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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER ALVARADO et al., Defendants and Appellants.	B250367 (Los Angeles County Super. Ct. No. BA372847)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Fay Arfa, under appointment by the Court of Appeal, for Defendant and Appellant Christopher Alvarado.

Jennifer M. Hansen, under appointment by the Court of Appeal, for Defendant and Appellant Faustino Beltran.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorneys General, Zee Rodriguez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Christopher Alvarado and Faustino Beltran appeal from the judgment entered following their conviction by jury of two counts of robbery, with special allegations regarding use of a gun and association with a gang. Alvarado was sentenced to a total term of 12 years, Beltran was sentenced to a total term of 22 years, and both defendants were ordered to pay various fines and fees. Defendants assert multiple bases for appeal, including insufficiency of the evidence, ineffective assistance of counsel, prosecutorial misconduct, instructional error, and erroneous admission of several pieces of evidence. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. Procedural Background

An amended information filed on November 29, 2011, charged Alvarado and Beltran with two counts of robbery. (Pen. Code, § 211.)[1] The information further contained special allegations as to counts one and two that a principal personally used a firearm, a handgun (§ 12022.53, subds. (b) and (e)(1)), and that the offense was committed for the benefit of, at the direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)(1)(C)). Count three charged Beltran with possession of a controlled substance, cocaine base (section 11350, subd. (a)). Count four, charging Alvarado and Beltran with child abuse (section 273a(a)), was later dismissed pursuant to section 1118.

The joint jury trial commenced on November 29, 2011. On December 9, 2011, the jury found Alvarado and Beltran guilty of all charges and further found the firearm and

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[1] All further statutory references herein are to the Penal Code unless otherwise indicated.

gang enhancements true.[2] On July 26, 2013, the trial court heard and denied defendants' motions for new trial. The court sentenced Alvarado to a total term of 12 years—a low base term of two years on count one, plus 10 years for the firearm enhancement, and the same sentence for count two, to be concurrent to the sentence in count one. The court sentenced Beltran to a total term of 22 years—a low base term of two years on count one, plus 10 years for the firearm enhancement and 10 years for the gang enhancement, the same sentence for count two, and on count three, a low term of 16 months, with the sentences on counts two and three to be concurrent to the sentence in count one. Defendants timely appealed.

B. Prosecution Case

1. The Robberies

On May 19, 2010, at around 8:00 p.m., Marcelo Alatorre (then 18 years old) was walking to his mother's apartment with his girlfriend, Teri Ingram (then 17 years old), his two younger brothers, and Ingram's younger brother. As they neared the home, a red, two-door car[3] pulled up behind them. Alatorre testified that a "tall" man exited the car from the front passenger seat, approached Alatorre, and said "This is my hood, what are you doing here?" At trial, Alatorre identified the tall man as Alvarado. Concerned for his brothers, Alatorre told them to "run along upstairs." Once he was about two to three feet from Alatorre, Alvarado said "Give me all your shit." Alatorre then tried to "talk him out of it," saying "Come on. Have more respect. I'm with my little brothers at this time, you know. Come on. I'm just trying to take them home."

A few seconds after Alvarado approached, a girl exited the passenger side of the car, approached Ingram, and screamed at her, "Give me all your shit." Alatorre estimated he was about six to seven feet away from Ingram during the incident.

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[2] The jury deliberated for two hours and 20 minutes before reaching a verdict.

[3] Alatorre testified at trial that he was not sure whether the car was an Acura Integra or a Honda, but knew it was red.

About ten seconds after Alvarado approached, a second "short" man exited the passenger side of the car. Alatorre identified him at trial as Beltran. Beltran came up to Alatorre, "pointed something to my right kidney, and he told me, 'Give me all your shit or I'll pop you.'" Alatorre glanced at the object and saw the "black tip" of a gun barrel, at which point he "freaked out" and then "took everything out of my pockets," and gave it to Alvarado, while continuing to try to dissuade the men from doing anything "in front of my little brothers." After that, he could see that Ingram was resisting giving up her purse, so he told her "Just give them your stuff. They have a gun." Ingram still resisted, and the girl said "This bitch doesn't want to give up her shit." Then Alvarado went over to Ingram and "snatched her purse," breaking the strap. Alvarado then said "this is big badass ARC" and "this is my hood" and they left. Alatorre estimated the entire incident took about a minute and a half.

Ingram also positively identified Alvarado at trial as the first man out of the car, followed first by a woman and then by a second man she identified as Beltran.[4] Ingram testified that Alvarado and the woman exited the car from the driver's side and Beltran exited from the passenger side.[5] The woman approached Ingram, said "give me your shit," and then swung at her, hitting Ingram's upper-right cheek. Ingram moved backward, tripped and fell, and the woman tried to keep her from getting up. While Ingram was on the ground, fighting to retain her purse, the woman said "this bitch doesn't want to give up her shit." Alvarado then approached Ingram and grabbed her

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[4] Although Ingram positively identified Beltran at trial as the second man out of the car, she was unable to do so at the preliminary hearing, and was not shown a photographic lineup including Beltran because she had been unable to sufficiently describe him to the police on the night of the robberies.

[5] As detailed above, Alatorre testified that all three assailants came from the passenger side of the vehicle, and that the driver's door never opened.

purse off of her shoulder, breaking the strap. Ingram heard Alatorre tell her to give the assailants her stuff because they had a gun, but she did not personally see one.

Ingram testified that there were four people[6] in the vehicle—the three who exited and confronted her and Alatorre, along with Christian Reyes, who remained in the vehicle and whom Ingram saw "looking and smiling" at them during the incident. She recognized Reyes because she had known him as her brother's friend for about five years. Alatorre also identified Reyes in the back seat of the car that night. Alatorre had been introduced to Reyes by a neighbor two weeks earlier.

Ingram and Alatorre saw Reyes again about six months after the robberies, when he confronted them behind the same apartment building. Alatorre and Ingram testified that Reyes called them "snitches" and said that "we were going to get what was coming to us." Frightened, they moved to a new residence. The police paid for their relocation expenses.

After the robberies, Ingram and Alatorre went to Ingram's mother's house and told her what had happened. She called the police, who arrived about an hour later. Alatorre and Ingram both testified they had never seen either defendant before the incident. Alatorre described Alvarado as wearing a black shirt, blue jeans, and black hat with the letter A outlined in white, being about five feet ten inches to six feet tall, weighing about 185 pounds, with a "light goatee." He stated that Beltran was around five feet tall, weighed 145 to 150 pounds, was bald, and was wearing a white shirt and long, baggy gray shorts.[7] Although it was dark outside, Alatorre stated he had a clear view of defendants' faces from the apartment building's lights. Ingram testified that Alvarado

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[6] Ingram testified at the preliminary hearing that there were five people in the vehicle. In addition to the three who exited, Alatorre saw two other people in the car—the driver and Reyes.

[7] The responding police officer recalled Alatorre describing the taller suspect as six foot two inches tall and 215 pounds, and the shorter suspect as five foot four inches tall and approximately 150 pounds.

wore a black hat with white "A" lining, black shirt, five feet 11 inches, 200 pounds, with a "light" goatee. She testified at trial that she had described Beltran to the police that night as five feet six, bald, with a round face, but could not "really remember" anything else and could not "really describe" him at the preliminary hearing. Neither victim recalled Beltran wearing glasses.

Serge Gavinet, a neighbor who knew both Alatorre and Ingram, was sitting in his car in front of the apartment building on the evening of May 19, 2010, waiting for his brother. He saw a burgundy Acura parked nearby. He then noticed Ingram on the ground with a woman on top of her and Alatorre standing facing two males. Mr. Gavinet could not identify the men as they were facing away from him, but he stated that one male was about six inches taller than the other. He got out of his car and yelled "Hey." The assailants got back in their car and left. Mr. Gavinet memorized the license plate number of the car and gave it to police. Mr. Gavinet testified that he saw four individuals in the car—the three who got out, plus a male driver. He recalled that all three suspects re-entered the car through the passenger side door.

2. The Investigation, Identification, and Arrest

The day after the robberies, Alatorre identified Reyes from a photographic array as the person sitting in the back seat of the red car. A few weeks later, Los Angeles Police Officer Michael Chang was assigned as the investigating officer on the case. He ran the license plate number provided by Mr. Gavinet and it came back as a BMW located in Oakland. His partner then ran the license plate number with one number different and it came back as a red Acura registered to Mario Garcia, an Arcadia Street gang member.[8]

Officer Chang learned that Reyes had been identified as a suspect, and then searched his resources to identify people who were known associates of Reyes and who matched the descriptions of the men given by Alatorre and Ingram. He then made six-pack photographic identification packets to show to Alatorre and Ingram.

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[8] At trial, Alatorre identified the Acura registered to Garcia as the vehicle he saw on the night of the robberies.

Alatorre identified a photo of Alvarado from a six-pack on June 10, 2010, stating at trial that he knew he "was the guy that robbed me." He then identified Beltran from a six-pack on June 11, 2010 as the "little guy" who approached him with the gun. He said as soon as he saw the photo of Beltran's face, he "recognized it." Ingram also identified Alvarado from a six-pack on June 10, 2010 as the man who took her purse. Officer Chang did not show a six-pack with Beltran's picture to Ingram because she indicated she could not identify the shorter male suspect.

Following the identifications, Officer Chang obtained warrants to search the homes of Alvarado and Beltran. On June 23, 2010, LAPD officers searched Alvarado's home. They retrieved from Alvarado's bedroom a baseball hat with an A's logo and two rounds of .22 caliber bullets, sealed in packaging. LAPD officers, including Officer Chang, also searched Beltran's home the same day. Prior to the search, Beltran advised Officer Chang that he had a firearm and narcotics in his bedroom dresser drawer. The officers recovered a .44 caliber magnum handgun and 6.98 grams of crack cocaine from that location. Photographs of gang members at a party, including Reyes, Alvarado, Beltran, and Garcia also were recovered from Beltran's residence. None of the items stolen from Alatorre or Ingram were recovered at either residence.

Officer Chang also reviewed video surveillance footage from security cameras outside Reyes' residence on the night of the robberies. The footage showed Reyes and his wheelchair being loaded into a red Acura around 4:47 p.m. and the Acura returning to the residence around 11:48 p.m. Based on "still" photographs captured from the video, Officer Chang believed that Garcia was the driver of the Acura.

3. Gang Evidence

Officer Chang also testified as an expert on the Arcadia Street gang. The gang has existed since the 1980s and included about ten members as of May 19, 2010. The gang participates in "shootings, graffiti, narcotic sales, [and] robberies." Chang also opined that those were the gang's primary activities. Members often wear items with the letter A on it, including baseball caps from teams with "A" logos, and often have tattoos bearing

the name "Arcadia Street" or "ARC." The robberies took place within Arcadia Street gang territory. The court admitted certified minute orders for two prior convictions—a conviction for robbery by Joey Mixco on July 25, 2007, and a conviction for assault with a firearm by Reyes on October 19, 2009. Chang testified based on his personal knowledge that both Mixco and Reyes were Arcadia Street gang members at the time of these crimes.

Alvarado and Beltran both admitted at trial they were members of the Arcadia Street gang. Alvarado used the gang moniker "Silent" and Beltran used the moniker "Little One." Both men have gang tattoos.

Officer Chang opined that a hypothetical crime, mirroring the facts of the instant case, would be committed for the benefit of the gang because it would create fear and intimidation in the community. Further, stolen items would be sold to profit the gang.

C. Defense

1. Alvarado's Defense

Alvarado's defense pointed to evidence of inconsistencies in the victims' descriptions of the suspects given on the night of the robberies, at the preliminary hearing, and at trial. Alvarado presented evidence that Mario Garcia had a goatee that night and was about the same height as he was; conversely, Alvarado had never been able to grow facial hair. He also testified that he had "never" committed a crime and had joined the Arcadia Street gang to survive in the neighborhood. He claimed that he found the .22 bullets outside his house but did not even know how to shoot a gun.

Alvarado also presented an alibi defense, testifying on his own behalf that he was at the Morongo casino in Cabazon, California, from 9:30 p.m. to midnight on the night of the robberies. The casino is one to two hours away from Los Angeles, depending on traffic; Alvarado thus claimed he could not have been near the site of the robberies at the time they occurred. Gary Stevens,[9] an acquaintance of Alvarado, testified that he saw

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[9] Stevens had prior convictions for child molestation, possession of child pornography, being a felon in possession of a firearm, and impersonating a peace officer.

Alvarado at the casino between 8:00 and 9:30 p.m. Alvarado's girlfriend, Maria Cabrera, testified that she was with him at the casino that night, and that they left Los Angeles for the casino around 7:30 pm. Alvarado and his girlfriend are regular visitors to Morongo—he has a "Winner's Club" card from the casino. On the day of the robberies, Alvarado testified that he stopped for gas at the gas station on Temple and Alvarado in Los Angeles before driving to the casino. Sometime later, he returned to the station to ask the clerk, William Romero, whether he would be willing to testify that Alvarado had been there on May 19, 2010. Mr. Romero said he would. Alvarado denied asking Romero to lie for him.

2. Prosecution's Rebuttal

The prosecution presented several witnesses to rebut Alvarado's alibi defense. Rodney Lester, Investigations Manager for the Morongo Casino, testified that the casino records did not show that Alvarado's Winner's Club card was used in May 2010. If someone hit the jackpot on a slot machine but did not have a Winner's Club card inserted, when the jackpot was paid it would nevertheless be connected to the player's Winner's Club account. However, Lester acknowledged that a player's Winner's Club account would not necessarily reflect any activity if a player was playing without their Winner's Club card and did not hit a jackpot.

The prosecution introduced a W-2G tax form that had been turned over by Alvarado's counsel in discovery. The W-2G purported to show that Alvarado had won a jackpot on May 19, 2010, the day of the robberies. However, Mr. Lester testified that the original document from the casino reflecting the same jackpot win showed that the win occurred on March 23, 2010.

Romero, the gas station attendant, testified that he recognized Alvarado as a semi-frequent customer. Alvarado came in, dressed "like a gang member" and said he was being accused of armed robbery. Alvarado asked Romero to tell the police that he had been at the gas station on the day of the incident. Romero was a "little afraid" because

Alvarado was in a gang. Romero admitted it was possible Alvarado was at the gas station on the day of the robberies, but he had no specific memory one way or the other.

3. Beltran's Defense

Beltran admitted knowing both Alvarado and Reyes but denied participating in the robberies. He testified that he wears prescription glasses and cannot see "from far" or read without them. The drugs found in his room belonged to his brother, who was in prison at the time.

Beltran also presented an alibi defense. His mother is diabetic and her kidneys are failing. In May 2010, she required daily treatment with a home dialysis machine from 8:00 p.m. until 7:00 a.m. the next morning. At that time, Beltran and his mother were the only two people who knew how to use the machine and someone had to be there while the machine was running to call for help if a problem arose. Beltran would connect his mother to the machine every night between 8:30 and 9:00 p.m. Beltran's sisters, Zonia and Zolia, testified that he was their mother's caregiver at the time because they both worked outside the home. Zonia did not specifically know that Beltran was home on the night of the robberies, but she assumed he was because his normal routine was to connect his mother to the dialysis machine every night at 9:00 p.m. Zolia stated she was home with Beltran on the night of the robberies between 7:00 and 9:00 p.m. When Beltran was in jail for four or five days, their mother was able to connect herself to the machine, but she needed some help from Zolia to do so.

DISCUSSION

A. Defendants' Claims of Insufficient Evidence[10]

Alvarado argues that none of the charges against him were supported by sufficient evidence, as they were based principally on eyewitness identifications by Alatorre and

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[10] Defendants each raise multiple issues they contend warrant reversal; additionally, each defendant has joined his co-defendant's brief on all issues that could affect him. Thus, while for the sake of clarity we discuss the argument with reference to the specific defendant who raised it, we consider each claim with respect to both defendants wherever applicable.

Ingram. He also claims there was insufficient evidence to establish either the gun enhancement related to Ingram's robbery or the "primary activities" element of the gang enhancement. As detailed below, we conclude that substantial evidence supports each of defendants' convictions and enhancements.

1. Legal Principles

In reviewing a challenge to the sufficiency of the evidence, "the relevant inquiry is whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1180.) "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

2. Substantial Evidence Supported Defendants' Convictions

Alvarado contends that the evidence, "based principally on uncorroborated eyewitness identification failed to prove that Alvarado had anything to do with the robberies," and therefore failed to support his conviction. We disagree and affirm as to both defendants.

Applying the standard set forth above, we conclude that sufficient evidence supports the finding that both defendants committed the robberies at issue. Crucially, both Alatorre and Ingram positively identified Alvarado and Beltran at trial. They also independently identified Alvarado about a month after the robberies from a photographic lineup, as well as at the preliminary hearing. Alatorre also positively identified Beltran from a photographic lineup and at the preliminary hearing. As the trial court concluded in denying defendants' motions for a new trial, both Alatorre and Ingram gave lengthy testimony and were "vigorously cross-examined about the details of their testimony, their

prior statements, and any perceived deficiencies." While there were some discrepancies, "nothing the witnesses said w[as] so blatantly inconsistent or so obviously untrue as to suggest fabrication. . . . [¶] More importantly, both Alatorre and Ingram testified in a manner that supported truthfulness. Qualities that do not show on the record, such as tone of voice, eye contact, body movements, and the emotional content of their testimony all pointed towards credibility."

Alvarado contends that the eyewitness identifications were both inherently unreliable and unsupported by "corroborating evidence." But the record contains substantial evidence from which a jury could have reasonably found that Alatorre's and Ingram's identifications of defendants were both credible and reliable. For example, although the incident occurred at night, Alatorre testified that both defendants were standing within a few feet of him, directly facing him, and that he got a clear look at their faces. Indeed, he briefly spoke directly to both men as he tried to convince them not to go through with the robbery in front of the younger children. Moreover, Alatorre indicated he was able to discern their features due to the lighting provided by the nearby apartment building. He also unequivocally stated that he saw the tip of a gun when Beltran pointed it at him.

The fact that there was no physical or other "corroborating" evidence tying defendants to the crime does not invalidate the eyewitness identifications. In fact, "[i]t is well settled that, absent physical impossibility or inherent improbability, the testimony of a single eyewitness is sufficient to support a criminal conviction. [Citation.]" (*People v. Allen* (1985) 165 Cal.App.3d 616, 623.) And while Alvarado focuses on the inconsistencies in the eyewitness testimony, particularly their insistence that the taller suspect had a goatee, it is not the role of the reviewing court to resolve credibility issues or evidentiary conflicts—"[r]esolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.]" (*Young*, *supra*, 34 Cal.4th at p. 1181.) Defendants were free to point out those inconsistencies at trial (and did so), and the jury was free to weigh them against the credibility of the witnesses; in fact, the jury

specifically was instructed regarding eyewitness testimony, including that they should consider "factors which bear upon the accuracy of the witness' identification" such as the witness' opportunity to observe the perpetrator, the stress of the incident, and "the extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness."

Alvarado also ignores other pieces of evidence that support the victims' testimony. Officer Chang identified Garcia as the driver of the red Acura on the night of the robberies, and both Alatorre and Gavinet stated that the driver never left the vehicle (thus rebutting the inference suggested by Alvarado that Garcia was really the taller suspect with the goatee). Alvarado and Beltran are both admitted members of the Arcadia Street gang; the assailants invoked the shortened gang name "ARC" and the victims also identified Reyes, another Arcadia Street gang member whom they both knew, in the suspect vehicle.

In sum, viewing the evidence in the light most favorable to the prosecution, we conclude that substantial evidence supports the verdict against both defendants.

3. Substantial Evidence Supports The Gun Enhancement As To Ingram

Alvarado also challenges the imposition of the gun enhancement against him, claiming that the "evidence failed to show that anyone used a gun during Ingram's robbery," and thus the gun enhancement on that count cannot stand. We affirm as to both defendants.

Alvarado suggests that the prosecution failed to meet its burden of proof as to the gun enhancement because the evidence at trial demonstrated that Ingram never saw a gun and that the "tall man" (Alvarado) who grabbed her purse was unarmed. Both of those facts were undisputed at trial, but it does not necessarily follow that no principal "used" a gun during Ingram's robbery within the meaning of the statute. The gun enhancement under section 12022.53, subdivision (e)(1), applies where "a principal" in a robbery "uses a firearm." It does not require that the charged defendant personally use the firearm, just

that the defendant acted as a principal in the underlying crime.[11] Certainly substantial evidence supports the finding that Alvarado was a principal in Ingram's robbery—both Ingram and Alatorre testified that Alvarado snatched her purse from her.

Thus, in order to impose the gun enhancement, the prosecution needed to prove that Beltran acted as a principal in Ingram's robbery and "used" a firearm for that purpose. Alvarado cites no authority to suggest that, under the facts here, Beltran did not "use" a firearm to aid the robbery of both victims under the meaning of the statute. As he acknowledges, the term "use" in this context has a broad meaning: "'when a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure. . . . [A] failure to actually point the gun, or to issue explicit threats of harm, does not entitle the defendant to a judicial exemption from section 12022.53.'" (*People v. Wilson* (2008) 44 Cal.4th 758, 807.) Nor must the firearm "use" occur at the precise time Alvarado was grabbing Ingram's purse. "'In considering whether a gun use occurred, the jury may consider a "video"- of the entire encounter; it is not limited to a "snapshot" of the moments immediately preceding a[n] . . . offense. Thus, a jury could reasonably conclude that although defendant's presence with the victims was sporadic, the control and fear created by his initial firearm display continued throughout the encounter.' [Citation.]" (*Ibid*.)

Simply put, the test is whether Beltran took "some action with the gun in furtherance of the commission of the crime." (*People v. Granado* (1996) 49 Cal.App.4th 317, 325, fn.7.) The evidence here establishes that he did. Alatorre testified that he

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[11] In order to trigger section 12022.53, subdivision (e)(1), the charged defendant also must be eligible for the gang enhancement under section 186.22, subdivision (b)(1). A defendant cannot have both the gang and gun enhancements imposed unless he "personally" uses a firearm in the commission of the offense (see § 12022.53, subd. (e)(2)). Thus Alvarado had only the gun enhancement imposed on him, while Beltran, who personally used the gun, had both.

clearly saw the black tip of a gun barrel as Beltran pointed it at him. Moreover, Beltran then threatened to "pop" him if he did not hand over his belongings. Alatorre "freaked out" once he saw the gun and complied with the assailants' demands and "took everything out of [his] pockets." He also told Ingram, who he could see was resisting giving up her purse, "Just give them your stuff. They have a gun." Ingram heard Alatorre's plea; immediately thereafter, Alvarado approached her and snatched her purse.[12] Thus, Alvarado's claim that there was no evidence "that the assailants used a gun" is belied by the record.

Whether Ingram actually saw the gun is irrelevant (and particularly so here, since she knew of its use through Alatorre's warning to her). (See *Granado, supra,* 49 Cal.App.4th at p. 327 [statute requires only act of defendant bringing gun "into play," "[t]o excuse the defendant from this consequence merely because the victim lacked actual knowledge of the gun's deployment would limit the statute's deterrent effect for little if any discernible reason. [Citation.]"]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 421 ["There is no requirement the victim actually see the gun. [Citation.]"].)

As the trial court stated in denying defendants' motion for new trial, "[w]hile Beltran might not have specifically pointed the gun at Ingram, he specifically brought the gun to commit the robbery of both Ingram and Alatorre. . . . Beltran's use of a firearm had a direct impact on causing Ingram to submit." Thus, the evidence reasonably supported the conclusion that Beltran used a gun during Ingram's robbery and the firearm enhancement was warranted as to both defendants.

4. Substantial Evidence Supports The Gang Enhancement

Alvarado further contends there was insufficient evidence that the Arcadia Street gang had as one of its "primary activities the commission of one or more of the criminal acts" enumerated in section 186.22, subdivision (e). (§ 186.22, subd. (f).) Proof of this

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[12] Alvarado's statement that "Ingram never saw the short man" is similarly unsupported. Ingram testified that she "got glances" at Beltran, although she acknowledged she did not get a good look at him.

element is a prerequisite to establishing that Arcadia was a "criminal street gang" and that defendants committed the robberies for the benefit of that criminal street gang, thereby triggering the gang enhancement under section 186.22. The acts listed in subdivision (e) include assault with a deadly weapon, robbery, felony vandalism, and the sale of controlled substances.[13] (§ 186.22, subd. (e)(1), (2), (4) and (20).)

The prosecution may establish a gang's primary activities through the testimony of a police gang expert, where that expert testifies with the proper foundation as to his knowledge of the gang's activities. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [expert based his opinion "on conversations with the defendants and with other [gang] members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies"].)

Alvarado contends that the testimony of Officer Chang, the LAPD gang expert offered in this case, lacked adequate foundation to prove that the Arcadia Street gang engaged in any of the enumerated offenses as a primary activity. And while he acknowledges that the prosecution proved the specifics of two past convictions of Arcadia Street gang members, he points out that two offenses alone would amount only to "occasional," as opposed to "primary" activity. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith)* [the statute "exclude[s] the occasional commission of those crimes by the group's members"].)

We disagree that only the evidence of the two specific convictions may count toward establishing the Arcadia Street gang's primary activities here. Officer Chang testified extensively regarding his training and experience regarding criminal street gangs, including spending seven years as a "gang enforcement detail officer" with his primary job to "monitor and suppress the criminal activity of street gangs," with three of

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[13] In addition to showing that the gang engaged in one or more of the enumerated offenses as a "primary activity" (the element at issue here), the definition of "criminal street gang" under the statute requires proof that its members engaged in a "pattern of criminal gang activity," defined as "the commission of . . . two or more" of the same list of offenses set out in subdivision (e). (§186.22, subd. (f).)

those years spent conducting "thorough gang investigations," and more recently working on a "multi-agency task force with the primary responsibility of gang crimes." He discussed his ongoing gang training and provision of gang-related training to others, his experience touring prison gang units and interviewing inmates and guards, writing warrants for and conducting parole and probation searches of gang members, assisting various agencies, and interviewing gang members on "over a thousand" occasions. Chang also testified that he is currently qualified as an expert on the Arcadia Street gang. To that end, he provided details regarding his knowledge of and experience with the gang, including his knowledge of the gang's background, his discussions with members of the gang and his personal involvement in investigations into crimes committed by the gang—specifically "street robberies, shootings, graffiti, as well as quality of life crimes." He then testified as to the gang's primary activities:

"Q: Do they have anything that you would consider their primary activities?

A: Yes.

Q: What's that?

A: Same I just said [sic], shootings, graffiti, narcotic sales, robberies."

Thus, Chang's testimony established an adequate foundation for his knowledge of primary activities and provided a proper basis from which the jury could reasonably find that the Arcadia Street gang met the statutory requirement. By contrast, in Alvarado's cited case, *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611, the expert's entire testimony regarding the gang's primary activities was as follows: "'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.'" Unsurprisingly, the court found the expert's testimony lacked sufficient foundation as to his knowledge of these crimes, and further noted that the expert had admitted on cross-examination that the "vast majority" of the cases connected to this gang "that he had run across were graffiti related." (*Id.* at pp. 611-612.)

Alvarado also cites several cases for the proposition that the prosecution was required to "elicit[] specifics about the circumstances of the crimes." In doing so, he has confused the requirements for the "primary activity" element of section 186.22, subdivision (f), with the "pattern of criminal gang activity" element. As discussed above, the former requires proof that the gang engaged in one or more of the listed offenses as a primary activity. The latter requires proof that gang members committed two or more of the listed offenses, and must be established with specific evidence of those offenses.[14] The cases cited by Alvarado deal with the requirements for the "pattern of criminal gang activity" element. (See *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462; *In re Leland D.* (1990) 223 Cal.App.3d 251, 258-259.) They are therefore irrelevant to our consideration of the "primary activity" element here. Thus, we conclude that substantial evidence supported the finding of "true" as to the gang enhancement for both defendants.

B. Error In Jury Instructions

Alvarado contends the trial court erred in instructing the jury regarding the gang enhancement and his purported efforts to fabricate evidence. We disagree.

1. Gang Enhancement Instructions Were Not Erroneous

Alvarado raises several claimed errors with respect to the jury instruction on the gang enhancement under section 186.22. The trial court gave CALJIC 17.24.2, instructing that a "criminal street gang" must have "as one of its primary activities the commission of one or more of the following criminal acts, robbery, vandalism, and assault with a firearm." The standard instruction was modified to include the applicable potential primary activities from the list of offenses set forth in section 186.22, subdivision (e). Neither defendant objected to this instruction at trial.[15] Alvarado now

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[14] Of course, Alvarado does not contend that the prosecution failed to establish this element here, as it introduced evidence of two specific prior qualifying offenses.

[15] The Attorney General contends that defendants' failure to object results in a forfeiture of this claim, as "'[g]enerally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete

claims this instruction was erroneous in the following ways: (1) the instruction should not have included assault with a firearm and vandalism, because Chang never testified about those crimes and thus there was no evidence to support their inclusion; (2) the court should have instructed the jury as to the elements of the primary activity offenses; and (3) the instruction should have specified "felony vandalism," rather than "vandalism," as the applicable offense.

First, Alvarado's claim that no evidence supports the inclusion of assault with a firearm and vandalism as applicable primary activities is without merit. As detailed above, Officer Chang provided expert testimony that the gang's primary activities included "graffiti" and "shootings." Moreover, one of the two convictions offered into evidence was for assault with a firearm. Alvarado does not explain how, given this evidence, the court erred in including assault with a firearm and vandalism as potential triggering offenses for the "primary activity" element of the gang enhancement.

Second, Alvarado claims that the elements of the "primary activity" offenses should have been included as an "element[] of the charged offense." A trial court must properly instruct sua sponte on all elements of sentence enhancement allegations. (*People v. Wims* (1995) 10 Cal.4th 293, 303, 314; *Sengpadychith, supra,* 26 Cal.4th at p. 326.) Alvarado contends that duty extends to the underlying elements of the predicate primary activity offenses. Because nothing in the standard CALJIC instruction requires such an inclusion, Alvarado is suggesting that the court had a sua sponte duty to modify the instruction or to separately instruct as to the elements of vandalism, assault with a firearm, and robbery. In support of that proposition, he cites only the comparable CALCRIM instruction, number 1400. CALCRIM 1400 includes a paragraph stating that separate instructions on the primary activity offenses are to be given "only when the

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unless the party has requested appropriate clarifying or amplifying language.' [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 149.) However, because Alvarado argues that the instruction was not merely unclear or incomplete, but that the inclusion of inapplicable primary activities and the exclusion of the elements of those activities rendered the instruction legally incorrect, we proceed to the merits of his claim.

conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition." The bench notes similarly state that the court "should also give the appropriate instructions defining the elements of crimes inserted in the list of alleged 'primary activities,' or the definition of 'pattern of criminal gang activity' that have not been established by prior convictions or sustained juvenile petitions." (See *ibid*.)

Alvarado's reliance on CALCRIM 1400 (which he did not request at trial) does not establish a duty by the court to define the elements of all crimes alleged to be the primary activities of a criminal street gang. Thus, we conclude the court did not err in this respect.

Moreover, the trial court here essentially complied with the requirements of CALCRIM 1400. The prosecution provided evidence establishing prior convictions for a robbery and an assault with a firearm, two of the three predicate offenses that could qualify as a primary activity. The jury was also entitled to consider defendants' involvement in the commission of the robberies charged here. (See CALJIC No. 17.24.2.) Under the circumstances, the elements of those two predicate offenses were not in dispute and we reject Alvarado's claim that it was error not to include separate instructions regarding those elements. At most, even if it was error for the court not to include the elements of vandalism (as the only one of the three offenses without evidence of a conviction), that error was harmless, as discussed below.

As to the third potential predicate offense, Alvarado points out that the jury instruction listed "vandalism" as a possible primary activity pursuant to section 186.22, subdivision (e), instead of "felony vandalism" (requiring damage over $400) as specified in the statute. (§186.22, subd. (e) 594, subd.(b)(1).) He contends that this error permitted the jury to find that gang was a criminal street gang based on its commission of misdemeanor vandalism and thus warrants reversal of the true finding on the gang enhancement.

Even assuming the jury impermissibly relied on vandalism to establish the primary activity element of the gang enhancement, we find that the error did not prejudice defendants. "[A] trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision 'increases the penalty for [the underlying] crime beyond the prescribed statutory maximum.' [Citation.] Such error is reversible under *Chapman* [*v. California* (1967) 386 U.S. 18, 24], unless it can be shown 'beyond a reasonable doubt' that the error did not contribute to the jury's verdict." (*Sengpadychith, supra*, 26 Cal.4th at p. 326.) Here, as discussed above, the prosecution introduced substantial evidence supporting a finding that both assault with a firearm and robbery constituted primary activities of the gang, including expert testimony, certified court records of past convictions by gang members, as well as defendants' (as admitted members) involvement in the instant charges. Accordingly, we conclude that any instructional error as to the gang enhancement was harmless beyond a reasonable doubt.

2. Instructions Regarding Evidence Tampering Were Proper

Alvarado next turns to two jury instructions regarding efforts by a defendant or others to fabricate evidence. He asserts that CALJIC No. 2.04 ("Efforts by defendant to fabricate evidence") was improperly given, while CALJIC No. 2.05 ("Efforts other than by defendant to fabricate evidence") should have been given.[16]

As an initial matter, the Attorney General argues that this claim is forfeited, as defendants failed to object to the proposed instructions or to request CALJIC No. 2.05 at trial. We agree. The trial court does not have a sua sponte duty to instruct regarding consciousness of guilt, including with CALJIC No. 2.05. (*People v. Najera* (2008) 43 Cal.4th 1132, 1139.) Alvarado's failure to request inclusion of CALJIC No. 2.05 or object to CALJIC No. 2.04 forfeited any claimed error. (*See People v. Jennings* (2010)

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[16] Alvarado actually states that CALJIC No. 2.06 was improperly given, but discusses the language of CALJIC No. 2.04. Since 2.04 was given by the court here and 2.06 was not, we assume Alvarado intended to refer to the former.

50 Cal.4th 616, 671.) Alvarado suggests that he did not forfeit this claim because "any objection would have been futile," but does not explain why futility applies here.

Moreover, even if we were to reach this claim, we would conclude that no error occurred. The jury was instructed pursuant to CALJIC No. 2.04 as follows:

> "If you find that a particular defendant attempted to persuade a witness to testify falsely or attempted to or did fabricate evidence to be produced at the trial, that conduct may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide."

Evidence at trial supported the inference that Alvarado attempted to persuade Romero (the gas station attendant) to testify falsely that Alvarado was at the gas station the evening of the robberies. Alvarado ignores this evidence in his briefs. He also acknowledges that the instructions regarding consciousness of guilt, which include CALJIC No. 2.04, are of a "cautionary nature" that "benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1224.) We conclude that CALJIC No. 2.04 was appropriately given based on the evidence presented here.

Alvarado then argues that CALJIC No. 2.05 should have been given because there was no evidence that he was involved in the alteration of the W-2G form or in Reyes' threats to Ingram and Alatorre. CALJIC No. 2.05 reads:

> "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

Alvarado admits that the court generally has no sua sponte duty to instruct regarding consciousness of guilt, but notes that the duty "exists in an occasional extraordinary case." He makes no showing that this case would qualify as such an "extraordinary case." The case he cites as an example, *People v. Olguin* (1994) 31 Cal.App.4th 1355 (*Olguin*), does not discuss the use (or omission) of CALJIC No. 2.05. We therefore conclude that the court did not err by failing to instruct the jury pursuant to CALJIC No. 2.05.

C. Ineffective Assistance of Counsel - Eyewitness Expert

Alvarado contends his trial counsel rendered ineffective assistance and denied him due process by failing to call an eyewitness expert at trial. We disagree.

1. Factual Background

Prior to sentencing, Alvarado filed a motion for a new trial, offering the proposed testimony of an eyewitness expert and arguing that the expert would have significantly helped his defense.[17] Both members of Alvarado's trial team testified at the hearing on the motion. Mr. Pittera testified that they decided not to retain or use an eyewitness expert because they felt they had "overwhelming evidence" that Alvarado was not the perpetrator, particularly because of the witness identifications of a man with a goatee and Alvarado's inability to grow one. He therefore did not think an expert was necessary. Mr. West stated that they had "evaluated the case and came to the conclusion that [Alvarado's] alibi defense was better and we did not want to dilute that by bringing in other issues that might confuse the jury as well as look like we were fabricating issues." Thus, he felt there was "no reason" to consult an eyewitness expert because they believed their alibi defense was "very strong." Mr. West further testified that, in his experience, he knew he could solicit the same information from the prosecution officer witnesses, and that it would be more credible from that source than from a defense expert.

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[17] At that point, Alvarado had replaced his trial counsel with his current appellate counsel.

The trial court denied the motion for a new trial, concluding that, under the circumstances, "it is difficult to find that counsel's performance and not calling an eyewitness identification expert falls below the reasonable attorney standard."

2. Legal Principles

"A criminal defendant's federal and state constitutional rights to counsel (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15) include the right to effective legal assistance. When challenging a conviction on grounds of ineffective assistance, the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*People v. Mai* (2013) 57 Cal.4th 986, 1009 (*Mai*).)

3. Defendants' Trial Counsel Was Not Ineffective

Alvarado claims that an eyewitness expert was crucial because the case centered on the eyewitness identifications; the expert, he claims, could have "explained to the jury the scientifically proven deficiencies of eyewitness identification." Of course, Alvarado is correct that expert testimony regarding the various factors that can affect eyewitness identification is admissible when relevant and in certain eyewitness-centered cases it might be error for a court to exclude it, but it does not necessarily follow that his counsel

was ineffective for failing to employ such an expert. Tellingly, none of the cases Alvarado cites conclude that defense counsel rendered ineffective assistance based on a failure to call an eyewitness expert.

We find Alvarado's ineffective assistance claim particularly unavailing where, as here, Alvarado's trial counsel clearly articulated legitimate strategic reasons for deciding not to use an eyewitness expert. Specifically, they thought their alibi defense was stronger and did not want to dilute it with an expert on eyewitness testimony, and they further believed they could point out the inconsistencies in the eyewitness testimony (most notably the testimony that the assailant had a goatee) without an expert.[18] Moreover, they chose to elicit testimony from the prosecution's expert, Officer Chang, regarding the fallibility of eyewitness identification, which they believed would be more effective coming from an opposing expert than from one paid by the defense. The jury also received instruction under CALJIC No. 2.92 regarding some of the factors that could affect an eyewitness identification.

Moreover, the circumstances of the identifications in this case are not the type that would most acutely benefit from an expert's knowledge. For example, the witnesses had the opportunity to observe the defendants at close range and, at least in Alatorre's case, testified that he got a clear look at their faces. There were no issues of cross-racial identification on which an expert could base a potential misidentification. (See *Jointer v. Superior Court* (2013) 217 Cal.App.4th 759, 767 [noting risk of misidentification is higher with cross-racial identification].) Moreover, both defendants were repeatedly identified, and in Alvarado's case, by two separate witnesses. As the trial court noted, the expert could not offer an opinion regarding the accuracy of the actual identifications made here. Finally, the identifications were bolstered by the additional evidence at trial, as discussed above.

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[18] Alvarado argues his counsel should have presented both an alibi defense and an attack on the eyewitness identifications, as the two defenses are not inconsistent with each other. The record shows that counsel did so, including extensive cross-examination of both eyewitnesses, but chose not to include an eyewitness expert as part of the defense.

While Alvarado's alibi defense certainly appears less attractive in hindsight, much of that information was not available to defense counsel prior to trial and hindsight is not the standard by which we measure the effectiveness of counsel. (*In re Valdez* (2010) 49 Cal.4th 715, 729-730.) Alvarado's counsel testified that they were assured repeatedly by Alvarado that his alibi and supporting W-2G were accurate and that they had been stonewalled by the casino in their attempts to corroborate the form's details. Further, counsel was able to elicit testimony from Officer Chang regarding misidentification by eyewitnesses, as well as testimony by Alatorre, Ingram, and LAPD officers regarding the inconsistencies in the eyewitness identifications here. In light of the foregoing considerations, we cannot say that defendants' counsels' tactical decision not to call an eyewitness expert falls outside of the "wide range of reasonable professional assistance." (*In re Valdez, supra,* 49 Cal.4th at p. 730 [quoting *Strickland v. Washington* (1984) 466 U.S. 668, 689].)

D. Errors in Admission of Evidence

Alvarado asserts that the trial court erred in admitting three pieces of evidence: his altered W-2G form, Reyes' threats against the victims after the robberies, and the bullets found in his home. He further contends these errors violated his due process rights and deprived him of a fair trial. We find no error.

1. Legal Principles

We review a trial court's rulings on the admissibility of evidence under the abuse of discretion standard. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial fundamentally unfair. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

2. No Error in Admission of W-2G

a. Factual Background

As part of his pre-trial discovery obligations, Alvarado's counsel turned over to the prosecution a W2-G form purporting to show that Alvarado won money at the Morongo Casino on May 19, 2010, the night of the robberies. Alvarado's counsel referred to the document in opening argument, telling the jury that there was a "casino slip, a W-2G on 5/19/2010 at 10:23. As far as the time, it's physically impossible for him to have made it back this quickly." However, while Alvarado testified in his defense that he gambled at the Morongo Casino on May 19, 2010, he made no reference to any winnings or to the corresponding W-2G form during his defense case. He did testify, however, that he had never committed a crime.

In rebuttal, the prosecution sought to introduce the W-2G, as well as supporting evidence that it had been altered to show a different date, to show that Alvarado had altered the document and to impeach his statement that he had never committed a crime. Defense counsel acknowledged to the court that the document was "a W-2G that was given to Mr. Alvarado on the evening that he had winnings. It was provided to us as counsel. We provided it to the People." Defense counsel objected to the introduction of the form, arguing that there was no evidence that Alvarado altered the form, and that it was therefore inadmissible to impeach his statement that he never committed a crime. The trial court excluded the document because the evidence refuting Alvarado's alibi could be established without it, through the testimony that the casino had no record he was there on May 19, 2010. As to the impeachment issue, the court noted there was circumstantial, but not direct, evidence that Alvarado had altered the document, and thus excluded the W-2G as more prejudicial than probative under Evidence Code, section 352. However, the court indicated it could revisit the issue "as the trial goes on if it becomes . . . more probative."

The prosecution then presented testimony from Lester that casino records did not show that Alvarado's Winner's Club card was used in May 2010 and that Alvarado's

records would show the payout of a jackpot even if he did not use his Winner's Club card that day, because the "taxable" jackpot winnings would be connected back to his Winner's Club account. On the other hand, Lester testified that if a player was playing in the casino without his Winner's Club card and did not hit a jackpot, the Winner's Club account for that player would not reflect his gambling activity during that time. During cross-examination, Alvarado's counsel then reiterated that "just because the paperwork that you've been shown [referring to the Winner's Club account records] shows no particular activity for the date [of the robberies], doesn't necessarily mean that that's evidence of Mr. Alvarado's absence from the casino, is that correct?" Lester confirmed that was correct.

At that point, the prosecution again sought to introduce the W-2G. The court held an additional hearing regarding the admissibility of the W-2G, including testimony from Lester. As a result, the court stated that the questions to Lester at trial "now left the impression . . . with the jury that Mr. Alvarado on that day could have been there and that he simply had no notations that were reported with the casino. But he, in fact, has a document which purports to show that there were winnings from that day, and [Lester] has testified that, if that happened, that would have been noted onto his Winner's Club account. . . . So it refutes what [the defense] has attempted to establish." The court therefore admitted the W-2Gs (both the original and the altered version) into evidence.

b. Trial Court Did Not Abuse Its Discretion

Alvarado argues that the altered W-2G was erroneously admitted and used against him, when there was no evidence that he altered the W-2G or even knew it had been altered. And without evidence that he "himself altered the W-2G form or knew about or approved the alteration" of the W-2G, the jury could have improperly inferred consciousness of guilt from that evidence.

Contrary to Alvarado's claim, there was circumstantial evidence from which the jury could reasonably infer that Alvarado altered the W-2G, or at the very least knew of its alteration. The W-2G came from Alvarado and his counsel testified that Alvarado

provided it to them when they requested support for his alibi. Of course, the date on which Alvarado won a jackpot at the casino and the date reflected on the W-2G were critical details for Alvarado's alibi, and details he could confirm or refute. Further, Lester, the casino employee, confirmed that the W-2G was not altered by the casino—the original bore the March date. Lester also established that Alvarado's account reflected no winnings in May 2010. In addition, Alvarado was present when his counsel referenced the W-2G in his opening statement. These facts established circumstantially that, at a minimum, Alvarado knew the W-2G was altered and was prepared to use the altered W-2G (or to have altered it himself) to bolster his alibi. As a result, the court did not abuse its discretion in admitting the W-2G as more probative than prejudicial regarding the inference that Alvarado fabricated it.

Additionally, we note that any error would have been harmless, in light of Alvarado's consistent identification by two eyewitnesses and the credibility of their testimony at trial, as well as Lester's testimony regarding the lack of any record of Alvarado's presence at the casino that night. Thus, it was not reasonably probable that the jury would have reached a more favorable result absent the admission of the W-2G. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. No Error in Admission of Threats

Alvarado and Beltran both contend that the trial court erroneously admitted the evidence that Reyes threatened Alatorre and Ingram six months after the robberies, forcing them to relocate. Defendants contend this evidence was irrelevant, as there was nothing connecting either of them to the threats made by Reyes, as well as highly inflammatory and prejudicial.

"'Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible.' [Citation.]" (*Olguin, supra*, 31 Cal.App.4th at p.1368; *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3.) "It is not necessary to show threats against the witness were made by the

defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.]" (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588; *Olguin*, *supra*, 31 Cal.App.4th at p. 1369 ["the fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat."].).)

Here, both Alatorre and Ingram were called "snitches" and were told they were going to "get what was coming to them" as a result of this case. Their fear of retaliation from those threats caused them to move to a different residence. The threats and the victims' fear of retaliation in response are relevant to their credibility and therefore admissible.

Beltran suggests that the testimony regarding threats was unnecessary because the witnesses were not dissuaded from restating their previous identifications. He cites no authority for the proposition that the admissibility of threats by a third party should be so limited. While defendants contend that the potential for prejudice outweighed the probative value of the evidence under Evidence Code, section 352, we will not disturb the trial court's determination in weighing the admissibility of evidence absent a clear abuse of the court's broad discretion. We find none here.

As such, we cannot say that the trial court's decision to admit the evidence that the victims were threatened and relocated as a result was an abuse of discretion.[19]

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[19] Even if we found the evidence was erroneously admitted, any such error was harmless. Given the credibility of the testimony by Alatorre and Ingram and their identifications of defendants, it was not reasonably probable that the jury would have reached a more favorable result as to either defendant. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Notably, as discussed above, neither defendant requested a jury instruction (such as CALJIC No. 2.05) cautioning the jury that they could not infer defendant's consciousness of guilt from evidence of a third party's attempt to intimidate a witness without some evidence that a defendant was involved in the intimidation. Nor did defendants seek to limit the introduction of the testimony regarding Reyes' threats to its relevance to the credibility of the witnesses. And the prosecutor did not argue that the threats supported defendants' consciousness of guilt.

4. Objection to Admission of Bullets is Forfeited

Alvarado also argues that the trial court erred in admitting evidence of the .22 caliber bullets recovered in the search of his residence, because they were irrelevant to the charges and prejudiced him by "making it seem like he possessed firearms and firearm paraphernalia." The Attorney General contends this issue is forfeited, as defendants failed to object at trial to the admission of the bullets. Alvarado does not address the forfeiture in his briefs. We find that Alvarado has failed to preserve this issue for appeal by failing to object below. (See, e.g., *Partida*, *supra*, 37 Cal.4th at p. 435 [to preserve issue on appeal, objection must "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling"].)

E. Prosecutorial Misconduct in Closing Argument

Defendants raise three portions of the prosecution's closing argument that they claim constitute misconduct. We find these claims were forfeited by defendants' failure to object at trial. However, even if we reached the merits, we would conclude no misconduct occurred.

1. Legal Principles

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.)'" (*People v. Williams* (2013) 56 Cal.4th 630, 671.) Regarding the scope of permissible prosecutorial argument, '"'a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]'"' (*People v. Stanley* (2006) 39 Cal.4th 913, 951.)

2. Misconduct Claims are Forfeited

As an initial matter, the Attorney General contends these claims are forfeited, as no defense counsel objected at trial. We agree. ["'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.]"]. (See *People v. Williams*, *supra*, 56 Cal.4th at p. 671.) Because a timely objection and admonition could have cured any misconduct alleged, defendants may not raise these objections for the first time on appeal.

Defendants attempt to avoid their forfeiture by arguing the failure to object constituted ineffective assistance of counsel. We note that a decision to raise or forgo an objection during the heat of trial is generally a matter of trial tactics and we will not "attempt to second-guess trial counsel" except in rare cases. (*People v. Frierson* (1979) 25 Cal.3d 142, 158.) Here, where defendants have identified fleeting references that were, at most, somewhat questionable, we cannot say that there could have been no tactical reason not to highlight the statements (or to believe the statement did not constitute misconduct). We therefore reject the contention that trial counsel was ineffective on this basis. In any event, as detailed below, we find no misconduct occurred.

3. No Misconduct Occurred

First, Alvarado contends the prosecutor improperly vouched for the credibility of eyewitnesses Alatorre and Ingram in the italicized portion of the following statement:

> "So what does that come down to? Do you believe Marcelo Alatorre and Teri Ingram? And I know it's been a while since they testified, but when you're in the jury room, think back to while you were watching them testify. Did they actually do anything that made you think they're making this up or they're wrong? Did they say anything really that led you to believe that? *I don't think so*. They didn't exaggerate anything. They didn't even know the two defendants beforehand. There's no vendetta here

> or anything like that. They just told you things as they happened. *And I think that's the feeling you probably had as you were watching them testify, because they were telling you the truth*."

Alvarado argues this statement was the equivalent of the prosecution stating he believed the witnesses were telling the truth. In the context of the argument, we disagree. The prosecution never stated or implied that he had some personal knowledge regarding the witnesses' credibility or some external basis to believe them. (See, e.g., *People v. Calpito* (1970) 9 Cal.App.3d 212, 223 ["It is within the domain of legitimate argument for a prosecutor to state his deductions or conclusions drawn from the evidence and to relate to the jury that, in his opinion, the evidence shows that the defendant is guilty of the crimes charged, unless his statements are not based upon legitimate evidence or are to the effect that he has personal knowledge of the defendant's guilt. [Citation.]"].) We conclude the prosecutor's comments may be fairly characterized as commenting on the evidence rather than offering his personal opinion and therefore did not rise to the level of misconduct.

Second, Alvarado claims the prosecutor impermissibly argued guilt by association when he showed the jury a photograph depicting Alvarado, Beltran, and Reyes and stated the following:

> "Through detective work, through the police, because they got the license plate, that's how [the police] found these two guys. [Ingram's and Alatorre's] descriptions alone, that's not enough to I.D. these guys. They never would have been found based on that. . . . Because they all know each other, right? They hang out together, and they committed this crime together."

Alvarado also points to the following statements by the prosecution during his final rebuttal argument:

> "Again, it all comes back to these pictures of the four of them together. They're friends. The victims in this case didn't know the defendants. But

> they picked them out in court and in photographs. This isn't some random coinciden[ce]. . . . It's because they recognized the two guys that robbed them."

Alvarado does not detail how the above statements constitute improper argument of guilt by association. The prosecutor was entitled to point to the evidence, such as the photographs of Alvarado, Beltran, Garcia, and Reyes together, the evidence that all four were members of the same gang, and the testimony placing all four in the red car and at the scene of the robberies, as supportive of the inference that they knew each other and committed the robberies together. As such, we conclude the prosecution did not argue guilt by association and therefore committed no misconduct.

Finally, Beltran asserts the prosecutor committed misconduct by making the following reference to Beltran's mother's failure to testify in his final rebuttal argument:

> "But I will leave you with this one last thought, and I know I sound kind of jerky when I say this, but it is something you need to consider and that is where was defendant Beltran's mom? She's capable of coming to court, but she didn't take that stand and tell you that her son was with her during the time of the robber[ies]. And she's the one that would have been with him during that time period when he was doing the dialysis for her. And I have to actually say something nice about him, the fact that he didn't make his mom come in here and say stuff that wasn't true on his behalf. There is some goodness in his character somewhere in there."

Beltran contends that these statements impermissibly shifted the burden of proof to him by suggesting that he needed to call his mother as a witness to prove his alibi. He also argues that the prosecutor's suggestion that Beltran's mother would lie if she testified referred to facts not in evidence and offered an improper opinion regarding the truth of her testimony. We disagree. The prosecutor was entitled to rebut Beltran's alibi evidence and emphasize "the defense's failure to call logically anticipated witnesses," (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1051), which he did by referring to Beltran's

mother's failure to testify. As he noted, Beltran's mother would have been the most logical witness to confirm his presence at home during the time of the robberies. The prosecutor then argued that the logical inference from her failure to testify was that she would have been unable to support his alibi without lying. Such comments were within a prosecutor's "broad discretion to state [its] views as to what the evidence shows and what inferences may be drawn therefrom." (*People v. Kelly* (1990) 51 Cal.3d 931, 967.) The prosecutor did not suggest that he had some basis outside of the record to believe Beltran's mother would lie on the stand. Under the circumstances, we find no misconduct.

F. Effect of the Problems with Alvarado's Alibi Defense on Defendants' Right to a Fair Trial

Alvarado and Beltran both claim that the misconduct of Alvarado's trial counsel related to Alvarado's alibi defense deprived them of their right to a fair trial. They both point to the same conduct: the introduction by the prosecution of the altered W-2G, the use of Gary Stevens, a convicted felon, as an alibi witness, and Alvarado's testimony regarding Romero, which allowed Romero to testify on rebuttal regarding his intimidation by Alvarado. However, defendants premise their misconduct claim on two different legal theories. Alvarado conclusorily argues that his trial counsel's conduct amounted to ineffective assistance at trial. Beltran, on the other hand, claims that Alvarado's counsel's misconduct "allowed the prosecutor to present a blistering rebuttal which eviscerated" Alvarado's alibi, which, in turn, poisoned the jury as to Beltran's own alibi and "fatally prejudiced" him in their eyes. We find neither claim has merit. As a result, we reject Beltran's further contention that the trial court improperly denied his motion for a new trial on the same basis.

1. Alvarado's Attorneys Were Not Ineffective

Alvarado's claims of ineffective assistance of counsel center around his alibi defense and the problems that arose related to that defense as the trial progressed. He points to several decisions by his trial counsel that he contends constitute ineffective

assistance. As above outlined in Section C, to prevail on this claim, Alvarado must overcome the presumption that counsel acted "within the wide range of reasonable professional assistance" such as by showing that "counsel had no rational tactical purpose for the challenged act or omission." (*Mai*, *supra*, 57 Cal.4th at p. 1009.) He cannot meet this burden here.

First, Alvarado argues his counsel erred by referring to the W-2G form during his opening statement, telling the jury that "a casino slip, a W-2G" would show that Alvarado was at the casino at the time of the robberies. The prosecution indicated that it had informed Alvarado's counsel that the document was false before his opening statement; thus, Alvarado claims it was ineffective assistance to promise to show it to the jury. Specifically, the prosecutor told the court that he turned over the original, unaltered W-2G "before opening statements." But Alvarado's counsel told the court during the hearing on the motion for new trial that the information that the document was false "came out in trial" and he did not know about it beforehand. He also testified that both counsel had been repeatedly assured by Alvarado that the document was authentic and that their efforts to corroborate that information were "stonewalled" by the casino. Thus, it is not entirely clear, contrary to defendants' assertions, that Alvarado's counsel knew there was an issue with the W-2G prior to giving his opening statement. Assuming he did not, his decision to mention the W-2G as support for Alvarado's alibi in his opening statement, as well as his subsequent decision not to introduce the W-2G during trial once he realized there were problems with it, is not so unreasonable as to fall outside the range of competent tactical decisions and into the range of ineffective assistance.

Second, Alvarado claims his counsel should not have "opened the door" to allow the W-2G to be admitted into evidence and used against him. While defense counsel's questioning of Lester immediately preceded the successful second motion by the prosecution to introduce the W-2G into evidence, in fact, as outlined above, the defense question simply reiterated testimony Lester had already given during his direct examination that if a player did not use his Winner's Club card, his activity would not be

reflected on his Winner's Club account unless he won a jackpot. Moreover, it was Alvarado who initially chose to testify that he was at the casino that night, and who provided to his attorneys the W-2G form bearing a May 2010 date but reflecting March 2010 winnings. As the trial court noted in rejecting Alvarado's ineffective assistance claim, once Lester testified that there was no record of Alvarado gambling at the casino on the night of the robberies, defense counsel "had two choices: One, try to clarify it; or, two, leave it alone." Defense counsel chose the first course and asked Lester whether "just because the paperwork that you've been shown [referring to the Winner's Club account records] shows no particular activity for the date [of the robberies], doesn't necessarily mean that that's evidence of Mr. Alvarado's absence from the casino, is that correct?" Lester confirmed that was correct. While in hindsight this exchange appears to have triggered the introduction of the W-2G,[20] at the time the question was posed, it was a tactical decision within the range of a reasonably competent attorney.

Finally, Alvarado contends that his trial counsel erred in presenting certain testimony. First, counsel should not have allowed Stevens, an "unsavory witness with multiple recent crimes of moral turpitude," to testify as an alibi witness. Second, counsel should have structured Alvarado's testimony to avoid triggering rebuttal witness Romero, who stated he was intimidated by Alvarado and that Alvarado had asked him to tell the police that he had been at the gas station on the day of the incident. While each of these witnesses had their downsides, their testimony also had some positive results and Alvarado cannot overcome the presumption that his counsel's decisions could have been sound trial strategy. For example, while Stevens' prior convictions undoubtedly did not endear him to the jury, he did confirm the alibi provided by Alvarado and his girlfriend for the time of the robberies. Similarly, although Romero acknowledged being somewhat

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[20] We also note that, as discussed above, the trial court had previously acknowledged the potential relevance of the altered W-2G to support (at least circumstantially) the inference that Alvarado altered it. As the trial progressed, it is therefore entirely possible that the court would have decided to admit the W-2G upon renewed motion by the prosecution, even without this question by defense counsel.

afraid of Alvarado, he did not testify at trial that Alvarado had asked him to lie. He stated that Alvarado had "asked" him to tell police that Alvarado was at the gas station on May 19, 2010 and he admitted that he did not remember one way or the other whether Alvarado was there that night. He also confirmed Alvarado's claim that he had never worn a goatee, a beneficial point for the defense. In sum, Alvarado fails to point to any conduct by his attorneys, either individually or cumulatively, that amounts to an ineffective assistance of counsel.

2. Alvarado's Attorneys' Conduct Did Not Violate Beltran's Right to a Fair Trial

As Beltran acknowledges, while "it is clear that the conduct of counsel for a codefendant can violate a defendant's constitutional rights [citations], there are few cases on the matter, and the law generally applicable to such situations is not well developed." (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095-1096 (*Estrada*).) In *Estrada*, the court decided that "the analysis applicable to prosecutorial misconduct, if not a perfect template, is at least a useful guide for the review of misconduct committed by counsel for a codefendant." (*Id*. at p. 1096.) Beltran relies on the same standard to argue that Alvarado's counsel's misconduct was "so egregious that it infects the trial with such unfairness as to make [Beltran's] conviction a denial of due process."

In *Estrada*, a co-defendant's counsel disregarded the trial court's orders and engaged in an egregious pattern of improperly impugning the credibility of the appellant to the extent that the court, prosecutor, and appellant's counsel all stated they had never seen anything like counsel's behavior in their experience practicing law. (*Estrada, supra*, 63 Cal.App.4th at p.1101.) On appeal, the court recited the litany of "highly improper" conduct by counsel: his "comments concerning appellant's prior arrests, his suggestion that other evidence not presented at trial showed appellant's guilt, his suggestion appellant's failure to testify at [his client's] preliminary hearing was relevant to his credibility, his use of appellant's prior convictions to suggest appellant had a propensity to commit crimes, and his suggestion appellant's own attorney did not believe him. . . ."

(*Id*. at p. 1106.) The extreme nature of counsel's "constant and pervasive" misconduct caused the court to find that counsel had done "everything in his power, ethical and otherwise, to destroy appellant's credibility." (*Ibid*.) Therefore, the attorney's "acts of misconduct, inadequately checked by the trial court, were so egregious they infected the trial with such unfairness they denied appellant due process." (*Id*. at p.1107.)[21]

Here, Beltran's entire argument hinges on Alvarado's attorneys' purported misconduct as to *Alvarado's* alibi defense—he points to the same conduct outlined in Alvarado's ineffective assistance claim above. The only link to Beltran's defense was a statement by Alvarado's counsel in opening that Beltran's defense counsel "said he wants a not guilty verdict because there would be reasonable doubt. Ladies and gentlemen, we're going to provide and prove [Alvarado is] innocent. We're going to take it one step forward when the evidence comes out." Otherwise, nothing in the evidence or argument linked the two alibis. Beltran nevertheless contends that Alvardo's "foiled alibi defense" left the jury unable to independently and fairly evaluate his own alibi.

We disagree that the conduct by Alvarado's attorneys, even if it constituted misconduct, rose to the level demonstrated in *Estrada* so that it affected Beltran's due process rights. Crucially, none of the testimony, evidence, or argument related to Alvarado's alibi was linked to Beltran during the trial. Moreover, the alibis and supporting evidence presented by defendants were completely different—Alvarado claimed to have been gambling at a casino, while Beltran claimed he was at home helping his mother with her dialysis, and presented testimony from his two sisters in support of that claim. Apart from the simple fact that both defendants claimed to be elsewhere, there was nothing about the infirmities of Alvarado's alibi defense that undermined Beltran's defense. Thus, we conclude that Beltran was not denied a fair trial based on the conduct of Alvarado's attorneys.

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[21] The other two cases cited by Beltran deal with a co-defendant's counsel's comment on a defendant's failure to testify. (*People v. Hardy* (1992) 2 Cal.4th 86, 157; *People v. Haldeen* (1968) 267 Cal.App.2d 478, 481-483.)

3. Denial of Defendants' Motion for New Trial

Beltran also asserts that the trial court erred in denying his motion for a new trial based on Alvarado's counsel's misconduct. He claims that the trial court improperly focused its analysis on a single question posed by Alvarado's counsel to Lester, the casino employee, rather than reviewing the full extent of the misconduct alleged. He further argues that the court incorrectly applied the standard of ineffective assistance of counsel to his due process claims, rather than the prosecutorial misconduct standard under *Estrada*. We find that neither contention has merit.

First, the court's focus on defense counsel's question to Lester was not unreasonable. It was that exchange that immediately preceded the admission of the W-2G form, which is the centerpiece of defendants' claims about attorney misconduct. Moreover, the court's discussion of that question on the record, and its analysis of whether defense counsel's decision to pose it resulted in ineffective assistance, does not lead to the conclusion that the court refused to consider any other evidence of misconduct raised by Beltran. Second, while the *Estrada* court found the standard for prosecutorial misconduct to be a "useful guide" in evaluating a claim that a co-defendant's counsel's misconduct violated the appellant's due process rights (*Estrada, supra,* 63 Cal.App.4th at p.1096), Beltran cites no authority that compels the conclusion that the trial court was required to apply that template here. In any event, as discussed above, even under *Estrada* (and taking the full range of the asserted misconduct by Alvarado's counsel) we conclude that Beltran was not deprived of his right to a fair trial. Accordingly, even if the trial court erred, Beltran suffered no prejudice as a result.[22]

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[22] Because we found no individual errors, we also reject defendants' contention that the cumulative effect of the errors raised deprived them of a fair trial.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.