Admissibility of Expert Opinion Testimony

By Jonathan Grossman

I. QUALIFIED TO BE AN EXPERT

"(a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert. [¶] (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony." (Evid. Code, § 720.)

"A witness testifying in the form of an opinion may state on direct examination . . . his special knowledge, skill, experience, training, and education) upon which it is based . . . . The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based." (Evid. Code, § 802.)

"[T]he purpose of expert testimony, to provide an opinion beyond the common experience, dictates that the witness possess uncommon, specialized knowledge." (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547.)

The admission of expert testimony is generally reviewed for abuse of discretion. Thus, weaker evidence could properly be admitted when stronger evidence is excluded in a different case or in the same case. The standard for determining if a witness is an expert can be low. "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." (*People v. Bolin* (1998) 18 Cal.4th 297, 322, internal quotation marks omitted; *People v. Catlin* (2001) 26 Cal.4th 81, 131-132 [need not be a licensed doctor to give medical opinion]; *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620 [police officer on gangs]; *In re Brandon Q.* (2009) 174 Cal.App.4th 637, 644-645 [a police officer could provide the opinion the "stun gun" was capable of immobilizing a victim, though the officer never inspected the item]; *People v. Villareal* (1985) 173 Cal.App.3d 1136, 1142 [need not have a medical license].)

An expert can be someone who took some classes. (See, e.g., *People v. Clark* (1993) 5 Cal.4th 950, 1018-1019, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; but see *People v. Hamilton* (2009) 45 Cal.4th 863, 912-913 [defense expert attended an FBI seminar for four hours but could not remember the details].)

The standard for determining if a witness is an expert can be rather high. (See, e.g., *People v. Watson* (2008) 43 Cal.4th 652, 692 [a person with a background in criminal justice and non-capital sentencing alternatives could properly be excluded in giving expert testimony on the psychological impact of defendant's upbringing on his behavior and how he would adjust to prison]; *People v. Vieira* (2005) 35 Cal.4th 264, 292 [former police officer who was not a psychologist could not testify about factors concerning defendant's mental state].)

II. THE SUBJECT OF AN OPINION

A. Generally

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] [r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" (Evid. Code, § 801, subd. (a).)

Less expansive test for admitting expert testimony: "Opinion testimony is generally *inadmissible* at trial. (Evid. Code, §§ 800, 801.) Opinion testimony may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience. Thus, expert opinion is admissible if it is '[r]elated to a subject that is sufficiently beyond common experience [and] would assist the trier of fact.' (Evid. Code, § 801, subd. (a).) Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness. [Citation.]" (*People v. Torres* (1995) 33 Cal.App.4th 37, 45; see, e.g., *People v. Sandoval* (2008) 164 Cal.App.4th 994, 1001-1003 [can exclude expert testimony on make-up sex]; *Kotla v. The Regents of the University of California* (2004) 115 Cal.App.4th 283, 290-291 [error to have expert witness testify in a wrongful termination case that defendant's firing of plaintiff was retaliatory].)

More expansive test: "The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission; if that were the test, little expert opinion testimony would ever be heard. Instead, the statute declared that even if the jury has some knowledge of the matter, expert opinion may be admitted whenever it would 'assist' the jury" (*People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.) " 'The law does not disfavor the admission of expert testimony that makes comprehensible and logical that which is otherwise inexplicable and incredible.' " (*People v. Gonzalez* (2006) 38 Cal.4th 932, 947; see, e.g., *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1179 [the court erred in excluding a gang expert for the defense who

would say that not every time a person rides with a gang member is it gang related].)

Due process right: Defense right to present a defense includes the right to present an expert witness. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [exclusion of defense expert on coerced confession violated the right to present a defense]; but see *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1206 [exclusion of expert on coerced confession was proper].) Testimony of psychologists or other experts is not cumulative because they "can identify the 'elusive and often deceptive' . . . and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 80-81, citations omitted.)

The testimony must be relevant. (See *People v. McAlpine* (1991) 53 Cal.3d 1289, 1303-1304.) It is also subject to exclusion under Evidence Code section 352. (See *People v. Coleman* (1985) 38 Cal.3d 69, 91-92; *People v. Manning* (2008) 165 Cal.App.4th 870, 879-880 [defense expert who would testify why a defendant would plead under *West* was properly excluded it because of undue consumption of time in light of the prosecution's proffered rebuttal].)

The expert might not be providing any opinions but simply facts. (See, e.g., *People v. McDonald* (1984) 37 Cal.3d 351, 366-367.) "To illustrate, assume the witness testifies that journal A published an article B in which researcher C reported that he conducted an empirical study of the effect of factor D on the accuracy of eyewitness identification, that he designed the experiment in manner E, that the experiment produced raw data F, that he analyzed those data by statistical method G, and that such analysis yielded finding H; in that event, A, B, C, D, E, F, G, and H are facts, not opinions, and in relating them to the jury the expert witness is not testifying 'in the form of an opinion.' (Evid. Code, § 801, subd. (a).) By contrast, if the same expert goes on to assert, on the basis of these facts, that a particular eyewitness in the case before him was or was not mistaken in his identification of the defendant, that assertion would be opinion testimony." (*Id.* at p. 367, fn. 12.)

An expert on possession of drugs for sale must have training on the legal use of the drugs if the drug is otherwise legal to possess. (*People v. Hunt* (1971) 4 Cal.3d 231, 237-238; *People v. Chakos* (2007) 158 Cal.App.4th 357, 363-369 [marijuana which can be lawfully possessed for use or distribution for medical purposes]; but see *People v. Newman* (1975) 5 Cal.3d 48, 53, disapproved on other grounds in *People v. Daniels* (1975) 14 Cal.3d 857, 862 [officer's opinion was adequate when there was no evidence the drugs were purchased by a prescription].) The supreme court is currently considering "[i]f the defendant raises a medical marijuana defense in a prosecution for possession of marijuana for sale,

must the People call an expert who has experience in distinguishing lawful medical possession from unlawful possession?" (See *People v. Dowl* (2010) 183 Cal.App.4th 702, review granted July 21, 2010, S182621.)

Identification expert. (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) When identity is shown not just by an identification but also with corroborating evidence, an identification expert is unnecessary. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 509-510 [defendant planned with others to commit the crime and two shotguns being found in the defendant's apartment which matched the description of the weapons used in the crime, while property which could have been taken in the robbery was found in the home of a codefendant].) But "*Sanders* cannot be viewed as limiting the holding of *McDonald, supra*, 37 Cal.3d at page 376 to cases in which, apart from the eyewitness identification, there is no other evidence whatever linking defendant to the crime: Exclusion of the expert testimony is justified only if there is other evidence that *substantially corroborates* the eyewitness identification and gives it independent reliability." (*People v. Jones* (2003) 30 Cal.4th 1084, 1113.)

An expert cannot give an opinion of the law. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1598-1599; *Summers v. A.L. Giblert Co.* (1999) 69 Cal.App.4th 1155, 1178; *People v. Torres* (1995) 33 Cal.App.4th 37, 45-46 [it is for the judge to instruct the jury on what the law is].) "An 'expert may not usurp the function of the jury . . . . ' " (*Id.* at p. 1183, quoting *People v. Humphrey* (1996) 13 Cal.4th 1073, 1099.) "Expert opinions which invade the province of the jury are not excluded because they are not helpful (or perhaps too helpful)." (*Ibid.*) "[W]hen an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Ibid.*, emphasis in original.) "[T]here is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witness." (*Id.* at pp. 1182-1183; accord, *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal. 3d 863, 884 ["Opinion testimony is inadmissible and irrelevant to adjudging questions of law."].)

Note, it has been said that "[t]he 'legal cliché used by many courts, [that evidence] would "invade the province" or "usurp the function" of the jury' is, as Dean Wgmore has did, ' "so misleading, as well as so unsound, that it should be entirely repudiated. It is a mere bit of empty rhetoric," and "remains simply one of those impracticable and misconceived utterances which lacks any justification in principle." ' (*People v. McDonald* (1984) 37 Cal.3d 351, 370, quoting 7 Wigmore on Evidence (Chadbourne rev. ed.) 1978, §§ 1920, 1921, pp. 18, 22.)" (*People v. Chatman* (2006) 38 Cal.4th 344, 380, brackets in original.).

B. Opinion on Credibility

An expert or lay opinion as to another witness's credibility is generally inadmissible. (See, e.g., *People v. Curl* (2009) 46 Cal.4th 339, 359-360 [exclude defense expert on how snitches could have received "inside information" because the jury was able to determine this]; *People v. Avila* (2006) 38 Cal.4th 491, 588 [defense expert opinion that a prosecution witness was a pathological liar can be excluded because the jury was just as capable of determining credibility]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 ["The general rule is that an expert may not give an opinion whether a witness is telling the truth . . . . "]; *People v. Smith* (2003) 30 Cal.4th 581, 628 ["Credibility questions are generally not subject to expert testimony . . . . "]; *People v. Anderson* (2001) 25 Cal.4th 543, 576 [" 'the psychiatrist may not be in any better position to evaluate credibility than the juror' "]; *People v. Melton* (1988) 44 Cal.3d 713, 744-745 [because the opinion is not helpful for the jury to determine credibility]; but see *People v. Reyes* (2008) 165 Cal.App.4th 426, 436-437 [officer's testimony that witness gave critical information before was not improper opinion on credibility but instead evidence of conduct corroborating credibility]; *People v. Gonzalez* (2006) 38 Cal.4th 932, 945, 947 [expert testimony on gangs generally intimidating witnesses admissible on the witnesses' credibility]; *People v. Stitely* (2005) 35 Cal.4th 514, 546-547 [officer's testimony that he believed defendant was not truthful during interrogation was admissible to show why the interrogation proceeded in a certain way].) "A denial of fundamental fairness occurs whenever the improper evidence 'is material in the sense of a crucial, critical, highly significant factor.' " (*Snowden v. Singletary* (11th Cir. 1998) 135 F.2d 732, 738 [inadmissible and highly prejudicial evidence by expert witness that 99.5 percent of molest victims never lie violated due process when the case rested on the witnesses' credibility].) It has been suggested that the holding in *Melton* might not survive Proposition 8. (See *People v. Riggs* (2008) 44 Cal.4th 248, 300-301; *People v. Padilla* (1995) 11 Cal.4th 891, 946-947.)

In some situations, the prosecution can ask the defendant if other witnesses were lying when their testimony conflicted with the defendant's. (*People v. Collins* (2010) 49 Cal.4th 175, 206-207 ['was she lying' concerning a phone conversation the defendant had with the victim]; *People v. Hawthorne* (2009) 46 Cal.4th 67, 97-98 ["were they lying" can be acceptable, depending on the facts of the case]; *People v. Tafoya* (2007) 42 Cal.4th 147, 178-179 ["were they lying" questions about a witness proper if the defendant would have personal knowledge of the facts]; *People v. Chatman* (2006) 38 Cal.4th 344, 377-384 [can ask a witness whether he or she knows of a reason why another witness would be motivated to lie, though generally cannot ask why a witness is lying]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1125-1126 [asking defendant why witnesses who testified differently were lying]; *People v. Foster* (2003) 111 Cal.App.4th 379, 383-385 [analyzing out of state cases].) "[C]ourts should carefully scrutinize 'were they lying' questions in context. They should not

be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions" (*Chatman, supra,* at p. 384.) "If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. (See Evid. Code, § 702.) Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. (Evid. Code, § 210.) [¶] In challenging a witness's testimony, a party impliedly or expressly urges that because a witness is lying, mistaken, or incompetent, the witness should not be believed. A party who testifies as to a set of facts contrary to the testimony of others, may be asked to clarify what his position is and give, if he is able, a reason for the jury to accept his testimony as more reliable." (*Id.* at p. 382.)

C. Victim Profile Evidence to Support Witness Credibility

Victim profile evidence is admissible to support the credibility of the complaining witness. (*People v. Morgan* (1998) 58 Cal.App.4th 1210, 1215-1216; *People v. Housley* (1992) 6 Cal.App.4th 947.) "This court has frequently permitted the use of expert testimony to explain to lay jurors conduct that may appear counterintuitive in the absence of such insight. [Citations.] Invariably, the point of such an explanation is to support another witness's credibility." (*People v. Ward* (2005) 36 Cal.4th 186, 211.)

Battered women syndrome is a summary of common characteristics that appear in women who are abused over an extended period of time by the male dominant figure. (Evid. Code, § 1107; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1083-1084; see also *People v. Riggs* (2008) 44 Cal.4th 248, 292-294; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1193-1199; *People v. Erickson* (1997) 57 Cal.App.4th 1391, 1399; see *Ballard v. Roe* (9th Cir. 2001) 244 F.3d 758, 766 [not violate due process].) It should now be called evidence of "intimate partner battering and its effects." (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.)

Child sexual abuse accommodation syndrome (CSAAS) is admissible in order to show why a minor recanted, but the judge has a sua sponte responsibility to instruct: (1) the evidence admitted solely for the purpose to show victim's reaction not inconsistent with being abused; (2) expert testimony does not show whether the claim is true. (*People v. Housley* (1992) 6 Cal.App.4th 947; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1300 [can admit that parents sometimes do not report molestations and there is no profile of a typical molester]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 394.) The expert cannot say the complaining witness was a victim of molestation. (*Seering v. Department of Social Servs.*

(1987) 194 Cal.App.3d 298, 310-311; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099.) The expert should not testify about the complaining witness in particular but about victims in general. (*People v. Stark* (1989) 213 Cal.App.3d 107, 117; cf. *People v. Wells* (2004) 118 Cal.App.4th 179, 189 [evidence by a defense expert that the minor's demeanor did not suggest sexual abuse was inadmissible].) Some courts have criticized CSAAS evidence. (See, e.g., *Newkirk v. Commonwealth* (Ky. 1996) 937 S.W.2d 690, 693, 695; *State v. Bolin* (Tenn. 1996) 922 S.W.2d 870, 873; *Commonwealth v. Dunkle* (Penn. 1992) 602 A.2d 830, 837; *State v. Anderson* (Tenn.Cr.App. 1994) 880 S.W.2d 720, 730; *State v. Stribley* (Iowa App. 1995) 532 N.W.2d 170, 173-171; *Hadden v. State* (Fla. 1997) 690 So.2d 573, 577.)

Battered child evidence is admissible to show the child's injuries were not accidental. (*People v. Jackson* (1971) 18 Cal.App.3d 504, 506-508; see *Estelle v. McGuire* (1991) 502 U.S. 62, 68.) It is not admissible to show the crime occurred or the defendant fit the profile of a batterer. (*People v. Bledsoe* (1984) 36 Cal.3d 236, 245-249; *People v. Walkey* (1986) 177 Cal.App.3d 268, 278, fn. 7.)

D. Gang Evidence

Whether the defendant "actively participates" in a criminal street gang can be shown by expert testimony. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617; *People v. Williams* (1997) 16 Cal.4th 153; *People v. Champion* (1995) 9 Cal.4th 879, 919-925.) Such an opinion can be based on officer contacts, the defendant's tattoos, and his participation in the crime. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1331; *People v. Manriquez* (1999) 72 Cal.App.4th 1486.)

Whether the defendant's activity "benefits the gang," etc. can be shown by expert testimony. (*People v. Albillar* (2010) 51 Cal.4th 47, 63-64; *People v. Williams* (2009) 170 Cal.App.4th 587, 620-621; see *Briceno v. Scibner* (9th Cir. 555 F.3d 1069, 1078, disapproved on other grounds in *Albillar, supra,* at pp. 65-66 [asking a gang expert if the crime was committed for the benefit of the gang did not violate due process].)

"Sufficient proof of the gang's primary activities might consist of . . . expert testimony, as occurred in *Gardeley, supra*, 14 Cal.4th 605. . . . The gang expert based his opinion on conversations he had with fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley, supra,* at p. 620.)" (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

An expert cannot give an opinion on whether the gang engaged in a pattern of

criminal activity; this must be proved by documentary evidence or percipient witnesses. (*People v. Gardeley* (1996) 14 Cal.4th 605, 624.)

An expert cannot give an opinion that the defendant specifically intended to benefit the gang. (Pen. Code, § 29; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1196-1199; see *People v. Killebrew* (2002) 103 Cal.App.4th 644, 656-658; but see *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193-1194 [based on gang evidence and listening to wiretapped conversations].) Yet an expert can testify about gang practices and motives which is probative to the defendant's intent. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 945-947 [gang practices]; *People v. Ward* (2005) 36 Cal.4th 186, 209-210 [gang practices]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1126 [can testify about the defendant's motive for shooting an undercover officer].)

E. Ultimate Issue

"Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." (Evid. Code, § 805.)

But "opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact." (*People v. Torres* (1995) 33 Cal.App.4th 37, 47; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 652-658 [opinion that if one gang member in a car possesses a weapon all gang members in the car possess it should have been excluded]; *People v. Brown* (1981) 116 Cal.App.3d 820, 829 [officer's testimony that the defendant was a drug runner (so he was guilty of selling drugs) was inadmissible]; but see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1549-1551 [saying all Hispanic gang members act in a certain way did not amount to an opinion of defendant's guilt].)

Similarly, criminal profile evidence is inadmissible. "A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime." (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084 [opinion that defendant had the characteristics of a child molester was inadmissible].) " . . . ' "Profile" evidence is that which attempts to link the general characteristics of serial murders to specific characteristics of the defendant.' [Citation.]" (See *People v. Prince* (2007) 40 Cal.4th 1179, 1226.) "Perhaps the most frequently cited example is the drug courier profile, which the United States Supreme Court has defined as 'a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics.' (*Reid v. Georgia* (1980) 448 U.S. 438, 440.)" (*People v. Robbie* (2001) 92 Cal.App.4th 1075, 1084; accord, *People v. Walkey* (1986) 177 Cal.App.3d 268, 276-277.) "Profile evidence is objectionable when it is insufficiently probative because the conduct or matter that fits the profile is as consistent

with innocence as guilt." (*People v. Smith* (2005) 35 Cal.4th 334, 358 [profile in penalty phase of a "sadistic pedophile" admissible]; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006 [exclude auto theft ring evidence].)

But testimony on modus operandi is admissible. (*People v. Prince* (2007) 40 Cal.4th 1179, 1219-1230 [modus operandi of a crime spree attributed to defendant]; *People v. Jennings* (1975) 13 Cal.3d 749, 755 [explaining what items were burglary tools]; *People v. Lopez* (1994) 21 Cal.App.4th 1551, 1554-1555 [various roles in meth lab operation]; *People v. Harvey* (1991) 233 Cal.App.3d 1206 [hierarchy of Columbian drug cartel cell in order to explain defendant's actions].) "We have allowed 'government agents or similar persons [to] testify as to the general practices of criminals to establish the defendants' modus operandi.' [Citation.] Such testimony helps the trier of fact to understand how 'combinations of seemingly innocuous events may indicate criminal behavior.' " (*United States v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1017.)

F. Defendant's Intent

Penal Code "Sections 28 and 29 permit introduction of evidence of mental illness when relevant to whether a defendant actually formed a mental state that is an element of a charged offense, but do not permit an expert to offer an opinion on whether a defendant had the mental capacity to form a specific mental state or whether the defendant actually harbored such a mental state." (*People v. Coddington* (2000) 23 Cal.4th 529, 582; *People v. Cortes* (2011) 192 Cal.App.4th 873, 902-912; cf. *People v. Davis* (2009) 46 Cal.4th 539, 604-605 [prosecution psychologist testified that Richard Allen Davis's behavior was consistent with paraphilia based in part on a prior second degree burglary]; *People v. Ward* (2005) 36 Cal.4th 186, 209-211 [gang expert could testify about gang culture and habit on the question whether defendant came to the crime scene (to commit premeditated murder) in order to further a gang].) Thus "neither side may elicit from an expert that a defendant acted with, or lacked, a particular mental state." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 408.) One can ask an expert the ultimate question in the form of a hypothetical. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172-1173 [though could not ask if the defendant were tweaking when committed the crime, could ask it as a hypothetical question].)

The supreme court is currently considering: "(1) Did the Court of Appeal correctly find that the trial court erred in permitting the use of hypothetical questions of the prosecution expert witness [on a gang member's intent to benefit the gang]? (2) If so, did the Court of Appeal correctly find the error to be harmless?" (*People v. Vang* (2010) 185 Cal.App.4th 309, review granted Sept. 15, 2010, S184212.)

III. BASIS OF OPINION

"If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] . . .[¶] Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (Evid. Code, § 801, subd. (b).)

"The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. In such case, the witness may, if there remains a proper basis for his opinion, then state his opinion after excluding from consideration the matter determined to be improper." (Evid. Code, § 803.)

A. Reliability

" 'The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed**.** [Citations.] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value.' (*Pacific Gas & Elec. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.)" (*In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563.) "An expert opinion has no value if its basis is unsound," and "an expert opinion based on speculation or conjecture is inadmissible." (*Id.* at p. 564.)

"[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support . . . or on speculative or conjectural factors . . . has no evidentiary value . . . and may be excluded from evidence. [Citations.]" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) "Exclusion of expert opinions that rest on guess, surmise or conjecture (*Lockheed Martin Corp. v. Superior Court, supra*, 29 Cal.4th 1096) is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide? [Citation.] Therefore, an expert's opinion that something could be true if certain assumed facts are true, without any foundation for concluding those assumed facts exist in the case before the jury, does not provide assistance to the jury because the jury is charged with determining what occurred in the case before it, not hypothetical possibilities. [Citation.] Similarly, an expert's conclusory opinion that something did occur, when unaccompanied by a reasoned

explanation illuminating how the expert employed his or her superior knowledge and training to connect the facts with the ultimate conclusion, does not assist the jury. In this latter circumstance, the jury remains unenlightened in how or why the facts could support the conclusion urged by the expert, and therefore the jury remains unequipped with the tools to decide whether it is more probable than not that the facts do support the conclusion urged by the expert. An expert who gives only a conclusory opinion does not assist the jury to determine what occurred, but instead supplants the jury by declaring what occurred." (*Id.* at pp. 1117-1118.)

" '[T]he value of an expert's opinion depends on the truth of the facts assumed.' (1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence, § 28, p. 558.) 'Where the basis of the opinion is unreliable hearsay, the courts will reject it.' (*Id.,* Unreliable Hearsay, § 36, p. 567; see, e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 43-44 [rejection of expert opinion testimony based on unreliable hearsay not an abuse of discretion].)" (*People v. McWhorter* (2009) 47 Cal.4th 318, 362; but see *People v. Williams* (2009) 170 Cal.App.4th 587, 621-623 [hearsay of unknown reliability can be a basis for a gang expert's opinion when there is a limiting instruction].)

The court should exclude opinions based on unreliable basis. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1174-1175 [exclude opinion that inmates possess weapons for self-defense when the expert knew not the jail conditions]; see *People v. Richardson* (2008) 43 Cal.4th 959, 1008 [under Evid. Code, § 352]; *People v. Daniels* (2009) 176 Cal.App.4th 304, 320-324 [a defense expert's opinion that the victim with a black-out would have poor memory was speculative and was properly excluded under Evid. Code, § 352 when it could not establish the victim blacked out, though some of her testimony was consistent with having a black-out]; but see *People v. Gonzalez* (2006) 38 Cal.4th 932, 944-949 [gang expert on witness intimidation]; *People v. Horning* (2004) 34 Cal.4th 871, 900-901 [ballistics evidence was admissible that the gunshot could have been from defendant's gun, though there was not a match]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1125-1126 [gang evidence]; *People v. Fulcher* (2006) 136 Cal.App.4th 41, 54 [any lack of basis because of erroneous factual assumption does not make the opinion inadmissible but instead goes to the weight of the opinion].)

Although scientific evidence must be reliable (see *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S.579, 587), the *Kelly-Frye* or *Daubert* test does not generally apply to an expert's opinion. (*People v. Clark* (1993) 5 Cal.4th 950, 1018, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Stoll* (1989) 49 Cal.3d 1136, 1156-1157; *People v. McDonald* (1984) 37 Cal.3d 351, 372-373; *People v. Therrian* (2003) 113 Cal.App.4th 609, 614-616.)

B. There (Usually) Must be Facts in Evidence to Support the Opinion

An expert's opinion, based on assumptions of fact that lacked support had no evidentiary value and the opinion alone does not constitute substantial evidence. "[A]n expert's opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based." (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510; accord, *People v. Dodd* (2005) 133 Cal.App.4th 1564, 1568-1571 [opinion based on unreliable hearsay in a parole report]; *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 741-743 [a doctor's medical opinion based on records which were not admitted was worthless]; *In re Asia L.* (2003) 107 Cal.App.4th 498, 512 ["the social worker's conclusion alone is insufficient to support a finding of adoptability"]; *Atiya v. D Bartolo* (1976) 63 Cal.App.3d 121, 126 [opinion without a factual basis did not constitute substantial evidence]; *Griffith v. County of Los Angeles* (1968) 267 Cal.App.2d 837, 847 ["An expert's opinion is no better than the reasons given for it. 'If his opinion is not based upon facts otherwise proved . . . it cannot rise to the dignity of substantial evidence.' "].)

A declaration containing an expert opinion was inadmissible when it did not provide the basis of the opinion. (*Kelly v. Trunk* (1998) 66 Cal.App.4th 519, 524-525; see *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 498, fn. 3, superseded by statute on other grounds as stated in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1542.)

"The chief value of an expert's testimony in this field, as in all other fields, rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion . . . it does not lie in his mere expression of conclusion. [Citation.] In short, Expert evidence is really an argument of an expert to the court, and is valuable only in regard to the proof of the facts and the validity of the reasons advanced for the conclusions." (*People v. Hunt* (1971) 4 Cal.3d 231, 237, internal quotation marks and emphasis omitted; *Pacific Gas & Elec. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135.) "Like a house built on sand, the expert's opinion is no better than the facts on which it is based." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

When an expert witness relays hearsay or otherwise inadmissible information as the basis of the information over a proper objection, the information does not become competent evidence. A "witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. (*Korsak v. Atlas Hotels, Inc,* [(1992)] 2 Cal.App.4th [1516,] at pp. 1524-1525, citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 893-896.)" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)

However, a gang expert can render an opinion based on hearsay information without presenting facts in evidence to support the opinion. (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1128-1129; *People v. Valdez* (1997) 58 Cal.App.4th 494, 511.) For criticism of this rule, see *Hill, supra,* at pp. 1129-1136; *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179, 187-188, 198-199 [gang opinion based on hearsay violated Confrontation Clause]; *People v. Goldstein* (N.Y. 2005) 6 N.Y.3d 119, 128 ["The distinction between a statement offered for the truth and one offered to shed light on an expert's opinion is not meaningful."].)

Generally, in a trial under the Sexually Violent Predators (SVP) Act, a government expert can testify about the defendant's past conduct based on documents reviewed by the expert without placing the underlying facts in evidence. (See *People v. Hubbart* (2001) 88 Cal.App.4th 1202*,* 1233-1235.)

Hypothetical questions. " 'Generally, an expert may render opinion testimony on the basis of facts given "in a hypothetical question that asks the expert to assume their truth." (1 McCormick on Evidence (4th ed. 1992) § 14, p. 58.) Such a hypothetical question must be rooted in facts shown by the evidence, however.' (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.)" (*People v. Boyette* (2002) 29 Cal.4th 381, 449; accord, *People v. Moore* (2011) 51 Cal.4th 386, 399.) "Although the field of permissible hypothetical questions is broad, a party cannot use this method of questioning a witness to place before the jury facts divorced from the actual evidence and for which no evidence is introduced." (*Ibid.*; but see *Guardianship of Jacobson* (1947) 30 Cal.2d 312, 324; *People v. Hill* (1897) 116 Cal. 562, 566 [absence of facts in evidence goes to the weight of the opinion]; *Marriage of S.* (1985) 171 Cal.App.3d 738, 750-751 [hypothetical question allegedly omitting unfavorable facts was proper].) For a criticism of the use of hypothetical questions, see *Estate of Collin* (1957) 150 Cal.App.2d 702, 713-714.

C. Admission of Evidence of the Basis of the Opinion

"A witness testifying in the form of an opinion may state on direct examination the reasons for his opinion and the matter (including, in the case of an expert, his special knowledge, skill, experience, training, and education) upon which it is based, unless he is precluded by law from using such reasons or matter as a basis for his opinion. . . . " (Evid. Code, § 802.)

An expert can testify about hearsay which is the basis of an opinion, but it is not admissible for the truth of the matter. (*People v. Gardeley* (1997) 14 Cal.4th 605, 617-618; *People v. Monteil* (1993) 5 Cal.4th 877, 918-919; *People v. Coleman* (1985) 38 Cal.3d 69, 92.)

Because the extrajudicial information is not admitted for the truth of the matter asserted, it does not violate the confrontation clause. (*People v. Mendoza* (2007) 42 Cal.4th 686, 698-699; *People v. Ledesma* (2006) 39 Cal.4th 641, 707, fn. 18; see *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427.) "The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street* [(1985)] 471 U.S. 409, 414 . . . ." (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9.)

Under Evidence Code section 352, the hearsay evidence supporting an opinion may be inadmissible on direct examination; a party cannot introduce inadmissible hearsay under the guise of giving the basis of the opinion. (*People v. Coleman* (1985) 38 Cal.3d 69, 91-92; *People v. Bell* (2007) 40 Cal.4th 582, 607-608 [can exclude defense expert's basis of statements by defendant]; *People v. Hughes* (2002) 27 Cal.4th 287, 339 [same]; *People v. Price* (1991) 1 Cal.4th 324, 415-416; *People v. Venegas* (2004) 115 Cal.App.4th 592, 597-598.) This restriction on the admission of evidence does not apply in court trials. (*People v. Martin* (2005) 127 Cal.App.4th 970, 977.)

A court shall give a limiting instruction upon request that the extrajudicial information is not admitted for the truth of the matters asserted, but the evidence should be excluded if the limiting instruction would not be sufficient. (*People v. Coleman* (1985) 38 Cal.3d 69, 92-93; *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 789.) There is not a sua sponte responsibility to give the limiting instruction. (*People v. Monteil* (1993) 5 Cal.4th 877, 918-919.)

D. Testimony Concerning Another Expert's Opinion

"(a) If a witness testifying as an expert testifies that his opinion is based in whole or in part upon the opinion or statement of another person, such other person may be called and examined by any adverse party as if under cross-examination concerning the opinion or statement. [¶] (b) This section is not applicable if the person upon whose opinion or statement the expert witness has relied is (1) a party, (2) a person identified with a party within the meaning of subdivision (d) of Section 776, or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement upon which the expert witness has relied. [¶] (c) Nothing in this section makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person. [¶] (d) An expert opinion otherwise admissible is not made inadmissible by this section because it is based on the opinion or statement of a person who is unavailable for examination pursuant to this section." (Evid. Code, § 804.)

A court can allow an expert to testify that she relied upon a non-testifying expert's

reports in forming her own opinions. The trial court, however, cannot allow the testifying expert to reveal their content on direct examination; for example, the expert could not testify that each prior medical evaluation agreed with her own opinion. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308 [error to admit expert to testify her diagnosis of a mental disorder was confirmed by another expert who did not testify], citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 894, 895; see *Mosesian v. Penwalt* (1987) 191 Cal.App.3d 851, 857, 863-864, disapproved on other grounds in *People v. Ault* (2004) 33 Cal.4th 1250, 1272, fn. 15.) "An expert may not, on direct examination, reveal the content of reports prepared or opinions expressed by nontestifying experts. ' " 'The reason for this is obvious. The opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse.' " ' [Citations.]" (*Id.* at pp. 307-308.)

IV. CROSS-EXAMINATION OF AN EXPERT

"(a) Subject to subdivision (b), a witness testifying as an expert may be cross-examined to the same extent as any other witness and, in addition, may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter upon which his or her opinion is based and the reasons for his or her opinion. [¶] (b) If a witness testifying as an expert testifies in the form of an opinion, he or she may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless any of the following occurs: [¶] (1) The witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion. [¶] (2) The publication has been admitted in evidence. [¶] (3) The publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. [¶] If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits." (Evid. Code, § 721.)

"(a) The fact of the appointment of an expert witness by the court may be revealed to the trier of fact. [¶] (b) The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony." (Evid. Code, § 722.)

One can cross-examine expert on evidence not admitted or on inadmissible evidence. (See, e.g., *People v. Hawthorne* (2009) 46 Cal.4th 67, 92-93 [other bad acts by the defendant]; *People v. Boyer* (2006) 38 Cal.4th 412, 461-464 [can impeach defense expert witness with illegally obtained statements from the a custodial interrogation]; *People v. Wilson* (2005) 36 Cal.4th 309, 358-359 [on other misconduct in documents concerning defendant]; *People v. Smith* (2005) 35 Cal.4th 334, 359 [when "a mental health expert offers

a diagnosis, this opens the door to rebuttal testimony questioning that diagnosis or suggesting an alternative diagnosis."].)

One can cross-examine an expert on his or her opinion in another case. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1164-1165; *People v. Price* (1991) 1 Cal.4th 324, 457; but see *People v. Higgins* (2011) 191 Cal.App.4th 1075, 1086-1092 [prosecutorial misconduct to ask argumentative and irrelevant questions about the expert's past cases]; *People v. Buffington* (2007) 152 Cal.App.4th 446, 454-456 [facts of other SVP cases in which defense expert said the person did not qualify was inadmissible because the jury could not determine from the facts the reliability of the expert's conclusions].)

V. LAY OPINION

"If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: [¶] (a) Rationally based on the perception of the witness; and [¶] (b) Helpful to a clear understanding of his testimony." (Evid. Code, § 800.)

"Lay opinion is also admissible, but it plays a very different role than expert opinion and is subject to different rules of admissibility. ' "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" [Citation.]' (*People v. Williams* [(1992)] 3 Cal.App.4th [1326,] at p. 1332.) It must be rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800; *People v. Farnum* (2002) 28 Cal.4th 107, 153; *People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1609.)" (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547.)

Lay opinion becomes inadmissible expert opinion when the witness relies on facts not perceived, such as hearsay, research, experience. (*People v. Williams* (1988) 44 Cal.3d 883, 915.) "Lay opinion testimony is admissible where no particular scientific knowledge is required, or as 'a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to court or jury in any other manner.' [Citations.]" (*Ibid.*)

The rule that lay opinion testimony must be based on the witness's personal observation thus does not apply to reputation testimony. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1311.)

"Where the witness can adequately describe his observations, his opinion or

conclusion is inadmissible because it is not helpful to a clear understanding of his testimony." (*People v. Miron* (1989) 210 Cal.App.3d 580, 583; *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.)

A police officer's lay opinion that shoe marks matched the defendant's shoes is admissible. (*People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110-1111.) A police officer's lay opinion that strike marks on a bullet were similar is admissible. (*People v. Lewis* (2008) 43 Cal.4th 415, 503-504.) A probation officer's opinion that defendant was the one in the surveillance photograph is admissible. (*United States v. Beck* (9th Cir. 2005) 418 F.3d 1008, 1013-1014.)

An opinion that someone was intoxicated is admissible. (*People v. Garcia* (1972) 27 Cal.App.3d 639, 643 & fn. 2.) An opinion of a vehicle's speed is admissible. (*Jordan v. Great Western Motorways* (1931) 213 Cal. 606, 612.) An opinion that a person was angry is admissible. (*People v. Deacon* (1953) 117 Cal.App.2d 206, 210.)

VI. APPELLATE PROCEDURE

A. Cognizability

Generally, any evidence, including hearsay evidence, admitted without objection is competent evidence. (*People v. Panah* (2005) 35 Cal.4th 395, 476; *In re C.B.* (2010) 190 Cal.App.4th 102, 132-133; *People v. Bailey* (1991) 1 Cal.App.4th 459, 463.)

Expert opinion constituted competent evidence, though the court did not formally qualify the witness when there was no objection. (See, e.g., *In re Brandon Q.* (2009) 174 Cal.App.4th 637, 644.) Failure to object to expert testimony forfeited the claim, though there was never a motion to qualify the witness as an expert. (*Ibid.*) When the prosecution introduced expert opinion without qualifying the witness, and the defense failed to object, the defense could not try to impeach the witness as if he or she were an expert. (*People v. Jablonski* (2006) 37 Cal.4th 774, 823.)

The objection must be specific. (Evid. Code, § 353.) When defense expert testimony is excluded, there must be a sufficient offer of proof. (Evid. Code, § 354.)

B. Reversible Error

Expert testimony not beyond the jury's ability to draw its own inferences was prejudicial because it likely played a decisive role in the verdict. (*Kotla v. The Regents of the University of California* (2004) 115 Cal.App.4th 283, 294-295.)

"It should first be observed that expert evidence has become 'increasingly important in modern litigation.' (1 Witkin, Cal. Evidence (3d ed. 1986) The Opinion Rule, § 472, p. 444.) Unquestionably, expert witnesses can be very persuasive to jurors on topics unfamiliar to the layperson. (§ 801, subd. (a).) It is prejudicial error to exclude relevant and material expert evidence where a proper foundation for it has been laid, and the proffered testimony is within the proper scope of expert opinion." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523; see, e.g., *Brown v. Colm* (1974) 11 Cal.3d 639, 647 [exclusion of expert on the standard of care in a medical malpractice suit required reversal]; *Gordon v. Nissan Motor Co., Ltd.* (2008) 170 Cal.App.4th 1103, 1114 ["when a trial court erroneously denies all evidence relating to a claim, or essential expert testimony without which a claim cannot be proven, the error is reversible per se because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice."]; *Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc*. (1999) 74 Cal.App.4th 1232, 1246 [exclusion of an expert on the valuation of property deprived defendant of a fair trial].)

C. Ineffective Assistance of Counsel

An attorney has a duty to investigate whether an expert is necessary. (*People v. Frierson* (1979) 25 Cal.3d 142, 162-164; see *Baylor v. Estelle* (9th Cir. 1996) 94 F.3d 1321, 1323-1324.) An attorney has a duty to present an expert when an expert is necessary to present a defense. (*Ibid.*)

An attorney has a duty to properly prepare an expert witness. (See, e.g., *Hovey v. Ayers* (9th Cir. 2006) 458 F.3d 892, 925-928; see also *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer* (2005) 130 Cal.App.4th 14, 33-35 [attorney has duty to make sure the expert understands the governing legal principles, understand the details of the testimony and field of expertise, make sure the testimony is understandable, the declaration is complete, and the qualifications are properly presented]; but see *People v. Carter* (2003) 30 Cal.4th 1166, 1211-1212 [no IAC on balance when expert witness gave some damaging testimony].)

Normally, to show ineffective assistance of counsel in a habeas corpus petition, there must be a declaration from trial counsel of his or her tactical reasons (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1152) and a declaration from the witness describing what he or she would have said (see *In re Fields* (1990) 51 Cal.3d 1063, 1071, 1075; *People v. Datt* (2010) 185 Cal.App.4th 942, 952-953.)