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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. QUINZELL HOOFBOOKER et al., Defendants and Appellants.	B285288 (Los Angeles County Super. Ct. No. KA113513)

APPEALS from judgments of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Judgments of conviction affirmed; matter remanded with directions.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Quinzell Hoofbooker.

Caneel C. Fraser, under appointment by the Court of Appeal, for Defendant and Appellant Joshua Woodard.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendants and appellants Joshua Woodard and Quinzell Hoofbooker of robbery and attempted robbery. For a separate incident, the jury also convicted Hoofbooker of kidnapping for carjacking and kidnapping to commit robbery. The jury also found true the allegation that he personally used a firearm in the commission of both these offenses.

On appeal, Woodard and Hoofbooker challenge the exclusion of expert testimony regarding the lack of correlation between an eyewitness's certainty in his or her identification and the accuracy of that identification. Nearly 35 years ago, *People v. McDonald* recognized this psychological phenomenon. (*People v. McDonald* (1984) 37 Cal.3d 351, 369 (*McDonald*), overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 (*Mendoza*).) It authorized the admission of expert testimony on this subject, as well as others. This expert testimony directly addresses the certainty factor included in CALJIC No. 2.92. Without further explanation, the instruction could prompt the jury to conclude that an identification is more reliable when the eyewitness expresses certainty. Exclusion of this evidence constituted error, but we conclude it was harmless.

Either jointly or individually, Woodard and Hoofbooker raise other claims including the erroneous admission of uncharged act evidence and gang evidence, the erroneous denial of motions for judgment of acquittal and mistrial, instructional error, and cumulative error. They also challenge the trial court's refusal to strike their prior strike convictions, its imposition of prior serious felony conviction enhancements, and its imposition

of the restitution fine and assessments without a determination of their ability to pay.

We order Hoofbooker's and Woodard's sentences vacated and remand for resentencing to allow the trial court to exercise its discretion as to the prior serious felony conviction enhancements, in light of Senate Bill No. 1393. In all other respects, the judgments of their convictions are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

A. Facts[1]

1. *Prosecution Evidence*

a. *Pioneer Park Incident*

On August 20, 2016, at approximately 9:00 p.m., Joey S.[2] and Nick C. arrived at Pioneer Park, near its skate park. They were picking up Ryan N. and Marina S. Fifteen-year-old December S., Marina S.'s sister, and 14-year-old Haylie P. were also at the park.

Joey S. exited his truck once he arrived with Nick C. at the park. Woodard approached Joey S. He asked, "Who is Joey?" When Joey S. stated, "I'm Joey," Woodard responded, "You don't have a name here. What are you about? Do you know what I'm

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[1] Viewed in the light most favorable to the judgment (*People v. Najera* (2006) 138 Cal.App.4th 212, 215; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303–1304), the evidence relevant to the issues on appeal established the facts presented here.

[2] To protect the personal privacy interests of the victims, we refer to each by first name and last initial. (Cal. Rules of Court, rule 8.90(b)(4).)

about? Where are you from?" Woodard also announced that he was a Crip. Joey S. felt a metal object against his temple. Woodard removed Joey S.'s wallet from his pocket. He then removed cash from the wallet. He threw the wallet to Daveon Hoofbooker,[3] who drove up in a black four-door car. Woodard told him to throw the wallet out on the freeway. Daveon Hoofbooker drove away.

While Woodard confronted Joey S., codefendant Uchechukwu Mbaruguru[4] walked up to Marina S., December S., Ryan N. and Haylie P. Mbaruguru told them to leave. Marina S. and Ryan N. became frightened because he said he was a Crip. Specifically, Mbaruguru stated, "Blocc Crips. What are you doing on our block? Bounce. You need to roll out. Get the fuck out of here." Marina S. walked away with Ryan N. and December S. She looked back to tell Haylie P. to join them.

Mbaruguru approached Nick C. who remained seated in the passenger's side of Joey S.'s truck. Hoofbooker was next to Mbaruguru. Woodard joined them. Mbaruguru asked Nick C., "Hey, what do you have in here?" and "do you have anything on you?" After Nick C. denied having anything, Mbaruguru reached into the truck and tried to grab his wallet and pat his pants. Mbaruguru demanded, "Give me your shit." Mbaruguru, Woodard, and Hoofbooker grabbed Nick C. to remove him from the truck. They also tried to take his wallet and unbuckle his

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[3] The trial court dismissed the charges alleged against Daveon Hoofbooker. To avoid confusion, we will refer to him by his first and last names, and to Quinzell Hoofbooker by his first and last names or only by his last name.

[4] Mbaruguru is not a party to this appeal.

seatbelt. They made statements including, "what do you have," "what are you about," "open the door," "get out," and "unbuckle."

Joey S. returned to the driver's seat and drove away with Nick C. to the San Dimas Sheriff's station. At the Sheriff's station, Joey S. informed a deputy that he was familiar with his assailants. Joey S. had seen them on prior occasions at the park. Ryan N. also called Joey S. after he arrived at the Sheriff's station. Ryan N. told him the names of the perpetrators, including the name "Joshua." Ryan N. was provided with the names by someone at the skate park as he was leaving.

b. *Identifications*

(1) *Joey S.*

Joey S. later met with Los Angeles County Sheriff's Detective Crisanta Reyes. He told her that one of the perpetrators was Joshua Woodard, or "Joshua." Joey S. also told her that two of the others were brothers. He provided the names of "Quin" and "Dae Dae." He told Detective Reyes that he knew each of them from the neighborhood. He did not tell her that Ryan N. provided him with information about them.

Detective Reyes showed photo six-pack lineups to Joey S. He identified all four participants, consisting of Woodard, Mbaruguru, Quinzell Hoofbooker, Daveon Hoofbooker. For Woodard's photo, Joey S. wrote, "This is Josh Woodard." He identified Woodard as the person who took his wallet. However, Joey S. wrote the name of "Dae Dae" for the photograph of Quinzell Hoofbooker and the name of "Quin" for the photograph of Daveon Hoofbooker.

Before meeting with Detective Reyes, Joey S. obtained the names of the perpetrators from an acquaintance and saw photos

of them on Instagram. Hoofbooker also later contacted Joey S. on Facebook and called his phone. Joey S. had never previously provided his contact information to Hoofbooker. Joey S. did not tell Detective Reyes that he searched for the perpetrators on the internet. He recognized the faces in the photo six-packs from the incident, not from photos on social media.

During trial, Joey S. identified Woodard as the person who confronted him, placed a metal object against his temple, and took his wallet. Joey S. also identified Mbaruguru as the person who confronted Nick C. He identified Daveon Hoofbooker and Quinzell Hoofbooker, but was unable to specify who went to talk to Joey S.'s other friends and who was in the passing black car.

(2) *Nick C.*

Detective Reyes also showed photo six-packs to Nick C. In one photo six-pack, Nick C. commented that Mbaruguru looked similar to the person who tried to pull him out of the truck. In another photo six-pack, he identified Hoofbooker as the person who was next to Mbaruguru. In a third photo six-pack, he indicated that Woodard possibly looks like the person who stole Joey S.'s wallet. Nick C. was unable to identify Daveon Hoofbooker in any photo six-pack.

In court during trial, Nick C. also identified Woodard, Hoofbooker, and Mbaruguru.

(3) *Marina S.*

When interviewed by Detective Reyes, Marina S. expressed her concern about retaliation for assisting in the investigation, specifically because the perpetrators were gang members. Marina S. was unable to identify Woodard in any photo six-pack. She identified Mbaruguru in court, as well as in a photo six-pack

prior to trial. However, she testified that she could not tell if the person in court was the person in the photo six-pack. Marina S. claimed to not be good with faces, but she recognized Mbaruguru's face in the photo six-pack. During her testimony, she also said that she was afraid.

In court, Marina S. identified Daveon Hoofbooker as one of the men who initially approached Joey S. However, she was not sure if he was actually one of the men. She was unable to identify him in a photo six-pack.

(4) *December S.*

December S. identified Mbaruguru and Daveon Hoofbooker in court. She also identified Daveon Hoofbooker in a photo six-pack as the person who tried to pull Nick C. out of the truck.

In court, December S. identified Woodard as the person who placed a gun to Joey S.'s head, after initially identifying Mbaruguru. She was afraid in court because Woodard stared at her. She was unable to identify Woodard in any photo six-pack. December S. identified a different man in the photo six-pack because she believed he "looked like" the person who placed a gun to Joey S.'s head. She explained that seeing Woodard in person in court made a difference to her.

(5) *Haylie P.*

Haylie P. identified Woodard in court. Before trial, she provided Woodard's name to Detective Reyes. She told Detective Reyes that she knew Woodard from the park. In a photo six-pack, she selected a photo which did not depict Woodard. She was also unable to identify Daveon Hoofbooker in a photo six-pack.

(6) *Ryan N.*

In court, Ryan N. identified Woodard and Mbaruguru. He testified that he was afraid.

Prior to trial, Detective Reyes did not show any photo six-packs to Ryan N. He was reluctant to speak with her. He wanted to forget about the incident. He told her that he would be unable to identify anyone. He claimed to have not seen anyone's face well. He also did not think he could identify anyone from papers or photos.

c. *Gang Evidence*

Los Angeles County Sheriff Deputy Joseph Sumner was a gang investigator since 2007. He opined that the concept of territory is important to gangs, especially gangs with predominantly African American members. The gang members want to broaden their territory to have a larger area to recruit members and commit crimes to collect money for the gang. Gang members will even claim specific locations within their territory to hang out or commit crimes to raise revenue.

Sumner testified that a gang member confronts a person in his or her territory by asking, "Where are you from?" He called this confrontation "hitting up." Gang members utilize it to determine if the other person is a member of an ally gang or a rival. It is also used to publicize the gang to both rival gang members and non-gang members. To accomplish this, the gang member will identify himself or herself and his or her gang during the confrontation or even during the commission of crimes. He explained that publicizing the gang's presence places fear into the community. Consequently, the presence of gangs in a neighborhood makes residents reluctant to report crimes committed by gang members.

Sumner also discussed "putting in work," which requires gang members to perform acts on behalf of the gang. These acts range from confronting rival gang members to committing crimes, including robberies and shootings. He described a hypothetical scenario where gang members confront people in a public park, announce their gang, and rob them. Sumner explained that placing people in fear is the objective of gang activity.

In Sumner's experience, victims and witnesses in gang cases do not cooperate with peace officers. They also do not want to testify against gang members. They fear retaliation by gang members against them and their family members.

d. *Incident Involving Rene C.*

On October 2, 2016, at 2:00 a.m., Rene C. was walking to his car after leaving a bar. Hoofbooker approached Rene C. and lifted his shirt to reveal a silver semiautomatic firearm. He told Rene C. that they were going for a ride. Rene C. sat in the driver's side and Hoofbooker entered the passenger's side. Hoofbooker also said he was member of the Crips and his gang name was D-Rock or G-Rock. Rene C. was scared Hoofbooker would shoot him.

Rene C.'s car had an ignition interlock device installed, as a result of a prior DUI conviction from 2011. The device requires the driver to blow into it. If the breath sample contains alcohol, the car will not start. Rene C. explained to Hoofbooker that the car would not start because he had been drinking. Hoofbooker asked a bystander to blow into the device in exchange for money. The man did so, and Hoofbooker paid him $10.

After driving on the freeway, the car horn sounded because the interlock device randomly required a breath sample. Both Rene C. and Hoofbooker tried blowing into the device, but the

horn did not stop. Rene C. could smell alcohol on Hoofbooker's breath. They continued to drive to a residential area.

When they stopped, Hoofbooker pulled out his gun, and pointed it at Rene C.'s face. Hoofbooker ordered, "Empty out your pockets, motherfucker, or I'm gonna blast you." Rene C. complied and gave him his wallet and phone. The wallet contained his driver's license and $150 in cash. Hoofbooker also removed the ignition interlock device and took it with him. He told Rene C. to remain in the car, and he walked away.

After five minutes, Rene C. got out of his car to look for Hoofbooker. However, Hoofbooker ran away as he followed him. Rene C. screamed for help, but no one helped him. He saw a green four-door sedan with tinted windows. It drove slowly by his car and made a turn toward the area where Hoofbooker had been walking. Rene C. was scared so he went to a gas station to call 911.

Police officers responded to Rene C.'s 911 call. Rene C. saw the same green car which he had seen when Hoofbooker left him. He advised the officers of the green car. The officers pulled over the car which contained Hoofbooker and another man. When the officers showed the two men to Rene C., he identified Hoofbooker as his assailant.

2. *Defense Evidence*

a. *Eyewitness Identification Expert*

Dr. Mitchell Eisen testified as an expert in eyewitness identification. He first explained how human memory works. It is not like a camera. It is malleable. Memories have gaps. When retrieving a memory, a person fills the gaps by making inferences. Memory also fades over time. Each time a person accesses a memory, he or she will rewrite it. With each

subsequent accessing of the memory, the person will recall the most recent version, not the original memory. If a person considers new information, it can influence the memory. The memory will incorporate the new information whether it is correct or incorrect.

A witness may confuse the source of his or her memory. The witness may believe the source is a particular event, but the true source may be a different event or a photo. Consequently, a witness's memory of a face can only be tested once because he or she will become familiar with the face selected in the test. The witness will be more likely to select the same face in subsequent tests. Research has shown that a witness generally continues to select his or her original choice in subsequent tests, even if that choice was incorrect.

Eisen further described specific psychological factors which can affect the reliability of an eyewitness identification, including traumatic stress, presence of a weapon, multiple perpetrators, exposure duration, cross racial identification, the passage of time, and suggestibility.

He explained that the identification procedures or circumstances surrounding them can also affect the identification. A witness's expectation that the perpetrator is in the photo six-pack could affect his or her selection. Admonishments to a witness that the perpetrator may or may not be in the photo six-pack—before he or she views it—can prevent arbitrary identifications. Double-blind administration of a photo six-pack prevents the administrator of the six-pack from influencing the witness.

Eisen stated that a strong identification occurs when a witness has a good view of the person and is presented with a

fair, nonsuggestive photo six-pack which has an image that is a strong match to his or her memory. Under this ideal scenario, the selection will be quick and highly confident. Eisen testified that a quick, confident selection is associated with accuracy only under such pristine circumstances. However, if the procedure is suggestive or the witness is influenced by other information, a quick and confident selection is not evidence of recognition or accuracy.

b. *Codefendant Uchechukwu Mbaruguru*

Mbaruguru testified on his own behalf. He approached the group of people by Joey S.'s truck. He told the people standing on the grass to leave. He walked up to Nick C., frisked him, asked him if he had any money, and tried to grab him. But Nick C. got into the truck and locked the door. The truck drove away.

After Mbaruguru frisked Nick C., Hoofbooker approached. He told Mbaruguru to stop. He said that Mbaruguru was making a mistake. Hoofbooker explained that he had a similar incident in 2011.

Mbaruguru claimed to have approached the truck alone. He was familiar with Woodard. But Woodard was not at the park. He did not see anyone take a wallet from the driver of the truck or throw it to anyone.

Sheriff's deputies searched Mbarguru's home and discovered a revolver in his bedroom closet. Mbaruguru found the revolver at a dog park.

B. Procedure

For the Pioneer Park incident, the jury convicted both Woodard and Hoofbooker of second degree robbery (Pen. Code, § 211;[5] count 1) and attempted second degree robbery (§§ 664/211; count 3). The jury acquitted both of attempted carjacking (§§ 664/215, subd. (a); count 2), and Woodard alone of possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4). As to each count, the jury also did not find true allegations that Woodard personally used a firearm. (§ 12022.53, subd. (b).) Nor did it find true the allegations against Hoofbooker that a principal was armed with a firearm as to each count. (§ 12022, subd. (a)(1).)

For the incident involving Rene C., the jury convicted Hoofbooker of kidnapping for carjacking (§ 209.5, subd. (a); count 5) and kidnapping to commit robbery (§ 209, subd. (b)(1); count 6). For these counts, the jury found the firearm allegation to be true. (§ 12022.53, subd. (b).)

In a bifurcated court trial, the trial court found true the allegations that Woodard and Hoofbooker each had two prior felony convictions under the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), and one prior serious felony conviction (§ 667, subd. (a)(1)).

The trial court sentenced Hoofbooker to 75 years to life in state prison, plus 15 additional years. The sentence consisted of consecutive terms of 25 years to life each for counts 1, 3, and 5, pursuant to the Three Strikes law. The trial court imposed an additional and consecutive 10 years as to count 5 for the firearm enhancement, under section 12022.53, subdivision (b), and five

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[5] All further undesignated statutory references are to the Penal Code.

years for the prior serious felony conviction enhancement, under section 667, subdivision (a)(1).[6] The trial court imposed and stayed the sentence for count 6 pursuant to section 654.[7]

The trial court sentenced Woodard to a term of 25 years to life in state prison, plus five years and eight months. The sentence consisted of 25 years to life for count 1, pursuant to the Three Strikes law. After striking the two prior strike convictions as applied to count 3, the trial court imposed a consecutive eight months.[8] It imposed an additional five years for the prior serious

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[6] The trial court did not impose a consecutive five-year term under section 667, subdivision (a)(1), for each count on which an indeterminate sentence was imposed, as required under *People v. Williams* (2004) 34 Cal.4th 397, 405. Upon resentencing, if the trial court decides not to strike the punishment for the prior serious felony conviction enhancement, it must impose the additional five-year term to each count on which it imposes an indeterminate sentence. If the trial court stays one of the indeterminate sentences pursuant to section 654, it must also stay the punishment for the prior serious felony conviction enhancement applied to that stayed sentence. (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1143 (*Tua*).)

[7] The trial court did not also impose and stay the 10-year term for the firearm enhancement as applied to count 6. Upon resentencing, if the trial court again stays the term for count 6 pursuant to section 654, it must also impose and stay the 10-year term for the firearm enhancement, if it is not stricken.

[8] The trial court did not impose a full term for count 3. Upon resentencing, if the trial court imposes a determinate sentence on one count by striking both prior strike convictions applied to it but imposes an indeterminate sentence on the other count under the Three Strikes law, it must impose a full term on the count for which it imposes the determinate sentence. (§ 1170.1; *People v. Neely* (2009) 176 Cal.App.4th 787, 797.)

felony conviction enhancement, under section 667, subdivision (a)(1).[9]

DISCUSSION

1. Exclusion of Expert Testimony on Eyewitness Identification

a. *Certainty Versus Accuracy of Identification*

The trial court excluded eyewitness identification expert testimony about the lack of correlation between a witness's certainty or confidence in identifying a perpetrator and the accuracy of that identification. Woodard and Hoofbooker argue that the trial court erred by excluding this testimony.

Generally, the trial court has broad discretion to admit or exclude testimony on the psychological factors affecting eyewitness identification. (*McDonald*, *supra*, 37 Cal.3d at p. 377, overruled on another ground in *Mendoza*, *supra*, 23 Cal.4th at p. 914.) Of course, that discretion is not absolute. The Supreme Court in *People v. McDonald* held that the admission of eyewitness identification expert testimony depends on whether eyewitness identification is a key element of the prosecution's case but is not substantially corroborated by evidence giving it

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[9] The trial court should have imposed the additional five-year term for the prior serious felony enhancement once to count 1, on which an indeterminate sentence was imposed, and once to count 3, on which a determinate term was imposed. (*Tua*, *supra*, 18 Cal.App.5th at p. 1141; *People v. Tassell* (1984) 36 Cal.3d 77, 90.) Upon resentencing, the trial court must add five years for the prior serious felony enhancement once to each count on which an indeterminate sentence is imposed, and once for any aggregate determinate term imposed.

independent reliability. (*McDonald*, at p. 377; *People v. Jones* (2003) 30 Cal.4th 1084, 1111.)

Our facts satisfy the standard in *McDonald*. Eyewitness identification was a key element of the prosecution's case against Woodard and Hoofbooker. Multiple eyewitnesses testified at trial. Corroborating evidence did not give their testimony independent reliability.[10] But even satisfying the *McDonald* standard of admissibility does not precisely resolve the issue here. The trial court did not entirely exclude the expert's testimony. It only excluded a portion related to a witness's certainty in identification.

McDonald authorized expert evidence that included the lack of correlation between an eyewitness's certainty about an identification and the accuracy of that identification. (*McDonald*, *supra*, 37 Cal.3d at p. 369.) This lack of correlation contradicts the expectation of an average person, who believes that certainty is a valid predictor of accuracy. (*Ibid.*) Jurors' expectations are no exception. Jurors tend to overvalue a witness's certainty in determining the accuracy of the identification. (*People v. Sanchez* (2016) 63 Cal.4th 411, 497 (conc. opn. of Liu, J.) (*Sanchez*); *State*

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10 For example, the police found a revolver found in Mbaruguru's home. However, none of the witnesses ever described a firearm used by any of the perpetrators in the Pioneer Park incident. Moreover, the jury found the firearm allegations not true, and acquitted Woodard of possessing a firearm. No other physical evidence connected any of the defendants to the Pioneer Park crimes. Joey S. testified that Hoofbooker contacted him on Facebook and on the phone after the incident, even though he never provided his contact information. This post-incident communication could suggest witness intimidation. However, Joey S. never revealed the details of the communication.

v. Lawson (2012) 253 Ore. 724, 778.) The Supreme Court continues to recognize that studies have found no statistically significant correlation. (*Sanchez*, at p. 462.)

Despite this recognition, CALJIC No. 2.92 includes certainty as a factor for the jurors to consider in evaluating eyewitness identification evidence.[11] After *McDonald*, the Supreme Court has addressed challenges to the certainty factor in the eyewitness identification jury instruction.[12] (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231–1232; *People v. Ward* (2005) 36 Cal.4th 186, 213–214; *Sanchez*, *supra*, 63 Cal.4th at p. 461.) Most recently, in *People v. Sanchez*, the Court reiterated the propriety of including the certainty factor. (*Sanchez*, at p. 462.) Following *People v. Wright*, *Sanchez* explained that the instruction listed the certainty factor in a "neutral manner, telling the jury only that it could consider it." (*Ibid.*; *People v. Wright* (1988) 45 Cal.3d 1126, 1141 (*Wright*).)

Wright opted to have the instruction avoid taking a position as to the impact of any factor, including the certainty factor. (*Wright*, *supra*, 45 Cal.3d at p. 1141.) *Wright* reasoned that if the instruction explained a factor, it would incorporate the results of the studies from which the factors originated. It would also adopt

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[11] CALJIC No. 2.92 states, "In determining the weight to be given eyewitness identification testimony, you should consider … factors which bear upon the accuracy of the witness' identification of the defendant, including … [t]he extent to which the witness [was] certain or uncertain of the identification." (CALJIC No. 2.92; see also CALCRIM No. 315.)

[12] No case has disapproved of the instruction yet. We need not address it here. The Supreme Court is reviewing a challenge to the factor as set forth in CALCRIM No. 315. (*People v. Lemcke*, review granted Oct. 10, 2018, S250108.)

the views of the experts who rely on them. This would confuse the roles of expert witnesses and judges. (*Ibid.*) *Wright* stated that the explanation of factors is best left to expert testimony, along with closing argument and examination of the eyewitnesses. (*Id.* at p. 1143.)

By eliciting expert testimony on the relationship between certainty and accuracy, Woodard simply tried to follow *Wright*'s suggestion. However, the trial court excluded this testimony. Although the trial court did instruct the jury on the factor of certainty, it excluded expert testimony on it. The trial court reasoned that such expert testimony would negate the instruction.[13] Its justification for excluding the testimony was completely at odds with *Wright*'s suggestion.

Contrary to the trial court's concern, the proposed testimony would not render the instruction unnecessary. It would have merely explained the certainty factor. The jury could still consider the certainty or uncertainty of an identification, as stated in the instruction. The proposed testimony would have only offered the interpretation that certainty does not necessarily correlate with accuracy. This principle would not otherwise be

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[13] The trial court stated, "There is an objection to your question dealing with … the extent … to which the witness is either certain or uncertain of the identification … . That's a factor that's laid out in black and white, and I don't believe that this is something we are going to modify. The jury instruction is pretty solid on that. Maybe this will be the case to say I'm wrong … ." The court further reasoned, "The jury instruction basically states that the jury can base their opinion on how certain a person is or not … . I'm guessing what he's going to say … just because somebody is certain doesn't mean they are certain. That means there is no point in that instruction whatsoever."

understood by the instruction alone because it contradicts the expectation that certainty indicates accuracy.

Moreover, the proposed expert testimony was otherwise unobjectionable. First, it was relevant to the witnesses' identifications because they, at times, expressed certainty. Second, it was sufficiently beyond common experience, as previously discussed. (Evid. Code, § 801, subd. (a); *McDonald*, *supra*, 37 Cal.3d at p. 369.) Third, it would not have invaded the jury's task of judging credibility. (*McDonald*, at pp. 370–371; *People v. Sandoval* (1994) 30 Cal.App.4th 1288, 1298.) CALJIC No. 2.20 instructed the jurors that they retained the power and duty to judge the credibility of all witnesses. The jurors also remained free to reject this portion of expert testimony, as well as the entirety of it. (§ 1127b; CALJIC No. 2.80.)

As *McDonald* and *Wright* recognized, Woodard and Hoofbooker were entitled to show by expert testimony that there is no correlation between certainty and accuracy of an identification under suggestive circumstances. The trial court hindered their effort. Accordingly, the trial court abused its discretion by excluding Eisen's testimony related to this scientific principle.

b. *Exclusion of the Expert's Testimony was Harmless*

The applicable standard of prejudice for this error is whether it is reasonably probable that Woodard and Hoofbooker would have reached more favorable results in the absence of the error.[14] (*McDonald*, *supra*, 37 Cal.3d at p. 376; *Sanders*, *supra*,

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[14] Woodard and Hoofbooker argue that the exclusion of Eisen's testimony is an issue of constitutional magnitude requiring application

11 Cal.4th at p. 510; *Watson*, *supra*, 46 Cal.2d at p. 836.) The error was not prejudicial under any standard.

Prior to the trial court's ruling, Eisen did testify, before the jury, about the relationship between certainty or confidence and accuracy. He discussed this concept when asked about factors associated with "strong identifications" and factors that can affect "quick identifications." He first explained that a quick, confident selection is associated with accuracy only under pristine circumstances. He commented that such pristine circumstances include a fair, non-suggestive photo six pack with a strong match to the witness's memory. The six-pack would be presented under fair, non-suggestive circumstances without contamination by incorrect information after the initial observation of the subject and without viewing other photos before the six-pack. Under such circumstances, Eisen declared that the quick, confident selection would be evidence of recognition.

Eisen elaborated that when any of these circumstances are compromised, a confident selection does not result from recognition of the subject. Instead, a witness selects the subject because some other event or circumstance influenced his or her decision. Eisen concluded that a confident selection can be artificially created by introducing such suggestive elements into the identification procedures.

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of the standard of prejudice under *Chapman v. California* (1976) 386 U.S. 18, 24 (*Chapman*). Given the Supreme Court's repeated analysis of the exclusion of the entirety of an expert's testimony on eyewitness identification under *Watson*'s harmless error standard, no basis exists to apply the *Chapman* standard to the trial court's exclusion of only one portion of expert testimony. (*McDonald*, *supra*, 37 Cal.3d at p. 376; *People v. Sanders* (1995) 11 Cal.4th 475, 510; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)

After completing this testimony, defense counsel specifically asked Eisen about the relationship between confidence and accuracy. The prosecutor objected. Outside the presence of the jury, Eisen described his proposed testimony on confidence and accuracy. Specifically, he stated that heightened confidence is related to accuracy if a fair, non-suggestive test is used and it includes a strong match to the witness's memory. Eisen further explained that suggestive circumstances can affect the witness's decision, altering his or her confidence.

We see no substantive difference between the admitted testimony and the proposed testimony that the trial court excluded. Both versions included a discussion of the relationship between certainty or confidence and accuracy. Both versions qualified that a correlation exists between confidence and accuracy only when a non-suggestive test is used. Finally, both versions explained that suggestive circumstances could affect a witness's confidence.

Woodard argues that although Eisen's admitted testimony did discuss certainty and accuracy, it did not respond to a specific question about certainty and accuracy. He complains that the trial court prohibited him from asking a question that used the same language that the jury would have considered in CALJIC No. 2.92. Woodard reasons that without the same language, he was unable to provide the context for the jury to evaluate the factor of certainty.

Woodard's complaint is unwarranted. In eliciting testimony about certainty and accuracy, Woodard's question asked about factors associated with "strong identifications" and "quick identifications." Contrary to Woodard's interpretation, this question did ask about certainty and accuracy. A strong

identification is an accurate identification. A quick identification is a confident or certain identification. Moreover, Eisen's answer discussed the concepts using the terms confidence and accuracy. The evidence considered by the jury is the content of the answer, not the question. (CALJIC No. 1.02.) A question is only important if it helps jurors to understand the answer. Omission of the words "certainty" and "accuracy" from Woodard's questions would not affect the substance of Eisen's testimony.

It is doubtful that any additional expert testimony about certainty and accuracy would have benefitted Woodard or Hoofbooker. Despite the exclusion of expert testimony, Woodard and Hoofbooker still conveyed the principle that certainty in identifications does not correlate with accuracy under suggestive circumstances. For example, Woodard argued to the jury that any confidence expressed by Joey S., Nick C., or Ryan N. was the product of information received from others, rather than from a memory of the incident. Moreover, the prosecutor never argued the certainty of any identification showed it was accurate.

Additionally, multiple witnesses expressed varying degrees of certainty in identifying Woodard and Hoofbooker in the Pioneer Park crimes.[15] This case contained uncertain, as well as certain, identifications. The certainty versus accuracy expert testimony has less impact with uncertain identifications. It focuses on the misunderstanding about certainty in identifications. Accordingly, its exclusion did not foreclose Woodard's and Hoofbooker's arguments as to any deficiencies in the identifications. Even without the expert testimony, they

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[15] The prosecutor conceded this point.

could still direct the jurors to consider how uncertain some of the witnesses were.[16]

For example, both Woodard and Hoofbooker highlighted Nick C.'s use of the word "possibly" in his prior identifications. Hoofbooker also elicited testimony from Joey S. that he initially believed the driver of the black car was a person he knew as Dominic, but realized it was not. These indications of uncertainty were available for the jurors' consideration, in accordance with CALJIC No. 2.92, as instructed by the trial court. (See *Sanchez*, *supra*, 63 Cal.4th at p. 462.)

Notwithstanding any deficiencies, the identification evidence sufficiently supported Woodard's and Hoofbooker's identities as the perpetrators in the Pioneer Park crimes. Each was positively identified prior to trial in photo six-packs by at least one witness, and tentatively identified by at least one additional witness. Each was also positively identified in court. Similarly, prior to trial and in court, Rene C. established Hoofbooker's identity in the crimes against him. These identifications were presented to the jury, along with Eisen's otherwise complete explanations of human memory and the pertinent psychological factors which may have affected the identifications. Accordingly, we conclude that it is not reasonably probable that Woodard or Hoofbooker would have obtained a more favorable result had the trial court admitted Eisen's testimony about the certainty and accuracy of an identification.

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16 In closing, counsel for Hoofbooker did not argue misidentification for the Pioneer Park crimes. He conceded that Hoofbooker was present. But he did challenge Joey S.'s and Nick C.'s identifications on cross-examination. He also argued that Rene C. misidentified him.

2. Evidence of Uncharged Acts Under Evidence Code Section 1101, Subdivision (B)

a. *Additional Facts*

One afternoon in 2011, Richard E. and Derrick V. were near the skate park at Pioneer Park. A person approached Richard E., and asked if he wanted to buy a marijuana pipe. The person led Richard E. and Derrick V. into a bathroom. In the bathroom, Richard E. and Derrick V. declined to buy the pipe. As they turned to leave, the exit was blocked by three or four people, including Woodard and Hoofbooker. Richard E. and Derrick V. asked the individuals to move. They also tried to get around them. However, the individuals continued to block the exit.

The individuals demanded that Richard E. and Derrick V. empty their pockets. Richard E. and Derrick V. initially refused. Each of the individuals punched and pushed Richard E. and Derrick V. The individuals took their belongings.

The trial court admitted this 2011 incident under Evidence Code section 1101, subdivision (b). Woodard and Hoofbooker stipulated that they each sustained convictions for two counts of robbery and two counts of false imprisonment as a result of this 2011 incident.

b. *No Abuse of Discretion in Admitting the Uncharged Acts Evidence*

Both Hoofbooker and Woodard contend that the trial court erred by admitting evidence of the robbery of Richard E. and Derrick V. They argue that it was improper propensity evidence and unduly prejudicial, requiring exclusion under Evidence Code section 1101, subdivision (a), and section 352, respectively. We reject their arguments.

A trial court may not admit evidence of other crimes, civil wrongs or other acts to show the defendant is a person of bad character or has a criminal predisposition. (Evid. Code, § 1101, subd. (a); *People v. Foster* (2010) 50 Cal.4th 1301, 1328 (*Foster*).) However, it may admit evidence of such uncharged acts[17] to prove a material fact at issue for the charged crime, including motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. (Evid. Code, § 1101, subd. (b); *People v. Cage* (2015) 62 Cal.4th 256, 273 (*Cage*).) This list is not exhaustive. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.) Courts take a two-step approach to determining admissibility.

First, the trial court must determine the relevance of the uncharged act based on whether it is sufficiently similar to the charged crime to support a rational inference of the material fact. (*Leon*, *supra*, 61 Cal.4th at pp. 597–598.) Proving intent requires the least degree of similarity between the uncharged act and charged crime. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402; *Cage*, *supra*, 62 Cal.4th at p. 274.) A common plan requires a greater similarity. (*Ewoldt*, at pp. 402–403.) Identity requires the greatest similarity. (*Id.* at p. 403; *People v. Scott* (2011) 52 Cal.4th 452, 472–473.)

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[17] Cases vary in shorthand terminology of the evidence admissible under Evidence Code section 1101, subdivision (b), using terms such as "prior misconduct" or "prior [bad] acts." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393 (*Ewoldt*); *People v. Noguera* (1992) 4 Cal.4th 599, 623.) The Supreme Court has criticized such terms as imprecise because Evidence Code section 1101, subdivision (b) authorizes admission of "a crime, civil wrong, or other act." (*People v. Leon* (2015) 61 Cal.4th 569, 597 (*Leon*).) For simplicity, we refer to the evidence as relating to an uncharged act. (*Ibid.*) This distinguishes it from the charged crimes for the case on appeal.

Second, the trial court must evaluate whether the probative value of the uncharged act is substantially outweighed by prejudice, confusion, or undue consumption of time, under Evidence Code section 352. (*People v. Thomas* (2011) 52 Cal.4th 336, 354; *Leon*, *supra*, 61 Cal.4th at pp. 598–599; *Ewoldt*, *supra*, 7 Cal.4th at p. 404.) The principal factor affecting the probative value is the tendency of the evidence to demonstrate the existence of a material fact. (*Ewoldt*, at p. 404.) Prejudice must be substantial. Evidence is not prejudicial merely because it bolsters the proponent's case or undermines the opponent's. (*People v. Scott*, *supra*, 52 Cal.4th at p. 491.)

We review for abuse of discretion the trial court's rulings on relevance and the admission of uncharged act evidence under Evidence Code sections 1101, subdivision (b), and 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) We will not find error, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004; *Foster*, *supra*, 50 Cal.4th at pp. 1328–1329.)

Here, the trial court did not abuse its discretion. It found that the uncharged act and the charged crimes were sufficiently similar to infer that Hoofbooker and Woodard committed the charged crimes pursuant to the same plan they used to commit the uncharged act. To prove the existence of a common plan, the uncharged act must demonstrate " 'a concurrence of common features' " that are " 'to be explained as caused by a general plan of which they are individual manifestations,' " rather than a series of similar spontaneous acts. (*Ewoldt*, *supra*, 7 Cal.4th at p. 402; *Foster*, *supra*, 50 Cal.4th at p. 1328.) The plan need not be distinctive or unusual. (*Ewoldt*, at p. 403.)

The uncharged act involved a group of men robbing two young men, as occurred in the charged crimes. In both situations, the group of men isolated the victims from others. Both involved force by multiple assailants in taking the victims' belongings. Both occurred by the skate park at Pioneer Park. This common feature was essential to the trial court's analysis. As the trial court noted, Hoofbooker and Woodard were territorial about the park. In the charged crimes, Woodard told Joey S. that he did not belong there. Their plan was to rob persons who entered their park. The common features are manifestations of this general plan. These features therefore support the trial court's finding that, in committing the charged crimes, Hoofbooker and Woodard acted in accordance with that plan.[18]

Woodard argues that the uncharged act evidence must be relevant to prove a disputed material fact. He points out that the only issue in dispute for him was identity, which requires the greatest degree of similarity between the uncharged act and the charged crime. (*Ewoldt*, *supra*, 7 Cal.4th at p. 403; *Leon*, *supra*, 61 Cal.4th at p. 598.) Woodard contends that the sets of crimes must rise to the level of signature crimes, sharing a highly distinctive pattern. We disagree that identity was the only issue in dispute for Woodard.

The uncharged act evidence is admissible to establish any fact material for the prosecution or to overcome any material

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[18] Woodard and Hoofbooker argue that the prosecutor's concession that the charged crimes were impromptu negates the existence of a plan. To the contrary, the prosecutor noted the existence of a plan. He did suggest the plan was impromptu. However, a plan can be impromptu, or lacking organization. This comment does not persuade us to conclude the trial court abused its discretion.

matter sought to be proved by the defense. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373.) As discussed, the existence of a common plan is one type of material fact. Identity is another. But there are others. When an uncharged act is proffered to prove a material fact, that fact must be in dispute. A plea of not guilty places all elements of the charged crimes in dispute, unless the defendant has taken some action to narrow the prosecution's burden of proof. (*People v. Daniels* (1991) 52 Cal.3d 815, 857–858; *People v. Roldan* (2005) 35 Cal.4th 646, 705–706, overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Myers* (2014) 227 Cal.App.4th 1219, 1225.)

The district attorney charged Woodard with robbing Joey S. For the attempted robbery of Nick C., the prosecutor proceeded against Woodard under an aiding and abetting theory. Hoofbooker was prosecuted for aiding and abetting both crimes. Intent is an element of these charged crimes for either a direct perpetrator or an aider and abettor. Robbery requires the specific intent to permanently deprive the victim of his or her property. (*People v. Guerra* (1985) 40 Cal.3d 377, 385; *In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007.) Aiding and abetting robbery requires an intent to commit or facilitate the robbery. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Accordingly, intent was yet another material fact for which the uncharged act evidence was relevant.

Woodard's and Hoofbooker's joint involvement in the uncharged act supported the inference that they harbored the intent to rob as aiders and abettors in the attempted robbery of Nick C. It also supported the inference that Woodard had the intent to rob Joey S. and Hoofbooker had the intent to aid him.

(*Ewoldt*, *supra*, 7 Cal.4th at p. 402; *Leon*, *supra*, 61 Cal.4th at p. 598.) As noted earlier, compared to common plan, intent requires less similarity between the uncharged act and charged crimes. Because the evidence was sufficiently similar for the former, it was also sufficient for the latter.

The uncharged act evidence also showed Hoofbooker's and Woodard's motives to commit the charged crime. Although motive is not an ultimate fact put at issue by the charges or the defense in this case, it is an intermediate fact from which intent and the existence of a common plan may be inferred. (*Cage*, *supra*, 62 Cal.4th at p. 274.) The trial court found that the motive in both instances was to exert power and control over the park by obtaining money from intruders. Both instances also supported the simple motive of wanting to steal money from people.

Beyond its relevance and probative value, the uncharged act evidence was not unduly prejudicial, under Evidence Code section 352. Prejudice, as considered for Evidence Code section 352, is not synonymous with damaging. (*People v. Bolin* (1998) 18 Cal.4th 297, 320 (*Bolin*); *Cage*, *supra*, 62 Cal.4th at p. 275.) Moreover, prejudice is inherent whenever other crimes evidence is admitted. (*People v. Kipp* (1998) 18 Cal.4th 349, 372; *Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Risk of such prejudice was not unusually significant here.

First, the uncharged act was no more inflammatory than the charged crimes. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144.) The evidence consisted of only Richard E.'s testimony, which was brief and did not present any graphic details. He and the other victim did not sustain any injuries. No weapons were used.

Second, the stipulations by the parties that Woodard and Hoofbooker were convicted for the uncharged act further reduced any prejudice. The jury would not have been tempted to punish either for the uncharged act because punishment was imposed for it. (*People v. Jones* (2011) 51 Cal.4th 346, 371–372 (*Jones*); *People v. Steele* (2002) 27 Cal.4th 1230, 1245; *Ewoldt*, *supra*, 7 Cal.4th at p. 405; *People v. Balcom* (1994) 7 Cal.4th 414, 427.)

Third, the trial court gave a limiting instruction both prior to Richard E.'s testimony and prior to closing arguments. Both instructions specifically required the jury to not consider the evidence as proof the defendants are persons of bad character or have a disposition to commit crimes. We presume the jury followed the instructions which mitigated the potential for prejudice.[19] (*Cage*, *supra*, 62 Cal.4th at p. 275; *Jones*, *supra*, 51 Cal.4th at p. 371.)

As indication that the jury was not confused by the instruction or the uncharged act evidence, it acquitted Hoofbooker and Woodard of the attempted carjacking of Joey S. It also acquitted Woodard of possession of a firearm by a felon and found that the firearm allegations were not committed.

We conclude the trial court did not abuse its discretion in finding that the uncharged act evidence was relevant and sufficiently similar to the charged crimes to prove common plan, intent, and motive. The trial court also did not exceed the bounds of reason in determining that the probative value of the

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[19] Woodard argues that the instruction's language confused the jurors because it allowed them to consider the uncharged act evidence to show intent and motive. We reject this argument. As we discussed earlier, intent and motive were material facts for the charged crimes which the uncharged act evidence could support.

uncharged act was not substantially outweighed by prejudice, confusion, or undue consumption of time. (*People v. Carter* (2005) 36 Cal.4th 1114, 1152.) Accordingly, there was no error in admitting the uncharged act evidence.[20]

3. Gang Evidence

Although the prosecutor did not proceed on the gang allegations, he called Deputy Sumner as an expert witness on gangs.[21] The trial court permitted this testimony, over defense objections of relevancy and undue prejudice under Evidence Code section 352. Woodard and Hoofbooker now argue that the trial court erred in admitting this expert testimony on gangs.

We review a trial court's admission of gang evidence—including rulings regarding relevancy and undue prejudice—for abuse of discretion. (*People v. Lee* (2011) 51 Cal.4th 620, 643 (*Lee*); *People v. Avitia* (2005) 127 Cal.App.4th 185, 193 (*Avitia*).)

a. *Basis for Witnesses' Fear*

Gang evidence is admissible if it is relevant to a material issue in the case, subject to Evidence Code section 352. (*Avitia*, *supra*, 127 Cal.App.4th 185, 192; *People v. Carter* (2003) 30

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[20] In light of our conclusion that admission of the evidence was not error, we need not reach the appellants' argument that they were prejudiced.

[21] Originally, the district attorney alleged that the Pioneer Park crimes were gang related, charging Woodard and Hoofbooker with allegations under section 186.22, subdivision (b)(1)(B). After the percipient witnesses testified at trial, the prosecutor announced that he was not proceeding with the gang allegations. The prosecutor explained that he would be unable to establish the predicate acts for the pattern of criminal activity of the criminal street gang at issue.

Cal.4th 1166, 1194.) Courts have upheld the admission of gang evidence even in cases without allegations or substantive charges under section 186.22. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 178–179 [element of offense]; *People v. Williams* (1997) 16 Cal.4th 153, 193 [motive and identity]; *People v. Champion* (1995) 9 Cal.4th 879, 922–923 [identity]; *Lee*, *supra*, 51 Cal.4th at pp. 643–644 [identity and intent]; *People v. Jordan* (2003) 108 Cal.App.4th 349, 365–366 [motive]; *People v. Ruiz* (1998) 62 Cal.App.4th 234, 240–241 [bias].) On the other hand, gang evidence is inadmissible if it only shows a defendant's criminal disposition or bad character. (*Avitia*, at p. 192; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449; *Ruiz*, at pp. 239–240.)

Evidence that a witness is afraid to testify is relevant to his or her credibility. (Evid. Code, § 780; *People v. Gonzalez* (2006) 38 Cal.4th 932, 946; *People v. Sanchez*, *supra*, 58 Cal.App.4th at p. 1449; *People v. Warren* (1988) 45 Cal.3d 471, 481.) An explanation of the basis for a witness's fear, such as gang retaliation or intimidation, is also relevant. (*Gonzalez*, at p. 946; *Sanchez*, at pp. 1449–1450.) Expert testimony is admissible if it can explain that gang intimidation may generate reluctance in a witness to testify against a gang member who committed a violent crime against him or her, or family or friends. (*Ward*, *supra*, 36 Cal.4th at p. 211.)

Fear played a part in the witnesses' trial testimony. The trial court admitted the gang evidence to explain this fear. As an example, it specifically commented on Marina S.'s demeanor during her testimony. She was emotional. She expressed her fear of gangs when discussing Mbaruguru's mention of Crips. The trial court noted that, at that point, he recessed the trial because she could not proceed with her testimony. Other

witnesses, including Joey S., Ryan N., and December S., also expressed their nervousness or fear while testifying.

Detective Reyes described each witness as frightened during her interviews prior to trial. Ryan N. was reluctant to speak with Detective Reyes. He wanted to forget about the incident. He even refused to view the photo six-packs. Detective Reyes opined that he did not want to cooperate because he was scared. Marina S. was also frightened. She expressed to Detective Reyes her concern about retaliation specifically because the perpetrators were gang members.

Deputy Sumner provided the connection between the gang-related nature of the crimes and the fear it instills in witnesses. He spoke about gang behavior and witnesses in gang cases. He discussed how gang members are territorial. They verbally confront and announce their gang affiliation to those who enter their territory. He also discussed how gang members can claim specific locations within their territory to hang out or commit crimes to raise revenue. Finally, he discussed how these facets of gang behavior affect witnesses, causing them to be reluctant to testify and cooperate with law enforcement in gang cases.

Deputy Sumner's testimony was relevant to determining whether the gang-related statements made by Mbaruguru and Woodard could affect the witnesses' credibility, rather than constitute mere empty threats.[22] (*People v. Sanchez*, *supra*, 58

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[22] On appeal, Woodard argues that the witnesses' fear was not a disputed issue and therefore the gang evidence to explain their fear was irrelevant. He reasons that Deputy Sumner's testimony was cumulative to Detective Reyes's testimony about the witnesses' fear. However, at trial, he did challenge the genuineness of the witnesses' fear. In closing argument, Woodard specifically argued that if

Cal.App.4th at p. 1450.) Three of the witnesses were passive observers to the crimes committed against Joey S. and Ryan N. Reasons for their reluctance to cooperate might be less apparent in a case not involving gangs. Deputy Sumner's testimony explained their reluctance.

b. *Probative Value and Minimal Prejudicial Impact of Gang Evidence*

Woodard argues that the trial court further abused its discretion in finding that any probative value of the gang evidence was not substantially outweighed by prejudicial impact. The Supreme Court has recognized that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal in cases without a gang allegation under section 186.22, subdivision (b), or cases not charging the substantive gang offense under subdivision (a). (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).)

However, all evidence that tends to prove guilt is inherently prejudicial or damaging to a defendant's case. As we stated earlier, damaging evidence is not unduly prejudicial under Evidence Code section 352. (*Bolin*, *supra*, 18 Cal.4th at p. 320; *Cage*, *supra*, 62 Cal.4th at p. 275.) For exclusion, the evidence must have a tendency to evoke emotional bias against the defendant. (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

The gang evidence was probative. It explained the witnesses' fear. (*People v. Sanchez*, *supra*, 58 Cal.App.4th at p. 1450.) In varying degrees, each witness hesitated in his or her

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December S. and Ryan N. were really scared during trial, they would not have identified him in court.

identification. Each expressed fear before and during trial. Each also described gang-related statements made by the perpetrators of the crimes. Each witness's fear of retaliation by gang members would have explained his or her hesitation in identifying the participants in the crime, rather than merely his or her inability to identify. Deputy Sumner's testimony supported the former explanation and negated the latter.

The presentation of the gang evidence also mitigated any potential prejudice. Deputy Sumner's testimony was brief. The initial third of Sumner's testimony related to his experience in law enforcement and his knowledge of gangs. The testimony was not inflammatory, even if the subject matter of gangs generally is. Sumner did not discuss any of the particular facts of the case.[23] He did not comment on the witnesses. He did not discuss any Crip gang. He did not connect Woodard, Hoofbooker, or any other defendant with gangs, nor mention any defendant by name. Consequently, this generalized testimony diminished the risk of the gang evidence implying that Woodard or Hoofbooker had a criminal disposition.

Deputy Sumner's testimony about gang behavior and its effect on witnesses had no tendency to evoke emotional bias against Woodard and Hoofbooker which would warrant exclusion. Accordingly, the trial court's analysis of the gang evidence under Evidence Code section 352 did not exceed the bounds of reason. (*People v. Montes* (2014) 58 Cal.4th 809, 859.)

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[23] It is not necessary to show a witness's fear of retaliation is directly linked to a defendant for the evidence to be admissible. (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1587–1588; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368; *People v. Sanchez*, *supra*, 58 Cal.App.4th at p. 1450.)

c. *Limiting Instruction on Gang Evidence*

The trial court limited the jury's consideration of the gang evidence by instructing with CALJIC No. 2.50. The instruction allowed the jury to consider the gang evidence, along with the uncharged acts evidence, to determine: (1) the existence of a plan or scheme similar to the plan used in the commission of the charged crimes, (2) the existence of the intent for the charged crimes, (3) the identities of the persons who committed the charged crimes, (4) the motive for the charged crime, or (5) that the crime is part of a larger continuing plan, scheme or conspiracy. (CALJIC No. 2.50.) The jury was not permitted to consider the evidence for any other purpose.

Woodard and Hoofbooker argue that the trial court's limiting instruction improperly allowed the jury to consider the gang evidence in the same manner as the uncharged act evidence.[24] They reason that such a consideration was improper

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[24] At trial, Hoofbooker requested the instruction. Woodard objected to the instruction only as it applied to the uncharged acts evidence under Evidence Code section 1101, subdivision (b). Neither requested modification of, or objected to, this instruction as it related to the gang evidence. A party may not complain on appeal that a legally correct instruction is too general or incomplete in the absence of an appropriate clarifying instruction. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) To preserve the right of appeal, a defendant must object in the trial court. Failure to do so waives any instructional error unless the defendant's substantial rights are affected. (§ 1259; *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) This determination of substantial rights is equated with the standard for reversible error. With either determination, we consider whether the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Rivera*, at p. 146; *Watson*, *supra*, 46 Cal.2d at p. 836.) As we will discuss, we conclude that any error with the instruction was harmless.

without a nexus between them and the gang evidence. Woodard and Hoofbooker assert that, unlike the nexus established by their convictions for the uncharged acts, Sumner's testimony did not connect them to the gang evidence.

The Supreme Court in *People v. Hernandez* recognized that evidence of gang membership can help prove identity, motive, modus operandi, intent, and other issues pertinent to guilt of the charges. (*Hernandez*, *supra*, 33 Cal.4th at p. 1049.) Based on *Hernandez*, CALJIC 2.50 was modified to add optional language regarding the admission of evidence to show criminal street gang activities, much like the purposes for uncharged acts under Evidence Code section 1101, subdivision (b). (Use Note to CALJIC No. 2.50 (Spring 2009 ed.) p. 74.) A trial court is to instruct with CALJIC No. 2.50 when both gang evidence and uncharged act evidence are admitted. (*Ibid*.)

Deputy Sumner's testimony on gangs was relevant to explain the material facts of the charged crimes, as listed in the trial court's modified version of CALJIC No. 2.50. The facts of the incidents provided the nexus between Sumner's testimony and Woodard and Hoofbooker. As discussed earlier, the crimes were gang-related. Woodard and Hoofbooker injected their gang status into the crimes. (*Hernandez*, *supra*, 33 Cal.4th at p. 1050.) Woodard and Mbaruguru identified themselves as gang members and used gang intimidation to commit the robbery and attempted robbery in the Pioneer Park incident. Woodard's gang identity was further established by the collection of writings and drawings depicting "200 Blocc Crips," which were found at his home by deputies. During the commission of the crimes against Rene C., Hoofbooker also identified himself as a gang member.

Deputy Sumner's testimony provided context for this evidence. He offered opinions that gang members are territorial and commit crimes in specific areas within their territory to bring in revenue for the gang. His testimony would have helped the jury understand the gang-related nature of the crimes as it was revealed by the victims and witnesses. By restricting the gang evidence to its proper scope, CALJIC No. 2.50 was "neither contrary to law nor misleading." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168–1169; *Hernandez*, *supra*, 33 Cal.4th at p. 1051; Evid. Code, § 355.)

Woodard and Hoofbooker further contend that the instruction encouraged the jury to assume that they were gang members and committed gang crimes. But the instruction invited no such improper assumption. It specifically did not inform the jury that any defendant was a gang member. Instead, it neutralized any improper prejudice associated with the gang evidence. The instruction appropriately prohibited the jury from concluding any of the defendants are persons of bad character or have a criminal disposition. (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1168.) We presume that the jury understood and followed the trial court's instruction in the absence of any showing to the contrary. (*People v. Williams* (2009) 170 Cal.App.4th 587, 613; *People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Woodard and Hoofbooker correctly note that the instruction did not include the evaluation of witness credibility as a purpose for which the jury could consider the gang evidence, even though it was the basis for the trial court's decision to admit the gang evidence. However, they benefitted from the omission. It enabled them to argue that the witnesses' fear was unfounded.

In closing argument, Woodard did challenge the genuineness of the witnesses' fear. He specifically argued that if December S. and Ryan N. were really scared during trial, they would not have identified him in court. Explicit instruction on the consideration of the gang evidence to evaluate the witnesses' credibility could have highlighted their fear. Such a limiting instruction would not have significantly aided Woodard and Hoofbooker. (*Hernandez*, *supra*, 33 Cal.4th at p. 1054.)

d. *Any Potential Error was not Prejudicial Under Any Standard*

Even if we assume that the trial court erred in admitting the gang evidence, we would find the error was harmless under any standard.[25] (*Watson*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24.)

As discussed earlier, Deputy Sumner's testimony was not the only gang evidence admitted in this trial. The more damaging evidence came from the multiple witnesses who described the gang-related nature of the crimes, as well as

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[25] In addition to their claim of prejudicial error under state law, Woodard and Hoofbooker claim that their federal due process rights were violated because the evidence prevented them from receiving a fair trial. Other than the initial objections of relevancy and undue prejudice under Evidence Code section 352, no one ever objected during Deputy Sumner's testimony. Because Woodard and Hoofbooker did not object to the admission of the evidence on due process grounds at trial, they failed to preserve their claims for review. (*People v. Partida* (2005) 37 Cal.4th 428, 436 (*Partida*); *People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Ramos* (1997) 15 Cal.4th 1133, 1170.) We otherwise reject any objections under federal due process grounds to the extent that we are permitted to recognize them. (*Partida*, at p. 436.)

identified Woodard and Hoofbooker as participants in the crimes.[26] The jury learned about Woodard's and Hoofbooker's gang affiliation from these witnesses, not from Sumner. Even if Sumner's theoretical testimony was excluded, it is not reasonably probable that Hoofbooker and Woodard would have obtained more favorable results had the trial court excluded the gang evidence. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

Moreover, the admission of the gang evidence did not render the trial "fundamentally unfair." (*Partida*, *supra*, 37 Cal.4th at p. 436; *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) The trial court restricted the evidence to its proper scope. By acquitting both Hoofbooker and Woodard of the attempted carjacking charge and finding the firearm allegations not true, the jurors further demonstrated that it considered the gang evidence within this limited scope.[27] They did not improperly consider it to find criminal disposition. Accordingly, neither was deprived of his federal due process rights.

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[26] Nearly each of the percipient witnesses in the Pioneer Park incident revealed that the crimes were gang related. Only December S. did not mention that any gang-related comments were made by any of the perpetrators of the Pioneer Park crimes. Rene C. testified about Hoofbooker's gang affiliation when he was kidnapped.

[27] Woodard argues that the jury's acquittal of the attempted carjacking charge shows it did not believe the entirety of the testimony of the witnesses. We disagree. Joey S. did not remember anyone demanding his car key or trying to take it from him. Additionally, none of the other witnesses testified that any of the defendants tried to carjack Joey S.

4. Denial of Hoofbooker's Motion Under Section 1118.1

Hoofbooker contends that the trial court erred in denying his motion for judgment of acquittal.[28] He specifically argues that insufficient evidence supported: (1) his identity as one of the persons involved in the Pioneer Park crimes, (2) his culpability as an aider and abettor in those crimes, and (3) his identity as the perpetrator in the crimes against Rene C. We reject his arguments.[29]

We review the denial of a motion for judgment of acquittal under section 1118.1 for substantial evidence.[30] (*People v. Hajek*

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[28] Both Woodard and Hoofbooker attempt to join one another's claims, including those for which they fail to provide any argument. The Supreme Court disapproves of this improper tactic. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 364.) "Purporting to join in a claim when no colorable argument can be made that the claim is applicable and preserved is akin to raising a frivolous claim in the first instance." (*Id.* at p. 363.) If an appellant's brief does not provide legal argument and citation to authority on each point raised, the court may treat it as waived. (*Ibid.*)

[29] To the extent Woodard attempts to join Hoofbooker's claim, we reject his claim on the merits. Joey S., Nick C., December S., Haylie P., and Ryan N. identified Woodard in court. Joey S. and Nick C. also identified him in photo six-packs, although with different degrees of certainty. Each of the witnesses, except for Marina S. and Ryan N., described Woodard as taking Joey S.'s property by force or fear.

[30] Hoofbooker argues that the denial of the section 1118.1 motion violated his state and federal due process rights. Generally, the determination of whether the evidence is sufficient to sustain the charges is a question of state law. Such a determination rises to the level of a federal constitutional violation only if it was arbitrary and capricious, such that no reasonable factfinder could have concluded the evidence was sufficient to sustain the charges. (*People v. Letner and*

and Vo (2014) 58 Cal.4th 1144, 1182–1183, overruled on another ground by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Watkins* (2012) 55 Cal.4th 999, 1019.) The question is simply whether the prosecution has presented sufficient evidence for the jury to determine guilt. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) We must review the entire record "in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*Hajek and Vo*, at pp. 1182–1183; *Watkins*, at p. 1019; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.) "If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 639.) We do not determine the facts. We do not reweigh evidence or reevaluate a witness's credibility. (*People v. Houston* (2012) 54 Cal.4th 1186, 1215 (*Houston*).)

a. *Identity as a Principal in Pioneer Park Crimes*

Nick C. implicated Hoofbooker in the Pioneer Park incident. Specifically, he positively identified Hoofbooker—in a photo six pack and in court—as the person who was behind Mbaruguru during the incident. The identification by Nick C. alone was sufficient to establish, beyond a reasonable doubt, Hoofbooker's identity as the perpetrator of a crime. (Evid. Code, § 411; *People v. Boyer* (2006) 38 Cal.4th 412, 480; *People v. Reed*

Tobin (2010) 50 Cal.4th 99, 161.) As we will discuss, the trial court's ruling was not erroneous under any standard.

(2018) 4 Cal.5th 989, 1006.) There is nothing to suggest Nick C.'s testimony is "physically impossible or inherently improbable," requiring us to disregard any finding that it was believable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Nick C. was in the best position to view Hoofbooker because he was closest to him during the incident. Beyond Nick C.'s identifications, Joey S. also identified Hoofbooker as being present and involved, even though he was less certain of his role.

Hoofbooker attacks the credibility of Nick C. and Joey S. Specifically, he raises multiple factors which might have diminished the accuracy of their identifications, including poor lighting, cross racial identification, weapon focus, and stress. Hoofbooker also complains that Joey S.'s identification was tainted by information about him from social media and other people. The court evaluated each witness's credibility in light of these factors as presented by an eyewitness identification expert witness.[31] The court was free to reject the expert's opinion. (§ 1127b; *People v. Brown* (2014) 59 Cal.4th 86, 101.) The factors are of no consequence to us. (*People v. Bento* (1998) 65 Cal.App.4th 179, 183.) On appeal, we cannot reconsider a witness's credibility and its weight. The strength of an identification, uncertainty in recollection, and discrepancies in testimony relate to the weight of the evidence, which is directed exclusively to the factfinder in the first instance. (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.)

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[31] The trial court could consider the eyewitness identification expert's testimony even though it was admitted in the defense case. As discussed below, Hoofbooker and Woodard made motions under section 1118.1 at the end of the prosecution case and at the end of the defense case.

Hoofbooker also points out the failures to identify him by December S., Haylie P., and Ryan N. Again, we cannot reweigh the evidence. But even each witness's inability to identify Hoofbooker does not necessarily discredit Nick C.'s identification of him, nor otherwise exonerate him.

Hoofbooker argues that a few of the witnesses from the Pioneer Park crimes confused him for his brother, Daveon Hoofbooker. He implies that because the trial court dismissed Daveon Hoofbooker's case pursuant to section 1118.1, it should have also dismissed his case.

It is true that Marina S. identified Daveon Hoofbooker in court as one of the men who initially approached Joey S. December S. identified Daveon Hoofbooker in a photo six-pack as the person who tried to pull Nick C. out of the truck. Joey S. also showed uncertainty regarding the roles of each and mismatched their names in his six pack identifications. However, Mbaruguru's testimony clarified any confusion about the identities of Quinzell Hoofbooker and Daveon Hoofbooker.

Hoofbooker made two motions for judgment of acquittal. The first was at the close of the prosecution's case-in-chief. The second was after Mbaruguru testified.[32] During the hearing on Hoofbooker's first motion, the trial court noted that he was positively identified as the person who assisted Mbaruguru. During the hearing on the second motion, the trial court commented that Mbaruguru's testimony solidified Hoofbooker's identity as a participant. Mbaruguru admitted to trying to rob

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[32] Generally, "[r]eview of the denial of a section 1118.1 motion made at the close of a prosecutor's case-in-chief focuses on the state of the evidence as it stood at that point." (*People v. Houston*, *supra*, 54 Cal.4th at p. 1215.)

Nick C. who was in the passenger's side of the truck. He placed Hoofbooker at that same location. This was the same location where Nick C. placed Hoofbooker. Mbaruguru's testimony clarified that Quinzell Hoofbooker was not in any car. This dispelled any confusion of him for Daveon Hoofbooker.

Moreover, the trial court dismissed the case against Daveon Hoofbooker because of his lack of involvement in the crimes. It did not rely on an insufficient identification of him. The trial court found that at least Joey S. sufficiently identified Daveon Hoofbooker as present.

In contrast, the trial court saw the evidence was clear as to Quinzell Hoofbooker's involvement. We share this view and conclude that Nick C.'s identification of Hoofbooker provides sufficient evidence of his identity as one of the principals in the Pioneer Park crimes.

b. *Culpability as an Aider and Abettor in the Pioneer Park Crimes*

Hoofbooker also contends that the evidence was insufficient to support his culpability as an aider and abettor in the Pioneer Park crimes. He correctly points out that mere presence at the scene is not sufficient to establish aiding and abetting. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460; *People v. Durham* (1969) 70 Cal.2d 171, 181.) However, presence at the scene can be considered, along with companionship and conduct before, during, and after the offense. (*Campbell*, at p. 409; *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; *People v. Lara* (2017) 9 Cal.App.5th 296, 322.)

Hoofbooker was not a mere bystander who independently appeared at the scene of the crime. First, he had an existing

relationship with Mbaruguru and Woodard. Mbaruguru testified that he knew both Hoofbooker and Woodard. Hoofbooker also had a prior criminal relationship with Woodard, as established by the uncharged act evidence.

Second, no evidence suggested Hoofbooker was surprised by Woodard's or Mbaruguru's criminal conduct during the Pioneer Park incident. Although we do not know Hoofbooker's actions prior to the incident, we do know that he remained for the entire incident until Joey S. and Nick C. escaped. The trial court could reasonably conclude that Hoofbooker, even if merely standing behind Mbaruguru, was present to intimidate the victims, divert suspicion, and look out for others who might thwart the crimes. At the very least, he played a supportive role in the crimes.

Third, the record shows he did more. He reached into the truck's passenger window to try to take Nick C.'s wallet, unbuckle his seatbelt, and remove him. He also joined Mbaruguru in stating, "what do you have," "what are you about," "open the door," "get out," and "unbuckle." These acts affirmatively assisted Mbaruguru. They also demonstrated Hoofbooker's knowledge of Mbaruguru's intent to rob Nick C., and his own intent to rob. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) Accordingly, substantial evidence supported Hoofbooker's culpability as an aider and abettor.

c. *Crimes Against Rene C.*

Hoofbooker questions the sufficiency of evidence to support his identity in the crimes against Rene C. He first suggests Rene C.'s intoxication impaired his ability to identify his assailant. He highlights Rene C.'s admission to drinking three beers and his prior DUI conviction. He also points out Rene C.'s failure to describe Hoofbooker's tattoos. These issues relate to Rene C.'s

credibility, which was for the trial court to evaluate in the first instance and not for us to reevaluate.

Hoofbooker also notes the lack of physical evidence to corroborate his identity as the perpetrator. Specifically, when the police arrested Hoofbooker, he was not wearing the same clothing described by Rene C. Hoofbooker was not in possession of the stolen ignition interlock device, which he took from Rene C.'s car. The firearm found was a different color than the one described by Rene C. However, the lack of physical evidence does not require reversal simply because it might also be reconciled with a finding that he was not the perpetrator. (*Jennings*, *supra*, 50 Cal.4th at pp. 638–639.)

Other evidence supports Rene C.'s identification of Hoofbooker. The police apprehended Hoofbooker within an hour to an hour and half of the incident. After this short time, Rene C. identified Hoofbooker. This proximity in time to the incident supports an accurate identification. It also provides sufficient time for Hoofbooker to change his clothes and hide the loot and weapon from the incident. Additionally, the police arrested Hoofbooker in the same green four-door sedan with tinted windows which Rene C. had seen driving slowly by him after the incident. The entirety of this evidence reasonably justifies the trial court's denial of the motion for judgment of acquittal for counts 5 and 6.

5. Trial Court's Admonishment of Counsel

a. *Additional Facts*

During trial, counsel for Quinzell Hoofbooker and counsel for Daveon Hoofbooker objected to the prosecutor reading from a police report in examining Marina S. Counsel for Quinzell

Hoofbooker objected two more times. Counsel for Daveon Hoofbooker additionally objected on hearsay grounds. After the trial court overruled the objections, it recessed the proceedings. While in the hallway behind the courtroom, the trial judge heard Charles Uhalley, counsel for Daveon Hoofbooker, comment to another defense counsel that the ruling was "improper." Jurors were still in the courtroom.[33]

The trial court returned to the courtroom, where all parties and the jurors remained. It first instructed counsel to stop talking and arguing in front of the jury. It stated that the conduct of counsel was unacceptable. It admonished the jury not to hold that conduct against "their clients." It also told the jury to forget what happened and to disregard it.

Outside the presence of the jury, the trial court stated that Uhalley's comment impugned its ability to control the proceedings. The trial court further explained it had repeatedly admonished counsel not to make "speaking objections" in front of the jury.

Uhalley moved for a mistrial because the trial court tainted his ability to effectively represent his client in front of the jury. Counsel for Hoofbooker also moved for a mistrial. He believed because the court's reprimand did not appear to be directed at only Uhalley, it undermined the credibility of all four defense

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[33] Uhalley believed that he made his comment in a lowered voice to prevent the jurors from hearing him. However, the trial court stated that Uhalley was loud enough to hear from the hallway. The trial court recognized that Uhalley's behavior resulted from "the heat of the moment." After further discussion, both the judge and Uhalley expressed respect for one another.

attorneys.[34] The remaining two defense counsel joined. The trial court denied each motion for mistrial.

b. *Proper Denial of Motions for Mistrial*

Woodard and Hoofbooker now argue that the trial court abused its discretion in denying their motions for mistrial based on its reprimanding Uhalley in front of the jury. Both contend that they were affected because the trial court did not specify that its comments were directed to Uhalley alone. We reject these claims. We conclude the trial court did not abuse its discretion in denying the motions for mistrial because it did not commit misconduct. (*People v. Alvarez* (1996) 14 Cal.4th 155, 237, fn. 35.)

A judge commits judicial misconduct "if it persistently makes discourteous and disparaging remarks to defense counsel," discrediting the defense or creating the impression that it is allying itself with the prosecution. (*People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Sturm* (2006) 37 Cal.4th 1218, 1233.) The propriety and prejudicial effect of a particular judicial comment is evaluated by its content and the circumstances in which it was made. (*Sanders*, *supra*, 11 Cal.4th at pp. 531–532.)

Here, the trial judge merely upheld his duty to control trial proceedings before the jury, and to limit the introduction of evidence and argument of counsel to relevant matters with a view to the effective ascertainment of the truth. (§ 1044; *People v. Sturm*, *supra*, 37 Cal.4th at p. 1237.) In front of the jury, Uhalley appeared to criticize the judge's ruling. When an

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[34] The record shows that the trial court's comments were directed only at Uhalley. No other attorney was involved. The trial court clarified this to the jury.

attorney violates his or her obligations as an officer of the court during trial, the judge may reprimand him or her to control the proceedings and protect the integrity of the court and the judicial process. (*People v. Chong* (1999) 76 Cal.App.4th 232, 243–244 (*Chong*); see *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.)

Because events unfold rapidly during trial, it is not always feasible to excuse the jury. (*Chong*, *supra*, 76 Cal.App.4th at p. 244.) When counsel defies the authority of the court in the presence of the jury, reprimand may be necessary also in its presence. (*Ibid.*) The judge made his comment only after he tried to stop the proceedings and excuse the jury. He had even left the courtroom. The judge returned into the courtroom because he heard the high volume of Uhalley's voice. He acted only to stop any further statements by counsel before the jury.

The trial judge made one isolated comment. We do not view it as disparaging, nor as a personal attack against any defense counsel. The judge's comment did not constitute judicial misconduct because it was an appropriate response to counsel's inappropriate actions. Moreover, it did not discredit the defense theory or create an impression that the court was allying itself with the prosecution. Included in the comment was a cautionary instruction that the jury should not hold any inappropriate behavior by counsel against any defendant.

The defendants must establish prejudice for reversal due to alleged judicial misconduct. (*People v. Abel* (2012) 53 Cal.4th 891, 914.) Prejudice results only when the judge's behavior denied the defendants a fair trial. (*People v. Harris* (2005) 37 Cal.4th 310, 347.)

Here, it did not. The trial court's comment itself included a curative instruction to the jurors that they were not to hold

counsel's conduct against the defendants. The court also instructed the jurors to disregard the event.

After speaking with all counsel, the trial court took several additional measures to ensure that no prejudice fell upon the defendants. First, the trial court explained to the jury that disagreements occur in almost every case, and attorneys must vigorously defend their clients. It indicated that Uhalley was simply doing his job when the incident occurred. Second, the trial court conceded to the jury that it overreacted. It instructed the jurors to again disregard its comments. Third, the trial court reminded the jurors that they are to decide the case based on the evidence and not from anything else. Finally, the trial court asked if any jurors would be unable to follow its instructions and disregard the earlier comments. No jurors raised any concerns.

At the trial's conclusion, the court also instructed with CALJIC No. 17.30, which stated that it had not intended by anything it had said or done to suggest what the jury should find to be the facts on any questions submitted. The trial court reminded the jurors that if it had said or done anything that would seem to so indicate, they were to disregard it and form their own opinions. (CALJIC No. 17.30.) We presume the jury followed these instructions and did not penalize Hoofbooker or Woodard because of the trial court's response to Uhalley's conduct. (*Chong*, *supra*, 76 Cal.App.4th at pp. 244–245.)

Each of the precautionary measures taken by the trial court sufficiently neutralized any potential prejudicial effect its comments may have had. We conclude that the judge's comment did not deprive Hoofbooker or Woodard of a fair trial. Moreover, in the context of the trial as a whole, it is not reasonably probable the jury would have reached a different verdict had the judge

refrained from making the comments. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

6. Evidence Found in Car at Hoofbooker's Arrest

During the incident involving Rene C., Hoofbooker pointed a firearm at his face. Rene C. described this firearm as a silver semiautomatic handgun, which was "maybe" .45-caliber. Hoofbooker took Rene C.'s phone and wallet. The wallet contained $150 cash. Soon after the incident, police officers pulled over the car in which Hoofbooker was the passenger. Officer Preciado testified that he found $8,300 in cash in the glove compartment located in front of the passenger seat. He also found a black semiautomatic handgun wedged between the driver's seat and the center console.

Hoofbooker argues that the trial court abused its discretion by admitting Officer Preciado's testimony about the cash and the firearm found in the car after his arrest. We disagree as to the cash. Even assuming the challenge is not forfeited as to the firearm, any error would be harmless.

a. *The $8,300 in Cash*

When the kidnapping concluded, Hoofbooker took $150 in cash from Rene C. Soon after the incident, Rene C. called the police. When the police arrived, Rene C. saw the same green car which he saw earlier. Hoofbooker was in the car with the $8,300 in cash. The police found the $8,300 in cash close in time to when money was taken from Rene C. These facts raise a reasonable inference that the cash found in the car carrying Hoofbooker included the money he stole from Rene C.

The significant amount of cash may have suggested it was all obtained illegally. But any prejudicial effect did not

substantially outweigh its probative value. The discovery of the cash was probative of Hoofbooker's identity as the perpetrator of the crimes against Rene C. The cash was found in Hoofbooker's possession close in time to the commission of the crimes. Accordingly, admission of the cash did not amount to an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)

b. *The Black Firearm Found in the Green Car*

As a threshold matter, we agree with the Attorney General that Hoofbooker has forfeited his challenge to the admission of testimony about the black firearm found in the car. We generally will not review challenges to the admissibility of evidence, absent a timely objection in the trial court on the ground raised on appeal. (*People v. Merriman* (2014) 60 Cal.4th 1, 84; *Waidla*, *supra*, 22 Cal.4th at p. 717.)

Hoofbooker concedes that he did not object to the trial court's admission of testimony about the firearm. He claims that after the trial court overruled his objection to the admission of testimony about the cash, it would have also overruled an objection to the firearm evidence. He relies on the exception to forfeiture that an issue may be raised for the first time on appeal, when an objection would have been futile in the lower court. (*People v. Hill* (1998) 17 Cal.4th 800, 820–822; *People v. Thompson* (2010) 49 Cal.4th 79, 129–130; *People v. Wilson* (2008) 44 Cal.4th 758, 793.)

We are not convinced. After ruling on the admissibility of the testimony about the cash, the trial court invited counsel for Hoofbooker to raise any other issue on the record. He declined. We cannot presume that because the trial court allowed testimony about the cash, it necessarily would have overruled an objection to the admission of the firearm.

Moreover, counsel for Hoofbooker demonstrated a tactical reason to admit the firearm evidence. Officer Preciado revealed the firearm found in the car at Hoofbooker's arrest was black, not silver as Rene C. described. The discrepancy in color between the firearms supported Hoofbooker's theory that Rene C. misidentified him as the perpetrator. Counsel for Hoofbooker did not cross-examine Officer Preciado. He had no reason to do so. In closing, he argued that no evidence found in Hoofbooker's possession at his arrest corroborated Rene C.'s identification. This included the firearm found in the car, which was black, not silver. The record supports Hoofbooker's deliberate decision to not challenge the firearm evidence.

Even if the trial court erred in admitting the firearm evidence, any error was harmless. We review errors for prejudice under the *Watson* standard.[35] (*People v. Marks* (2003) 31 Cal.4th 197, 227; *Watson*, *supra*, 46 Cal.2d at p. 836.) Based on the entirety of the evidence, it is not reasonably probable that Hoofbooker would have obtained more favorable results, for either the crimes against Rene C. or the Pioneer Park crimes, had the trial court excluded the firearm evidence.

The prosecutor never argued that the firearm in the car was used against Rene C. Defense counsel argued the contrary. Exclusion of the firearm evidence would have eliminated defense counsel's argument that Hoofbooker was found with a different firearm than that used against Rene C. But even without the firearm, the prosecution case included Rene C.'s positive

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[35] Despite Hoofbooker's argument to the contrary, the application of the rules of evidence, including the determination of relevancy and the analysis under Evidence Code section 352, does not implicate the federal Constitution.

identification of Hoofbooker close in time and proximity to the incident. The peculiar green sedan carrying Hoofbooker also corroborated Rene C.'s identification.

For the Pioneer Park crimes, the jurors apparently did not consider the firearm evidence, as demonstrated by their findings that a firearm was not used in their commission.[36] Other evidence—including the eyewitnesses' identifications and Mbaruguru's testimony—independently implicated Hoofbooker. Accordingly, admission of the black firearm was harmless for the Pioneer Park incident, as well as the crimes against Rene C.

7. Accomplice Testimony Instruction

Hoofbooker contends the trial court erred in failing to instruct that Mbaruguru's testimony required corroboration under section 1111 and should be viewed with caution.[37] We conclude the error was harmless.[38]

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[36] Both Hoofbooker and the Attorney General comment that the prosecutor argued that the firearm found in the car could have been the firearm used by Woodard in the Pioneer Park crimes. However, the prosecutor was referring to a photo of a black revolver which was found in Mbaruguru's home. The prosecutor claimed to not know if this revolver was used by Woodard, or if it was found in the car at Hoofbooker's arrest. We note that a semiautomatic firearm, not a revolver, was found in the car.

[37] CALJIC Nos. 3.11, 3.12, 3.18.

[38] Again, Woodard attempts to join Hoofbooker's challenge, but does not provide any argument. Even if we reached the merits of Woodard's contention, we would reject it. Mbaruguru's testimony was completely favorable to Woodard. Mbaruguru admitted to acting alone in his attempt to rob Nick C. He testified that Woodard was not present during the crimes. Such exculpatory testimony by an accomplice does not need to be corroborated. (*People v. Smith* (2017) 12 Cal.App.5th 766, 780.) Accordingly, the jury did not need to

As a codefendant in this case, Mbaruguru was an accomplice to the Pioneer Park crimes charged against Hoofbooker and Woodard. (§§ 1111, 31.) A trial court must instruct sua sponte on accomplice testimony only when the accomplice witness or a testifying co-defendant incriminates a defendant. (*People v. Avila* (2006) 38 Cal.4th 491, 561–562 (*Avila*).) Specifically, the trial court must instruct the jury that, to the extent an accomplice's testimony tends to incriminate a defendant, it should be viewed with caution and is subject to the corroboration requirement. (*Id.* at p. 562; *Houston*, *supra*, 54 Cal.4th 1186, 1223.)

On its face, Mbaruguru's testimony for Hoofbooker was favorable. He testified that Hoofbooker only appeared after the attempted robbery. Mbaruguru further testified that Hoofbooker warned him not to make the same mistake of committing a robbery as he did in the past. These portions of testimony supported Hoofbooker's theory, as articulated in his closing argument, that he was merely present and did not aid and abet in the crimes.

However, Mbaruguru's testimony simultaneously incriminated Hoofbooker because it placed him at the scene of the crimes. During closing argument, the prosecutor relied on Mbaruguru's testimony to corroborate the identifications of Hoofbooker by Joey S. and Nick C. Because Mbaruguru's testimony incriminated Hoofbooker, it necessitated the cautionary instruction about accomplice testimony. When an accomplice's testimony favors both the prosecution and the

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consider a cautionary instruction on any incriminating accomplice testimony against Woodard.

defense, as here, the instruction concerning accomplice testimony is required but should refer only to testimony that tends to incriminate the defendant. (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.)

Failure to instruct the jury on accomplice testimony constitutes state law error.[39] It is harmless if sufficient evidence corroborates the accomplice's testimony. (*Avila*, *supra*, 38 Cal.4th at p. 562; *People v. Williams* (2010) 49 Cal.4th 405, 456.) The prosecution must present independent evidence that tends to connect the defendant with the charged crime without assistance from the accomplice's testimony. (*Avila*, at pp. 562–563.) The corroborating evidence must tend to implicate the defendant and thus relate to an element of the crime. (*Id.* at p. 563.) It may be slight and entitled to little consideration when standing alone. (*Ibid.*; *Williams*, at p. 456.)

Joey S. and Nick C. corroborated the incriminating portion of Mbaruguru's testimony that placed Hoofbooker at the scene of the crimes. They both identified Hoofbooker as a participant in the crimes. Hoofbooker also contacted Joey S. on social media and on the phone after the crimes. All of this evidence sufficiently corroborated Hoofbooker's presence at the scene of the Pioneer Park crimes. Accordingly, we conclude that any error in omitting the accomplice testimony instruction was harmless.

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[39] Hoofbooker contends that his state and federal rights to due process, a fair trial, and jury determination of every element of the offenses were violated by the omission of the instruction on accomplice testimony combined with the instruction that a single witness's testimony is sufficient to convict. Courts have rejected Hoofbooker's argument that omission of the instruction violates these federal constitutional rights. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1133; *People v. Mackey* (2015) 233 Cal.App.4th 32, 123–124.)

8. Instruction on Lesser-related Offense of Receiving Stolen Property

Hoofbooker argues that the trial court erred by denying his request for an instruction on receiving stolen property as a lesser offense to robbery. We reject his argument.[40]

A trial court must instruct on lesser-included offenses when warranted by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) However, the obligation does not exist for lesser-related offenses. (*People v. Kraft* (2000) 23 Cal.4th 978, 1064.) A trial court may only instruct on an uncharged lesser-related offense if the prosecution agrees. (*People v. Birks* (1998) 19 Cal.4th 108, 136 (*Birks*); *Jennings*, *supra*, 50 Cal.4th at p. 668.) A trial court is not required to instruct on lesser-related offenses, even if requested by a defendant and supported by substantial evidence. (*Kraft*, at p. 1064.)

Receiving stolen property is a lesser-related offense to robbery, not a lesser-included offense.[41] (*People v. Valentine* (2006) 143 Cal.App.4th 1383, 1387; *People v. Mora* (1956) 139

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[40] Again, Woodard never specifically makes this argument, but joins in all issues raised by Hoofbooker which benefit him. Even if we reached the merits of Woodard's challenge, we would reject it for the same reasons we reject Hoofbooker's claim. Additionally, overwhelming evidence showed that Woodard took the wallet from Joey S. Nothing showed he merely received stolen property.

[41] Hoofbooker recognizes this distinction but notes that the Supreme Court in *People v O'Malley* suggested that receiving stolen property is a lesser included offense to robbery. (*People v. O'Malley* (2016) 62 Cal.4th 944, 984.) The Supreme Court made no such suggestion. It merely noted that trial counsel requested an instruction on receiving stolen property as a lesser included offense to robbery. (*Ibid*.)

Cal.App.2d 266, 273–274; *People v. Spicer* (2015) 235 Cal.App.4th 1359, 1372.) A lesser offense is necessarily included in a greater offense if the statutory elements of the greater offense include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.[42] (*Birks*, *supra*, 19 Cal.4th at p. 117; *People v. Smith* (2013) 57 Cal.4th 232, 240.) Based on a comparison of their statutory elements, receiving stolen property is not necessarily included in the offense of robbery. (§§ 211 [prohibits the taking of personal property], 496, subd. (a) [prohibits receiving stolen property].) The offense of robbery does not include all the elements found in the offense of receiving stolen property.

Hoofbooker further contends that the trial court was required to instruct sua sponte on receiving stolen property because it was relevant to an issue raised by the evidence which was necessary for the jury's understanding of the case. We reject this contention. In the context of lesser offenses, this sua sponte instructional obligation only applies to lesser-included offenses, not lesser-related offenses. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 162.) Accordingly, omission of the instruction was not error.

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[42] Alternatively, a lesser offense is necessarily included in a greater offense if the facts actually alleged in the accusatory pleading include all the elements of the lesser offense such that the greater cannot be committed without also committing the greater. (*Birks*, *supra*, 19 Cal.4th at pp. 117–118.) It is undisputed that the District Attorney did not charge any defendant with the elements of receiving stolen property. Accordingly, the accusatory pleading test does not apply.

9. Cumulative Error

Both Woodard and Hoofbooker contend that the cumulative effect of the purported errors deprived them of a fair trial and due process. We reject their contentions.

The aggregate prejudice from multiple errors could require reversal even if no single error was itself prejudicial. (*People v. Hill, supra,* 17 Cal.4th at p. 844.) Under the cumulative error doctrine, we must review each challenge and evaluate the cumulative effect of any errors to determine if it is reasonably probable the jury would have reached a more favorable result in their absence. (*People v. Williams*, *supra*, 170 Cal.App.4th at p. 646.)

The only error established for both Hoofbooker and Woodard was the exclusion of a portion of the eyewitness identification expert's testimony. For Hoofbooker individually, we also concluded that the trial court erred by omitting the accomplice testimony instructions. The errors were harmless.

Reviewing these errors cumulatively, we reach the same conclusion. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 499.) First, the substance of the excluded expert testimony was admitted during an earlier portion of his testimony. Second, in his closing argument, Hoofbooker embraced all of Mbaruguru's testimony, including the unfavorable portion which necessitated the cautionary instruction. Accordingly, the errors did not compromise the fairness of the trial or any due process rights. Moreover, to the extent we have assumed that errors occurred, those errors, even when considered cumulatively, did not deprive Hoofbooker or Woodard of due process or a fair trial.

10. Denial of Request to Dismiss Strike Priors

Woodard and Hoofbooker are both third-strike offenders. They were each convicted of two counts of robbery in the 2011 incident, which served as the uncharged act evidence. The district attorney alleged these convictions as prior serious or violent felonies under the Three Strikes law.[43] The trial court denied Woodard's and Hoofbooker's requests to dismiss one or more of their respective prior strike convictions as to each of their respective counts. They both now argue that the trial court abused its discretion.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529–530 (*Romero*).) To strike or dismiss one or more prior felony conviction allegations under the Three Strikes law, the trial court must consider whether the defendant may be deemed outside the law's spirit, in whole or in part "in light of the nature and circumstances of his [or her] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects." (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Garcia* (1999) 20 Cal.4th 490, 498-499; *People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).)

The Three Strikes law is intended to restrict discretion in sentencing repeat offenders. (*Romero*, *supra*, 13 Cal.4th at p. 528.) It establishes a sentencing scheme to be applied in every case where the defendant has a qualifying prior conviction. (*People v. Strong* (2001) 87 Cal.App.4th 328, 337–338; *Carmony*,

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[43] Sections 667, subdivisions (b)–(j), 1170.12.

supra, 33 Cal.4th at p. 377.) "In deciding to strike a prior, a sentencing court is concluding that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he [or she] actually fell outside the Three Strikes scheme." (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474; *Strong*, at pp. 337–338; *Carmony*, at p. 377.)

Accordingly, we review for abuse of discretion a trial court's refusal to dismiss a prior "strike" conviction in the interests of justice. (*Carmony*, *supra*, 33 Cal.4th at p. 376; *Romero*, *supra*, 13 Cal.4th at p. 530.) We must not substitute our judgment for the judgment of the trial court. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.)

a. *Request to Strike Woodard's Prior Strike Convictions*

Woodard contends that the intent or spirit of the Three Strikes law did not support the trial court's refusal to strike one of his prior strike convictions as to count 1.

He first directs us to *People v. Vargas*, which requires the dismissal of one of a defendant's two prior strike convictions when they are both based on the commission of the same act. (*People v. Vargas* (2014) 59 Cal.4th 635, 645.) This circumstance of committing one criminal act necessarily places a defendant outside the spirit of the Three Strikes law. (*Ibid.*; *People v. Garcia* (2001) 25 Cal.4th 744, 756–757.)

Woodard recognizes *Vargas* does not require striking his convictions because they resulted from committing offenses against two separate victims. A trial court is not required to strike or dismiss one of multiple prior convictions because it arose out of a single act that harmed more than one victim.

(*People v. Rusconi* (2015) 236 Cal.App.4th 273, 281.) Woodard does assert that the trial court should have dismissed one prior conviction because the prior convictions arose from a single act of serving as a lookout in the robberies of the two victims. He emphasizes that the act could not be divided.

Woodard is incorrect. Acting as a lookout is no different than a single act which places more than one victim in harm. Even as a lookout, the culpability is greater with multiple victims than with a single victim. Accordingly, dismissal of one of the prior strike convictions was not required.

Woodard also contends that his youthful age, lack of an extensive criminal record, and personal characteristics place him outside the spirit of the Three Strikes scheme. However, we cannot characterize the prior robberies from 2011 as isolated or aberrant behavior which was remote in time. Woodard was 21 years old. But by this age, he was already a convicted felon who had served a state prison sentence. In 2014, he sustained another felony conviction for which he served a 32-month state prison sentence. Within only five years of the prior robberies, Woodard committed the current offenses. He was also still on post-release community supervision. The trial court noted that Woodard's criminal background did not merit dismissing any prior strike convictions, despite his personal characteristics and prospects which included artistic talent and a supportive family.

Woodard further seems to imply that the trial court abused its discretion by limiting itself to either dismissing both prior strike convictions for count 1, or neither. The trial court maintained no such position. It refused to dismiss any prior conviction for count 1 based on multiple factors in aggravation. It found that the current crimes involved planning and

sophistication, gang intimidation, and vulnerable victims. The trial court did exercise its discretion and dismissed both prior strike convictions for the attempted robbery of Nick C. It was not required to dismiss both prior convictions. But it did. The trial court simply refused to impose the same leniency on count 1. Based on the factors considered, the trial court did not abuse its discretion.

b. *Request to Strike Hoofbooker's Prior Strike Convictions*

In claiming the trial court abused its discretion in refusing to dismiss the prior strike convictions, Hoofbooker reminds us of his passive role in the Pioneer Park crimes. In contrast to Woodard and Mbaruguru, who were the direct perpetrators of the crimes, the evidence revealed that Hoofbooker served as backup. However, the trial court specifically noted this as the only mitigating factor.[44]

As an aggravating factor, the trial court highlighted Hoofbooker's recidivistic behavior while considering the facts of the prior convictions and the current convictions. It noted that Hoofbooker has engaged in robberies of five different people over a period of five years. The sum of these comments indicate that the trial court thoughtfully balanced the relevant facts and reached an impartial decision in conformity with the spirit of the

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[44] The trial court commented that it would have preferred a shorter aggregate sentence of 50 years to life plus 15 years for the prior serious felony convictions and firearm enhancement. However, the law mandated consecutive sentences. (§§ 1170.12, subd. (a)(7), 667, subd. (e)(2)(B).) Hoofbooker mentions this only to suggest the trial court agreed that he played a passive role in the Pioneer Park crimes.

Three Strikes law. (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

c. *Cruel and Unusual Punishment*

With minimal argument, Hoofbooker mentions that the sentence of 90 years to life constitutes cruel and unusual punishment as applied to him in violation of the federal and state constitutions.[45] On review, appellants have the burden of showing that the punishment prescribed is unconstitutional. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) We reject Hoofbooker's challenge.

The evaluation of whether a penalty constitutes cruel and unusual punishment under the state and federal constitutions depends on its disproportionality to the crime.[46] (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*); *Solem v. Helm* (1983) 463 U.S. 277, 290 (*Solem*).) Under the state constitution, disproportionality depends on whether the punishment "shocks the conscience and offends fundamental notions of human dignity." (*Lynch*, at p. 424.) The federal constitution prohibits extreme sentences that are "grossly disproportionate" to the crime. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc.

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[45] Hoofbooker only states, "Appellant will die in prison for crimes in which no one was physically harmed." We reach our conclusion on this issue even though he has not made an adequate attempt to carry his burden. We also do not reach the issue of forfeiture. Even though he did not raise this challenge in the trial court, the prosecutor did address it in his sentencing memorandum.

[46] The California Constitution proscribes cruel *or* unusual punishment. (Cal. Const., art. I, § 17.) The federal Constitution prohibits cruel *and* unusual punishment. (U.S. Const., 8th Amend.) For consistency, we use the word "and."

opn. of Kennedy, J.); *Solem*, at p. 288; *Ewing v. California* (2003) 538 U.S. 11, 23–24.)

It is not cruel and unusual to enhance the penalty for a crime because the defendant is a repeat offender, as long as it is not disproportionate to the crime. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359.) Accordingly, to determine whether a penalty is cruel and unusual as applied to Hoofbooker, we examine the nature of the offense and the offender with consideration to the degree of danger to society.[47] (*Lynch*, *supra*, 8 Cal.3d at p. 425; *People v. Sullivan* (2007) 151 Cal.App.4th 524; *People v. King*, *supra*, 16 Cal.App.4th at p. 572.)

We conclude that Hoofbooker's sentence does not violate the proscription against cruel and unusual punishment under either the federal or state constitution. Our analysis relies on the nature of the prior crimes and the current crimes, as discussed earlier. Hoofbooker committed violent felonies against five persons over five years. The prior robberies occurred at the same location and in a similar manner as the Pioneer Park robberies.

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[47] The California Supreme Court in *Lynch* adopted a tripartite test to evaluate whether a penalty constitutes cruel and unusual punishment under the state constitution. (*Lynch*, *supra*, 8 Cal.3d at p. 425; *People v. King* (1993) 16 Cal.App.4th 567, 572.) Under this test, a reviewing court is to: (1) evaluate the nature of the offense and the offender; (2) compare the challenged penalty with those imposed in the same jurisdiction of more serious crimes; and (3) compare the challenged penalty with those imposed in other jurisdictions. (*Lynch*, at p. 425; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 569.) The United States Supreme Court utilized a similar test to analyze the federal constitutional counterpart. (*Solem*, *supra*, 463 U.S. at pp. 290–292.) Because Hoofbooker is not challenging the Three Strikes law as facially or inherently unconstitutional, we need only consider the first factor.

Only a few weeks after the Pioneer Park robberies, Hoofbooker kidnapped Rene C. at gunpoint for the purpose of carjacking him. These crimes—kidnapping, robbery, and carjacking—involve an inherent danger to the lives of the victims. Accordingly, Hoofbooker's past and current crimes validated the term imposed under the Three Strikes law.

11. Senate Bill No. 1393 and the Prior Serious Felony Conviction Enhancement

The trial court imposed an additional five years to Woodard's and Hoofbooker's respective sentences based on the prior serious felony conviction enhancement under section 667, subdivision (a)(1). They both now contend their respective sentences must be vacated and remanded to allow the trial court to exercise its discretion to strike or dismiss the enhancement in light of Senate Bill No. 1393.

When Hoofbooker and Woodard were sentenced—on September 21, 2017 and October 30, 2017, respectively—section 667, subdivision (a), required the imposition of an additional and consecutive five years to the sentence. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Effective January 1, 2019, Senate Bill No. 1393 amended sections 667, subdivision (a), and 1385, to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2; *Garcia*, at p. 971.) Senate Bill No. 1393 applies retroactively to all cases that were not final when it took effect, such as Hoofbooker's and Woodard's cases. (*Garcia*, at p. 973.)

The trial court made no comment related to the prior serious felony conviction enhancement for Hoofbooker. We see nothing in the record demonstrating that the trial court would

have imposed the enhancement had it possessed the discretion to strike it. The Attorney General concedes.

Although the Attorney General views the trial court's position differently as to Woodard, the record before us does not clearly indicate that the trial court would have declined to strike the prior serious felony conviction enhancement if it had the discretion to do so. (*People v. Gonzales* (2019) 39 Cal.App.5th 115, 123; *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427–428.)

" ' "Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record." [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record "clearly indicate[s]" that the trial court would have reached the same conclusion "even if it had been aware that it had such discretion." ' (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391.)" (*People v. Chavez* (2018) 22 Cal.App.5th 663, 713.)

Accordingly, we vacate Hoofbooker's and Woodard's sentences and remand their cases for resentencing to allow the trial court to exercise its discretion and determine whether to strike the prior serious felony enhancement under section 667, subdivision (a)(1).[48] We offer no opinion on how the trial court

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[48] As noted earlier, the trial court imposed the enhancement under section 667, subdivision (a)(1), only one time in Woodard's and Hoofbooker's respective sentences. An enhancement under section 667, subdivision (a)(1), must be imposed on each count for which an

should exercise its discretion. Such discretion is for the trial court to exercise in the first instance.[49]

12. The Restitution Fine and Assessments

Both Hoofbooker and Woodard challenge the trial court's imposition of restitution fines and court assessments. We conclude this issue should be raised in the trial court in the first instance.[50] We express no opinion on how the trial court should resolve this issue if raised by defendants at resentencing.

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indeterminate sentence is imposed under the Three Strikes law. (*People v. Williams*, *supra*, 34 Cal.4th at p. 402.) If there is a combination of indeterminate sentences and determinate sentences, the trial court must impose the five-year enhancement to each indeterminate sentence, and once to the combined aggregate term of the determinate sentence. (*Tua*, *supra*, 18 Cal.App.5th at p. 1141; *People v. Tassell*, *supra*, 36 Cal.3d at p. 90.)

[49] Hoofbooker and Woodard have filed supplemental briefs requesting that we strike their prior conviction enhancements under section 667.5, subdivision (b), in light of Senate Bill No. 136. The trial court may address this request at resentencing.

[50] The issue is on review before the Supreme Court. (*People v. Kopp* (2009) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844.)

DISPOSITION

Both defendants' sentences are vacated. The matter is remanded to allow the trial court to exercise its discretion and determine whether to strike the prior serious felony conviction enhancement under section 667, subdivision (a)(1). Upon resentencing, the court may consider the full range of options available to it at that time. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HANASONO, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.