Filed 2/15/17 P. v. Saba CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LADIV SABA,

Defendant and Appellant.

2d Crim. No. B261038
(Super. Ct. No. BA410454)
(Los Angeles County)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura F. Priver, Judge. Affirmed with directions.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

Ladiv Saba appeals from the judgment entered after a jury had convicted him on two counts (counts 1 and 2) of making criminal threats (Pen. Code, § 422, subd. (a))[1] and two counts (counts 3 and 4) of attempting to dissuade a victim or witness from reporting a crime. (§ 136.1, subd. (b)(1).) The jury found true allegations that appellant had committed the offenses for the benefit of a criminal street gang. (§ 186.22, subds. (b)(1)(B), (b)(4)(C).) Pursuant to the alternate penalty provision of section 186.22, subdivision (b)(4)(C), on counts 3 and 4 appellant was sentenced to prison for concurrent terms of seven years to life.[2] The court sentenced appellant to prison for eight years on count 1 and seven years on count 2. The sentences on counts 1 and 2 were stayed pursuant to section 654.

Appellant contends that the trial court (1) abused its discretion in admitting evidence of an uncharged burglary, (2) made comments during voir dire that lowered the prosecution's burden of proof, (3) made an erroneous evidentiary ruling concerning a photographic line-up, and (4) erroneously instructed the jury. In addition, appellant claims that the prosecutor committed misconduct during closing argument. Finally, appellant argues, and the Attorney General concedes, that his concurrent seven-year-to-life sentences on counts 3 and 4 are unauthorized. We reverse appellant's sentences on these counts,

---

[1] Unless otherwise stated, all statutory references are to the Penal Code.

[2] "Section 186.22, subdivision (b)(4) is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related. [Citation.]" (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.)

remand the matter for resentencing, and affirm in all other respects.

Facts

Nancy Renteria lived in a duplex apartment. One evening her tires "screeched" when she was driving away from the duplex. Upon her return, she saw appellant banging hard on the metal gate in front of the door to her apartment. Appellant was a member of the 18th Street criminal street gang. He was with a group of about 11 persons. Renteria had previously seen him "a couple times." "[H]e would park his vehicle in front of . . . the house [she] rented but [she] never spoke to him."

Renteria testified that appellant had said to her: "[W]hy are you trying to bring the police in here[?]" "Don't you know where you're at? . . . This is 18th Street. There is enough heat [here] as it is." Renteria told the police that appellant had stated, "This is 18th Street bitch hood you better get the f[uck] out of here."

Renteria protested that appellant was "frightening [her] kids" inside the apartment by banging on the metal gate. Appellant said, "Let me talk, you fucking bitch." "'Shut up or I'm gonna hit you.'" Renteria replied, "What? You're gonna hit me?" Appellant hit Renteria in the forehead, causing her to bleed. Renteria yelled to her daughter, who was outside, "[C]all 911."

The daughter testified that she had "heard someone say that if I called the police . . . they were going to shoot me." Renteria testified that appellant had said that if they called the police he would "[s]hoot me or my daughter."

The daughter gave Renteria a telephone so she could call the police. Appellant's "associate" pointed to Renteria and her daughter. He said, "If you call the police we're gonna shoot

you . . . and your family." Appellant "pointed as well like 'you got that?'" Appellant's associate grabbed the telephone and threw it on the ground so that it "broke . . . completely."

Renteria's daughter got another telephone and called 911. Appellant and his companions covered the license plates of appellant's vehicle, and he drove away. "Everybody helped him escape before the police . . . got there." The police arrived about five minutes after the 911 call.

Renteria did not sleep in her apartment that night. She was too scared. She knew that appellant and his companions were gang members. When Renteria returned to her apartment in the morning, the "whole house was burglarized."

Alejandro Vidaurri, a forensic print specialist, was called as a defense witness. He went to Renteria's apartment after the burglary. He described its condition as follows: "It was just destroyed. [E]verything was like oily greasy in there. [E]verything was all over the place." The apartment had been "trashed." Vidaurri was able to lift only one good quality fingerprint at the point of entry into the apartment. The identity of the person who left the fingerprint is unknown.

The police searched the residence of Jose Moreira, an 18th Street gang member. They found a television that had been taken from Renteria's apartment during the burglary. A photograph depicted Moreira lying on a sofa that had been inside Renteria's apartment at the time of the burglary. Another photograph depicted Moreira and appellant "showing their sign for their gang."

After the burglary, Renteria did not spend another night at her apartment. She believed that she and her family were in danger. The police helped her relocate to another

residence. When Renteria's daughter testified at trial, she felt scared because "they might hurt [her] family."

Appellant did not testify. His defense was that he had been "wrongly identified" as the perpetrator of the crimes.

Admission of Evidence of Uncharged Burglary

Appellant argues that the trial court erroneously admitted evidence of the uncharged burglary of Renteria's residence. Before the trial began, defense counsel argued, "There is evidence that somebody else did it. There is no evidence [appellant] did it." The trial court responded that the gang may have committed the burglary, which "adds to the sustained fear." To prove the offense of making a criminal threat in violation of section 422, subdivision (a), "the prosecution must establish . . . that the threat actually caused the person threatened 'to be in *sustained* fear for his or her own safety or for his or her immediate family's safety.'" (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228, italics added.) "Sustained fear" means fear for "'a period of time that extends beyond what is momentary, fleeting, or transitory.' [Citation.]" (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1024.)

At the beginning of Renteria's testimony about the burglary, the trial court instructed the jury, "The information about the house and the burglary is being offered solely for the state of mind of the victim and is not to be considered for any other purpose." Later on during the trial, the court told the jury, "[A]ny evidence regarding the residential burglary is being offered for the limited purpose of the element of sustained fear as required in counts 1 and 2, . . . the criminal threats charges."

Appellant maintains that evidence of the burglary was irrelevant because it did not have "any tendency in reason to

prove" the sustained fear element of a violation of section 422. (Evid. Code, § 210.) The evidence "only served to establish that [appellant's] friends had committed a terrible crime against Ms. Renteria for which nobody would be punished."

"The appropriate standard of review is abuse of discretion." (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) We "revers[e] only if "'the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132.) A trial court does not abuse its discretion if it has a reasonable basis for its ruling. (*Kennedy v. Superior Court* (2007) 145 Cal.App.4th 359, 368-369.)

The trial court did not abuse its discretion in admitting evidence of the burglary for the limited purpose of showing that appellant's threats caused Renteria "to be in sustained fear for . . . her own safety or for . . . her immediate family's safety." (§ 422, subd. (a).) The burglary was committed by at least one of appellant's fellow gang members, Jose Moreira. In view of the timing of the burglary - the night of appellant's threat - a trier of fact could reasonably infer that appellant was also involved in the burglary. Appellant threatened to harm Renteria or her daughter if they called the police, but they ignored his threat. Renteria's daughter testified that appellant had told her to "tell [her] mom" that "they were gonna come after her" if the police were called.

The burglary soon "after the threat give[s] meaning to [appellant's] words and impl[ies] that he meant serious business when he made the threat," thus supporting Renteria's "sustained fear" as a result of the threat. (*People v. Martinez* (1997) 53 Cal.App.4th 1212, 1221.) "[I]t is clear a jury can

properly consider a later action taken by a defendant in evaluating whether the crime of making a terrorist threat has been committed. . . . The point is that all of the circumstances can and should be considered in determining whether a terrorist threat has been made." (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1014.)

Voir Dire

During voir dire, juror number 8509 said she had two friends who were deputy district attorneys. The court asked, "Anything about those relationships which would impact your fairness?" The juror replied: "One presumes that the defendant is innocent. However, in speaking to the D.A.'s, . . . I strongly get the feeling that the People don't waste time. They don't bring cases to court if they don't -- if they are not most likely --" The trial court interrupted the juror. It said: "Obviously there are standards that the District Attorney adheres to when filing criminal charges. I think that's what you're referring to, right? They don't just willy-nilly file cases. And I'll also say there are checks and balances within the system to weed out cases that shouldn't be before the court[3]. . . . But would you also agree that regardless of any of that someone is entitled to their trial, entitled to make the District Attorney prove the case, . . . and if the People fail to do that the individual is entitled to a not guilty verdict[?]" The juror responded, "I do believe that."

---

[3] The court was referring to the preliminary hearing process. "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and expense of a criminal trial." (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 668.) Appellant was held to answer at a preliminary hearing.

Defense counsel objected that juror number 8509 "spoke about her belief in how the system worked. It seems like there was an attempt to poison the pool." Counsel asked the court to give a "curative instruction." The proposed instruction was "that while there is a process that leads a person to be here on trial that that process does not affect whether or not he is presumed to be innocent and that process does not necessarily weed out innocent people from trial."

The court refused to give the proposed instruction: "I'm not going to say all of that. I think I've said all of the things, presumption of innocence repeatedly. I said it has to be proved beyond a reasonable doubt . . . ." Counsel protested, "But . . . what you . . . said was that there is a specific process and they don't just show up at trial." The court explained that "the point [it] was trying to make is that regardless of that process [the prosecutor] still has to prove it and if he fails to prove it he gets not guilty. And that's to your benefit, not to your detriment."

Appellant contends that the court's remarks to juror number 8509 lowered the prosecution's burden of proof by implying that there were facts outside the record that justified the charges. The contention is devoid of merit. No reasonable juror would have construed the remarks as indicating that incriminating evidence would be withheld from the jury during the trial. The court was trying to make certain that the jurors understood a fundamental precept of our criminal justice system: although groundless felony charges generally do not reach the jury trial stage, the People must prove the defendant guilty beyond a reasonable doubt by evidence presented at the trial. This point was emphasized in the court's general instructions to the jury: "The fact that a criminal charge has been filed against

the defendant is not evidence the charge is true. You must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt."

Photographic Line-up

A police officer showed Renteria a "photographic line-up card, commonly known as a six-pack." The six-pack included a photograph of appellant, and Renteria identified him as the perpetrator of the crimes. Before the trial began, the court stated that it "would allow the officer to testify that he conducted his investigation and *based* upon that investigation he prepared a six-pack and it was shown to the victim." (Italics added.) The court explained: "I think they [the People] get to . . . at least allow the officer to indicate that [he acted] *based* upon something not just, you know, 'because [he] plucked [appellant's] picture out of the air.' I don't think that's fair . . . ." (Italics added.) A few minutes later, the court said: "I'm going to allow the officer to testify that as part of their investigation [not based on their investigation] they prepared a six-pack with [appellant's] picture and they showed it to the witness and she did what she did." "I think [the officer] can answer it 'as part of my investigation, I prepared a six-pack with [appellant's] picture. I showed it."

At trial Detective Ann Chavez testified that Renteria had selected appellant's photograph from the six-pack. The prosecutor asked Chavez if she had known appellant's identity at the time she prepared the six-pack. Chavez responded, "My investigation eventually led to [appellant] in creating

photographic line-up card, commonly known as a six-pack." The trial court granted appellant's motion to strike the response.

Appellant moved for a mistrial on the ground that Chavez's response violated the court's pretrial order limiting her testimony. Defense counsel stated: "You [the court] made it very clear what the witness was allowed to say which was that 'in the course of my investigation I put his picture in the six-pack' as opposed to what was brought out was 'based on investigations I conducted, I put [appellant's] picture in the six-pack' which is a very different and very prejudicial way of putting it because then that leads one to believe there was some investigation conducted to get us to his picture being in the six-pack . . . ." The prosecutor protested, "It was my understanding from the court that the people would be . . . allowed to have the detective testify that based on her investigation [Detective Chavez] prepared a six-pack."

The court concluded that Chavez's testimony had violated its pretrial order. Instead of granting appellant's motion for a mistrial, the court decided to give a "curative instruction." The instruction was as follows: "All parties are bound by the rules of evidence and the court's ruling regarding what evidence is admissible. The prosecution elicited testimony, whether or not inadvertently, from Detective Chavez that was in violation of the court's order. That testimony was stricken from the record. You must not consider any evidence that was stricken from the record for any purpose. You may consider the fact of the violation of the court order. You may give this fact whatever weight you think it deserves."

Appellant does not claim that the trial court erroneously denied appellant's motion for a mistrial. Nor does he

claim that the curative instruction was erroneous. Instead, he contends: "[T]he jury was informed that there had been a[n] additional investigation, about which the jury was not informed, that justified the charges against [appellant]. This lowered the prosecution's burden of proof by assuring the jury . . . that even if the evidence against [appellant] did not prove the case beyond a reasonable doubt, there was additional incriminating evidence that pointed to [his] guilt."

Appellant overlooks the effect of the trial court's curative instruction directing the jury to disregard Chavez's stricken testimony. We presume that the jury followed this instruction. (*People v. Pearson* (2013) 56 Cal.4th 393, 434-435 ["the court admonished the jury to disregard any mention of the arrest, and we presume it followed the court's instructions"].)

Even if the jury had not followed the instruction and had considered Chavez's stricken testimony, this would not have lowered the prosecution's burden of proof by suggesting that evidence outside the record "pointed to [appellant's] guilt." The stricken testimony indicated what should have been obvious to the jury: the inclusion of appellant's photograph in the six-pack was not because of mere happenstance or, to use the trial court's words, "'because [Chavez] plucked his picture out of the air.'"

Flight Instruction

Over appellant's objection, the trial court gave CALCRIM No. 372 on a defendant's flight after the commission of a crime. The instruction provided: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and

importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Appellant asserts that the court erred because "[t]he flight instruction should not be given when [as here] the identity of the perpetrator is the issue contested at trial." We disagree. (*People v. Johnson* (2015) 61 Cal.4th 734, 774 [flight instruction is appropriate and "does not lessen the prosecution's burden of proof even if the identity of the perpetrator is at issue"]; *People v. Avila* (2009) 46 Cal.4th 680, 710 ["a flight instruction . . . is proper even when identity is at issue"].)

Moreover, appellant never conceded that identity was the sole contested issue at trial. In his closing argument, defense counsel questioned whether any crime had been committed against Renteria's daughter. Counsel stated, "I'll point out some evidence that maybe raised a little bit of question about whether [the daughter] was actually threatened . . . by the suspect they've identified as [appellant]." "Maybe [the daughter] didn't see or hear any of this." "[L]isten carefully to her testimony. Seemed like much of it was coached."

Instruction to Consider with Caution Evidence of Appellant's Statements

Over appellant's objection, the trial court gave CALCRIM No. 358, which instructed the jury, "Consider with caution any statement made by a defendant tending to show his guilt unless the statement was written or otherwise recorded." The trial court believed it had a duty to give the instruction sua sponte. Appellant maintains that the trial court erred.

"[T]he cautionary instruction applies to any extrajudicial oral statement by the defendant that is used by the prosecution to prove the defendant's guilt—it does not matter

whether the statement was made before, during, or after the crime, whether it can be described as a confession or admission, or whether it is a verbal act that constitutes part of the crime or the criminal act itself." (*People v. Diaz* (2015) 60 Cal.4th 1176, 1187 (*Diaz*).) *Diaz* was decided after the trial in the instant case. It held that the cautionary instruction is not required to be given sua sponte. (*Id*., at pp. 1188, 1190.)

Before *Diaz*, the instruction was required to be given sua sponte if the defendant had made out-of-court statements. (*Diaz*, *supra*, 60 Cal.4th at p. 1189.) The *Diaz* court declined to decide whether the new rule should be applied retroactively. (*Id*., at p. 1195.) We need not decide this issue because appellant has failed to show that the instruction prejudiced him. The instruction was for his benefit. "The cautionary instruction . . . advises jurors that in deciding whether to believe a witness's testimony about the defendant's statements, they must exercise particular caution." (*Id*., at p. 1188.) The instruction "can be useful in highlighting for the jury the need to carefully consider a type of evidence that is particularly vulnerable to distortion, whether intentional or accidental. [Citation.]" (*Id*., at p. 1194.)

Appellant argues that the instruction was prejudicial because it "told the jury that it was the defendant who made the statement," thus lowering the People's burden of proof. Appellant is referring to the first sentence of CALCRIM No. 358: "You have heard *evidence* that the defendant made an oral or written statement before the trial." (Italics added.) No reasonable juror would have misinterpreted this sentence as saying that appellant had in fact made the statement in question.

Prosecutorial Misconduct during Closing Argument

Vouching for Renteria's Credibility

Two days after the crimes were committed Renteria told the police that the suspect who hit her had a tattoo on his left arm. Appellant had a tattoo on his lower right arm, not on his left arm. At the preliminary hearing, Renteria testified that the suspect had a tattoo on one of his arms but she could not remember which one. On direct examination at trial, Renteria testified that she had told the police she "did not know if it was the right or the left arm, but he had a tattoo." On cross-examination, Renteria testified that she could not remember whether she had told the police that the tattoo was on the suspect's left forearm.

Appellant claims that, during the opening phase of closing argument, the prosecutor committed misconduct when he told the jury that he "believed" Renteria's preliminary hearing testimony that she did not remember which of appellant's hands bore a tattoo. The prosecutor stated: "[Defense counsel] will get up here and tell you that . . . [Renteria] said the tattoo was on the left hand. What about the tattoo? Well, I'm going to tell you. The last thing she saw . . . was a fist coming right here to her face, the right hand where this tattoo is at." "In the prelim she says, you know what, I don't remember which hand it [the tattoo] was [on]. *I believe her*." (Italics added.) Defense counsel objected on the ground that this was "[i]mproper argument." The trial court overruled the objection. Appellant asserts that the prosecutor's statement, "I believe her," was "plainly a statement of [his] personal belief in Ms. Renteria's veracity. This was vouching in its most pure form."

Appellant arguably forfeited the vouching issue because in the trial court he did not object on that specific ground. Instead, he objected on the vague ground of "improper argument." (See *People v. Mendoza* (2016) 62 Cal.4th 856, 906; *People v. Hill* (1998) 17 Cal.4th 800, 820.) In *People v. Fernandez* (2013) 216 Cal.App.4th 540, 560, the defendant "appropriately concede[d] the merits" of the Attorney General's contention "that by objecting . . . on the vague ground of 'improper argument[,]'" the defendant had forfeited his claims of prosecutorial misconduct, including the claim of improper vouching for the credibility of the complaining witnesses. Unlike the Attorney General in *Fernandez*, the Attorney General here does not claim that appellant forfeited the vouching issue. We therefore do not decide whether the issue was forfeited. (See Gov. Code, § 68081.)

"A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] . . . However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his] comments cannot be characterized as improper vouching. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Romero and Self* (2015) 62 Cal.4th 1, 39.)

The prosecutor's statement, "I believe her," was improper vouching. The statement appears to have been based on the prosecutor's personal belief, not "the evidence adduced at

trial and reasonable inferences flowing from such evidence." (*People v. Frye*, *supra*, 18 Cal.4th at p. 972.)

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.]" (*People v. Doolin*, *supra*, 45 Cal.4th at p. 444.) The prosecutor's improper vouching was not so egregious that it rendered the trial fundamentally unfair and resulted in a denial of due process. Accordingly, the "harmless beyond a reasonable doubt" standard of review is inapplicable. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed. 2d 705] ["before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"].)

"The test of prejudice for misconduct not involving federal constitutional error is whether it is "'reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the comment attacked by the defendant. [Citations.]"' [Citation.]" (*People v. Galloway* (1979) 100 Cal.App.3d 551, 564-565.) Thus, we may reverse the judgment only if it is reasonably probable that, in the absence of the prosecutor's improper vouching, a result more favorable to appellant would have been reached. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

Under this standard, a reversal is not warranted. Indeed, the prosecutor's improper vouching was harmless beyond a reasonable doubt. The prosecutor did not vouch for the credibility of Renteria's trial testimony. He vouched only for the credibility of her preliminary hearing testimony that she did not "remember which hand it [the tattoo] was" on. Renteria's

memory of the location of the tattoo was not crucial to the prosecution's case. The identification of appellant was credible and solid. Renteria observed him at close range, and this was not the first time she had seen him. She testified that she had previously seen him "a couple times." "[H]e would park his vehicle in front of . . . the house [she] rented but [she] never spoke to him." Renteria's identification was corroborated by her daughter's identification of appellant and his membership in the 18th Street criminal street gang. Moreover, the trial court instructed the jury that "[n]othing that the attorneys say" during closing argument "is evidence." "In the absence of any showing to the contrary, we presume the jurors followed this instruction. [Citation.]" (*People v. Pearson*, *supra*, 56 Cal.4th at p. 477.)

Assuming Facts not in Evidence

Appellant contends that, during closing argument, the prosecutor made three comments that together constituted misconduct. First, the prosecutor told the jury that the 18th Street gang's "main purpose is to keep people from reporting [crimes] to the police, keep people from coming to court and testifying. [¶] And for the most part they are successful, but not in this case." Defense counsel objected without stating the grounds for his objection. The trial court overruled the objection. Second, the prosecutor stated, "Ask yourself why didn't [Renteria's daughter] show for the prelim?" Defense counsel objected that the statement assumed facts not in evidence. The court overruled the objection. Third, the prosecutor said, "The reason why they [the 18th Street gang] couldn't get to [Renteria's daughter] is because her mom was protecting her." Defense counsel objected, "Assumes facts not in evidence." The trial court

sustained the objection. Appellant did not request a curative instruction.

Appellant claims that the prosecutor's comments "suggested that the 18th Street gang often intim[id]ated witnesses and that [Renteria's daughter] had not testified at the preliminary hearing in order to ensure her safety." Appellant continues: "These arguments - that the witnesses were credible because they had braved unexplored - at least in court - threats by the 18[th] Street gang, effectively circumvented the rules of evidence by asking the juror[s] to trust the prosecutor's knowledge of what had really happened, as opposed to what the witnesses had testified to in court." Appellant therefore "did not receive a fair trial in violation of the Sixth Amendment." (Bold and capitalization omitted.)

The prosecutor did not commit misconduct by his first comment concerning witness intimidation by 18th Street gang members. The gang expert testified that witness intimidation was one of the gang's primary activities. It "was a common tool or tactic that gang members have used in the past to attempt to dissuade witnesses from going to court and testifying against them." Moreover, appellant forfeited this misconduct claim because he failed to state the grounds for his objection. (*People v. Hill*, *supra*, 17 Cal.4th at p., 820; *People v. Pitts* (1990) 223 Cal.App.3d 606, 691 ["Generally, in order to raise the alleged misconduct on appeal, the objection must be both timely and specific"].)

Appellant's claim of misconduct as to the prosecutor's third comment is also forfeited. After the trial court sustained his objection that the third comment assumes facts not in evidence, appellant did not request that the jury be admonished

to disregard the assumed facts, i.e., "The reason why they [the 18th Street gang] couldn't get to [Renteria's daughter] is because her mom was protecting her." "[A] claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]" (*People v. Crew* (2003) 31 Cal.4th 822, 839.) "[A]ny conceivable harm resulting from the . . . alleged misconduct [here] could have been cured by an admonition." (*People v. Farnam* (2002) 28 Cal.4th 107, 167.)

In any event, as to both the third comment and the second comment - "Ask yourself why didn't [Renteria's daughter] show for the prelim?" - appellant has failed to show that the alleged misconduct was sufficiently egregious to constitute reversible error. "Under the federal standard, prosecutorial misconduct that infects the trial with such "'unfairness as to make the resulting conviction a denial of due process'" is reversible error. [Citation.] In contrast, under our state law, prosecutorial misconduct is reversible error where the prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and "'it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" [citation]." (*People v. Martinez* (2010) 47 Cal.4th 911, 955-956.) The prosecutor's third and second comments did not result in a denial of due process. Nor is it reasonably probable that a result more favorable to appellant would have been reached had the prosecutor not made the comments.

Seven-Year-to-Life Sentences on Counts 3 and 4

Appellant argues, and the Attorney General concedes, that on counts 3 and 4 the trial court was not

authorized to impose concurrent life sentences with a minimum term of seven years. The Attorney General states, "[A]ppellant did not qualify for life sentences under section 186.22, subdivision (b)(4)(C) as to counts 3 and 4, and the matter should therefore be remanded for resentencing."

Each of counts 3 and 4 charged a violation of section 136.1, subdivision (b)(1): attempting to dissuade a victim or witness from reporting a crime. The seven-year-to-life sentences on these counts were imposed pursuant to the alternate penalty provision of section 186.22, subdivision (b)(4)(C), which requires imprisonment for seven years to life "if the felony [of which the defendant is convicted] is . . . threats to victims and witnesses, as defined in Section 136.1." (*Ibid.*) The making of a threat is not an element of a violation of section 136.1, subdivision (b)(1), the felony of which appellant was convicted. On the other hand, section 136.1, subdivision (c)(1) applies "[w]here the act is accompanied . . . by an express or implied threat of force or violence, upon a witness or victim or any third person . . . ." (*Ibid.*) Appellant was neither charged with nor convicted of violating section 136.1, subdivision (c)(1). While a violation of subdivision (b)(1) of section 136.1 is an alternate felony-misdemeanor, a violation of subdivision (c)(1) is a straight felony.

We accept the Attorney General's concession that, because appellant was convicted of violating section 136.1, subdivision (b)(1) instead of subdivision (c)(1), he was not convicted of making "threats to victims and witnesses, as defined in Section 136.1." (§ 186.22, subd. (b)(4)(C).) In *People v. Lopez* (2012) 208 Cal.App.4th 1049, 1065, the court concluded: "Only subdivision (c)(1) of section 136.1 refers to the use of an implied or express threat. Therefore, the plain meaning of section 186.22,

subdivision (b)(4)(C) is that a seven-year-to-life sentence can be imposed only if the jury convicts the defendant of attempting to dissuade a witness by use of an implied or express threat of force pursuant to section 136.1, subdivision (c)(1)."

Accordingly, the concurrent seven-year-to-life sentences on counts 3 and 4 must be reversed. As requested by the Attorney General, we remand the matter for resentencing. "When a case is remanded for resentencing by an appellate court, the trial court is entitled to consider the entire sentencing scheme. Not limited to merely striking illegal portions, the trial court may reconsider all sentencing choices. [Citations.] This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme. [Citation.] . . . The trial court is entitled to rethink the entire sentence to achieve its original and presumably unchanged goal." (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.)

Disposition

The sentences imposed on counts 3 and 4 are reversed, and the matter is remanded to the trial court for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.*

We concur:

PERLUSS, P. J. SEGAL, J.

* Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.