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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DEVONTE ROSS, Defendant and Appellant.	B229323 (Los Angeles County Super. Ct. No. TA107923)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ricardo R. Ocampo, Judge. Affirmed in part; sentence vacated; remanded with directions.

Susan Wolk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Lawrence M. Daniels, Supervising Deputy Attorney General, and Ana R. Duarte, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Devonte Ross appeals from the judgment entered following a jury trial in which he was convicted of willful, deliberate, and premeditated attempted murder, with gang and gun-use findings. Defendant raises numerous contentions, including evidentiary error, prosecutorial misconduct, and ineffective assistance of counsel. We affirm, but vacate the sentence and direct the trial court to resentence defendant after considering *People v. Caballero* (2012) 55 Cal.4th 262, and to issue an amended abstract of judgment.

BACKGROUND

About 7:00 p.m. on July 28, 2009, 17-year-old Eric Moton was shot numerous times in a small park a block from his home in Lynwood. (Undesignated date references pertain to 2009.) Just before the shooting, Moton and his girlfriend, Monique Sneed, were sitting on a bench alongside a basketball court at the back of the park, which was enclosed on three sides by walls and accessible only from the front. The sun had not yet set, and children were playing on the basketball court and in other areas of the park. Moton and Sneed saw defendant walk into the park from the front. Moton knew defendant because they had attended Lynwood High School together. Moton knew defendant as "Little Man," and he recognized defendant right away from his "body language."

While Moton and defendant were in school together, defendant became a member of the Lynwood Neighborhood Crips gang and proclaimed his membership and moniker of "Caccy Blue" to Moton. Moton testified that, although had been affiliated with the Palm and Oaks Gangster Crips gang, he was not a member, had never claimed to be a member, and had no tattoos. Moton never had any problems with any members of the Lynwood Neighborhood Crips gang, and had last seen defendant about one year before the shooting.

Defendant quickly walked straight toward Moton and Sneed. Sneed testified that defendant looked "really suspicious" and angry and held his hand inside his pants the entire time he was walking. Sneed asked Moton if he knew defendant. Moton replied,

"'Baby, that's Little Man from Lynwood Neighborhood.'" Defendant stopped on the basketball court, about seven feet from where Moton and Sneed were sitting. Moton testified defendant had a "mean" look on his face. Moton and defendant looked at one another. Moton said, "'I don't bang, man. Just stall me out,'" meaning, "Don't do this." Defendant replied, "'What? Fuck Jokes.'" "Jokes" was a disrespectful name for the Palm and Oaks gang.

Moton began running, but was trapped by the park walls behind him and on both sides of him. He thought he might be able to jump the wall to his left, so he ran toward it. Defendant began shooting. The other people in the park began screaming and running away. A gunshot struck Moton before he made it past the basketball court. Moton continued to run, but was struck by another bullet. He fell to the ground and attempted to crawl away. Defendant continued to shoot at Moton from behind. Sneed testified defendant fired six or seven shots. Defendant ran back to the park entrance and Moton crawled toward where Sneed had crouched behind one of the benches. Sneed phoned 911.

Julia Juarez, her 18-year-old son Joseph Ramirez, and her 7-year-old son lived in a second-story apartment next to the park. Their apartment had a large window that looked out onto the rear portion of the park. About 7:00 p.m. on July 28, Juarez was standing at the window in her apartment and heard six shots. Her younger son was in the park. She and Ramirez ran to the park. Juarez ran alongside her building and out through a gate. As Juarez ran, she saw defendant running away from the area of the basketball court toward the right of the open side of the park. Everyone else who was running out of the park was going straight across the street toward an apartment building. Defendant pulled on a hood as he ran. Defendant turned right at the street and ran directly past Juarez, at which time she saw his face.

Ramirez testified that he got up when he heard the first shot and moved toward the window in his family's apartment that had a view of the park. By the time of the second shot, he was at the window and saw one person shooting at "a guy" who was crawling in

the area behind the benches next to the basketball court. The shooter continued to fire at the rate of about one shot per second, a total of six or seven shots. Ramirez ran to the door, downstairs, and to the park. He hopped over a short wall between the park and his apartment building. He saw defendant running from the area of the shooting toward the street. Ramirez was able to see the side of defendant's face. Ramirez grabbed his brother, put his brother over the wall, hopped back over the wall, and took his brother inside.

Moton was in the hospital for two weeks and underwent several surgeries to repair the injuries caused by the gunshots. He suffered nerve damage in his left leg and one bullet remained lodged in his thigh.

Moton testified that at the time of the shooting defendant wore his hair in cornrows, that is, braids tied tightly to the scalp and hanging down in the back. Moton did not see tattoos on defendant's arms. Sneed testified that at the time of the shooting defendant had "really fuzzy . . . raggedy braids," that is, cornrows that needed to be taken out and redone. She did not see any tattoos on defendant's arms. Defendant was wearing a white T-shirt and gray basketball shorts. Ramirez testified that the shooter was a thin African-American male wearing a white T-shirt who appeared to be 16 or 17 years old, and had cornrows or braids.

Los Angeles Sheriff's Detective Hugo Reynaga did not know the identity of "Little Man" from the Lynwood Neighborhood Crips gang. Reynaga prepared a "sixpack" photographic array that did not contain defendant's photograph and showed it separately to Sneed, then Moton. Sneed told Reynaga that the shooter was not in the sixpack, but she circled one photograph and told Reynaga that although the person in the photograph was not the shooter, he looked the most similar to the shooter. Outside the presence of Sneed, Moton told Reynaga that defendant was not in the sixpack. Moton pointed to number four in the sixpack, who was Jerome Thomas, and said, "'I know this guy, but he is not the one who shot me.'" Moton then used his mother's laptop computer to find a video on YouTube that he had viewed a few days before the shooting. The

video, which was posted on YouTube in 2007, was played for the jury at trial. It showed defendant, who identified himself in the video as Caccy Blue, Jerome Thomas, and two other members of the Lynwood Neighborhood Crips gang Moton identified as Ashley and Brian pointing out their graffiti, making gang hand signals, stating their gang monikers, proclaiming their gang's superiority to rival gangs—including the Palm and Oak Crips gang, and insulting the rival gangs with statements such as "Fuck Jokes." Moton pointed to defendant in the video and told Reynaga that was the person who shot him. Reynaga called Sneed into the room and Moton played the video again. Sneed identified defendant in the video as the person who had shot Moton. Moton did not tell Sneed the shooter was in the video before she identified defendant. A few days later, Reynaga showed Sneed and Moton a new sixpack that contained defendant's photograph, and each identified defendant as the shooter. Moton and Sneed also identified defendant at trial.

About one week after the shooting, Juarez identified defendant from a sixpack as the person she saw running from the park. Juarez also identified defendant at trial, although she initially testified that she was uncertain. Juarez then explained she was nervous and feared for her children's safety. Ramirez also identified defendant from a sixpack and at trial as the shooter he had seen running away.

In January of 2010, Reynaga served Moton and Sneed with subpoenas to appear at the preliminary hearing. Neither appeared. Moton testified that he was still living one block from the park where he had been shot, and he knew that if he testified he could be killed for "snitching." He was happy to be alive and did not want the matter to be taken any further because he feared for himself and his family. Sneed testified that she ignored the subpoena because she was living with Moton in Lynwood, she was about to have a baby, and she feared she and her baby would be killed in retaliation for her testimony. Sneed and Moton were arrested for failing to appear and were jailed for several days. Both were then transported to testify at the preliminary hearing. Moton did not intend to testify truthfully, but before he was called as a witness, he saw defendant through a

window. They looked at each other and defendant "gave [Moton] like a little grin, kind of laugh kind of thing." This made Moton feel that defendant had "no remorse," and Moton decided to testify truthfully and fully. In Sneed's preliminary hearing testimony she did not identify defendant or reveal everything she knew. After the preliminary hearing, Moton and Sneed were relocated and they no longer feared retaliation.

Sheriff's personnel recovered six expended nine-millimeter casings on the basketball court. Reynaga requested that the casings be fingerprinted, but he did not receive any results, which led him to believe that no fingerprints were recovered. In Reynaga's experience, the sheriff's department rarely obtained fingerprints from casings.

On August 13, Reynaga arrested defendant at his mother's home in North Hollywood. At the same time, Reynaga and other sheriff's personnel executed a search warrant at the home. They recovered a notebook with defendant's name on the cover and gang writing inside; yellow and blue bandanas tied together, reflecting the colors used by the Lynwood Neighborhood Crips gang; and a blue hat emblazoned with "NY." Defendant made a statement after his arrest, claiming that at the time of the charged crimes he was doing something with his cousin Tiffany.

The parties stipulated that Moton and defendant both attended Lynwood High School during September and October of 2007.

Dr. Liby Eduarte testified she had been one of defendant's high school teachers, and defendant was known as "Little Guy." Eduarte testified she was unsure if anyone called him "Little Man," and did not remember whether she mentioned "Little Man" to a defense investigator. Olivia Vera was a teaching assistant at defendant's high school. She testified she gave defendant the nickname "Little Guy." Students in her classroom called defendant "Little Guy" and "Little Man." A defense investigator had interviewed Vera months before trial, but Vera did not remember what she said. When Reynaga and the prosecutor went to the high school to obtain documentation that Moton and defendant attended at the same time, they spoke to Vera, who "blurted" out that defendant was known as "Little Man."

Maria Rodriguez testified that she was an investigator for the Alternate Public Defender's Office and had interviewed several witnesses in defendant's case, including Eduarte, but not Vera. About five months before the trial, Eduarte told Rodriguez that she and other teachers called defendant "Little Man" or possibly "Little Guy." Rodriguez included the information about "Little Man" in a written report she provided to defense counsel. She had no duty to provide her report to the prosecutor or to sheriff's personnel, and did not do so.

Reynaga, who at the time of the charged offenses was "in charge of investigating any gang-related crime in the City of Lynwood," served as the prosecution's gang expert. He testified that the Lynwood Neighborhood Crips and Palm and Oak Gangster Crips gangs claimed territories in Lynwood and were enemies. A third gang, the Lynwood Vario Segundo, actually claimed the park where the shooting occurred, but there was Palm and Oak gang graffiti on the basketball court at that park. Reynaga testified to the symbols used by the Lynwood Neighborhood Crips gang, which included "NY," as well as the derogatory names they used for their rivals, such as "Jokes" for the Palm and Oak Gangster Crips gang. The primary activities of the Lynwood Neighborhood Crips gang are vandalism by graffiti, armed robberies, shootings, and murders. Reynaga also explained the meaning of the slang and graffiti in the YouTube video.

Reynaga opined that defendant was an active member of the Lynwood Neighborhood Crips gang and Moton was a member or affiliate of the Palm and Oak Gangster Crips gang. With respect to defendant, Reynaga based his opinion on the "N" and "H" tattoos on the inside of defendant's forearms, defendant's moniker Caccy Blue, the blue and yellow clothing defendant wore in the YouTube video, and defendant's statements and conduct in that video, which included pointing to his moniker in a gang "roll call" graffito. In response to the prosecutor's hypothetical question based upon the prosecution's evidence, Reynaga opined that the charged crime was committed for the benefit of, at the direction of, or in association with a criminal street gang. He further testified that the shooting would benefit the gang by demonstrating "how hardcore the

gang is," thereby generating respect for the gang and intimidating the community, which would make it easier for the gang to recruit new members and become stronger.

Deputy Chad Sessman testified that in December of 2008 he stopped defendant, Jerome Thomas, and two others on suspicion of painting fresh graffiti Sessman had just seen. Defendant had dried paint on his arms that was the same color as the graffiti. Defendant was arrested. In a statement to Sessman, defendant admitted that he was a member of the Lynwood Neighborhood Crips gang known as Caccy Blue, and that he had "tagged" four locations identified by Sessman for his gang. Sessman photographed the graffiti and those photographs were admitted at the trial in this case. Sessman testified that the graffiti referred to the Lynwood Neighborhood Crips gang claiming the area, and one graffito included the abbreviated names of two rival gangs—including Palm and Oaks Gangster Crips—crossed out.

Defendant's 19-year-old cousin, Tiffany Johnson, testified that defendant arrived at her house in Paramount around 11:00 a.m. or noon on July 28. During that summer, defendant visited her home two or three times per week. Johnson and defendant spent the day together at her house, at a park, and at her friend Daniel's house. They played video games and "chilled." Defendant was with her at her house at 7:00 p.m. Johnson's friends left around 9:00 p.m. and defendant spent the night. Johnson testified on direct examination that she specifically remembered July 28 because it was three or four days after her family went to Soak City to celebrate defendant's sister's birthday. On cross-examination, Johnson testified that the trip to Soak City was in early August, and the day she had described in her direct testimony occurred three to five days or a week before the trip to Soak City. She then testified that she remembered the day defendant came over because she got into a bad argument with her friend Daniel that day or the next day.

Leticia Holland was defendant's aunt and Johnson's mother. Defendant had lived with her from 2005 through the end of 2007 or beginning of 2008, and he was like a son to her. On July 28, defendant's hair was short—too short to braid. It had been short for two or three years. He had not worn his hair in braids or cornrows for about eight years.

Holland had not seen a video showing defendant with his hair tied back. She testified that when she arrived home from work at about 7:15 p.m. on July 28, defendant was in the garage playing with Johnson and "a bunch of other kids." Holland recalled that particular day because she needed to buy additional food because defendant was at her home. After she got home from work, she walked across the street to the grocery store, where she wrote a check for the groceries. On cross-examination, she testified that defendant came to her house often, she cooked dinner every Monday through Thursday, she regularly shopped at the grocery store across the street, and she regularly paid that store with checks. But when she was buying food to cook for defendant and his siblings, she would note "food for kids" on her check. She had all of her canceled checks and could have provided them, but no one asked her to do so, even though she told defense counsel and possibly a defense investigator that she had a check from the day of the charged offenses.

Reynaga testified that after hearing Holland's testimony regarding defendant's hair, he obtained photographs of defendant taken on December 22, 2008, and February 13, 2009. These photographs were admitted in evidence and showed defendant with what Reynaga described as "fuzzy cornrows and a little braid sticking out the back." (We note that the 2008 photograph shows a braid on the left side of defendant's head and possibly the top of a braid sticking out on the right side of defendant's head.)

The jury convicted defendant of attempted murder and found true allegations that the offense was willful, deliberate, and premeditated; the offense was 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; and defendant personally discharged a gun, causing great bodily injury in the commission of the offense. The court sentenced defendant to prison for 40 years to life, consisting of a life term for attempted murder, with a minimum parole eligibility term of 15 years pursuant to Penal Code section 186.22, subdivision (b)(5), plus 25 years to life for the

Penal Code section 12022.53, subdivision (d) gun-use enhancement. (Undesignated statutory references are to the Penal Code.)

DISCUSSION

1. Trial court's failure to conduct second *Marsden* hearing

Defendant was represented by the same deputy alternate public defender from preliminary hearing through trial. Defendant expressed no dissatisfaction with his attorney until voir dire was well underway. Defense counsel informed the court, and the court conducted a hearing outside the presence of the prosecutor, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). In that hearing, the court asked defendant to state his concerns about his attorney. Defendant said he did not think his attorney was "doing enough for" him or "working with" him, and he did not "feel comfortable going to trial with him." Pressed for specific perceived shortcomings of his attorney, defendant stated he felt that his attorney was "on the D.A.'s side," he and counsel did not understand each other, his attorney should talk to him more about the case, and his attorney "could have done more to try to get a better deal."

Defense counsel explained that he had "tried from day one to get the D.A.'s office to offer a determinate sentence," but "[i]t simply hasn't happened. It has gone all the way up the chain of command." Counsel explained, "This court is aware that the D.A. still isn't even making an offer. [¶] What they put out there is that if we wanted to offer them 25 to life, they would take that back . . . and it would be considered and they would accept that. That is not something that [defendant] wants to accept." The court confirmed that it had encouraged settlement, but the prosecution was not making an offer, and defense counsel was powerless to change that.

Defendant then complained that he had "been incarcerated since [he] was 16," was "pushed into adult court," and felt "[i]t could have gone better." Defendant explained that he thought he was facing a potential 14-year sentence, but "[n]ow we are looking at 25 to life. It just doesn't fit right with me. I don't feel as though it's going the right way. I feel that if I can get somebody more attentive and aware of my situation, someone to

look through it more, they can do better for me." The court found there was no breakdown in communication, but "only something, Mr. Ross, that you don't want to confront, and that's the reality of this case. And in this case there is no offer." The court denied the motion. Defendant does not appeal this ruling.

Six days later, at the end of the third day of testimony in the prosecution's case-in-chief, defense counsel informed the court, "[Defendant] earlier discussed with me and asked me—he would like a copy of his paperwork which I told him I am not going to provide at this time. It would waste valuable time for me to redact a bunch of stuff when I should be working on his case. [¶] Moreover, I already gave it to him in the past, and he doesn't have it anymore because he sent it to a family member. However, during that conversation, it came up that the only way he could get his paperwork was if he wished to fire me and represent himself. [¶] Now, it's my understanding after talking with him more about that, he doesn't want to do that, but I want to put that on the record and to make sure it's clear. And the court can ask [defendant] if he chooses to do that or not, but I don't want any, 'he said/she said.'" The court asked the prosecutor and defendant's family members to step outside "for purposes of—just clarification of non-*Marsden*, just for clarification." Defense counsel responded, "I don't know that it's a *Marsden* rather than a *Faretta*."

The court then stated to defendant, "I just want to make sure that there is—so far, since we had the conversation, everything is fine between you and your lawyer except this issue of you wanting paperwork; is that correct?" Defendant replied, "I have been telling you, I wanted someone else to represent me." The court said, "Okay," and defendant continued, "And you denied my request." The court responded, "Yes. And that continues to be denied. Now, I just want to make sure, you are not asking to represent yourself?" Defendant replied, "No, sir."

After the prosecutor returned to the courtroom, the court explained, "As to the matter that was put on the record by [defense counsel], Mr. Ross, I indicate to you that it is more beneficial to you to have [defense counsel] to continue to work on your defense

and prepare as we are moving along in the court rather than providing you with the paperwork, especially the fact that he has already provided you one. [¶] In addition to that, that is why there is a very strong policy of us giving limited information to the defendants because of the issue like you just did. [Defense counsel] indicated that you gave that paperwork to your family members. See, they have no right to those documents. And that is part of the problem with giving paperwork to individuals. [¶] Anyway, nothing else needs to be stated on the record."

Defendant contends that the trial court erred by failing to conduct a second "'meaningful'" *Marsden* inquiry.

When a defendant asserts that appointed counsel is inadequately representing him and asks the court to appoint another attorney, the court must allow the defendant to explain the basis of his request and state specific instances of allegedly poor representation. (*Marsden, supra*, 2 Cal.3d at p. 124.) After providing the required hearing, the trial court then has discretion in deciding whether to replace counsel. "'A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" (*People v. Taylor* (2010) 48 Cal.4th 574, 599.)

The trial court has "no obligation to initiate the *Marsden* inquiry sua sponte. A trial court's duty to conduct the inquiry arises '*only when the defendant asserts directly or by implication* that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' [Citation.]" (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) A request for self-representation does not trigger a duty to conduct a *Marsden* inquiry. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1372–1373.)

When defendant raised the issue of substitution of counsel during voir dire, the trial court allowed, and even urged, defendant to explain the basis of his request and state specific instances of allegedly poor representation. None of defendant's complaints reflected an irreconcilable conflict between defendant and counsel or even a possibility of

ineffective representation. Defendant made no further requests for a substitution of counsel. His later request was simply for "his paperwork," and defense counsel explained to him that he could obtain it if he represented himself pursuant to *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525]. The trial court then sought "clarification" to ensure that defendant had no new complaints against his attorney and did not wish to represent himself. The court gave defendant an opportunity to inform the court of any new instances of allegedly poor representation, but defendant referred only to what he had previously told the court. Under the circumstances, the trial court had no obligation to further inquire of defendant. The complaints defendant had stated at the original *Marsden* hearing during voir dire had no greater validity six days later, and defendant had an opportunity to tell the court of any new grounds, but failed to do so. The trial court did not err.

2. Prosecutorial misconduct

Citing a multitude of acts and statements, defendant contends the prosecutor committed prejudicial misconduct.

"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*).)

If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider whether, viewing 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.) A prosecutor has wide latitude to discuss, argue reasonable inferences from, and comment upon the evidence. (*Cole*, *supra*, 33 Cal.4th at p. 1203.) Whether the inferences the prosecutor draws are reasonable is for the jury to decide. (*Ibid.*)

To preserve a claim of prosecutorial misconduct for appeal, the defendant must make a timely objection at trial on the ground asserted on appeal and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm or objection would have been futile. (*People v. Thomas* (2012) 54 Cal.4th 908, 937; *Bennett*, *supra*, 45 Cal.4th at p. 595.) A trial court has no sua sponte duty to control or remedy purported misconduct. (*People v. Fuiava* (2012) 53 Cal.4th 622, 681.)

Defendant objected to only one of the numerous statements and acts of the prosecutor he contends were misconduct. He argues, without analysis or explanation pertinent to each purported instance of misconduct, that objection would have been futile because "the misconduct was unremitting and pervasive" and "permeated the trial." Defendant's conclusory assertion is insufficient to avoid forfeiture. The concerns asserted by defendant on appeal regarding each of the acts or statements of the prosecutor of which defendant complains could readily have been remedied or in some instances completely avoided had defendant asserted a timely objection. Accordingly, defendant forfeited his appellate claims regarding all prosecutorial misconduct claims except the one to which he successfully objected. We further note that a number of defendant's prosecutorial misconduct claims are asserted without any citation to authority. We would disregard those claims even if they had been preserved for appeal. (*People v. Catlin* (2001) 26 Cal.4th 81, 133 (*Catlin*); *In re Michael D.* (2002) 100 Cal.App.4th 115, 127 (*Michael D.*).)

The sole prosecutorial misconduct claim defendant preserved is his claim that the prosecutor posed an improper question to Tiffany Johnson. The prosecutor asked Johnson if she knew defendant associated with gangs. The trial court sustained defendant's objection that the question was outside the scope of direct examination. The prosecutor then asked Johnson if she had ever seen defendant's tattoos, and she said she had. The prosecutor asked Johnson if she had ever seen any of the friends defendant "hung around with." She replied, "Yeah. A few, but I didn't put myself in those types of places." The prosecutor asked, "Did you know any of those gang members?" The trial court sustained defendant's objection that the question was outside the scope of direct examination. Defendant contends the prosecutor committed misconduct by asking a question "calling for [an] inadmissible and prejudicial answer[]."

Significantly, the trial court sustained the objection not because the question called for a prejudicial answer, but because it was beyond the scope of defendant's direct examination. The record reveals no prior ruling by the trial court prohibiting the prosecutor from asking defense witnesses about defendant's gang membership, and the prosecutor's question did not place before the jury any information that the jury did not already have. The YouTube video showed that defendant "hung around with" people who also claimed membership in defendant's gang. One of the people in the video, Jerome Thomas, was also with defendant when Sessman arrested defendant for painting gang graffiti. Johnson had testified without objection that she had seen defendant's friends, and there was nothing improper in the prosecutor asking if she knew any of "those gang members," that is, defendant's frequent companions who belonged to his gang. Johnson's credibility was in issue, and the prosecutor was entitled to make inquiries in an attempt to impeach her. In contrast to the authorities cited by defendant, the prosecutor here did not introduce or attempt to introduce inadmissible evidence prejudicial to the defendant. The prosecutor's question did not involve the use of deceptive or reprehensible methods to attempt to persuade the jury and did not comprise

a pattern of conduct so egregious that it infected the trial with unfairness. Accordingly, it was not misconduct.

3. Denial of motion for mistrial

After both parties rested, defendant moved for a mistrial, alleging the prosecutor committed misconduct by asking defense investigator Marie Rodriguez whether she provided her report of her interview with Eduarte to the prosecutor or any sheriff's deputies. Defendant argued the questions implied that the defense was hiding something and acting unethically, invited the jury to speculate about what the defense was hiding, and impugned the character of defense counsel and the defense team. Defendant contended the misconduct undermined his privilege against self-incrimination and his right to counsel, and that it could not be cured by an instruction.

The trial court found the prosecutor had not committed misconduct and denied the motion. The court read into the record the portions of the transcript in which the prosecutor asked the questions in controversy, followed by the prosecutor's question to Rodriguez regarding her duty and her response: "'Your obligation is not to come to us and give us these reports; correct?' [¶] And the answer was, 'Correct.'" The court found the prosecutor's intent was "to support the fact or the reason why the investigator did not investigate further on Little Man and also to heighten the credibility of the teacher witnesses . . . . And there was no conspiracy, no issues with regards to them fabricating the Little Man testimony and the surprise in obtaining these witnesses." The court further noted that defendant did not object to the questions in controversy.

The court agreed that the jury might speculate "as to what the rules are and obligations are that may impugn the defense." But the court felt a limiting instruction would remedy the potential problem. Accordingly, without objection by either party to the wording, the court gave the following jury instruction: "During the trial certain evidence was admitted for a limited purpose. I am referring to the statement made by Marie Rodriguez regarding not turning over her report about the name 'Little Man' to the district attorney's office or the sheriff's department. [¶] You may consider that evidence

only for the purpose of its effect, if any, on the state of mind of Detective Reynaga with regards to the investigation of the name Little Man and for no other."

Defendant now contends that the questions in controversy infringed upon his attorney-client privilege and discovery rights under sections 1054.3 and 1054.6, as well as his privilege against self-incrimination and his right to counsel. He further argues that the questions in controversy "left the jury with the message that defense counsel lied to the jury when he said he did not know where the name Little Man came from since Ms. Eduarte had provided this information to defense counsel's investigator as early as May, 2010 . . . ." Defendant did not raise the attorney-client privilege, discovery statutes, or counsel's opening argument in the trial court as bases for his motion for mistrial, and these grounds are forfeited.

"A mistrial motion must be granted only when the risk of prejudice is incurable by admonition or instruction." (*People v. Elliott* (2012) 53 Cal.4th 535, 583.) "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]'" (*People v. Collins* (2010) 49 Cal.4th 175, 198.)

No abuse of discretion occurred here. The questions in controversy suggested Rodriguez concealed information, but the follow-up question clarifying that she had no obligation to provide her report to the prosecution or law enforcement expunged that suggestion. The trial court's limiting instruction severely limited the jury's consideration of the "failure" to provide the report to the prosecution. In light of the follow-up question and the limiting instruction, there was no risk of incurable prejudice. There also was no infringement upon defendant's privilege against self-incrimination, right to counsel, attorney-client privilege, or discovery rights. No one forced Rodriguez to turn over her report to the prosecution. The questions in controversy did not reflect statements by defendant, confidential communications between defendant and counsel, or "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (§ 1054.6; Code Civ. Proc., § 2018.030, subd. (a)). Defense

counsel's strategic decision to make a particular statement in opening argument cannot form the basis of a motion by defendant for mistrial. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1030.) Accordingly, even if defendant had preserved his claims regarding attorney-client privilege, discovery statutes, and counsel's opening argument, we would not find them meritorious. The trial court did not abuse its discretion by denying the motion for mistrial.

4. Ineffective assistance of counsel

Defendant contends that his trial attorney rendered ineffective assistance through numerous acts and omissions.

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

Defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*In re Jones, supra,* 13 Cal.4th at p. 561.) In order to prevail on an ineffective assistance of counsel claim 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.) We consider counsel's overall performance throughout the case, evaluating it from counsel's perspective at the time of the challenged act or omission and in light of all the circumstances. (*People v. Bolin* (1998) 18 Cal.4th 297, 335.) "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.]" (*Id.* at p. 333.)

Defendant first argues his attorney rendered ineffective assistance by telling the jury in his opening statement that defendant was not Little Man from Neighborhood

Crips, given that defense investigator Rodriguez had provided defense counsel with a report stating that Eduarte had told her that the teachers had called defendant "Little Man." The pertinent statements by counsel are the following: "[Moton] says to his girlfriend, because he knows something bad is about to happen, 'That is Little Man from Neighborhood Crips.' Okay? [¶] What is important is, this young man sitting over here, [defendant], is not Little Man from Neighborhood Crips. You will hear a bunch of gang evidence. You are going to see my client acting like a fool on a You-Tube video telling you what his gang name is. His gang name is Caccy Blue . . . ." Defense counsel's argument was focused on defendant's gang moniker, and, as far as the record reveals, was factually correct. This clearly related to counsel's trial strategy and theory of misidentification, and the record does not affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. Counsel had very little to work with to attempt to counter Moton's identification of defendant, particularly in light of Moton's familiarity with defendant. Under the circumstances, we cannot conclude that there could be no rational tactical purpose for counsel to attempt to cast doubt upon Moton's identification of defendant by pointing out an inaccuracy in Moton's statement naming his assailant. Even if we were to conclude that counsel's statement fell below an objective standard of reasonableness, defendant has not established a reasonable probability that he would have obtained a more favorable result if counsel had not made the challenged statement. The evidence against defendant, including the identifications by Moton, Sneed, Juarez, and Ramirez, was overwhelming, and his alibi was, at best, weak. There is no reasonable probability that defendant would have obtained a more favorable outcome if counsel had refrained from making a weak argument in support of the misidentification theory.

Defendant argues his attorney rendered ineffective assistance by failing to object when the prosecutor called defense investigator Rodriguez as a witness. He argues that counsel should have objected that Rodriguez's testimony would violate defendant's attorney-client privilege, section 1054.6, his constitutional privilege against self-

incrimination, and his constitutional rights to counsel, and due process. He further argues that counsel should have objected that Rodriguez's testimony "did not really impeach Eduarte's testimony." None of these objections would have been meritorious. Rodriguez testified to statements made to her by Eduarte regarding defendant's nickname in school. Such statements were not confidential communications between defendant and counsel, "[a] writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories" (§ 1054.6; Code Civ. Proc., § 2018.030, subd. (a)), or statements by defendant. Nor did Rodriguez's testimony about Eduarte's statements to her threaten defendant's right to counsel or due process. Rodriguez's testimony established a prior inconsistent statement by Eduarte regarding the use of "Little Man," as opposed to "Little Guy," and was thus relevant to her credibility, as well as to the hotly contested issues of identity and Moton's credibility. Counsel's failure to make a futile or unmeritorious motion, objection, argument, or request is not ineffective assistance. (*People v. Price* (1991) 1 Cal.4th 324, 387.) In addition, defendant has not established a reasonable probability that he would have obtained a more favorable result if counsel had objected to Rodriguez testifying.

Defendant argues his attorney rendered ineffective assistance by failing to object to each of the forfeited instances of purported prosecutorial misconduct. Even if we were to assume, for the sake of argument, that counsel's performance in this regard fell below an objective standard of reasonableness and that there could be no satisfactory explanation for counsel's failure to object to the alleged instances or prosecutorial misconduct, defendant has not established a reasonable probability that he would have obtained a more favorable result if counsel had objected. We have reviewed the entire record and all of defendant's prosecutorial misconduct claims. Several of the claims pertain to trivial matters, such as the prosecutor welcoming jurors to the courtroom. A number of other claims, such as the argument about an honest verdict, the argument regarding the prosecutor stating "I am sure myself," and the claim that the prosecutor sought to affect the jury psychologically by referring to Moton as "Eric" and defendant as

"'the defendant'" or "'Mr. Ross'" are based upon a highly selective and misleading reading of the record. But even the more plausible claims that the prosecutor's arguments improperly referred to societal concerns and appealed to the jury's passions were inconsequential to the verdict in this case. The evidence against defendant, including the identifications by Moton, Sneed, Juarez, and Ramirez was overwhelming, and his alibi was, at best, weak. Defendant has not shown a reasonable probability that defendant would have obtained a more favorable outcome if counsel had objected to the purported prosecutorial misconduct.

Defendant argues his attorney rendered ineffective assistance by failing to challenge the identifications by Sneed, Juarez, and Ramirez as based upon unduly suggestive sixpacks. Where the error claimed is the failure to make a motion, defendant must show that the motion would have been successful. (*People v. Grant* (1988) 45 Cal.3d 829, 864.) A pretrial identification procedure is impermissibly suggestive if it creates a very substantial likelihood of irreparable misidentification, that is, it suggests in advance the identity of the person suspected by the police. (*People v. Sanders* (1990) 51 Cal.3d 471, 508; *People v. Ochoa* (1998) 19 Cal.4th 353, 413.) The defendant bears the burden of proving unfairness as a demonstrable reality, not just speculation. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) We have reviewed the sixpacks presented to Sneed, Juarez, and Ramirez, and conclude they did not suggest in advance the identity of the person suspected by the police. All three sixpacks contain photographs of African-American boys who appear to be about the same age and build and have roughly similar facial shapes and features. Defendant's head is not, as he argues on appeal, larger than that of the other boys in the sixpacks. The photograph of the boy in the third position in all three sixpacks stands out because it is much brighter than the other photographs. Four boys in the sixpacks shown to Juarez and Sneed have curly hair, and although only defendant has a tiny braid visible, the boy depicted in the third position (the same photograph that stands out due to brightness) has braiding visible on top of his head. Three boys in the sixpack shown to Ramirez have curly hair, and the same boy with braids in the brighter photograph is in the

third position. In all three of the sixpacks, the lighting in defendant's photograph is dim, and his features and hair stand out the least. Defendant has not shown that he could have proven unfairness as a demonstrable reality. Even if there were a chance that the trial court would have found the sixpacks unduly suggestive, it would not have excluded the identifications of defendant by Sneed, Juarez, and Ramirez if it found such identifications were nonetheless reliable under the totality of the circumstances. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.) Because these witnesses all independently identified the same person, and that person was also identified by Moton, who knew his assailant, the identifications by Sneed, Juarez, and Ramirez were reliable without regard to the fairness of the sixpacks. Accordingly, defendant has not established that a motion challenging the identifications would have been successful.

Defendant argues his attorney rendered ineffective assistance by (1) failing to retain or request appointment of expert witnesses regarding identification and fingerprints on casings and (2) having a defense investigator develop evidence regarding the distance from the shooting site to the window in Ramirez's apartment and the view from that window. The record does not establish that defense counsel *failed* to consider doing these things. He may have pursued these matters and concluded that they would not benefit the defense. The appellate record thus does not affirmatively disclose the lack of a rational tactical purpose. In addition, defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if counsel had done these things. In this regard, we note that Reynaga testified that it was possible, but rare, to obtain identifiable fingerprints from casings, several photographs of the apartment window taken from the park were admitted, and Moton knew his assailant.

Defendant argues his attorney rendered ineffective assistance by failing to "investigate the case prior to putting on two alibi witnesses who testified in such a manner that they were extensively impeached." The record does not establish that defense counsel *failed* to investigate adequately the alibi witnesses or what they would say. The testimony of these witnesses may have differed dramatically from their pretrial

statements to an investigator. Accordingly, the appellate record does not affirmatively disclose the lack of a rational tactical purpose. In addition, defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if counsel had conducted the suggested investigation and decided not to call Johnson and Holland.

Defendant argues his attorney rendered ineffective assistance by failing to ask Holland to produce the check she testified she had written to a grocery store the evening of the charged crime. Defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if counsel had asked Holland to produce the check. Assuming, for the sake of argument, that she produced the check and it was admitted in evidence, it would not have strengthened defendant's alibi or have overcome the effect of the four identifications of defendant as Moton's assailant.

Defendant argues his attorney rendered ineffective assistance by failing to seek redaction of the prosecution's exhibit consisting of 11 pages of minute orders pertaining to a conviction of Jawan Deon Thomas to establish one of the predicate offenses for the gang enhancement allegation. Counsel probably should have sought to redact this exhibit to eliminate the minute order on the lower half of page 4 declaring "a security courtroom" and explaining that this was based upon (1) statements by the father of a minor witness that he did not want his daughters to testify because they had been beaten and (2) an occurrence in which "approximately 15 to 20 alleged gang members lined the halls with their hoods up over their heads forming the line of intimidating appearing young men." But defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if the minute order had been redacted. Notably, there were no similar occurrences at defendant's trial.

Defendant argues his attorney "violated the attorney client privilege when he told the court about his conversation with [defendant] in front of the prosecutor and courtroom spectators." He then cites nonexistent pages in the record. The Attorney General believes this argument pertains to the statements by counsel regarding

defendant's request for his "paperwork" and counsel's response. Defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if counsel had asked to speak to the court outside the presence of the prosecutor and spectators before making these statements.

Defendant argues his attorney rendered ineffective assistance by failing to move "to limit the massive amount of the gang evidence introduced by the gang expert." Defendant has neither indicated which aspects of the gang evidence such a motion should have sought to exclude, nor shown that such a motion would have been successful. Given the gang-related nature of the charged crime and the gang enhancement allegation, there is no reasonable possibility that the trial court would have excluded all gang evidence. We have reviewed the entire record and observe that although the gang evidence in this case was slightly more extensive than in most cases involving a gang enhancement allegation, this was necessitated by references to numerous gangs in defendant's graffiti and the video, as well as defendant's choice to shoot Moton in a park claimed by a third gang. In addition, defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if the gang evidence had been limited in some unspecified fashion.

Finally, defendant argues his attorney "admitted he did not object to the prosecutor's use of prior consistent statements in the prosecution's opening statement." This appears to refer to the prosecutor's statement that Moton had testified at the preliminary hearing and identified defendant. Defendant has not even attempted to establish a reasonable probability that he would have obtained a more favorable result if counsel had not made this admission, or, indeed, if counsel had objected to the prosecutor's opening statement. As to the latter point, we note that it was not the prosecutor's reference to Moton's preliminary hearing testimony and identification that worked to defendant's detriment, but the admission of Moton's trial testimony identifying defendant and explaining why Moton chose to testify truthfully and fully at the preliminary hearing. In addition, the

trial court repeatedly instructed the jury that statements by counsel in their opening statement and in their arguments were not evidence.

Thus, none of defendant's ineffective assistance of counsel claims has merit.

5. Sufficiency of evidence

Defendant challenges the sufficiency of the evidence to support his conviction and the true finding on the gang enhancement allegation.

To resolve these issues, we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable jury could find guilt beyond a reasonable doubt. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138.)

With respect to his attempted murder conviction, defendant contends that the evidence is insufficient to establish his identity as the person who shot Moton. His arguments on appeal essentially repeat the arguments he made to the jury attempting to cast doubt upon the identifications by Moton, Sneed, Juarez, and Ramirez. In essence, he improperly asks this court to reweigh the evidence and come to a different conclusion. Viewing the evidence in the light most favorable to the judgment, the identification testimony of Moton, Sneed, Juarez, and Ramirez constituted substantial evidence supporting the jury's conclusion that defendant was the person who shot Moton.

With respect to the gang enhancement, defendant contends there was insufficient foundation for Reynaga's opinion testimony regarding the primary activities and pattern of criminal gang activity elements. In particular, he argues, "There was neither testimony as to his personal knowledge nor any particular source he relied upon. There was no evidence as to the number of crimes or the timing of crimes to prove up the elements of the primary activities or a pattern of criminal activity. As in [*In re Alexander L.* (2007) 149 Cal.App.4th 605], no specifics were ever elicited as to the circumstances of these crimes, or where, when, or how Detective Reynaga had obtained the information."

Section 186.22, subdivision (f) defines a "criminal street gang" as an "ongoing organization, association, or group of three or more persons, whether formal or informal,

having as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." Subdivision (e) defines "pattern of criminal gang activity" as "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." Subdivision (e) then lists numerous crimes, including robbery and murder. A pattern of criminal gang activity may be shown through evidence of the charged offense and at least one other offense committed on a prior occasion by a member of the defendant's gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 625 (*Gardeley*).)

"Expert testimony may be founded on material that is not admitted into evidence and on evidence that is ordinarily inadmissible, such as hearsay, as long as the material is reliable and of a type reasonably relied upon by experts in the particular field in forming opinions." (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463.) "Thus, a gang expert may rely upon conversations with gang members, his or her personal investigations of gang-related crimes, and information obtained from colleagues and other law enforcement agencies." (*Ibid.*) "A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 949.)

Here, Detective Reynaga provided an adequate foundation for his opinion testimony as a gang expert by testifying to his extensive experience with gangs during his 13-year career as a deputy first, then a detective, within the Los Angeles County Sheriff's Department. He testified he had training regarding gangs in the sheriff's academy and "patrol school." He worked in the jail for about three years, during which he interviewed gang members from throughout Los Angeles County about their tattoos, the crimes they

committed, and how they "got away with some of the stuff that they did." He spent seven and one-half years on patrol from the Century station, with four of those years based in the City of Lynwood. He then spent six months on a countywide gang enforcement team that proactively targeted gangs, before being promoted to detective and assigned as a gang detective in the Century station. At the time of the charged offense, he was "in charge of investigating any gang related crime in the City of Lynwood." He explained, "If I am at work and any crime happens in the City of Lynwood, I have to be there to ascertain if, in fact, it is a gang-related crime or a non- gang-related crime. And if it's a gang-related crime, then I assume the handle on that investigation." Throughout his career with the sheriff's department, Reynaga had spoken to thousands of gang members, including about 20 members of the Lynwood Neighborhood Crips gang and 30 members of the Palm and Oaks Gangster Crips gang.

Reynaga testified he was familiar with the Lynwood Neighborhood Crips gang and he described the boundaries of the territory claimed by the gang, the gang's hand signals, the colors and symbols the gang used on their clothing, the symbols the gang used in its graffiti, the number of documented members of the gang, the gang's rivalries, and the nicknames the gang used for members of rival gangs.

Reynaga's testimony established his extensive personal knowledge of the Lynwood Neighborhood Crips gang and the crimes its members commit. Notably, defendant did not challenge Reynaga's expertise or the adequacy of his foundational testimony in the trial court.

The prosecution introduced certified court documents reflecting the conviction of David Bradford of a December 6, 2006 robbery and the conviction of Jawan Deon Thomas of an August 3, 2007 attempted murder. Reynaga testified that he was familiar with the facts giving rise to these convictions and that Bradford and Thomas were both members of the Lynwood Neighborhood Crips. The current offense was committed a little less than two years after the attempted murder of which Thomas was convicted.

This constituted substantial evidence that the Lynwood Neighborhood Crips engaged in a pattern of criminal gang activity.

Reynaga testified that the primary activities of the Lynwood Neighborhood Crips were writing graffiti, "strong armed robberies, armed robberies, shootings, and murders." The charged offense and the two predicate offenses were attempted murders and a robbery, which tended to corroborate Reynaga's opinion. This constituted substantial evidence that the Lynwood Neighborhood Crips "has as one of its primary activities the commission of one or more of the criminal acts enumerated in . . . subdivision (e)" of section 186.22.

No authority requires that a gang expert's testimony include the details defendant complains were missing, such as the number, timing, and circumstances of crimes committed by the gang, to support the opinion that the primary activities of the gang included robbery and attempted murder. Although *In re Alexander L.*, *supra*, 149 Cal.App.4th 605 (*Alexander L.*), upon which defendant relies, referred to the absence of such details in the expert's testimony, it did not purport to hold that such details were necessary to establish either the primary activities element or an adequate foundation for a gang expert's testimony, and no other decision has construed *Alexander L.* in that fashion.

When the gang expert in *Alexander L.*, *supra*, 149 Cal.App.4th 605, was asked about the primary activities of the gang in issue, he replied, "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.' No further questions were asked about the gang's primary activities on direct or redirect examination." (*Id.* at p. 611.) On cross-examination, the expert "testified that the vast majority of cases connected to Varrio Viejo that he had run across were graffiti related." The appellate court found the evidence insufficient to establish the primary activities element. It noted that the expert's testimony lacked details, such as the circumstances, locations, and dates of the crimes the

expert mentioned and how the expert had obtained his information. (*Id.* at p. 612.) This appears to have been directed to the absence of any factors that could be used to fill the gaps in the expert's "'I know they've committed'" testimony to conclude that substantial evidence supported the primary activities factor. Here, in contrast to the testimony in *Alexander L.*, Reynaga's testimony squarely addressed the issue of identifying the primary activities of the Lynwood Neighborhood Crips.

The court in *Alexander L.*, *supra*, 149 Cal.App.4th 605, also addressed a severe foundational defect. Apparently, no foundational testimony was elicited from the gang expert. The appellate opinion recounts, "information establishing [the expert's] reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang's activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay." (*Id.* at p. 612.) Here, in contrast, Reynaga testified to years of experience with gangs and gang members in Lynwood, including responsibility for investigating every gang-related crime in the City of Lynwood. Reynaga's testimony demonstrated that it was based upon highly reliable sources such as his own investigations and contacts with gang members, along with information from other law enforcement officers.

Although defendant does not challenge the sufficiency of the evidence to establish the mental state elements of the gang enhancement allegation, we note that defendant's "Fuck Jokes" statement to Moton provided abundant evidence that defendant acted with the mental states required for the gang enhancement allegation.

Viewed in the light most favorable to the judgment, substantial evidence supported the jury's finding on the gang enhancement allegation.

6. Evidentiary error

Defendant contends that the trial court erred by admitting the YouTube video featuring defendant and Moton's description of the defendant's "gesture" when they saw one another in custody before the preliminary hearing, and that the admission of this evidence violated due process.

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action." (Evid. Code, § 210.) But relevant evidence should be excluded 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. (Evid. Code, § 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.)

a. Moton's description of defendant's "gesture"

Just before Moton testified, defendant moved to preclude Moton from testifying to his "verbal confrontation" with defendant in custody before the preliminary hearing. Defendant argued the evidence was irrelevant and he had inadequate notice because he had just learned of the "confrontation." The prosecutor explained that Moton and defendant saw one another in lockup at the time of the preliminary hearing, and defendant gave Moton "kind of a menacing grin." Moton "then felt like, oh, okay, I thought he was going to say I'm sorry or something, and that's it." The prosecutor had just heard about this observation from Reynaga, who had just heard it from Moton that very morning. The prosecutor explained that the observation was relevant to show why Moton was willing to testify against defendant at the preliminary hearing, and thus supported Moton's credibility, which the defendant had attacked in his opening statement. Defense counsel then objected that the testimony would be "kind of an end run around getting in a prior consistent statement."

The trial court found that the evidence was relevant and its disclosure was not untimely because the prosecution just learned the information. The court cautioned the

prosecutor "to make sure that the information that is solicited from [Moton] is a description of what he sees and not his interpretation as to what it means."

After Moton testified on direct examination that he disregarded a subpoena to testify at the preliminary hearing because he feared retaliation for "snitching" and was then arrested and placed in jail, the prosecutor asked him about seeing defendant in custody before testifying at the preliminary hearing. The prosecutor asked, "Did he do anything, not verbally, but did he do anything in his demeanor that you looked at and saw?" Moton testified that defendant "just gave me like a little grin, kind of laugh kind of thing." The prosecutor asked, "How did that make you feel at that point?" Moton replied, without objection, "It just made me feel like no remorse, not even like, man, like nothing. There was nothing. There was no—like, man. I didn't—I don't even know how to put it. There was nothing." Moton then explained that defendant's expression caused him to change his mind and decide to testify truthfully at the preliminary hearing.

On appeal, defendant contends the trial court erred by failing to exclude the evidence as untimely, irrelevant, more prejudicial than probative under Evidence Code section 352, and inadmissible character evidence. He raised only the first two of these grounds for exclusion in the trial court, and thus forfeited the two latter grounds. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

Although defendant challenges the trial court's ruling that the evidence was admissible, his argument focuses on the testimony Moton subsequently gave, which he argues resulted from the prosecutor's conduct in failing to "caution[] the witness not to interpret the gesture" and in "elicit[ing] Moton's testimony" construing defendant's facial expression. But defendant did not object to either the prosecutor's "how did that make you feel" question or Moton's response, and the trial court made no ruling on the actual testimony given. The trial court has no sua sponte duty to exclude evidence. (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) Defendant forfeited his claims based upon Moton's actual testimony, as opposed to the trial court's ruling before Moton began testifying. We address only the latter.

Moton's observation of defendant's facial gesture and the effect it had upon his decision to testify was relevant to Moton's credibility, in that it explained, in part, how and why he had overcome his fear of snitching—which manifested in his disregard of a subpoena to testify at the preliminary hearing—and decided to testify against defendant. The trial court did not abuse its discretion by concluding the evidence was relevant and admissible.

Defendant's argument that the trial court's ruling admitting the evidence was erroneous due to untimely disclosure is asserted in a conclusory fashion, without argument and citation of authority. Accordingly, he has forfeited the argument. (*Catlin*, *supra*, 26 Cal.4th at p. 133; *Michael D.*, *supra*, 100 Cal.App.4th at p. 127.)

b. YouTube video featuring defendant

Just before the prosecutor played a DVD of the YouTube video featuring defendant, defendant objected that the video should be excluded under Evidence Code section 352 as "more prejudicial than probative. It certainly paints my client in a very negative light. I also argue that it's cumulative. There has already been quite a bit of gang evidence; there is more to come regarding tattoos."

The trial court overruled defendant's objection, stating, "This is not only as to the gang allegation, . . . but the gang evidence is very important also as to at least in the People's case as to the motives based on the People's theory that the wording is 'Fuck Jokes.' [¶] Also, based on what was stated to me earlier, I think it's on the record that it goes not only to the gang motive but the identification of the defendant; that he is not only an active gang member, but also that he used the same words. [¶] . . . So the court finds that under 352 that it is not—its probative value does not [*sic*] substantially outweigh its prejudicial effect—or the prejudicial effect is not [*sic*] substantially outweighed by the probative value . . . ."

Defendant argues the trial court erred by admitting the video because it "was far more prejudicial than probative because it was unknown when it was made, [defendant]

did not use unique language, and the evidence of [defendant's] gang membership was cumulative."

We have viewed the DVD of the video. It is 3 minutes 37 seconds long and principally focuses upon two other boys, not defendant. The three boys and one girl in the video wander around an alley and into a carport as they point out graffiti and state what the graffiti signify. In most of the scenes that depict defendant, he makes gang hand signals and states the name of his gang and his moniker, Caccy Blue Loco. In another scene, defendant points out his graffiti and says, "Eastside Lynwood" and "Fuck Jokes." Near the end of the video, defendant says, "Neighborhood Crip, cuz" and the girl says "Fuck Jokes, cuz."

The video was relevant to demonstrate defendant's membership in the Lynwood Neighborhood Crips gang, which was in turn relevant to show defendant's motive for shooting Moton and to assist in proving the gang enhancement allegation. It was also relevant to corroborate Moton's and Sneed's identification of defendant. They testified that defendant said "Fuck Jokes" just before opening fire, and the video demonstrated that "Fuck Jokes" was a phrase defendant used. In addition, Moton and Sneed first identified defendant to Reynaga by pointing him out in this YouTube video.

Although Reynaga testified that Lynwood Neighborhood Crips gang members called Palm and Oaks Gangster Crips gang members "Jokes," and Moton testified that "Fuck Jokes" was a statement of disrespect to members of the Palm and Oaks Gangster gang members Crips, the video was unique in demonstrating that defendant used this phrase. Thus, the video was not cumulative. That other members of defendant's gang, such as the girl in the video, used the same phrase provided defendant with an argument for the jury, but did not negate or diminish the probative value of the video.

In light of the violence entailed in the charged offense and the evidence introduced to establish the gang enhancement allegation, we cannot conclude that the trial court abused its discretion by concluding that the video should be admitted.

7. Admission of unredacted minute orders

Defendant contends that the trial court's admission of the unredacted minute orders regarding the conviction of Jawan Deo Thomas violated due process. Defendant did not object to admission of this exhibit on any ground, and the trial court has no sua sponte duty to exclude evidence. Accordingly, defendant has forfeited his appellate claim.

Even if defendant had preserved his appellate claim, we would not find it meritorious. Defendant argues that "[h]e had no means by which to confront and cross-examine the document or the information contained in the minute orders." Defendant cites no authority for the novel proposition that documentary evidence is admissible in a criminal trial only if it can somehow be cross-examined. In addition, redaction of the document would still have left defendant without the means to confront and cross-examine it.

If defendant meant to argue that the portion of the unredacted minute orders explaining the decision of the court in Thomas's trial to establish a "security courtroom" was so prejudicial as to violate due process, we would reject that claim also. The relevant inquiry is whether admission of the evidence in question was so extremely unfair as to violate "fundamental conceptions of justice." (*Dowling v. United States* (1990) 493 U.S. 342, 352 [110 S.Ct. 668].) "Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation. We, therefore, have defined the category of infractions that violate 'fundamental fairness' very narrowly." (*Id.* at p. 353.) Although it would have been preferable to remove the portion of the minute orders pertaining to the security courtroom, its inclusion did not render defendant's trial fundamentally unfair. The idea that gangs are dangerous and that they resort to intimidation to protect their members had already been introduced through the testimony of Moton regarding his fear of testifying, and the testimony of Reynaga regarding gangs' use of intimidation of the community. During voir dire, prospective jurors were asked about their experiences with and attitudes toward gangs, and some expressed fear of

gangs. The judge also told prospective jurors that their names and addresses would not be disclosed. If the jurors read the portion of the minute order regarding Thomas's security courtroom, they would have seen an example of a judge taking action to protect jurors and witnesses in response to an attempt at intimidation by gang members. In addition, jurors were instructed that they could consider the gang evidence, which included the minute orders pertaining to Thomas and Bradford to establish predicate offenses, only for the limited purposes of establishing the gang enhancement and defendant's motive.

Finally, even if defendant had preserved the issue and the trial court erred by failing to redact the minute orders, any error was harmless beyond a reasonable doubt. As far as the record reveals, no gang member attempted to intimidate any juror, no security issues arose, and the prosecution case against defendant was extraordinarily strong.

8. *Apprendi* error regarding gang enhancement

Defendant contends that his minimum parole eligibility term of 15 years violates his right to a jury finding under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348], which essentially requires any fact, other than a prior conviction, that increases the penalty for a crime beyond the prescribed statutory maximum to be charged, submitted to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.)

The gang enhancement allegation under section 186.22, subdivision (b)(1) was submitted to the jury, which found it true. No separate finding by the jury was required for the trial court's application of the 15-year minimum parole eligibility term provided by section 186.22, subdivision (b)(5). (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.)

9. Sentence disproportionality

Defendant contends that his 40-years-to-life sentence is disproportionate and thus violates the California and federal constitutions. Defendant did not raise this claim in the trial court. Although we would find no merit in defendant's disproportionality argument

under *People v. Dillon* (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 424; and *Ewing v. California* (2003) 538 U.S. 11 [123 S.Ct. 1179], while this case was pending on appeal, the California Supreme Court decided *People v. Caballero* (2012) 55 Cal.4th 262, addressing the constitutionality of sentences of juvenile offenders. Because neither counsel nor the trial court had the opportunity to address or consider the applicability of *Caballero* or develop a record regarding the factors deemed relevant in *Caballero*, we vacate defendant's sentence and remand for a new sentencing hearing.

10. Cumulative error

Defendant contends that the cumulative prejudicial effect of the various individual errors he has raised on appeal requires reversal of the judgment. His cumulative error claim has no greater merit than his individual assertions of error, which we have rejected or found to be harmless.

11. Error in abstract of judgment

We note the abstract of judgment incorrectly reflects the sentence imposed by the trial court. The court sentenced defendant, in pertinent part, to a life term, pursuant to section 664, subdivision (a), with a minimum parole eligibility term of 15 years pursuant to section 186.22, subdivision (b)(5). The abstract incorrectly reflects a concurrent term of 10 years pursuant to section 186.22, subdivision (b)(1)(C). Following the new sentencing hearing, the trial court must issue an amended abstract of judgment that does not include this error.

DISPOSITION

Defendant's sentence is vacated and the cause is remanded for a new sentencing hearing. The judgment is otherwise affirmed. At the conclusion of the resentencing hearing, the trial court must issue an amended abstract of judgment that correctly reflects the sentence imposed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.