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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROSHAWN ANTHONY CHARLES, Defendant and Appellant.	B250051 (Los Angeles County Super. Ct. No. MA058469)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kathleen Blanchard, Judge. Reversed.

David L. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Gerald Engler, Chief Assistant Attorneys General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Roshawn Anthony Charles appeals from the judgment entered following a jury trial in which he was convicted of criminal threats and aggravated assault, with a gang enhancement finding. Defendant contends that the prosecutor committed misconduct by introducing evidence of a codefendant's no contest plea and admission of a gang enhancement allegation, and then telling the jury in argument that it could consider the codefendant's admission of the gang enhancement allegation as if it were testimony by the nontestifying codefendant and as proof of the truth of the gang enhancement allegation against defendant. We agree. Given that we discern no tactical reason for defense counsel's failure to object to admission of this evidence, as well as to certain highly prejudicial YouTube videos discussed below, we also base our reversal on ineffective assistance of counsel.

BACKGROUND

1. Uncharged burglary

On one occasion around August 17, 2012, Jason Autry and David Holmes socialized and smoked marijuana together in the garage of Crystal Riley's home in Palmdale, where Autry sometimes lived. Autry drove Holmes home. Later, Autry found Holmes's wallet in the house and returned it to Holmes's residence. On August 20, 2012, several people burglarized Riley's home and stole her children's video game systems. Autry reviewed video from a neighbor's security camera and recognized Holmes as the driver of the car in which the burglars arrived. Defendant was not depicted on the security camera video.

2. Incident giving rise to charged offenses

On the afternoon of January 17, 2013, Autry and Riley were returning from a shopping trip when their car broke down. They pulled to the curb, lifted the car with a jack, and called for assistance. Holmes and three or four others walked by. Autry testified defendant was not part of the group. Autry spoke to Holmes, saying "'You stole from a 3-year-old and a 7-year-old. And it took six of you guys to do that.'" Holmes

replied, "'If I stole from your kids, why I'm not in jail?'" Holmes's group continued to walk. At that time, Autry did not remember Holmes's name.

Ten to 20 minutes later, Holmes returned with about 10 or 11 others. Members of the group were dressed in red and black, and they waved their arms and hands. They shouted things such as "Blood," "B.O.P.," "'I'm gonna get you,'" "'I want this bitch right here,'" and "You ready for this fade [beating]?" One of the girls in the group jumped on the car, then kicked in the windshield. A boy in the crowd dented the car with a kick. Some members of the group pulled food cans from the car and began throwing them at Autry and Riley. A girl yelled that Autry, who was wearing a blue shirt, was a Crips gang member. Members of the group said, "'Bloods. Bloods.'" Riley testified members of the group were "all spread out," with some even stopping traffic on the street. Riley photographed members of the group with her camera, and the photographs were admitted at trial. She testified one of her photos depicted defendant wearing a red sweatshirt. She saw him clearly while viewing the photo on her phone, but characterized the copy of the photo admitted in evidence as "a little fuzzy."

Autry testified that defendant and two other boys came toward him. Autry waved a crowbar or tire iron at them. Autry testified defendant "looked like he was about to hit me and I turned to him and I looked at him and I had a crowbar in my hand and he stepped back." Defendant came within two to three feet of Autry. Defendant did not say anything. Riley also identified defendant as someone who adopted a fighting stance, with his hands raised, and "tried to get to" Autry, but never actually touched Autry. She testified defendant never made any gang hand signs or said anything to her, and did not do anything to her car.

Thomas Fisher testified he was driving along when he saw about 15 to 20 young people involved in a confrontation with a man and woman. Two girls were harassing the woman, and four or five boys were several feet from a man who was against a fence and defending himself with a "four-way" bar. Fisher parked his car and stepped between the woman and the girls. One of the girls said, "'This is Bounty Hunter Watts,'" and began

"yelling out gang slurs." Fisher tried to "break the ice" by saying he knew people from Watts and had "stayed in the projects in Watts." The girl responded with "more gangs slurs," such as "'BOP'" and "'Bounty Hunter Watts.'"

Fisher testified he turned his attention to the boys and "had words" with them. Fisher did not know if defendant was one of those boys. The boys approached Fisher and one said "B.O.P." One boy—not defendant—raised his hands as if to fight Fisher. Fisher responded by raising his hands and unsuccessfully trying to trip the boy. The boy kicked Fisher "under" the ribs. Fisher fell, then got back to his feet. One of the boys rushed Fisher, but Fisher "kind of flipped him and fell on him." Fisher did not see the face of the boy who rushed him. While Fisher was on the ground, other boys kicked and punched him on the head, neck, and face. He received four to six blows. At some point, two girls and a boy threw cans of food at Fisher.

Autry testified he saw two boys—neither of whom was defendant—approach, then "attack" or "rush" Fisher. Fisher fell backward. Defendant ran "towards the group," but "actually ran pas[t]" Fisher as others punched and kicked Fisher. Autry "ran in with the crowbar, with the other guys, and [he] did a big swoop . . . and they all kind of scattered left to the right and back." The "interaction between the group and" Fisher lasted "just a few seconds." Autry helped Fisher to his feet. Girls were throwing cans at that time, and Autry saw defendant "in the distance to the right, out of the way," having taken "himself out of the picture and walked away." Defendant did not throw any cans. Riley testified she did not see if defendant took any action with respect to Fisher. Autry testified Holmes "stood very far back" and "didn't actually touch anyone. . . . It was almost like he was directing. He directed them to jump me and he stood back." Holmes was "yelling during this whole thing."

Autry testified that as members of the group walked away, he walked toward Holmes and yelled, "'You are a dumb ass. I know where you live.'" Holmes "turned around and he did the trigger finger and he's like, 'I know where you live.'" Defendant was standing next to Holmes when Holmes did that, but did not "give [Autry] the trigger

finger." Autry denied telling a sheriff's deputy that defendant also made a gun-imitation hand gesture or that he may have been the one who said he knew where Autry lived. Autry also denied he had testified at the preliminary hearing that defendant had also "'made a trigger hand" when Holmes said "they" knew where Autry lived. After the prosecutor read the pertinent portion of Autry's prior testimony into the record, Autry explained he had "said it incorrectly" at the preliminary hearing.

The prosecutor also read into the record Autry's preliminary hearing testimony to the effect that defendant "ran and jumped and kicked" Fisher. On recross-examination, Autry explained, "It looked like he kicked him, but I don't know if it was a run thing. [¶] He was right next to him and he overshot. The other two started kicking him." On redirect, Autry explained, "It looked like he was throwing a punch toward him. [¶] But his feet might have kicked him, 'cause the guy dropped right in front of him."

Autry admitted he did not want to testify at trial, he was moving out of state, and he feared that "defendant and all his friends" knew where he lived. On cross-examination, Autry testified defendant had never been to Autry's or Riley's residence, and when Autry said he was scared because "they knew" where he lived, he was referring to Holmes.

Deputy Anna Marie Stebbins arrived on the scene, which she described as "complete chaos." Autry, Riley, and Fisher told her about the melee and the direction in which the group had departed. Autry got into a squad car with Stebbins and directed her to the house where Holmes lived. Before they reached that house, Autry saw defendant and one of the girls from the group walking along. Autry told the deputy those two people were involved. Holmes was either with defendant and the girl or "came around the corner." Autry pointed out Holmes, as well, and said he was the one who had started the fight. Stebbins turned her car around, pulled over, and got out. Holmes ran away, but Stebbins detained defendant and the girl. Defendant was cooperative. Other officers transported defendant to another location where others had been detained, and Stebbins took Autry to that location for a field showup. Fisher arrived in his own car.

Stebbins testified that Autry said defendant had "punched and threatened him," punched Fisher in the face, thrown cans, made "the hand gestures for the gun[,] and said that he knew where he lived and that he was gonna come back to his house." Stebbins also testified that Autry "was a hundred percent certain one of those two said it. He wasn't sure which one." She further testified Autry told her one of the two said, "'I'm going to shoot you,'" but he was unable to tell her which one said that. Stebbins did not take any notes regarding Autry's statements to her because she was driving at the time.

Fisher testified he "was focusing" on the boy he fell on and did not know who was hitting or kicking him. Although Fisher identified defendant at trial, he testified he did not see defendant's face. When sheriff's deputies asked Autry and Fisher to identify some people the deputies had detained, Fisher identified a girl who had thrown cans. The deputy then showed defendant to Fisher and asked, "'Did you see him there?'" Fisher said he had. He testified he told the deputy defendant "looks like the one kinda that ducked his head and rushed me." Fisher denied telling any deputy that defendant had punched or kicked him. Autry, while pointing at defendant, then told Fisher, "Yeah. That's one of the guys. That's the one that rushed you." Fisher explained, defendant's face "kinda looked like he was one of the ones there," but "it all happened so fast."

Fisher acknowledged he had testified at the preliminary hearing that Autry told him about defendant before Fisher spoke to the deputy and identified defendant, but characterized his prior testimony as "wrong." Fisher also identified defendant at the preliminary hearing as someone who struck him. At trial he testified that identification was based upon Autry's statement and "common sense," meaning Fisher "figured [defendant] was one of the ones that had surrounded me" and "assume[d] that he was one of the ones that rushed me, because they had me surrounded and he was farther to my right."[1] Fisher did not know if defendant had made gang signs or yelled gang slogans.

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[1] The prosecutor read this testimony from the preliminary hearing into the record at trial.

Fisher testified he knew gang members and knew the "reputation" that "people who tell the truth, or cooperate" will "get killed" or "somethin' bad will happen to them or their family." He denied, however, that he was a reluctant witness, and testified he wanted to "see something done about" "that type of" "unacceptable" behavior.[2]

Detective Michael Thompson testified he spoke to Autry five days after the incident and had him "run through the entire incident." Autry's statements were consistent with Stebbins's report. In particular, Autry said defendant was one of the people who was "assaulting" Fisher and one of two who made a hand gesture "like they were holding a gun."

3. Gang expert's testimony and You Tube videos

Detective Richard O'Neal, the prosecution's gang expert, testified that the Bloods on Point, or B.O.P., gang had about 200 members in the Antelope Valley. Dollar signs, a particular hand gesture, the Angels' red A within a halo, "267," "1057," "San Francisco hats," and the color red were some of the symbols associated with the gang. In Riley's photographs of the melee, some people were making the B.O.P. hand gesture. The gang's primary activities were burglaries, assaults, murders, possession of weapons, and narcotics sales.

O'Neal found on YouTube two B.O.P. rap videos filmed in the Antelope Valley. The videos did not depict or refer to the incident upon which the charges were based, defendant did not appear in either video, and nothing in the record indicated that defendant was involved in their production or publication, or even knew anyone appearing in, or involved in the production or publication of, the videos. The videos were played at trial and admitted in evidence without objection. The jury was also provided with transcripts of the videos.

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[2] Fisher opined, without objection, "They're all just taking advantage of these people. They're just lookin' like wild animals out there. Just disruptive. And I've never seen the valley like that. So I just didn't want to see that."

We observe that the prosecutor had informed defense counsel before the commencement of voir dire that she had a "number of YouTube videos... that do sort of establish, or substantiate, the existence of the [B.O.P.] gang." At that time, the prosecutor acknowledged that defense counsel had "not yet seen them," represented that the videos were already transcribed, and stated that she would provide the videos to defense counsel "as soon as possible." The record does not indicate what, if anything, defense counsel did with respect to this information.

One of the YouTube videos admitted at trial is entitled, "We Ain't Leaving." It depicts a group of men and a few women at a party, where they gamble, drink, dance, and rap. The video is in black and white, except for red clothing and accessories. The other video, "Flamed Up," principally depicts men, women, and a young boy at a party in the backyard of a relatively new tract home and walking in a residential neighborhood. A number of shots focus on red clothing and accessories, including those worn by the child. It also includes shots of expensive cars in a driveway, street signs, a great deal of gang graffiti, and a restaurant. The lyrics of both videos boast of extreme loyalty to the gang, violent propensities, possession of guns, cultivating new gang members, and the strength and tenacity of the gang. For example, the refrain of "We Ain't Leaving" is "You can say what you want [¶] Still might get socked out [¶] This and every day when but [be] scared when [inaudible] out[**3**] [¶] We here to stay, and now we ain't leaving [¶] Enemy killer, jealousy is why we be beefing[.]" The same video includes the following lyrics: "I could still be a killer," "Little Nova and Juice will have your ass by the throat," "BOP boys is [inaudible] just look for our city we'll be coming out soon," "we active and we make our own rules," "I stay with a Smith and Wesson [¶] With it left in the glove I'm a lethal weapon," "This is a lot of people I love, few that I would kill for," and

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3 The transcript provided to the jury reflects the latter portion of this lyric as "we scared when (inaudible) out." In questioning O'Neal, the prosecutor portrayed this lyric as "be scared when I'm outside." A review of the DVD admitted at trial is consistent with O'Neal's interpretation of the verb.

"Training in the streets to be a BOP professional." The lyrics also include "I can't be around snitches" and "Chasing money with my brothers trying to stay up out of prison."

The lyrics of "Flamed Up" include "It's a nice day today, the gang bang in the streets," "Got to a nine millimeter with the red beam on it with the red hollow tips that'll leave you sleeping lonely," "I'm walking on fire with a red nose pit that'll bite," "Keep a snow bunny but always slap the bitch red," "BOP gang banging green and red bandanas [¶] Knocking niggers out like that's for Bandana," "I'm a mother fucking monster," "BOP boys for life," "All my YGs red, baby dragons," "All red everything even little babies," "Got my son a red bike, with some red Nikes [¶] Like his daddy, son gotta stay fly." The video focuses on the young child during the delivery of the quoted lyrics about "little babies" and "my son."

O'Neal opined that the intended audience for a lyric that stated, "'Be scared when I'm outside. We ain't leaving'" was both rival gang members and "the general public." He explained, "The whole song is about how bad we are, how much fear and violence we commit."

O'Neal testified he knew Holmes, and Holmes had admitted he was a B.O.P. member. O'Neal was not familiar with defendant, had never come across his name in association with any of the B.O.P. cases he had worked on, and knew of no field identification cards regarding him. Nevertheless, O'Neal opined defendant was a B.O.P. member because he had a dollar sign tattoo, was wearing a red sweater during the incident giving rise to the charged offenses, and associated with gang members during the charged offenses.

In response to a hypothetical question based upon the prosecution's evidence but phrased in terms of the group's activities, O'Neal opined that the charged offenses would have been committed in association with, at the direction of, or for the benefit of the B.O.P. gang, with the specific intent to promote, further, and assist in criminal conduct by gang members because street gangs "strive for that fear and intimidation and that level of violence to strike that fear and intimidation within the community and amongst their

rival gangs." In addition, calling someone a Crips gang member is a direction to assault that person, and "they're" saying the name of the gang and displaying gang colors and hand signs. O'Neal explained gangs want to intimidate the community and other gangs to prevent anyone from reporting the crimes committed by the gang. The prosecutor asked O'Neal whether the conduct of the entire group in blocking traffic, flashing gang signs, and yelling the name of the gang demonstrated "the regard that B.O.P. has for the community and their sense of entitlement as they approach the community?" O'Neal opined, "That's what they do. That's how they display this is our hood, not yours. We run this area." He added that the gang graffiti depicted in the YouTube videos were also declarations that "'This is our neighborhood and you can stay out of the way or reap the consequences.'"

O'Neal further testified that victims of gang crimes often testify to "'half truths'" because they fear "the gangs are gonna come back and kill their families."

4. Defendant's testimony

Defendant testified Holmes lived in the home of defendant's family. On the date of the charged offenses, defendant, Holmes, and two friends were walking to Palmdale High School to pick up defendant's younger sister when a man fixing a flat tire, i.e., Autry, began arguing with Holmes. Holmes said, "'It wasn't me,'" and the group continued walking. As defendant's group walked back, Autry again argued with Holmes. A group of kids from a different high school arrived on the scene and three from that group grabbed cans of food from Autry's car and began throwing them at Autry and Riley. No one mentioned a gang until Fisher arrived and said he was "from PJ Watts." One of the girls loudly replied that she was from "Bounty Hunters." Holmes said "B.O.P." or "Bloods." Some of the Palmdale High students "got riled up" because of a remark Fisher made to one of the girls. One of the boys from Palmdale High "rushed" Fisher. Fisher "flipped" that boy and landed on top of him. Other students then "jumped" Fisher. Defendant grabbed one by his backpack and pulled him off Fisher. Defendant then saw Autry coming at him with a crowbar, so he crossed the street.

Defendant denied he was a gang member and denied he made any gang hand signs or said the name of a gang during the incident. He further denied hitting or kicking Fisher, using his hand to imitate the shape of a gun, and telling Autry he knew where he lived. In fact, defendant did not know where Autry lived. Defendant also did not encourage the attacks. He further denied involvement in the "robbery" Autry claimed Holmes had committed.

Defendant explained he had a dollar sign tattoo on his forearm because he also had the names of his three sisters tattooed on his arm, and "they like money."

5. Evidence of Holmes's guilty plea and admission

During her cross-examination of defendant, the prosecutor asked defendant whether Holmes lived with defendant "[b]efore he was incarcerated for these crimes?" Defendant replied, "Yes." The prosecutor then asked whether Holmes was no longer living with defendant "because he plead[ed] guilty to the charges against him for that day; namely, the criminal threats and the assault and being a member of—or in furtherance of a street gang; correct?" Defendant said he was not "aware of that."

On rebuttal, the prosecutor introduced a certified document consisting of copies of the court's minute orders from the case against Holmes and additional testimony by Detective Thompson to establish that Holmes had pleaded nolo contendere to, and been convicted of, violating Penal Code section 245, subdivision (a)(4) (assault by means of force likely to produce great bodily injury), and he had admitted "the allegation that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members." The conviction and enhancement stemmed from the same incident that led to the charges against defendant.

Thompson further testified to his opinion that defendant was a B.O.P. gang member, which he based upon defendant's dollar sign tattoo, "the totality of the incident" underlying the charges, and defendant's "actions during this incident." Thompson

acknowledged that he had never come across defendant's name in any of his "intelligence" resources.

6. Verdicts and sentencing

The jury convicted defendant of criminal threats and assault by means of force likely to produce great bodily injury. The jury also found both crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. The court sentenced defendant to nine years in prison, consisting of two years for the criminal threats conviction, plus a five-year gang enhancement, and a consecutive subordinate term of one year for the assault, with one year for the gang enhancement for that count.

DISCUSSION

Initially, defendant contended that his constitutional right to the effective assistance of counsel was violated by his attorney's failure to object to the admission of evidence about Holmes's no contest plea and admission of the gang enhancement allegation. In response to this court's requests for letter briefs, defendant also contended his attorney committed ineffective assistance by failing to object to the prosecutor's arguments "[c]apitalizing" on that evidence and the admission of the YouTube gang videos. He further contended that the prosecutor committed misconduct amounting to a denial of due process by introducing evidence of Holmes's no contest plea and admission of the gang enhancement allegation, as well as by her arguments to the jury regarding that evidence.

In response, the Attorney General contended that defense counsel was not ineffective. While conceding that the prosecutor had "committed 'error,'" the "error" was not intentional or knowing. The Attorney General also asserted that defendant forfeited his prosecutorial misconduct claim because his counsel failed to raise that objection at trial.

In a letter brief responding to our inquiry about whether we could consider the YouTube videos in evaluating prosecutorial misconduct, the Attorney General argued that legally we could not, admission of the videos helped the jury understand the gang expert's testimony, and defendant waived the claim when his counsel failed to object to admission of the videos at trial.

1. Governing legal principles

a. General evidentiary principles

Only relevant evidence is admissible. (Evid. Code, § 350.)[4] Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (§ 210.) Relevant evidence should be excluded, however, if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury. (§ 352.) In this context, unduly prejudicial evidence is evidence that evokes an emotional bias against the defendant without regard to its relevance to material issues. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

Evidence of gang affiliation and activity is admissible where it is relevant to an issue such as motive, intent, the truth of a gang enhancement allegation, or a witness's credibility. (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*); *People v. Albarran* (2007) 149 Cal.App.4th 214, 223–224 (*Albarran)*; *People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449–1450.) However, the trial court must carefully scrutinize gang evidence because it can inflame the jury and create the risk that the jury will convict the defendant upon the basis of criminal propensity or guilt by association. (*Williams*, at p. 193; *Albarran*, at p. 230.) Due to these potential dangers, gang evidence is admissible only if its probative value is not substantially outweighed by the risk of undue prejudice. (*Williams*, at p. 193; § 352.)

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[4] Undesignated statutory references pertain to the Evidence Code.

The trial court has no sua sponte duty to exclude evidence. (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) The burden is upon the party seeking to exclude evidence to make a timely objection that clearly and specifically states the grounds for the objection. (*People v. Partida* (2005) 37 Cal.4th 428, 433–434.) Failure to object generally forfeits an appellate claim of evidentiary error. (*Ibid.*)

b. Admission of codefendant's guilty or no contest plea

Evidence of a codefendant's plea is generally inadmissible to prove a defendant's guilt because it is irrelevant to the defendant's guilt, and creates an extremely high risk of undue prejudice by "invit[ing] an inference of guilt by association." (*People v. Leonard* (1983) 34 Cal.3d 183, 188 (*Leonard*); *People v. Cummings* (1993) 4 Cal.4th 1233, 1322; *People v. Neely* (2009) 176 Cal.App.4th 787, 795.)

c. Prosecutorial misconduct

The parties do not appear to disagree as to the applicable legal principles. "A prosecutor's conduct violates a defendant's federal constitutional rights when it comprises a pattern of conduct so egregious that it infects '"the trial with unfairness as to make the resulting conviction a denial of due process." [Citation.]' [Citation.] . . . Conduct that does not render a trial fundamentally unfair is error under state law only when it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" [Citations.]'" (*People v. Bennett* (2009) 45 Cal.4th 577, 594–595 (*Bennett*).)

"The focus of the inquiry is on the effect of the prosecutor's conduct on the defendant, not on the intent or bad faith of the prosecutor." (*Bennett, supra*, 45 Cal.4th at p. 595.) "It is generally not necessary for the defendant to 'show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct, because the prosecutor's conduct is evaluated in accordance with an objective standard.'" (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.) "'[I]njury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally.'" (*People v. Bolton* (1979) 23 Cal.3d 208, 214.) Thus, "'[T]he term prosecutorial "misconduct" is

somewhat of a misnomer to the extent it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error. [Citation.]'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667 (*Centeno*).)

A prosecutor commits misconduct by intentionally eliciting inadmissible testimony. (*People v. Chatman* (2006) 38 Cal.4th 344, 379–380 (*Chatman*).) It is also misconduct for a prosecutor to ask a question that implies a fact harmful to the defendant if the question puts before the jury information outside the evidence that, but for the improper question, the jury would not otherwise hear. (*People v. Earp* (1999) 20 Cal.4th 826, 859–860.) "Such misconduct is exacerbated if the prosecutor continues to attempt to elicit such evidence after defense counsel has objected." (*People v. Smithey* (1999) 20 Cal.4th 936, 960.)

If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider whether, considering the challenged statements in the context of the argument as a whole, there is a reasonable likelihood that the jury construed or applied any of the challenged statements in an objectionable fashion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203 (*Cole*).) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) "'[W]e "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 772.)

d. Ineffective assistance of counsel

A claim that defense counsel was ineffective requires a showing, by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561 (*Jones*).)

To succeed on a claim of ineffective assistance, the defendant must also overcome presumptions that counsel was effective, and that the challenged action or inaction might be

considered sound trial strategy. (*Jones, supra*, 13 Cal.4th at p. 561.) Counsel is given broad discretion in the area of tactics and strategy, but the exercise of that discretion must be founded upon reasonable investigation and preparation, and be evaluated in light of the facts and options reasonably apparent to counsel at the time of trial. (*Id.* at pp. 561, 564–565.)

In order to prevail on a claim of ineffective assistance of counsel on appeal, "'"the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission."'" (*People v. Majors* (1998) 18 Cal.4th 385, 403.) "To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation . . . .' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) Nonetheless, "'"deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. '[D]eference is not abdication' [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions."' [Citation.] 'Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance.'" (*Jones, supra*, 13 Cal.4th at pp. 561–562.)

2. Admission of Holmes's conviction and argument thereon

When the prosecutor asked defendant about Holmes's incarceration "for these crimes," defense counsel objected on the ground of relevance after defendant replied, "Yes." Outside the presence of the jury, the prosecutor stated her theory of relevance: "He said that he didn't know any of these other people that were involved. [¶] The fact that Mr. Holmes has plead[ed] guilty to that, would suggest otherwise." Defense counsel said nothing.

The court stated it did not recall defendant's being asked about Holmes's involvement and suggested the prosecutor ask him "and then, of course, to impeach him about the fact that Mr. Holmes plead[ed] guilty if he denies Mr. Holmes' involvement."

Defense counsel did not object on the ground that admission of evidence of Holmes's plea and conviction would be unduly prejudicial by inviting an inference of guilt by association, nor did he mention section 352. Defense counsel did not object at all when the prosecutor introduced the certified court records from Holmes's case.

The prosecutor addressed Holmes's no contest plea several times in argument. The first time, she argued, "There's a question whether this was committed for a street gang—and I'll get to that but I submit to you, that that is not in dispute; especially given that Mr. Holmes—the main guy—admitted these were done for the benefit of the street gang when he admitted his guilt and pled guilty in turn for the dismissal of the remaining counts." Later, after noting that defendant had testified Holmes said "B.O.P." during the incident, the prosecutor argued, "You know that Mr. Holmes took a deal and plead[ed] guilty. He admitted committing the assault and he admitted that the gang allegation is true. What does that mean? That means, he admitted that [the] assault was committed to help the gang and the two elements that were laid out before—and we'll get into again. [¶] You have the person who started all of this, admitting—telling you, 'Yep, that's true, that happened.' And in return for his plea, the other charges were dismissed. That's not to say he's not guilty of those other charges—that's a question for another day—but it was a deal that was made."

Defense counsel did not object to either argument, but instead attempted to counter it in his own argument: "Now, we also heard about Mr. Holmes plead[ing] guilty to the criminal threats, as well as the gang allegation. I don't know why Mr. Holmes plead[ed] guilty. I don't represent Mr. Holmes. I represent Mr. Charles. I don't know; maybe he had a long record; maybe the deal was great; maybe he didn't want to go to trial; maybe he said, 'You know, I just don't want to do it.' Maybe his lawyer had a bad day; maybe he didn't have lunch. He said, 'I can't do your case.' I don't know. And neither of you—all of you should get that out of your mind that; well, Mr. Holmes was there. He plead[ed], so Mr. Charles, he's guilty as well. That is against the rules. . . . You can't do that. [¶] He's—Mr. Holmes is separate. I don't know why Mr. Holmes

plead[ed]. But you heard the facts against Mr. Charles. You make your determination, not guilty/guilty, based on the facts that you heard. Not assuming, not he might have, he could have; beyond a reasonable doubt. And it's an abiding conviction."

Neither counsel asked the trial court for a limiting instruction. As a result, the court did not instruct the jury that it could not infer defendant's guilt of the charges or the truth of the gang enhancement allegation from Holmes's no contest plea and his admission of the gang enhancement allegation.

a. Consideration of the merits of the prosecutorial misconduct issue

Generally, if the defendant did not raise the issue of prosecutorial misconduct in the trial court, we can consider that issue only if, viewing the alleged misconduct in context, a timely objection and admonition would not have cured the harm or an objection and request for admonition would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Arguably, an objection and request for an admonition would have been futile in this case. For example, even in the face of well-established law making Holmes's plea and admission of the gang enhancement inadmissible, the trial court nonetheless suggested that the prosecutor impeach defendant with Holmes's guilty plea.

We need not belabor this point, because we conclude that the nature and gravity of the prosecutor's misconduct violated defendant's fundamental, constitutional right to due process. "'A defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights.'" (*People v. Bradford* (2007) 154 Cal.App.4th 1390, 1411.) Moreover, "[a]n appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party." (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) "Whether or not it should do so is entrusted to its discretion." (*Ibid.*)

Because the prosecutor's misconduct in this case impaired the fundamental fairness and reliability of defendant's trial, we address the merits of defendant's prosecutorial misconduct claim, notwithstanding his attorney's failure to object below. In so doing, we recognize the importance of objection in the trial court, which permits the

court to correct error. We emphasize that the exercise our discretion to consider the claim of prosecutorial misconduct in this case is a rare exception to the salutary rule generally requiring objection in the trial court.

b. The prosecutor committed misconduct of federal constitutional dimension.

As noted, the courts of this state have held since at least 1983 when *Leonard* was decided, that evidence of a codefendant's plea is inadmissible to prove a defendant's guilt because it is irrelevant and prejudicial by "invit[ing] an inference of guilt by association." (*Leonard*, *supra*, 34 Cal.3d at p.188.) Thus, at the time of defendant's trial in 2013, this principle was well established.

The prosecutor's question to defendant, "Mr. Holmes no longer is living with you because he plead[ed] guilty to the charges against him for that day; namely, the criminal threats and the assault and being a member of—or in furtherance of a street gang; correct?" violated this principle. The matters stated in the question were inadmissible, and the prosecutor's question improperly put that information before the jury.

Failing to obtain defendant's admission of these improperly introduced facts, the prosecutor introduced official records of Holmes's plea and admission, then called her gang expert to testify regarding the plea and admission, along with testimony clarifying that Holmes's plea and admission of the gang enhancement stemmed from the same incident as the charges against defendant. The documentary evidence and testimony regarding Holmes's plea and admission were equally improper under the law.

The Attorney General admits that "the prosecutor committed 'error,'" but argues it was not "'misconduct'" because "there is no evidence that the prosecutor intentionally or knowingly committed misconduct." As previously noted, the California Supreme Court recently reiterated that there is no distinction between "prosecutorial misconduct" and "prosecutorial error." (*Centeno*, *supra*, 60 Cal.4th at pp. 666–667.) As also previously noted, a defendant generally need not show that the prosecutor acted in bad faith or with appreciation of the wrongfulness of his or her conduct.

We recognize that the introduction of inadmissible evidence presents an exception to this principle: "'"'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.'"' [Citation.]" (*People v. Mills* (2010) 48 Cal.4th 158, 199, quoting *Chatman*, *supra*, 38 Cal.4th at pp. 379–380, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1218, citing *People v. Bonin* (1988) 46 Cal.3d 659, 68; see also *People v. Hajek* (2014) 58 Cal.4th 1144, 1210, quoting *Mills*.)

The record in this case demonstrates the intentional nature of the prosecutor's misconduct. She initially tried to introduce the inadmissible evidence through defendant. Defense counsel objected to her first two questions. When, after his second objection was expressly overruled and defendant did not provide the prosecutor with the answer she wanted, she introduced official records establishing Holmes's plea and admission and called her gang expert to expound upon this. The prosecutor's efforts to place this inadmissible evidence before the jury cannot be viewed as inadvertent or unknowing.

In addition, the illogic of her stated reason to impeach defendant suggests her actual reason for introduction of the evidence. Defendant had already testified that Holmes lived with him and they were walking together on the afternoon of the altercation giving rise to the charges in this case. The prosecutor's theory to rebut that defendant "didn't know any of these other people that were involved" in the altercation therefore logically could not have reasonably included Holmes. Moreover, Holmes's plea and admission had no tendency logically to establish that defendant knew Holmes.

The prosecutor repeatedly told the jury that it could consider Holmes's admission of the gang enhancement allegation to establish the elements of the same allegation against defendant. By doing so, she improperly requested that the jury substitute a guilt-by-association inference for an evaluation of whether the evidence proved the elements of that enhancement with respect to defendant himself. In addition, her argument characterized Holmes's admission of the gang enhancement allegation as if it were testimony in defendant's case: "[Holmes] admitted that [the] assault was committed to

help the gang and the two elements that were laid out before—and we'll get into again. [¶] You have the person who started all of this, admitting—telling you, 'Yep, that's true, that happened.'" Holmes did not testify at defendant's trial and was not subject to cross-examination. The prosecutor's argument thus implicated Holmes's constitutional right to confront witnesses against him as well.

For all these reasons, we conclude that the prosecutor committed misconduct. Her efforts to introduce obviously inadmissible evidence, and her arguments urging the jury to infer defendant's guilt by association and view Holmes's admission of the gang enhancement as if it were testimony in the case constituted a pattern of conduct so egregious that it infected defendant's trial with unfairness, violating his federal constitutional right to due process.

c. The prosecutor's misconduct was prejudicial.

Because the prosecutor's misconduct violated defendant's federal constitutional rights, we assess its effect under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24. The Attorney General thus has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Bell* (1989) 49 Cal.3d 502, 534.)

Although defendant was admittedly present at the melee and was wearing red, the evidence of his actual role in the charged offenses and his relationship to the gang was in conflict. Notwithstanding, it was undisputed that defendant did not make gang hand signs or refer to any gang, even though a number of people around him did. Nor did the evidence clearly demonstrate that witnesses recanted due to fear of testifying against a gang, as the Attorney General argues. Fisher, who was familiar with gangs and the possibility of retaliation against a witness who testifies against a gang, did testify at the preliminary hearing that before he identified defendant in the field showup, Autry had pointed defendant out to him and said defendant was the one who "rushed" Fisher. At trial, Fisher insisted that his prior testimony was incorrect, and that he identified

defendant *before* Autry made that statement. If Fisher feared retaliation from the gang, he would not have given the latter trial testimony.

Eleven or more people participated in what was apparently a brief, chaotic attack, with multiple participants attacking the victims and the car more or less simultaneously. Apart from Autry's familiarity with Holmes, the participants were strangers to the victims and witnesses. Thus, the circumstances of the incident were ones that would potentially lead to confusion and misidentification. Much of the testimony and statements by the victims and witnesses was phrased in terms of what "they" did or said, and the prosecutor emphasized the collective action and presumed collective intent of the group and gang in her argument.

The prosecutor's use of Holmes's guilty plea and admission of the gang allegation during trial and argument served to fill in these gaps and uncertainties by encouraging the jury to (1) indulge in guilt-by-association inferences, and (2) view every member of the group involved in the incident as part of a gang, whose members acted collectively. Stripped of codefendant's guilty plea and admission, the remaining evidence against defendant was thin indeed, consisting of a dollar sign tattoo, a red shirt, being present at a melee involving gang members, and recanted testimony of the purported victims.

The involvement of a gang and a large number of perpetrators created inherent risks of anti-gang bias and guilt by association. The admission of evidence of Holmes's no contest plea and admission of the gang enhancement allegation, together with the prosecutor's arguments inviting the jury to rely upon Holmes's admission of the gang enhancement to find the gang enhancement alleged against defendant true and to view Holmes's admission of the gang enhancement as if it were testimony in the case, exploited these already substantial risks for the prosecution's benefit. Given the absence of a limiting instruction, we cannot conclude that the jury did not indulge in the guilt-by-association inference to find the gang enhancement allegation true and to convict defendant of the substantive offenses.

The prosecutor further exacerbated these risks by phrasing her hypothetical questions to O'Neal regarding the mental state elements of the gang enhancement (i.e., the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members) in terms of the conduct of the entire group during the incident, not the conduct of a hypothetical person performing the acts attributed to defendant by witnesses and victims. O'Neal's responses understandably failed to differentiate between the group's conduct and that of a hypothetical stand-in for defendant.

Finally, there were the gang rap videos touting the gang's culture of violence and fear replete with racial epithets and misogynist comments. The only possible relevance of the videos was, as the prosecutor argued in rebuttal, to demonstrate the culture of the gang, or, as the Attorney General argues in her letter brief, to support the gang enhancement because they showed "that B.O.P. was a criminal street gang," "B.O.P. members wore red, were antagonistic towards their perceived rivals, and used hand signs."

The prosecution's gang expert, Detective O'Neal, testified to all of these points. The Attorney General argues that the videos "assisted the jury in understanding and evaluating" O'Neal's testimony. This may be true to some extent, but the videos were nonetheless cumulative, especially given the admission of Riley's photographs of the actual attack, one of which O'Neal cited as an example of a person making a B.O.P. gang hand sign. Whatever weak probative value the videos may have had was substantially diminished by their cumulative nature.

More important, the videos created a high risk of undue prejudice that buttressed the prosecutor's misconduct in the admission of Holmes's plea and admission and her arguments thereon. Although no guns or acts of violence appear in the videos, their lyrics repeatedly refer to guns, killing enemies, slapping, using a biting pit bull, and "sock[ing]" and "knocking" out people. These lyrics, combined with references to gang

banging in the streets, the gang being active and making its own rules, the gang's tenacity and recruitment of new gang members, the number of people depicted in each video, and the apparent warning that others should be scared when the gang is out on the streets gave the videos a menacing quality, notwithstanding the absence of weapons and violent behavior on camera.

In addition, the videos include offensive language and violent references to women, and they depict adults grooming a young boy as a future gang member. For all of these reasons, the videos were likely to evoke an emotional bias against gangs and defendant, whom the prosecutor asserted was a member of the same gang that boasted of its strength, violence, and brazen conduct in the videos.

The videos were objectionable on relevance, hearsay, and section 352 grounds, at a minimum, yet defense counsel inexplicably failed to object to them on any ground. We acknowledge that defense counsel's failure to object, in conjunction with binding precedent requiring a basis for concluding that the prosecutor intentionally introduced inadmissible evidence (the videos), precludes us from holding that the introduction of the videos *alone* constituted prosecutorial misconduct.

The videos nonetheless bolstered the already prejudicial effort by the prosecutor to induce the jury to infer defendant's guilt by association with Holmes, "the person who started all of this," who had not only pleaded nolo contendere and admitted the gang enhancement allegation, but also, in the prosecutor's words, told the jury, "'Yep, that's true, that happened.'"

Any doubt about the significance of the videos to the jury and their likely effect upon the jury's decision-making process was resolved by the jury's sole request during deliberations: to watch the videos again.[5] The court's minutes reflect that the bailiff provided the jury with a laptop computer to play the discs at 11:39 a.m. Nineteen

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[5] The jury's note to the court stated, "We wish to review the You-Tube video in evidence—both 'We ain't Leaving' and 'Flamed up.'"

minutes later, the jury went to lunch. Seventeen minutes after the jury resumed deliberating after lunch, it informed the court it had reached verdicts. Given the minute probative value of these videos, their highly prejudicial nature, and their tendency to bolster the legally improper inferences nurtured by the prosecutor, the jury's request to re-watch them supports our conclusion the prosecutor's misconduct was prejudicial.

For all of these reasons, we cannot conclude that the prosecutor's conduct was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.)

3. Ineffective assistance of counsel

Defense counsel should have objected to admission of the gang rap videos. Their only possible relevance was, as the prosecutor argued in rebuttal, to demonstrate the culture of the gang, or, as the Attorney General argues in her letter brief, to support the gang enhancement because they showed "that B.O.P. was a criminal street gang," "B.O.P. members wore red, were antagonistic towards their perceived rivals, and used hand signs." For these purposes, the videos were inadmissible for many reasons.

First, they were largely hearsay because they consisted of out-of-court statements regarding the gang, its nature, culture, and principles. Because the statements were made by persons other than defendant, they were not party admissions. The record provides no basis upon which to conclude that either the declaration against penal interest[6] or adoptive admission hearsay exceptions applied. Accordingly, a hearsay objection by defense counsel would have been well-founded.

Second, defense counsel should have objected to the videos pursuant to section 352 on the ground that their probative value was substantially outweighed by the high risk of undue prejudice that they created. The prosecution's gang expert, Detective O'Neal, testified to all of the elements necessary for proof of the gang enhancement, including the existence of the gang members' use of hand signs and fondness for red, as

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[6] For a statement against penal interest to be admissible, the declarant must be unavailable. (Evid. Code, § 1230.) The record does not reveal any showing of unavailability.

well as matters such as the gang's motive for the attack, gang rivalries, and his observations that victims and witnesses often recant because they fear retaliation by the gang. As previously stated, while, as the Attorney General argues, the videos "assisted the jury in understanding and evaluating" O'Neal's testimony, the videos were obviously cumulative.

Moreover, the videos were unduly prejudicial relative to their probative value. The lyrics in the videos, combined with references to gang banging in the streets and the apparent warning that others should be scared when the gang is out on the streets, gave the videos a menacing quality. In addition, as previously described, the videos include offensive language and encouraged violent treatment of women accompanied by misogynistic comments. They also depicted an apparent gang member grooming his son in the culture of the gang. For all of these reasons, the videos were highly likely to evoke an emotional bias against gangs and defendant.

Accordingly, defense counsel should have sought to exclude the videos pursuant to section 352 and as inadmissible hearsay. Had he done so, it is probable that the trial court would have excluded the videos on one or both of these grounds. At a minimum, the objection would have preserved the evidentiary issue for appeal. Given the nature of the videos and lack of any possible benefit that defendant might have derived from their admission, there simply can be no tactical explanation for defense counsel's failure to object to their admission. His failure to object is all the more difficult to understand, given that before voir dire he was on notice that the prosecutor's expert had these videos.

Defense counsel was also ineffective in his lack of a response to the prosecutor's introduction of evidence and argument on Holmes's plea and conviction. As detailed *ante*, defense counsel did initially object on relevance grounds when the prosecutor asked questions about Holmes's plea and conviction. Although his relevance objection was perhaps technically correct, he failed to object on obvious prejudice grounds under section 352, particularly given that the prosecutor's stated relevance of the plea and conviction was nonsensical. He failed to object to the prosecutor's argument clearly

expounding the prosecutor's theme of guilt by association. Defense counsel also failed to ask for a limiting instruction regarding the very limited relevance of the evidence, which instruction potentially could have assisted the trial court in recognizing that the evidence was too prejudicial and prevented the prosecutor from compounding her "error" when she gave her closing argument. We can discern no tactical reason for these defaults on the part of defense counsel.

As addressed in our discussion of prosecutorial misconduct above, the admission of the videos and evidence of Holmes's no contest plea and admission of the gang enhancement, together with the prosecutor's argument pertaining to this evidence, was not harmless beyond a reasonable doubt. Accordingly, it was necessarily prejudicial under the less stringent standard applicable to ineffective assistance of counsel in *Jones, supra,* 13 Cal.4th 552. For all these reasons, we conclude defense counsel was ineffective.

In sum, both trial counsel failed the system at the expense of defendant's constitutional rights. We thus have no choice but to reverse.

DISPOSITION

The judgment is reversed. Pursuant to Business and Professions Code section 6086.7, subdivision (a)(2), the Clerk of this court is directed to send a certified copy of this opinion to the State Bar upon issuance of the remittitur in this matter. The Clerk shall also notify the prosecutor and defense counsel, Deputy District Attorney Sarah Slice and Daniel J. Teola, that they have been referred to the State Bar. (*Id.*, § 6086.7, subd. (b).)

NOT TO BE PUBLISHED.

BENDIX, J.*

I concur:

JOHNSON, 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.

Rothschild, P.J., concurring and dissenting:

I agree with the majority opinion with one exception. I do not agree that counsel was ineffective concerning the Holmes evidence. First, counsel did object to it on the correct ground, relevance ("[n]o evidence is admissible except relevant evidence" (Evid. Code, § 350)), and the court should have sustained that objection. No more was required of counsel. Any limiting instruction would have been nonsensical for the very reason that the evidence was inadmissible. Second, once that objection was overruled and the jury informed that Holmes had pleaded guilty and admitted the gang allegation, there might well be a tactical reason for counsel not to pester the judge or ask for a limiting instruction. No admonition or limiting instruction could cure the prejudice once the "cat was out of the bag." On the other hand, counsel might reasonably believe that explaining the lack of relevance to the jury, as he did, might more effectively undo the damage from admission of the evidence.

ROTHSCHILD, P. J.