, June 3, 2008, during the morning session, the trial court continued holding the bench warrant based on defense counsel's request. Trial commenced on this date with the parties' opening statements.

On Wednesday, June 4, 2008, the prosecution continued presenting its evidence. Defense counsel did not request that the trial court release the bench warrant on Montes.

On Thursday, June 5, 2008, the third day of trial, defense counsel requested that the trial court release the bench warrant.

On Friday, June 6, 2008, the defense investigator, Robert Freidman (Freidman), explained to the trial court that he served Montes with a subpoena multiple times the previous week and asked Montes's probation officer to assist him in bringing Montes to court. Additionally, defense counsel made the following offer of proof: Montes would testify that on the afternoon of the shooting, she was standing at Wilson Park when she saw Raul arrive at Santana's house in a white van. She saw Raul talk to Santana, and saw both Raul and Santana drive off in the white van. A few minutes later, she heard gunshots. According to defense counsel, Montes's testimony supported the defense theory that Santana was the shooter.

The prosecutor argued that even though he did not believe Montes's testimony was probative, he nevertheless would agree to continue the matter. The trial court continued the matter to Monday, June 9, 2008, and issued a minute order (per appellant's request) “request[ing] the assistance of the disarm[ament] unit of the probation department in securing the presence of Perla Montes as a witness in this case.”

On Monday, June 9, 2008, Freidman told the trial court that over the weekend, he checked Montes's known addresses but could not find her. Moreover, Freidman related that he spoke to the supervisor of the

probation department's disarmament unit and the supervisor told him that “[i]t would take a couple of weeks to get together and mount up to check addresses to go get her.”

Defense counsel, perhaps recognizing the futility of searching for Montes within a reasonable time period, added: “Yes, your Honor, it appears that she is in the wind.” Although counsel requested a further continuance “for the record,” he also stated that “I understand [the] court's interest in the administration of justice” by proceeding forward without Montes. The trial court explained that if it “had a little more information” about when Montes might be in court, it would consider a continuance. It denied the request for a continuance, however, because it was “totally open-ended” about when she would appear.

D. Denial of Continuance Was Proper

Under the deferential standard articulated in *Howard*, appellant's attempt to establish good cause for a continuance was inadequate in two salient respects:

First, appellant did not show that Montes's proposed testimony would have been material. According to appellant's offer of proof, Montes would have testified that she saw Raul drive to Santana's house and that Raul and Santana left together in Raul's van minutes before the shooting. This is entirely consistent with appellant's confession wherein he stated that he obtained a gun from Santana's house, that he walked along Spring Avenue until he saw the victim, and that Raul picked him up at some point after the shooting. It is also consistent with Barber's testimony that he saw one male parked inside the van before the shooting. Santana could have been sitting in the back of the van outside of Barber's view, or he could have exited the van prior to its arrival in front of Barber's home. In short, Montes's proposed testimony would have raised no contradictions in the evidence already presented at trial.

*10 Second, appellant did not show that he could procure Montes's attendance in court within a reasonable time. After more than a week of searching for Montes, defense counsel acknowledged to the trial court that she was “in the wind.” While defense counsel sought a continuance “for the record,” he conceded that the “court's interest in the administration of justice” militated in favor of going forward without Montes. Nonetheless, appellant contends on appeal the trial court “knew that the delay would likely not be longer than two weeks,” and could have been just “a few days.” The record does not support this contention. According to the defense investigator, the probation department told him that “[i]t would take a couple of weeks to get together and mount up to check addresses to go get her.” At most this was an assurance that it would take a couple of weeks to begin searching for Montes, and not an assurance that she would be found. The investigator had already checked the known addresses for Montes to no avail; it was reasonable for the trial court to believe that the probation department would be unsuccessful as well.

In sum, we conclude the trial court acted within its broad discretion in denying appellant's request for a continuance. Because we conclude the trial court acted within its broad discretion, appellant's constitutional claims are foreclosed. ([People v. Riggs \(2008\) 44 Cal.4th 248, 297.](#))

III. Motion for New Trial A. Appellant's Argument

Appellant argues that he is entitled to a new trial because the prosecution failed “vigorously” to use its “influence” in assisting the defense in locating Montes. Had the prosecution used its so-called influence, appellant contends, “it is likely that she would have been brought in.”

B. Relevant Authority

We review the trial court's denial of a motion for new trial under the abuse of discretion standard. ([People v. Navarette \(2003\) 30 Cal.4th 458, 526.](#))

“While a defendant's right to have process to compel the attendance of witnesses in his behalf is conceded, it is not the duty of public officials to locate or assist a defendant in locating a witness whose whereabouts is unknown to them or to the defendant himself.” ([People v. Bailey \(1949\) 91 Cal.App.2d 578, 580](#) (*Bailey*).)

C. Analysis

The record below shows that when the defense asked the prosecutor if he knew the whereabouts of Montes, the prosecutor spoke to the investigating officers and learned that Montes was on probation. He provided this information to the defense, along with Montes last known address. When the defense asked the prosecutor to direct sheriff's agents to locate Montes and arrest her, the prosecutor refused. In our view, the prosecutor acted appropriately.

As explained above, the prosecution need not “locate or assist a defendant in locating a [defense] witness whose whereabouts is unknown to [the prosecution] or to the defendant himself.” ([Bailey, supra](#), 91 Cal.App.2d at p. 580.) There is no evidence in the record to support appellant's bald assertion that the prosecution *knew* the whereabouts of Montes. The prosecution only knew of the addresses in her probation report, and as testified by the defense investigator, she was nowhere to be found at these addresses. We are aware of no authority (and appellant cites no such authority) that requires the prosecution to assist the defense by directing law enforcement officers to search for and arrest a witness for trial. [U.S. v. Filippi \(1st Cir.1990\) 918 F.2d 244](#) and [People v. Carrillo \(2008\) 163 Cal.App.4th 1028, 1031-1032](#) are inapposite because both cases strictly address the propriety of a prosecutor's blanket refusal to request an immigration visa for an out-of-country exculpatory defense witness when only the prosecutor could make such a request. The current situation involves no such facts.

*11 For these reasons, we conclude the trial court acted within its discretion when it denied appellant's new trial motion.

IV. Prosecutorial Misconduct A. Appellant's Argument

Appellant contends the prosecutor committed two types of misconduct during his closing argument: First, urging the jury to convict appellant as a means of combating the broader local gang problem, and second, appealing to the jury's passion and prejudice during his closing argument.

In the first category of misconduct, appellant cites to the following portions of the closing argument: (1) On the topic of shootings in Los Angeles and Compton, the prosecutor argued to the jury: “And at some point we really have to stop this culture.” (2) On the topic of gun use, the prosecutor argued to the jury that “the times [of] Leave It To Beaver and Ozzie and Harriet ... are just gone for us.” (3) On the topic of how Thomas was shot four or five times in front of his family's home, the prosecutor asked the jury: “Really, what have we gone to? Where have we gone as a society and as a community?”

In the second category of misconduct, appellant cites to the following portions of the closing argument: (1) On the topic of why he believed appellant did not commit voluntary manslaughter, the prosecutor argued to the jury: “Do not victimize Tramaine Thomas twice, a second time, by even giving any thought to this being a voluntary manslaughter. Because then, basically, we might as well get rid of murder in the Penal Code.” (2) On the topic of whether appellant's confession was false, the prosecutor argued to the jury: “If in this day and age a confession is not enough for a conviction, let's just pack it in. Let's just call it a day. We might as well not even have a courtroom. Let people do what they want to do. And when they take responsibility for it and admit to it, it doesn't matter. False confession.”

Appellant made no objection to the prosecutor's closing argument below.

B. Relevant Authority

In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. ([People v. Earp \(1999\) 20 Cal.4th 826, 858](#).)

The Supreme Court in [People v. Alfaro \(2007\) 41 Cal.4th 1277](#) (*Alfaro*), recently reiterated the following well-established legal principles regarding prosecutorial misconduct: “A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ‘unfairness as to make the resulting conviction a denial of due process.’” ([Darden v. Wainwright \(1986\) 477 U.S. 168, 181](#); see [People v. Cash \(2002\) 28 Cal.4th 703, 733](#).) Under state law, a prosecutor who uses such methods commits

misconduct even when those actions do not result in a fundamentally unfair trial. ([People v. Frye \(1998\) 18 Cal.4th 894, 969](#) [(Frye)].)” (*Alfaro, supra*, at p. 1328.)

*12 “To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.” ([Frye, supra, 18 Cal.4th at p. 970.](#)) We consider the statements in the context of the entire argument ([People v. Dennis \(1998\) 17 Cal.4th 468, 522](#)) and the reviewing court may not “ ‘lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*Frye, supra*, at p. 970.)

“A prosecutor is allowed to make vigorous arguments and may even use such epithets as are warranted by the evidence, as long as these arguments are not inflammatory and principally aimed at arousing the passion or prejudice of the jury.” ([People v. Pensinger \(1991\) 52 Cal.3d 1210, 1251.](#))

C. No Misconduct

As a threshold matter, we conclude the issue of prosecutorial misconduct is forfeited on appeal because trial counsel failed to object to any portion of the prosecutor’s closing argument at trial. The record fails to support appellant’s claim that his failure to object constituted an exception to the general rule of waiver. The complained-of comments were not so prejudicial that an objection and request for an admonishment would have been futile in dispelling any prejudice.

Forfeiture aside, we conclude the statements cited above do not rise to the level of misconduct based on our review of the prosecutor’s entire argument.

First, while it is true that the prosecutor raised the issues of community safety and the prevalence of guns during his closing argument, the prosecutor did not argue to the jury that it should convict appellant solely to achieve these goals, or to solve the broader gang problem. Rather, the prosecutor went over the evidence adduced at trial and argued that appellant should be convicted of murder *based* on this evidence. As explained in [United States v. Monaghan \(D.C.Cir.1984\) 741 F.2d 1434, 1441](#), a case cited by appellant, because the prosecutor did not urge the jury to convict appellant for reasons “wholly irrelevant to his own guilt or innocence,” the prosecutor’s arguments fell within the permissible boundaries of closing argument.^{FN5}

[FN5. In re Brian J. \(2007\) 150 Cal.App.4th 97](#), cited by appellant, is inapposite. In that case, the defendant was committed to the California Youth Authority after sexually assaulting an eight-year-old victim. ([Id. at p. 105.](#)) During the trial on the People’s petition to extend the commitment, the prosecutor argued to the jury that it could protect the community by extending the commitment period, that the prosecutor personally believed it was likely that defendant would reoffend if released, and that the eight-year-old victim would likely commit sexual assault in the future. ([Id. at pp. 121-122.](#)) Affirming the trial court’s ruling that the prosecutor committed misconduct, the Court of Appeal focused on the prosecutor’s statements implying facts not in evidence (i.e., that the victim would commit assault in the future), and his interjection of his personal views (i.e., that he believed defendant would reoffend). ([Id. at p. 123.](#)) Contrary to what appellant contends, the court did not criticize the prosecutor’s reference to protecting the community.

Second, the prosecutor’s statements urging the jury to reject appellant’s heat of passion argument and disbelieve appellant’s claim that his confession was false did not improperly appeal to the passion and prejudice of the jury. It is well-settled that a prosecutor “ ‘may vigorously argue his case’ “ in his closing statement. ([People v. Fields \(1983\) 35 Cal.3d 329, 363.](#)) In our view, that is what occurred here. On the issue of murder versus manslaughter, the prosecutor went over the evidence adduced at trial demonstrating premeditation and not heat of passion, and the statement about victimizing Thomas a second time by convicting appellant of something less than murder was vigorous argument and not inflammatory. As to the prosecutor’s argument urging the jury to reject appellant’s theory that his confession was involuntary, it was made during rebuttal and in direct response to the defense’s theory that the police “dressed” appellant up as the killer.

*13 In sum, while the prosecutor vigorously argued the case, his argument did not constitute misconduct.^{FN6}

[FN6](#). Because we find that the prosecutor's comments were unobjectionable, it follows that appellant's contention that defense counsel was ineffective for failing to object or otherwise preserve the issue for appeal fails. (*People v. Avena* (1996) 13 Cal.4th 394, 421.) Additionally, because we conclude the trial court did not abuse its discretion in denying the continuance and that the prosecutor did not commit misconduct, we necessarily reject appellant's passing argument that these purported errors were cumulatively prejudicial.

V. Gang Enhancement and Alleged Instructional Error A. Appellant's Argument

Appellant argues substantial evidence does not support the gang enhancement because there was insufficient evidence of: (1) the Vatos Lokos's primary activities, and (2) appellant's specific intent to promote, further, or assist in criminal conduct by gang members *beyond* the charged offense, citing [Garcia v. Carey](#) (9th Cir.2005) 395 F.3d 1099.

On this latter point, appellant also argues that the trial court committed prejudicial error by not instructing the jury that section 186.22, subdivision (b)(1) requires a showing that appellant had the specific intent to promote, further, or assist in criminal conduct by gang members *beyond* the charged offense.

B. Relevant Authority

To obtain a true finding on an allegation of a criminal street gang enhancement, the prosecution must prove the crime at issue was “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22, subd. (b)(1).) Also, the prosecution must prove that a gang is a “criminal street gang” that has as one of its “primary activities” the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and that it has engaged in such a “pattern of criminal gang activity” by committing two or more such “ ‘predicate offenses.’ ” (§ 186.22, subds.(e) & (f); [People v. Gardeley](#) (1996) 14 Cal.4th 605, 617.)

In determining the sufficiency of the evidence to support a jury's true finding, “ ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” ([Jackson v. Virginia](#) (1979) 443 U.S. 307, 319.) “[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ ” ([People v. Johnson](#) (1980) 26 Cal.3d 557, 578.)” ([People v. Leon](#) (2008) 161 Cal.App.4th 149, 156-157.)

C. Sufficient Evidence Supports the Enhancement; No Instructional Error

Appellant contends insufficient evidence supports the jury's finding that the Vatos Lokos's primary activities included one or more of the crimes enumerated in section 186.22, subdivision (e). We turn to the relevant portion of Officer Hecht's direct testimony:

“Q: What are some of the primary activities of the Compton Varrio Vatos Lokos?”

“A: Well, the Vatos Lokos are involved in all of the different types of crimes that we have in our community. Including the violent crimes such as robberies, carjackings, armed assaults, and even murder.

*14 “Q: They also include rape?”

“A: Yes.

“Q: And some of the lesser crimes-I don't know if you would call them lesser, but witness intimidation, vandalism, car theft, things like that?”

“A: Yeah, those are things-like vandalism is one-is the primary activity. They graffiti everywhere. And witness intimidation is a staple ... of the gang life.”

According to appellant, Officer Hecht's testimony supports the fact that the Vatos Lokos were merely “involved” in one or more of the crimes enumerated in section 186.22, subdivision (e), and *not* that the gang engaged in these crimes as their “primary activities.” We are not convinced by appellant's argument. The prosecutor specifically asked Officer Hecht to list “some of the *primary activities*” of the gang and in direct response to this question, Officer Hecht listed robberies, carjackings, armed assaults, and murder, all of which are enumerated in section 186.22, subdivision (e). Thus, appellant is simply incorrect when he asserts that Officer Hecht side stepped the question. The fact that Officer Hecht did not parrot the language of the question posed to him is inconsequential in this context. ([People v. Margarejo \(2008\) 162 Cal.App.4th 102, 107](#) [expert's failure to use exactly the phrase “ ‘primary activities’ “ was inconsequential because the prosecution used that term in its question; court explained: “[c]ounsel's questions themselves are not evidence, but the question's wording typically is relevant to a reasonable interpretation of the witness's answer. Often it is vital to consider the question to understand anything about the answer”].)

[In re Alexander L. \(2007\) 149 Cal.App.4th 605](#), cited by appellant, is not on point. In that case, the Court of Appeal held that an expert's testimony on a gang's primary activities did not support the gang enhancement because it was “impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.” ([Id. at p. 612.](#)) Appellant raises no such foundational issues here.

Appellant further contends that the evidence does not support a finding that he had the “specific intent to promote, further, or assist in any criminal conduct by gang members.” (§ 186.22, subd. (b)(1).) Relying on the majority opinions in [Garcia v. Carey, supra, 395 F.3d 1099](#) and [Briceno v. Scribner \(9th Cir.2009\) 555 F.3d 1069](#), appellant asserts that the statute requires a showing of intent to promote, further, or assist the gang's criminal activity *beyond* the charged crime.^{FN7} This court agrees with the decision in [People v. Hill \(2006\) 142 Cal.App.4th 770](#), which specifically rejected the argument posed by defendant here. The plain language of section 186.22, subdivision (b)(1) requires a showing of a specific intent to promote, further, or assist in *any* criminal conduct by gang members, which can include the charged offense. ([People v. Hill, supra](#), at pp. 773-774; accord [People v. Romero \(2006\) 140 Cal.App.4th 15, 19-20](#) and [People v. Villalobos \(2006\) 145 Cal.App.4th 310, 322.](#))

FN7. Appellant also cites to [People v. Ramon \(July 7, 2009, F054603\) 175 Cal.App.4th 843 \[2009 WL 1929841\]](#) in his supplemental letter brief to the court. We have reviewed that case and conclude it is inapposite.

*15 For this same reason, we reject appellant's argument that the trial court committed error by not instructing the jury that section 186.22, subdivision (b)(1) requires a showing that appellant had the specific intent to promote, further, or assist the gang's criminal activity *beyond* the charged crime.

Although we uphold the jury's findings as to the gang enhancement, we strike the 10-year sentence imposed by the trial court pursuant to section 186.22, subdivision (b)(1)(C). Because the jury convicted appellant of first-degree murder, an offense that carries a minimum sentence of 25 years to life in state prison, appellant's gang enhancement is governed by the 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). ([People v. Lopez, supra, 34 Cal.4th at pp. 1007-1008.](#)) Of course, our modification of the judgment has no practical effect because appellant's conviction for first-degree murder carries a 25-year minimum parole eligibility term. (§ 190, subs. (a) & (e).)

VI. DNA Fee

At sentencing, the trial court imposed the following fines: (1) a \$10,000 restitution fine; (2) a \$10,000 parole revocation restitution fine; (3) a \$20 court security fee; (4) a direct fine of \$644.60 to the victim's

mother; (5) a \$7,500 fine to the Victim's Compensation Board; and (6) a \$20 DNA collection fee. Appellant argues that the trial court had no authority to impose the \$20 DNA collection fee because under [Government Code section 76104.7](#), the fee is calculated as a percentage of qualifying fines, and none of the other fines imposed by the trial court qualifies as a basis for imposing the DNA fee.

The Attorney General agrees that the DNA fee was “improperly imposed” because the “fines and restitution imposed by the trial court did not provide a basis for the DNA penalty assessment.” The Attorney General, however, maintains that appellant forfeited his right to challenge this fee on appeal by failing to object to its imposition below.

“As a general rule, only ‘claims properly raised and preserved by the parties are reviewable on appeal.’ ([People v. Scott \(1994\) 9 Cal.4th 331, 354.](#))” ([People v. Smith \(2001\) 24 Cal.4th 849, 852.](#)) “We have, however, created a narrow exception to the waiver rule for ‘unauthorized sentences’ or sentences entered in ‘excess of jurisdiction.’ “ (*Ibid.*) Included within the scope of this exception are fines imposed without a statutory basis, which “are so obvious and so easily fixable that correction of these errors in the absence of an objection at sentencing will not unduly burden the courts or the parties.” (*Id.* at pp. 853-854 [declining to find forfeiture where defendant did not object to erroneous amount of parole revocation fine].)

For these reasons, we reject the Attorney General's claim of forfeiture and strike the \$20 DNA collection fee from the judgment.

DISPOSITION

The 10-year gang enhancement and the \$20 DNA collection fee are stricken from the judgment. The trial court is directed to prepare an amended abstract of judgment. We affirm the judgment as modified.

We concur: [DOITODD](#), Acting P.J., and [CHAVEZ](#), J.

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Not Reported in Cal.Rptr.3d, 2009 WL 2450673 (Cal.App. 2 Dist.)
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