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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 09/06/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 09-0606  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
) (Not for Publication -  
) Rule 111, Rules of the  
DONELL THOMPSON, ) Arizona Supreme Court)  
)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-006131-001-DT

The Honorable Kristin C. Hoffman, Judge

**AFFIRMED**

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by Kent E. Cattani, Chief Counsel,  
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G E M M I L L, Judge

¶1 Donell Thompson appeals his convictions for two counts of second-degree murder and one count of assisting a criminal street gang and the jury's finding that the offenses were

committed with the intent of assisting criminal conduct by a criminal street gang. For the reasons that follow, we find no reversible error and affirm.

¶12 The facts, viewed in the light most favorable to upholding the jury's verdict,<sup>1</sup> are as follows. An argument erupted at a party over the Crips and the Bloods, culminating in the fatal shooting of Kenneth R. and Regis S. Thompson, known by the nickname "Dooker," was a documented member of the Lindo Park Crips, a criminal street gang. Kenneth R., known as "Kenny Gangster," was a member of the Broadway Gangsters and the 1st Street Bloods. Regis S. liked the Bloods' customs, or lifestyle, and was known to say he was a Blood.

¶13 Several witnesses identified Thompson at trial as the person wearing a baby blue bandanna on his face who shot toward the crowd before Kenneth and Regis fell. Another witness testified that he saw Thompson point the rifle at Regis several minutes before the shooting and say, "It's on Park," meaning it was on behalf of the Lindo Park Crips. Two other witnesses testified that they saw Thompson with a rifle and a baby blue bandanna around his neck or covering his face shortly before the shooting. A gang expert testified that the Lindo Park Crips had been involved in violent war with the Vista Bloods, and were

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<sup>1</sup> *State v. Sullivan*, 187 Ariz. 599, 603, 931 P.2d 1109, 1113 (App. 1996).

also rivals of all Blood "sets."

¶14 The jury convicted Thompson of two counts of second-degree murder and one count of assisting a criminal street gang, and found with respect to each of the convictions that Thompson had intended to promote, further, or assist criminal conduct of the gang. It acquitted him of the charge of aggravated assault of a third victim. The judge sentenced Thompson to sixteen years in prison on each of the second-degree murder convictions, to be served consecutively, and eight and one-half years on the conviction for assisting a criminal street gang, to be served concurrently with the sentence on the first count. Thompson filed a timely appeal.

#### **Failure to Suppress Thompson's Statement**

¶15 Thompson argues first that the trial court fundamentally erred by failing to suppress statements he made to deputy sheriffs on March 7, 2008, when he was in jail after having been arraigned on these charges, violating his rights under the Sixth Amendment. The record, however, reflects that the State did not introduce any statements Thompson made to police on this occasion at trial. This argument accordingly has no support in the record.

#### **Speedy Trial Violation**

¶16 Thompson next argues that the trial court violated his right to a speedy trial by granting the State's motion to

designate this trial as a complex case pursuant to Arizona Rule of Criminal Procedure Rule ("Rule") 8.2(a)(3)(iii), "given the flagrant discovery violations and prejudicial evidentiary tactics employed by the state." We find no merit in this argument.

¶17 The background on this issue is as follows. A grand jury indicted Thompson in CR 2007-005250-001-DT on two counts of second-degree murder, one count of aggravated assault, and one count of assisting a criminal syndicate. Thompson moved for, and obtained, a designation that the case was a complex case, based on the numerous expert and lay witnesses expected to testify. The trial court subsequently dismissed the case without prejudice on the State's motion. A grand jury re-indicted Thompson on two counts of second-degree murder, one count of aggravated assault, and one count of assisting a criminal street gang. The trial court set trial for August 11, 2008.

¶18 A week before trial was set to start, the State filed a motion to designate the case as complex, asserting that it involved extensive physical and forensic evidence and more than twenty civilian witnesses, one of whom had only recently agreed to cooperate with the State, and many others who were uncooperative or difficult to locate. The State noted that it was exhausting its resources to ensure the missing witnesses

were located, and it might "need to take action to ensure compliance of all or some of the witnesses." Thompson did not file a written response. After hearing argument that is not part of the record on appeal, the trial court granted the State's motion, reasoning:

At first blush, Defendant's objection to the Motion is odd, inasmuch as the Defendant moved for, and obtained, the same designation in this same case, in its earlier creation, CR2007-005250-001-DT. Since this is, in essence, the same case, the Court incorporates by reference the same reasons the Defense counsel gave in CR2007-005250-001-DT as the justification for this same designation in CR 2008-006131-001-DT.

As a result, the judge extended the last day for Thompson's trial one-hundred twenty days, to December 22, 2008. Compare Ariz. R. Crim. P. 8.2(a)(1) (defendant in custody shall be tried within 150 days of arraignment) with Ariz. R. Crim. P. 8.2(a)(3) (defendant in case designated as complex shall be tried within 270 days of arraignment). Thompson's trial began on December 1, 2008.

¶19 We review a trial court's determination of whether a case is complex for Rule 8 purposes for abuse of discretion. *State v. Wassenaar*, 215 Ariz. 565, 570, ¶ 9, 161 P.3d 608, 613 (App. 2007). The trial court abuses its discretion if its exercise of its discretion is "manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *Id.*

at ¶ 11.

¶10 We find no such abuse of discretion. As an initial matter, we presume that the August 7, 2008 oral argument on this motion, the transcript of which Thompson failed to designate as part of the record on appeal, supports the trial court's ruling. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) ("When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court."). Our review of the record that is before us, moreover, convinces us that the judge did not abuse his discretion in designating the case as complex and allowing the State more time to prepare. "A case is 'complex' if it is 'so complicated by virtue of its nature or because of the evidence required, that the ordinary limits for the time to trial are insufficient and must be extended to afford more time to prepare so that the case can be fairly and fully presented.'" *Wassenaar*, 215 Ariz. at 570, ¶ 9, 161 P.3d at 613 (quoting *Snyder v. Donato*, 211 Ariz. 117, 120, ¶ 12, 118 P.3d 632, 635 (App. 2005)). Homicides are among those cases that are most likely to qualify as complex. *Snyder*, 211 Ariz. at 120, ¶ 13, 118 P.3d at 365 (citing Ariz. R. Crim. P. 8.2(a)(3) comm. cmt.).

¶11 This case not only involved two homicides, it involved allegations that the homicides were committed to assist a criminal street gang, the Lindo Park Crips. The State argued

that because the case involved gangs, many of the more than twenty witnesses to the shooting were uncooperative and difficult to locate, and the record supports this claim. In fact, three months after the court's designation of this case as complex, Thompson argued in support of a motion to preclude witnesses that seven of the State's witnesses still could not be located for defense interviews, and two of the State's witnesses had failed to appear at depositions after subpoenas were served. One of these witnesses (Terry T.) was beaten by members of the Lindo Park Crips when gang members obtained his original trial subpoena. Under the circumstances, in short, this was not an ordinary, run-of-the-mill case, but rather a case in which securing civilian witness interviews and testimony was difficult at best, ultimately requiring issuance of arrest warrants, field stops, and a court order that certain witnesses make themselves available for interviews. We accordingly find no abuse of discretion in the court's designation of this case as complex.

¶12 Moreover, even if the court had abused its discretion in granting the State's motion to designate this case complex, Thompson has failed to show that his ability to defend himself was harmed by the four-month delay in trying him, as necessary to reverse on this basis. *See State v. Spreitz*, 190 Ariz. 129, 136, 945 P.2d 1260, 1267 (1997) (requiring a showing of prejudice to reverse for violation of Rule 8 speedy trial

rights); *State v. Vasko*, 193 Ariz. 142, 147, ¶ 22, 971 P.2d 189, 194 (App. 1998) (to prove prejudice, defendant must show that his defense has been harmed by the delay). “[I]t is not sufficient for a defendant to contend that the state may not have made its case had the trial proceeded without the continuance,” *Vasko*, 193 Ariz. at 147, ¶ 22, 971 P.2d at 194, the only claim of prejudice that Thompson makes in this appeal. In short, we find no reversible error on this ground.

#### **Denial of Dismissal for Discovery Violations**

¶13 Thompson next argues that the trial court abused its discretion in denying his motion to dismiss the charges with prejudice or, alternatively, to exclude the witnesses, because the State had violated the discovery rules by its “inability or unwillingness to produce” its witnesses for defense interviews in a timely manner. We find no merit in this argument.

¶14 The background on this issue is as follows. On August 4, 2008, Thompson filed a motion seeking to preclude all civilian witnesses disclosed by the State from testifying because of difficulties the State was facing in setting up five witness interviews. The State responded that it had made good-faith efforts to set up interviews, and suggested, as a less onerous sanction, that the court order depositions of these witnesses. Defense counsel noted at the hearing on his motion a week later that he had completed interviews of the five



witnesses.

¶15 The judge denied the motion to preclude all of the State's civilian witnesses, reasoning that a more appropriate intermediate sanction would be to allow the defense to "subpoena for deposition any civilian witness who does not cooperate with the interview process." The judge agreed also to order the prosecutor to disclose the addresses of civilian witnesses, "and to the extent that those address[es] are no longer good, let the defense know so the defense investigator can attempt to locate those witnesses." The following month, the judge ordered the Office of Public Defense Services to appoint an investigator to assist Thompson in serving deposition subpoenas on civilian witnesses.

¶16 Three weeks before trial, on November 4, 2008, Thompson moved to preclude nine witnesses from testifying on the ground that two of the witnesses had failed to honor subpoenas to attend a deposition, and seven others were not at the addresses provided by the State. The State argued that it had and was making made good faith efforts to locate the witnesses, who were vital to its case, and Thompson not only knew of the witnesses but had copies of their recorded statements, and therefore could not be "surprised." The judge denied the motion to preclude, but continued trial for one week, made a jury room available for witness interviews, and ruled that "no one can

testify that hasn't been interviewed by the defense."

¶17 At a status conference a week and a half before trial, on November 21, 2008, Thompson orally moved to dismiss the charges, alleging in pertinent part that the State had failed to timely disclose exculpatory evidence. Thompson avowed, however, that he did not want a continuance to allow further discovery. After hearing argument, the court denied the motion.

¶18 The first day of trial, the defense had still not interviewed two of the State's witnesses. The trial court ordered the witnesses to make themselves available for interviews the following day, and reiterated that "no witness will testify who has not been interviewed." The prosecutor noted that police had finally conducted a field stop on one of these witnesses, who could not be served because he had been severely beaten by the Lindo Park Crips when they somehow obtained his initial trial subpoena. The prosecutor noted that she had obtained an arrest warrant for the second witness earlier that day. The record does not reflect that Thompson was unable to interview any witness who testified at trial.

¶19 The trial court may order preclusion of a witness or dismissal of the charges as a sanction for failure to disclose a witness. Ariz. R. Crim. P. 15.7(a)(1). The trial court must take into account, in determining the appropriate sanction, "the significance of the information not timely disclosed, the impact

of the sanction on the party and the victim and the stage of the proceedings at which the disclosure is ultimately made." Ariz. R. Crim. P. 15.7(a). Before precluding a witness, the court must also take into account whether less stringent sanctions would be available "to effect the ends of justice," "how vital the precluded witness is to the proponent's case," "whether the opposing party will be surprised and prejudiced by the witness' testimony," and "whether the discovery violation was motivated by bad faith or willfulness." *State v. Smith*, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979).

¶20 We review a trial court's imposition of sanctions for discovery violations for abuse of discretion. *State v. Lee*, 185 Ariz. 549, 555-56, 917 P.2d 692, 698-99 (1996). We will not find an abuse of discretion in a discovery ruling unless defendant shows that he suffered prejudice as a result of the nondisclosure. *State v. Martinez-Villareal*, 145 Ariz. 441, 448, 702 P.2d 670, 677 (1985). Finally, we will not find that a trial court has abused its discretion "unless no reasonable judge would have reached the same result under the circumstances." *State v. Armstrong*, 208 Ariz. 345, 354, ¶ 40, 93 P.3d 1061, 1070 (2004) (citation omitted).

¶21 We find no such abuse in this case. Thompson makes no allegation in this appeal that the State failed to disclose any witnesses, or the statements they had made to police officers.

He simply argues that the trial court should have precluded the testimony of some or all the State's witnesses because of "its inability or unwillingness to produce these witnesses for defense interviews." The trial court, however, did impose such a sanction: it precluded any witness from testifying who had not been interviewed by the defense. The court also lent its resources to assist in locating the missing witnesses and hauling them in for interviews, including ordering that defendant be given an investigator, issuing arrest warrants, ruling that defendant could subpoena the witnesses for depositions, and ordering witnesses to appear for interviews. Even when a witness is not timely disclosed, the trial court does not abuse its discretion in denying a motion to preclude the witness so long as the defendant has the opportunity to interview the witness before testifying. See *State v. Paxton*, 186 Ariz. 580, 587, 925 P.2d 721, 728 (App. 1996); *State v. Tyler*, 149 Ariz. 312, 315, 718 P.2d 214, 217 (App. 1986). In this case, the State avowed these eyewitnesses were vital to its case, and that it had acted in good faith in trying to secure their interviews by Thompson. Thompson has not offered any evidence suggesting otherwise, and our review of the record shows none. Nor has Thompson suggested that he was ultimately unable to interview any of the witnesses before they testified at trial, or that he was surprised or prejudiced by their

testimony. On this record, we cannot say that the judge abused his discretion in allowing these witnesses to testify.

#### **Denial of Severance of Gang Charge**

¶22 Thompson next argues that the trial court abused its discretion in denying his motion to sever trial of the charge of assisting a criminal street gang from the trial of the murder and aggravated assault charges, because the charges were joined only because they were "of the same or similar character," entitling him to severance as of right. He also argues that the evidence of gang involvement or activity would not have been admissible at the trial of the other charges. We find no merit in this argument.

¶23 The record forwarded on appeal reflects that Thompson made only an oral motion to "bifurcate," or sever, the gang charge from the other charges, and made it for the first time the third day of trial, after jury selection. A motion to sever must be made at least twenty days before trial or at the omnibus hearing, and, "if denied, renewed during trial at or before the close of the evidence." Ariz. R. Crim. P. 13.4(c). "Severance is waived if a proper motion is not timely made and renewed." *Id.* We will not reverse on the basis of the trial court's denial of a motion to sever absent a clear abuse of discretion. *State v. Prince*, 204 Ariz. 156, 159, ¶ 13, 61 P.3d 450, 453 (2003).

¶124 We need not decide whether Thompson waived any error by failing to make such motion twenty days before trial, and by failing to renew his motion "at or before the close of evidence" because we find no error in the judge's refusal to sever trial of the offense of assisting a criminal street gang from the murder and aggravated assault charges. Joinder and severance are governed by Rules 13.3 and 13.4. Offenses may be joined when they "[a]re of the same or similar character, "[a]re based on the same conduct or are otherwise connected together in their commission," or "[a]re alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a)(1), (2), and (3). When, however, it is "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on the motion of a party, order. . . severance." Ariz. R. Crim. P. 13.4(a). Rule 13.4(b) provides for severance as of right when offenses are 1) joined only because they are of the same or similar character, and 2) evidence of the other offense or offenses would not be admissible if the counts were tried separately. Ariz. R. Crim. P. 13.4(b).

¶125 Thompson argues that severance was mandatory under Rule 13.4(b) because Count Four, assisting a criminal street gang, was of the same or similar character as Counts One through Three, the murder and aggravated assault charges. The crime of

assisting a criminal street gang, however, is not of the same or similar character as murder and aggravated assault. See *State v. Johnson*, 212 Ariz. 425, 429, ¶ 10, 133 P.3d 735, 739 (2006). The charge of assisting a criminal street gang, rather, was based on the same conduct as the murder and aggravated assault charges, and accordingly, the offenses were properly joined for trial pursuant to Rule 13.3(a)(2). Moreover, evidence to prove the gang charge would have been admissible in a separate trial of the murder and aggravated assault charges to show Thompson's motive, and evidence of the murders would have been admissible in a separate trial of the gang charge because they supplied an element of the offense. See *Johnson*, 212 Ariz. at 429-30, ¶¶ 11-12, 133 P.3d at 739-40; *State v. Romero*, 178 Ariz. 45, 52, 870 P.2d 1141, 1148 (App. 1993). Under these circumstances, we decline to find that the judge abused his discretion in denying severance.

#### **Admission of Gang Expert Testimony and Presentation**

¶126 Thompson next argues that the trial court erred by denying his motion to preclude use of gang evidence at trial, specifically the testimony of a police detective who is a gang expert and the power-point presentation that accompanied his testimony. Thompson concedes in appeal that our courts have held such evidence relevant in a trial on a charge of assisting

a criminal street gang,<sup>2</sup> but argues that the evidence "went far beyond that necessary to establish the elements of Count 4 and was irrelevant, unnecessary, cumulative and fatally prejudicial," and much of it constituted inadmissible "profile testimony."

¶27 Before the State's gang expert testified, Thompson filed a motion to limit the expert's testimony and the power point slide show that he had developed to accompany his testimony. Thompson asked the court to preclude any expert testimony and any slides on the following:

The history and evolution of the Lindo Park Crips;

The geographical boundaries of the Lindo Park Crips, a map of the Lindo Park neighborhood in South Phoenix, pictures of graffiti in the neighborhood, and a City of Phoenix sign identifying park regulations for Lindo Park;

The type of gang, ethnicity, and age range of the Lindo Park Crips;

Identification of ongoing felony acts committed by the Lindo Park Crips criminal street gang;

Photographs seized from Thompson's cellular phone showing indicia of gang membership, and his possession of gang paraphernalia;

A call by Thompson to police on August 4, 2007, reporting a gang threat;

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<sup>2</sup> See *State v. Baldenegro*, 188 Ariz. 10, 15, 932 P.2d 275, 280 (App. 1996).



Thompson's contact with police on September 16, 2007, and photographs showing him wearing gang clothing and jewelry;

Gang graffiti showing Dooker's name and gang affiliation found in a jail holding cell;

A photograph of Thompson's tattoo reading "Dooker";

Identification of the statutory indicia of gang membership;

Identification of other documented Lindo Park Crips criminal street gang members;

Any opinion that the homicides at issue were gang-motivated; and

Slides or testimony from the expert repeating eyewitness testimony to show the basis of the expert's opinion that these homicides were gang-motivated.

Thompson argued the expert testimony and accompanying slides were irrelevant, cumulative to other witnesses' testimony that Thompson was a member of the Lindo Park Crips, and were unfairly prejudicial profiling evidence. He offered to stipulate that the Lindo Park Crips is a criminal street gang and he is a member, a stipulation that the State said it was unwilling to accept. After hearing argument, the judge denied the motion, reasoning "this is evidence or things that the gang detective relied upon in forming his opinions." The State's gang expert subsequently testified on the history, identifying marks, and criminal activities of the Lindo Park Crips, the indicia demonstrating Thompson's membership in the gang, and his

opinion, based on the circumstances surrounding the shootings, that they were gang-related.

¶128 Expert testimony is admissible at trial if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. Evidence is "unfairly prejudicial" when it has "'an undue tendency to suggest decision on an improper basis' . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (citing Fed. R. Evid. 403, advisory comm. note).

¶129 We view the challenged evidence on appeal in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998) (citation omitted). Moreover, "[b]ecause the trial court is best situated to conduct the [Arizona Rule of Evidence] 403

balance, we will reverse its ruling only for abuse of discretion." *State v. Canez*, 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002)(citation omitted).

¶30 We find none. The State charged Thompson with the offense of assisting a criminal street gang pursuant to Arizona Revised Statutes ("A.R.S.") section 13-2321(B) (2010)<sup>3</sup> in committing the two murders alleged in Counts One and Two of the Indictment, and alleged that each of the charged offenses in this case was intended to promote, further, or assist criminal conduct by the criminal street gang. The crime of assisting a criminal street gang is defined as "committing any felony offense . . . for the benefit of, at the direction of or in association with any criminal street gang." A.R.S. § 13-2321(B). A "criminal street gang" is defined in pertinent part as an "association of persons in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act and that has at least one individual who is a criminal street gang member." A.R.S. § 13-105(8) (2010). A "criminal street gang member" is defined as an individual "to whom at least two of the following seven criteria" indicating gang membership apply: self-proclamation, witness testimony or official statement,

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<sup>3</sup> We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

written or electronic correspondence, paraphernalia or photographs, tattoos, clothing or colors, or any other indicia of membership. A.R.S. § 13-105(9).

¶31 The gang expert's testimony summarizing the numerous indicia that Thompson was a member of the Lindo Park Crips was relevant to prove Thompson's membership in the gang as well as his motive for the shooting, and we cannot say that the judge abused his discretion in concluding that the expert's testimony on this issue would have assisted the jury in understanding the evidence and determining those facts. The gang expert's testimony on the membership and geographical boundaries of the Lindo Park Crips, and its commission of ongoing felony acts, including homicides, aggravated assaults, and threatening and intimidating was also relevant to show that the Lindo Park Crips met the statutory definition of a "criminal street gang." See *Baldenegro*, 188 Ariz. at 15, 932 P.2d at 280. Moreover, we cannot say the judge abused his discretion in concluding that the expert's testimony describing the history, culture, and customs of the Lindo Park Crips and its war with the Vista Bloods and its subsets, would be helpful to explain the significance of the witnesses' testimony regarding what had occurred the night of the shooting, and the conduct of Thompson.

¶32 The judge was in the best position to balance the significant probative value the expert testimony and the power

point presentation had on the issue of whether Thompson committed the murders to benefit the Lindo Park Crips against any unfair prejudice it might have had. In reviewing this evidence in the light most favorable to the State, as we must, see *Harrison*, 195 Ariz. at 33, ¶ 21, 985 P.2d at 518, we cannot say that the judge abused his discretion in rejecting Thompson's argument that the potential for unfair prejudice substantially outweighed any probative value. See *Baldenegro*, 188 Ariz. at 15, 932 P.2d at 280. Nor on this record was the State required to accept Thompson's stipulation that he was a member of the Lindo Park Crips, or that this was a criminal street gang. See *State v. Leonard*, 151 Ariz. 1, 8, 725 P.2d 493, 500 (App. 1986) ("[T]he state is not required to accept a stipulation when the prejudicial potential of the evidence is substantially outweighed by the state's legitimate need to prove the facts to which the defendant offers to stipulate.").

¶133 Thompson misplaces his reliance on *People v. Albarran*, 57 Cal. Rptr. 3d 92 (Cal. Ct. App. 2007). In *Albarran*, a California appellate court found that evidence identifying other gang members and their unrelated crimes, evidence of threats to police officers, and Mexican Mafia evidence, was unfairly prejudicial, depriving defendant of a fair trial, in light of the absence of evidence other than the fact of defendant's gang membership. See *id.* at 103-07. In this case, substantial

eyewitness testimony supported the State's allegation that Thompson shot into the crowd to benefit the Lindo Park Crips. The facts in this case distinguish it from *Albarran*.

¶34 Thompson also mischaracterizes the gang expert's testimony and slide presentation as improper "profile testimony" under *State v. Lee*, 191 Ariz. 542, 546, ¶ 19, 959 P.2d 799, 803 (1998) (reversing on the ground that drug courier profile testimony was improperly admitted to show defendant's knowledge of drug in suitcase) and *State v. Cifuentes*, 171 Ariz. 257, 257, 830 P.2d 469, 469 (App. 1991) (reversing on the ground that improper profile testimony was used to convict defendant of car theft). The testimony and presentation on Thompson's membership in the Lindo Park Crips gang and the ongoing felonies committed by that gang was not offered to show that Thompson fit the "profile" of a gang member who committed murders, but rather to prove that he was a member of this criminal street gang and that he had committed the offense of assisting this gang by murdering the two victims, as alleged in Count Four, and to prove his motive for the aggravated assault and murders alleged in Counts One through Three. We accordingly find no merit in this argument. For all of the foregoing reasons, we find no abuse of discretion in the judge's admission of the testimony from the gang expert and the accompanying power point presentation.

#### **Sufficiency of Evidence**

¶135 Thompson argues that the trial court erred in denying his motion for judgment of acquittal on all counts, and insufficient evidence supported his convictions for two counts of second-degree murder and assisting a criminal street gang. He argues that the evidence was insufficient because no physical evidence was offered against him, two witnesses were "under suspicion themselves as being the potential shooter," and the witnesses against him were not credible.

¶136 A directed verdict of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Landrigan*, 176 Ariz. 1, 4, 859 P.2d 111, 114 (1993) (citation omitted); see Ariz. R. Crim. P. 20(a).

¶137 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). The credibility of witnesses and the weight given to their testimony are issues for the jury, not the trial judge. See *State v. Just*, 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). "To set aside a jury verdict for insufficient evidence

it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶138 The evidence was more than sufficient in this case to survive a motion for judgment of acquittal and to support the convictions for two counts of second-degree murder and one count of assisting a criminal street gang. See A.R.S. § 13-1104(A)(3) (2010) (defining second-degree murder in pertinent part as without premeditation, "[u]nder circumstances manifesting extreme indifference to human life . . . recklessly engages in conduct that creates a grave risk of death and thereby causes the death of another person"); A.R.S. § 13-2321 (defining assisting a criminal street gang as "committing any felony offense . . . for the benefit of, at the direction of or in association with any criminal street gang"). Witnesses testified at trial that an argument at the party over the Bloods and the Crips led to a later fistfight outside, which culminated in the shooting deaths of Kenneth, a documented Bloods member, and Regis, who identified as a Blood. Thompson was a documented member of the Lindo Park Crips gang. The gang expert testified that the Lindo Park Crips was an association of persons claiming a South Phoenix neighborhood as their turf, several of whom had committed felonies, including homicides. He also testified that



the Lindo Park Crips were engaged in an ongoing war with the Vista Bloods and other Blood groups. One witness testified that, before the shooting, he saw Thompson point his rifle at Regis and heard Thompson say, "It's on Park," meaning it was on behalf of the Lindo Park Crips. Several witnesses testified that they saw Thompson, his face covered with a baby blue bandanna, the color identifying the Lindo Park Crips, fire his rifle into the crowd gathered outside after the party, killing Kenneth and Regis. The credibility of the witnesses who testified at trial was an issue, not for the trial court or this court, but for the jury. *See Just*, 138 Ariz. at 545, 675 P.2d at 1364. On this record, the evidence was more than sufficient to survive the motion for acquittal and to support the convictions.

#### **Gang Expert's Alleged Perjury**

¶139 Finally, Thompson argues that the trial court erred in finding that the State's gang expert had not offered perjured testimony in offering his opinion that the Lindo Park Crips had "been involved in a number of felonies, including ten homicides, as well as robberies, threatening and intimidating, drug offenses, and the like," in the absence of proof of actual convictions. He argues that the trial court accordingly erred in denying his motions for mistrial, a new trial, and dismissal of the charges on grounds of prosecutorial misconduct in eliciting this alleged perjury, and this court should therefore

immediately dismiss the convictions.

¶40 The testimony at issue in Thompson's allegations of elicitation of perjury from the gang expert by the prosecutor, summarized in a separate power point slide, was in pertinent part as follows:

Q. Now, have there been felonies committed by the Lindo Park Crips?

A. Yes.

Q. And what types of felonies have been committed?

A. Several different felonies.

Q. Homicides?

A. Yes.

Q. And approximately since this gang war has [be]gun, have you researched or documented how many homicides have occurred between the Lindo Park Crips and the Vista Bloods?

A. There's an average of about ten.

Q. How about aggravated assaults?

A. Several.

Q. Threatening or intimidating?

A. Several.

\* \* \*

Q. And what about reckless endangerment?

A. Yes.

Q. Burglaries and thefts?

A. Yes.

Q. Drug offenses?

A. Yes.

Q. And any other felonies under the Arizona Revised . . . Revised Statutes?

A. Yes.

Q. And have you documented the Lindo Park Crips - criminal street gang as committing all of those types of felony offenses?

A. Yes.

¶41 This issue first arose after trial, when Thompson asked the court to order the State in pertinent part to disclose records of convictions for the above-referenced offenses, and records of convictions demonstrating that the offenses had been committed to benefit the Lindo Park Crips. Shortly afterward, Thompson simultaneously filed a motion for a mistrial due to prosecutorial misconduct alleging in pertinent part that "[b]ased upon investigation, research, and belief, the defense contends these claims are false and/or grossly misleading," and a motion for new trial incorporating by reference in pertinent part his motion for mistrial based on prosecutorial misconduct. The trial court subsequently denied Thompson's motion for disclosure. The judge denied the motion for mistrial due to prosecutorial misconduct, finding no prosecutorial misconduct or any reasonable likelihood, had there been, that it would have affected the verdict. The judge also denied the motion for new trial without comment.

¶42 Thompson then filed a motion to disclose information (or lack thereof) that may tend to mitigate his punishment, seeking in pertinent part the same disclosure of convictions for gang-motivated offenses committed by the Lindo Park Crips to

support the gang expert's testimony that he had sought in his motion to disclose. After hearing argument, the judge granted the motion in part and ordered the prosecutor to produce to defense counsel "at least one defendant and cause number as to each named offense" identified by the gang expert committed in furtherance of the Lindo Park Crips criminal street gang. Shortly afterward, Thompson filed a motion to dismiss for Prosecutorial Misconduct, arguing that his review of the court records for the convictions produced by the prosecutor pursuant to the court order did not show that these crimes were gang-motivated, and the prosecutor accordingly had "intentionally suborned false and misleading testimony to obtain a conviction in disregard of Donell's constitutional rights," requiring dismissal without possibility of retrial.

¶143 The trial judge conducted an evidentiary hearing on the motion, and heard argument from the parties. Detective N. testified at the evidentiary hearing that he knew of about ten murders that had occurred during the war between the Lindo Park Crips and the Vista Bloods that started in January 2007, but those investigations were still ongoing, and only about five people had so far been charged with the murders. He testified that Todd L., a member of the Lindo Park Crips, was at that time on trial for a homicide that occurred during the war. He testified that he knew of several aggravated assaults that had

been committed to promote the objectives of the Lindo Park Crips, and referred to disclosure of a police report documenting the aggravated assault by two gang members of a police officer. He testified that he was also aware of the aggravated assault involving the shooting of a gang detective in the Lindo Park Crips neighborhood, causing him to lose his lower leg, as well as a wiretap investigation of the Lindo Park Crips for selling drugs. A Phoenix Police commander testified that the shooting of the gang detective was intended to retaliate against police for killing a Lindo Park Crips during a hostage situation.

¶144 Detective N. testified that a police report showed that Thompson and other Lindo Park Crips were shot in 2007 as part of the gang war, while driving in the Vista Blood neighborhood in a stolen vehicle. He identified the beating of Terry T., a witness in this case, by members of the Lindo Park Crips as involving the offense of threatening and intimidation of a snitch. He testified that there were hundreds of reports of which he was aware documenting members of the Lindo Park Crips gang committing felony offenses, and the reports he had disclosed were "just a very tiny tip of the iceberg."

¶145 The State advised the court that it planned to call two other police officers to testify about ongoing felonies committed by members of the Lindo Park Crips, but defense counsel told the court he did not have any desire to cross-

examine these witnesses, and the court advised the State it did not need to call them.

¶146 The judge denied the motion to dismiss for prosecutorial misconduct, based on the following findings:

The evidence and testimony presented doesn't support the contentions made by the defendant.

The COURT FINDS that Detective [N.] did not intentionally and knowingly present false testimony to the jury. Prosecutor April [S.] did not suborn perjury. There is no evidence that the State withheld Brady evidence from the jury.

¶147 We review a denial of a motion to dismiss on grounds of prosecutorial misconduct for abuse of discretion. *State v. Trani*, 200 Ariz. 383, 384, ¶ 5, 2 P.3d 1154, 1155 (App. 2001). We also review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000). "The trial judge's discretion is broad . . . because he is in the best position to determine whether the evidence will actually affect the outcome of the trial." *Id.* (citation omitted). We will reverse a denial of a motion for new trial "only when there is an affirmative showing that the trial court abused its discretion and acted arbitrarily." *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984).

¶148 Prosecutorial misconduct "taken as a whole, amounts to

intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial." *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.2d 423, 426-27 (App. 2007) (internal punctuation and citation omitted). The knowing use of perjury or false testimony to convict a defendant constitutes a denial of due process and is reversible error without a showing of prejudice. *State v. Ferrari*, 112 Ariz. 324, 334, 541 P.2d 921, 931 (1975) (citing *Mooney v. Holohan*, 294 U.S. 103 (1935)).

¶149 We find no abuse of discretion in the judge's denial of Thompson's motions for mistrial, new trial, and to dismiss on the basis that the prosecutor had suborned perjury, because Thompson has failed to cite to the record of a single instance of testimony from Detective N. that was in fact false. Thompson's argument on appeal that the State's gang expert testified to the Lindo Park Crips' "nefarious record of committing homicides and other serious offenses without any proof to back up his statements and knowing that he had no such proof" is not supported by the record. As outlined *infra*, Detective N. testified extensively at the post-trial evidentiary hearing on the information on which he relied to offer his opinion that members of the Lindo Park Crips had committed felony offenses, including homicides, aggravated assaults,

threatening and intimidating snitches and drug offenses. The State also introduced numerous police reports and other documents linking members of the Lindo Park Crips to the felonies that Detective N. testified to at trial.

¶150 Detective N. testified at the hearing he based his expert opinions at trial regarding the Lindo Park Crips on police reports, his personal knowledge of the Lindo Park Crips neighborhood and gang members, testimony presented at Thompson's trial, and conversations with other police officers who had dealt with members of the gang. We cannot say that these were improper bases for Detective N.'s expert testimony. See *Baldenegro*, 188 Ariz. at 15, 932 P.2d at 280 (noting that the gang expert in that case based his opinions on "personal observations and experience, the observations of other officers in the department, police reports, and conversations with other gang members").

¶151 The gravamen of Thompson's argument to the trial court was that Detective N. perjured himself when he testified that the Lindo Park Crips had committed these felonies to benefit the gang, because, in Thompson's view, the evidence failed to show actual convictions of members of the Lindo Park Crips for committing each of the referenced felonies to assist the gang. The statute defining a criminal street gang, however, does not require proof of *convictions* for felony acts. See A.R.S. § 13-



105(8). Rather, the statute requires only proof that members “engage in the commission, attempted commission, facilitation or solicitation of any felony act.” *Id.* Detective N. testified at trial that members of the Lindo Park Crips had committed these felonies, and he testified at the evidentiary hearing that he reached this expert opinion relying on police reports, personal observations, trial testimony, and the observations of other officers. Thompson acknowledges on appeal that Detective N. did not testify that the gang members had been convicted of these offenses. Thompson’s claim that Detective N.’s testimony was false accordingly fails.

¶152 On this record, the trial court did not abuse its discretion in finding that Detective N. did not knowingly present false testimony, and the prosecutor did not engage in misconduct by eliciting the testimony, or in denying Thompson’s motions for mistrial, new trial, and to dismiss on this ground.

**Conclusion**

¶153 For the foregoing reasons, we affirm Thompson’s convictions and sentences.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICK IRVINE, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge