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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN DEON HUNTER, Defendant and Appellant.	B239980 (Los Angeles County Super. Ct. No. VA117610)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

Joshua L. Siegel, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

The jury found defendant and appellant Adrian Deon Hunter guilty in counts 1-4 of second degree robbery (Pen. Code, § 211)[1] and in count 6 of street terrorism (§ 186.22, subd. (a)). Defendant was found not guilty of second degree robbery in count 5. With respect to counts 1-4, the jury found true allegations that defendant committed the charged crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and a principal was armed with or used a firearm (§§ 12022, subd. (a)(1), 12022.53, subds. (b) & (e)). The jury also found that a principal was armed with a firearm in count 6. Following a bench trial, the trial court found defendant suffered a prior strike under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), suffered a prior serious felony conviction (§ 667, subd. (a)), and served a prior prison term (§ 667.5, subd. (b)).

With respect to count 1, the trial court imposed the middle term of 3 years, doubled pursuant to the three strikes law, with a 10-year enhancement for the gang allegation, and an additional year pursuant to section 12022, subdivision (a)(1), for a total of 17 years. The court also imposed and stayed an additional 10 years pursuant to section 12022.53, subdivisions (b) and (e). An identical concurrent sentence was imposed as to count 3.

As to both counts 2 and 4, the trial court imposed consecutive terms of five years four months in state prison, calculated as follows: one year in state prison (one-third the middle term of three years), doubled pursuant to the three strikes law, with a three years four months enhancement for the gang allegation (one-third of ten years), and an additional term of four months pursuant to section 12022, subdivision (a)(1) (one-third of one year). The court also imposed and stayed a term of three years four months pursuant to section 12022.53, subdivisions (b) and (e) (one-third of ten years).

In count 6, defendant was sentenced to the upper term of three years, with an additional year for the firearm allegation (§12022, subd. (a)(1)) for a total of four years. The sentence was stayed pursuant to section 654.

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

Codefendants Maurice Lotten, Ameen Bryant, and DaShawn Combs[2] were also charged in connection with the robberies. Lotten negotiated a settlement prior to trial by entering a plea of no contest in counts 2-5. Defendant and Bryant were tried together, with Bryant charged in counts 1, 4, and 6. The jury was unable to reach a verdict with respect to Bryant on counts 1 and 4, but he was found guilty in count 6. Combs was charged in counts 1-4, but the record fails to indicate the disposition of the charges against him.

Defendant contends he was prejudiced by: (1) admission of a minute order containing Lotten's no contest plea; (2) use of Lotten's admission of the gang enhancement as a basis for expert testimony; (3) admission of testimony regarding uncharged robberies; (4) instructional error; and (5) cumulative error.

We affirm the judgment.

FACTS[3]

Count 1—Robbery

On October 2, 2010, at approximately 9:00 p.m., Lucy Ramirez saw three men in hooded sweatshirts enter the Shell gas station in Paramount, where she worked as a cashier, and jump over the counter. The tallest man, a Black male, held a gun to her head and told her to open the cash register. Ramirez did so, and he took the money from the register. The other two men were also looking for money. The robbers also took a carton of cigarettes and then left the store.

Detective Mike Davis of the Los Angeles County Sheriff's Department interviewed Ramirez after the robberies and showed her a series of 10 to 15 photos of

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2 Codefendants are not parties to this appeal.

3 Because defendant did not call witnesses on his behalf, the statement of facts reflects the evidence as presented by the prosecution at trial.

various men. Ramirez identified defendant as the lookout and identified Bryant as the robber who took money from the register. She pointed to defendant's picture and described his actions during the robbery. Ramirez was positive when she made her identifications and demonstrated no difficulty in discerning the different robbers.

Ramirez identified defendant and Bryant at the preliminary hearing, but at trial, she could not identify either of the men. Ramirez testified that she had told the truth when interviewed by Detective Davis, and she was positive the men she identified in the photographs were the man with the gun and the lookout.

Counts 2 and 3—Robbery

Man Gurang testified that he and Jalal Aranki were working as cashiers at a 7-Eleven store in Artesia on October 2, 2010. At approximately 9:45 p.m., three or four people entered the store. One displayed a gun and told the cashiers "to open the cash register and give the money." The robbers went over to Aranki's register and told him to open it. Aranki opened his register, and the robbers took the money. One of the robbers told Gurang to open his register. Gurang did not want to open it, so he pushed the wrong buttons, causing the register to lock. The men took the money from Aranki's register and ran.

Aranki testified that three Black men entered the store on the night of the incident. One of the men produced a gun and asked for money from his cash register. Aranki opened the register, and the two other men took money from the register drawer. Aranki pulled one robber's hood down so that he could see the man, but the robber quickly pulled it up. One of the robbers took some cigarette lighters, and they left the store quickly.

Detective Davis interviewed Gurang and Aranki on October 12th or 13th. He showed them a book of photos that included Bryant, but not defendant. Neither Gurang nor Aranki was able to make an indentification. They looked at the photos in a cursory manner and pushed them back toward Detective Davis as if they were not interested.

Detective Davis returned two weeks later and showed Gurang and Aranki more photos, this time including a photo of defendant. Gurang identified defendant and codefendants Bryant and Lotten. Gurang told Detective Davis he was 80 percent sure of his identifications of Lotten and Bryant and 60 percent sure of his identification of defendant. He told Detective Davis that Lotten was the robber with the gun, Bryant took the money, and defendant was the lookout. Aranki identified defendant as the man who stood by the door, and Lotten as the man with the gun. He was positive that his identification was correct and told Detective Davis he did not identify anyone the first time Davis showed him photos because he was afraid.

At trial, Gurang testified that a detective showed him photos after the robbery, but he could not remember the robbers' faces. Gurang was unsure if he identified anyone to the detective. He denied assigning a percentage value of his certainty as to the identification of the robbers at the interview. Gurang was not able to identify any of the robbers at trial. Gurang viewed surveillance footage of the robbery captured by a video camera installed at the store and identified it as accurately depicting the robbery. The video was played for the jury.

Aranki did not identify defendant as one of the robbers at trial but said he thought Bryant was involved in the incident. He confirmed that he was able to identify two of the robbers the second time he met with Detective Davis. He denied telling Detective Davis that he had not identified the robbers in the first interview because he was scared. Aranki described the robber with the gun as being tall, and the robber wearing a green hood as being close to his height or 5'7" to 5'8" tall. The other robber was a little taller than the one in the green hood.

Deputy Luis Reyes Pina viewed the store's surveillance video tape immediately following the robbery and took the video into evidence. He testified that at the scene the victims described the robber with the gun as being 5'11" to 6' tall, and the other two men as between 5'5" and 5'8" tall.

Count 4—Robbery

Baljit Johal was working as a cashier at Cerritos Market on October 2, 2010. At approximately 10:00 p.m., three Black men entered the market wearing hoodies. Two of the men approached Johal and told him to open the cash register. Johal opened the register but then closed it when the men tried to take the money. When Johal closed the register, one of the robbers, who had a gun, hit him on the head with something, but Johal was unsure if it was the gun. He shouted for his grandfather, who was working in the back of the store. When Johal's grandfather ran to the front of the store, one of the robbers grabbed the necklace from Johal's neck and they left. After the police arrived, Johal found his necklace on the floor.

At approximately 9:45 p.m., Deputy Ivan Delatorre responded to the robbery call at the 7-Eleven store in Artesia. While he was at the 7-Eleven, he received another call informing him of a robbery at the Cerritos Market. He responded to the call at the Cerritos Market, and after speaking with Johal, he determined the account of the robbery at the Cerritos Market sounded similar to other recent robberies. Johal told Deputy Delatorre the robber with a gun hit him on the head with the gun when he closed the cash register drawer. Johal also recounted the robber pulled his necklace from his neck as the robbers left. While Deputy Delatorre was at the market, Johal found the necklace on the floor, near the location where it had been pulled from his neck.

Detective Davis interviewed Johal on two occasions after the robbery and showed him photographs of suspects. During the first interview, Johal identified codefendants Bryant and Lotten as the robbers. The photos did not include defendant. At the second interview, defendant's photo was included and Johal identified defendant, as well as Bryant and Lotten. Johal stated that Lotten was the robber with the gun, and Bryant demanded money. Detective Davis initially testified Johal said defendant was the "look out," but on cross-examination, he corrected himself and testified that Johal told him defendant was "at the cash register retrieving money" and Johal did not identify any of the men as a look out. Johal told Detective Davis he was "certain" of his identification.

Johal did not identify any of the robbers at trial. He could not remember the details of his identification of suspects with the police, but he testified that his memory of the events and the identifications of the perpetrators was fresher when he spoke with the police, and that he told the police the truth.

Count 6—Street Terrorism

Officer Armando Leyva of the Los Angeles Police Department testified as a gang expert on the Avalon Gardens Crips (Avalon Crips). Avalon Crips is a criminal street gang that engages in burglary, robbery, assault with deadly weapons, homicide, narcotic sales, and possession of firearms. Officer Leyva was familiar with defendant, Lotten, and Bryant as active members of the gang. He viewed videos of robberies around Los Angeles County from the end of September to the first part of October and identified members of the Avalon Crips in the videos. Based on his experience with the Avalon Crips, if Officer Leyva were asked to identify a 5'5" tall Avalon Crips member who was committing robberies with Lotten, he would identify defendant. Defendant and his father are the only gang members that Officer Leyva is familiar with who are 5'5" tall. Defendant is of the correct physical description, age bracket, and was in Lotten's clique within the Avalon Crips. Officer Leyva opined the robberies would benefit the gang by providing monetary gain and increasing the gang's standing. He also testified that in his experience, it is common for witnesses to gang crimes to not want to testify or to identify gang members out of fear of retaliation.

DISCUSSION

Admission of Codefendant's No Contest Plea

At trial, the prosecution introduced the minute order of Lotten's plea of no contest in counts 2-5, which also contained Lotten's admission that the charged offenses were

committed for the benefit of a criminal street gang and with the specific intent to further criminal conduct by gang members. The minute order was offered to establish a predicate offense by Avalon Crips members for purposes of the gang enhancements and count 6, as a basis for Officer Leyva's expert opinion that the charged offenses would benefit the gang. Officer Leyva briefly referred to the minute order as a basis for his testimony and mentioned that he believed the crimes were the ones charged in the present case. The prosecutor also referred to the minute order in his closing argument, but the jury was promptly admonished not to consider the minute order for improper purposes and was instructed as to the same.

Defendant contends admission of the minute order was an abuse of discretion because it was highly prejudicial and had minimal probative value under Evidence Code section 352. Defendant argues admission of the minute order prejudiced him because it provided conclusive evidence the robberies were committed and were gang-related. He further asserts the jury found him guilty by association with Lotten. Alternately, defendant contends that, even if we conclude the claim was forfeited because he failed to raise it below, such failure constitutes ineffective assistance of counsel and must be reviewed in that context.

We hold the issue was forfeited because counsel failed to object on the specific grounds now raised (see *People v. Jones* (2012) 54 Cal.4th 1, 61) but conclude that, regardless, counsel's performance was not deficient, nor was defendant prejudiced by counsel's lack of objection.

"The Sixth Amendment guarantees competent representation by counsel for criminal defendants[, and reviewing courts] presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703, citing *Strickland v. Washington* (1984) 466 U.S. 668, 690 (*Strickland*); *People v. Freeman* (1994) 8 Cal.4th 450, 513.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that

counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*), citing *Strickland*, *supra*, at pp. 687-694; see *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068 (*Kraft*).) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' ([*Strickland*, *supra*, at p. 694]; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*Cunningham*, *supra*, at p. 1003.)

"A defendant who raises the issue [of ineffective assistance of counsel] on appeal must establish deficient performance based upon the four corners of the record. 'If the record on appeal fails to show why counsel acted or failed to act in the instance asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal.'" (*Cunningham*, *supra*, 25 Cal.4th at p. 1003, citing *Kraft*, *supra*, 23 Cal.4th at pp. 1068-1069; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The decision to object to the admission of evidence is tactical in nature, and a failure to object will seldom establish ineffective assistance. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Given the presumption of reasonableness proper to direct appellate review, our Supreme Court has "repeatedly emphasized that a claim of ineffective assistance is more appropriately decided in a habeas corpus proceeding. [Citations.] The defendant must show that counsel's action or inaction was not a reasonable tactical choice, and in most cases ""'the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged . . . .'"" [Citations.]" (*People v. Michaels* (2002) 28 Cal.4th 486, 526.)

In general, evidence is admissible if its probative value is not substantially outweighed by the probability that it will unduly consume time, "create substantial danger of undue prejudice," confuse the issues, or mislead the jury. (Evid. Code, § 352.) The courts recognize that gang evidence may have a "highly inflammatory" impact. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Nevertheless, gang evidence may be admitted "if it is relevant to a material issue in the case other than character, is

not more prejudicial than probative, and is not cumulative." (*Ibid*.)

Evidence is probative if it "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau* (1993) 6 Cal.4th 140, 177, overruled on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.) Evidence is not unduly prejudicial solely because it implicates the defendant. "'[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "[T]he decision on whether evidence . . . is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225.) We therefore review the trial court's ruling for abuse of discretion and reverse only if we conclude it is "reasonably probable that without the error a result more favorable to defendant would have occurred." (*People v. Leonard* (1983) 34 Cal.3d 183, 189 (*Leonard*).)

Here, there is nothing in the four corners of the record to indicate defense counsel's motivation for his decision not to object to the evidence, which is reason enough to reject the issue on direct appeal. Moreover, even if we were to conclude the issue was preserved for appeal, defendant fails to establish constitutionally deficient representation because the minute order was not more prejudicial than probative.

In this case, there was little room for doubt the robberies occurred or that Lotten was one of the perpetrators. Four witnesses testified the robberies occurred, and one of the robberies was captured by a security video camera. Three witnesses identified Lotten as the robber with the gun. The minute order provided no link between defendant and Lotten, nor did it connect defendant to the crime. Absent these links, it only aided the prosecution's case by establishing one of the bases for the gang expert's opinion that the Avalon Crips had a history of criminal activity, which was a permissible purpose, as we

will discuss below. Defendant's association with Lotten was established through Officer Leyva's personal knowledge of their relationship and common gang membership, not through any information contained in the minute order. To the extent that admission of the minute order could have impacted defendant, it would have affected only issues that were otherwise well-established and, thus, would not have prejudiced defendant.

Moreover, the jury was admonished that Lotten's admissions the robberies were committed and were gang-related could only be used for the purpose of supporting the gang expert's opinion, and that it was not permitted to consider them for any other purpose. It was also instructed under Judicial Council of California Criminal Jury Instructions (2011-2012) CALCRIM No. 1403 that it could "consider evidence of gang activity only for the limited purpose of deciding whether: [¶] [The defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related (crime[s]/[and] enhancement[s] . . . charged(;/.)] [¶] OR [¶] [The defendant had a motive to commit the crime[s] charged[.]] [¶] . . . [¶] [[The jury was also permitted to] consider this evidence when [] evaluat[ing] the credibility or believability of a witness and when [] consider[ing] the facts and information relied on by an expert witness in reaching his or her opinion.]" The jury is presumed to understand and follow the instructions of the trial court. (*People v. Archer* (1989) 215 Cal.App.3d 197, 204.) Absent some affirmative indication in the record to the contrary, we presume that it did so here. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

For these reasons, we conclude, considering the record as a whole, it is not reasonably probable that without the error a result more favorable to defendant would have occurred. (See *Cunningham, supra,* 25 Cal.4th at pp. 1003-1004.) Thus, counsel's failure to object did not constitute ineffective assistance.

Use of Codefendant's Gang Enhancement Admission as a Basis for Expert Testimony

Defendant next contends his constitutional right to confront witnesses was violated because the minute order documenting Lotten's conviction was testimonial and deprived

him of the opportunity to cross-examine Lotten. He claims that use of the minute order as basis evidence for gang expert testimony implicated the confrontation clause because it was offered for the truth of the matter asserted.

We find no merit in this contention. Assuming the minute order was testimonial, "the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' (*Crawford* [*v. Washington* (2004)] 541 U.S. [36,] 59 [(*Crawford*)], citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.)" (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1210.) As defendant concedes, current California precedent holds basis evidence is not offered for the truth of the matter asserted. (*Ibid*.) Regardless, even if offered for its truth, the minute order was properly admitted as a certified court record memorializing Lotten's plea and not as proof of any out-of-court statements made by Lotten.[4]

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) Testimonial statements may only be admitted where they are not offered for their truth, or where the witness is unavailable and the defendant has had an opportunity to cross-examine the witness. (*Crawford*, *supra*, 541 U.S. at pp. 61-68.)

In California, an expert may testify on the basis of otherwise inadmissible evidence as long as it meets threshold reliability requirements, and the expert may describe the evidence that is the basis for his opinion. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*); Evid. Code § 801, subd (b).) This is in accordance with

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[4] Defendant alternately contends that if this court determines trial counsel failed to object on this basis below, thereby forfeiting the claim on appeal, such failure constituted ineffective assistance of counsel and must be reviewed. Because the Attorney General does not argue that the claim was forfeited, we consider the claim on the merits without analyzing the ineffective assistance claim. Regardless, because we conclude the minute order was properly admitted, it necessarily follows that counsel's performance was not deficient.

rule 703 of the Federal Rules of Evidence (28 U.S.C.).[5] "[B]ecause the culture and habits of gangs are matters which are 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact' (Evid. Code, § 801, subd. (a)), opinion testimony from a gang expert, subject to the limitations applicable to expert testimony generally, is proper. [Citation.] Such an expert—like other experts—may give opinion testimony that is based upon hearsay, [or] based upon the expert's personal investigation of past crimes by gang members and information about gangs learned from the expert's colleagues or from other law enforcement agencies. [Citations.]" (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) California courts have traditionally held that basis evidence is properly admitted because it is offered to evaluate the expert's opinion and not for its truth. (*Gardeley*, *supra*, at pp. 618-619; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1131; see also *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Because the minute order was basis evidence not offered for its truth, the confrontation clause was not implicated.

Moreover, we agree with the prosecution that, to the extent the minute order could be determined to have been offered for its truth, it was offered for the fact of Lotten's conviction and did not deprive defendant of his constitutional right to confrontation. A certified minute order is an "official record of conviction" under Evidence Code section 452.5 and has been held admissible to prove a predicate offense within the meaning of section 186.22. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1459; Evid. Code, § 452.5, subd. (b) ["An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible . . . to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison

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5 Federal Rules of Evidence, rule 703 (28 U.S.C.) provides: "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."

term, or other act, condition, or event recorded by the record."].) Regardless of whether Lotten's admissions were true, the record of his conviction is a document of the kind upon which an expert may ordinarily rely. The only issue for cross-examination would be that of authenticity, and as a certified court record, the minute order's authenticity was established. (Evid. Code, § 452.) Accordingly, we conclude that admission of the minute order as a basis for expert testimony was not an abuse of discretion. (See *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1223-1225 ["[Records] prepared to document acts and events relating to convictions and imprisonments . . . are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue . . . [and] are beyond the scope of *Crawford* . . . ."].)

Evidence of Uncharged Robberies

Before trial, defense counsel objected to evidence of uncharged robberies committed by Avalon Crips gang members as unnecessary to the prosecution's case and unduly prejudicial under Evidence Code section 352. The trial court ruled, "I'm not going to allow the robbery evidence in the other case. I think there's too much prejudice that would be used toward the proving of robbery counts in this case. So I am going to exclude that as it relates to these defendants. [¶] I'm not going to exclude predicate acts on the gang allegation, but I don't want it to be identified that these are the ones who are committing the robberies."

The prosecutor then inquired about evidence that the gang in general was committing the crimes: "[T]he fact that members from this gang were committing robberies, similar type robberies, in other jurisdictions that are not before this court. But, again, they were all within L.A. County. But it was the same gang that was perpetuating these same type of robberies."

The trial court elicited defense counsel's opinion on admission of the evidence, and defense counsel responded, "Based on this court's statement, if my client's name is not mentioned, I don't really have a problem."

The trial court ruled the evidence could be admitted, reiterating, "Now the purpose is showing they committed this [*sic*] robberies because they committed other robberies elsewhere, but you also want to show that these robberies were committed for the benefit of the gang. Yes, you can show the evidence that the gang was committing robberies." The court did not allow the evidence for any other purpose.

The prosecutor assured the trial court he would speak to his expert to be certain he did not reveal that he believed defendants also committed the uncharged robberies.

A few days into trial, the prosecution sought to introduce a photo of defendant obtained in the investigation of the uncharged robberies to show identity, motive, and a common scheme or plan. Defense counsel objected, and the trial court denied the request stating it had already ruled on the issue.

The prosecution elicited testimony from Officer Keith Soboleski that he personally investigated other similar robberies committed by the Avalon Crips and shared the information with Officer Leyva.[6]

Defendant contends the trial court abused its discretion under Evidence Code section 352 by allowing the prosecution to elicit testimony regarding the facts of the other uncharged robberies. He asserts that in the event we conclude the claim was forfeited, we should review it regardless because trial counsel rendered ineffective assistance by failing to object below.

We agree with the prosecution that the claim was forfeited because trial counsel specifically stated he did not object to admission of the evidence under the trial court's limitations. We further conclude trial counsel did not render ineffective assistance because the admission of Officer Soboleski's testimony was not error.

As with defendant's other ineffective assistance of counsel claims, there is no evidence on the record to explain trial counsel's tactical decision, but even if there were, the evidence of prior crimes committed by the Avalon Crips is more probative than prejudicial. The evidence was highly relevant to establish whether the crimes committed

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6 The prosecution did not qualify Officer Soboleski as a gang expert.

were for the benefit of the gang, because it tended to show both that the Avalon Crips were involved in recent crime sprees and were involved in the specific types of crimes charged. From this evidence, the jury could infer that the present crimes, which were similar in nature, were committed to benefit the gang. Defendant was not unfairly prejudiced because no evidence was offered that he was personally involved in the uncharged crimes. The fact of the uncharged crimes alone did not tend to prove defendant was a member of the Avalon Crips alleged to have been involved in the crimes at issue. Independent evidence was offered to establish defendant was an active Avalon Crips member and was one of the members who participated in each of the specific crimes charged. Additionally, Officer Soboleski's testimony was brief and did not include more detail than necessary to establish the crimes occurred and were committed by the Avalon Crips. Accordingly, admission of Officer Soboleski's testimony was not an abuse of discretion, and trial counsel's lack of objection does not constitute ineffective assistance.

Aiding and Abetting Instruction

Defendant next contends the trial court erred in failing to give an aiding and abetting instruction. He argues the prosecution's evidence supported an inference that he did not directly perpetrate the robberies but instead aided and abetted by acting as a lookout. Defendant asserts this error allowed the jury to convict him without proof beyond a reasonable doubt he committed all the elements of the charged offenses in violation of his rights to due process and a jury trial.

"Even without a request, a trial court is obliged to instruct on '"general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case"' [citation], or put more concisely, on '"general legal principles raised by the evidence and necessary for the jury's understanding of the case"' [citation]. In particular, instructions delineating an aiding and abetting theory of liability must be given when such derivative culpability

'form[s] a part of the prosecution's theory of criminal liability and substantial evidence supports the theory.' [Citation.]" (*People v. Delgado* (2013) 56 Cal.4th 480, 488.)

Pursuant to section 31, "[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

Here, several witnesses described defendant as the lookout. This evidence could support the theory that defendant aided and abetted the robberies, rather than directly perpetrating the crimes, such that the trial court erred in not giving the aiding and abetting instruction. (See *Delgado*, *supra*, 56 Cal.4th at p. 488.) The error did not lower the prosecution's burden of proving every element of the charged offenses and was harmless under both state and federal constitutional standards.

Contrary to defendant's assertions, this case is distinguishable from *People v. Beeman* (1984) 35 Cal.3d 547, in which it held that giving an incomplete aiding and abetting instruction required reversal. In *Beeman*, the Supreme court concluded CALJIC No. 3.01 inadequately defined aiding and abetting because it stated an aider and abettor was liable if he acted to aid or promote the crime with knowledge of the principal's unlawful purpose but did not explain he must have shared the perpetrator's intent. (*Id*. at p. 560.) Here, however, as in *Delgado*, *supra*, 56 Cal.4th 480, omission of an aiding and abetting instruction was harmless error because the instructions given expressly included an intent element. CALCRIM No. 1600 (Robbery), as given to the jury, specifically requires that "[w]hen the defendant used force or fear to take the property, he intended to deprive the owner of it permanently . . . . [¶] The defendant's intent to take the property must have been formed before or during the time he used force or fear. If the defendant did not form this required intent until after using the force or fear, then he did not commit robbery."

In this case, as in *Delgado*, there is overwhelming evidence in the record supporting the jury's finding that defendant was liable as a perpetrator. Even if the jury had been instructed on aiding and abetting, it would have merely provided another avenue for defendant's conviction; it would not have afforded defendant the possibility of conviction of a lesser charge. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 413 [aiding and abetting is not a separate crime, but an alternate theory of liability].) Thus, the error was harmless under both the standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24, (requiring reversal unless it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict) and in *People v. Watson* (1956) 46 Cal.2d 818, 836 (reversal required if a reasonable probability exists that the error affected the trial's outcome). (See *Delgado, supra,* 56 Cal.4th at pp. 489-492.)

Cumulative Error

Defendant argues the errors alleged, even if not individually prejudicial, are prejudicial when taken together. There was no cumulative error, as any error was inconsequential. (See *People v. Hines* (1997) 15 Cal.4th 997, 1075.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.