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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER LEE CASTILLO,

Defendant and Appellant.

C073250

(Super. Ct. Nos. CRF 10-1890
& CRF 09-1349)

What began as a one-on-one fight between victim J¹ and defendant Christopher Lee Castillo, a member of the Broderick Boys criminal street gang, ended in a brawl between victim J and his brother, victim R, on the one hand, and numerous members of the Broderick Boys, on the other. Defendant and other Broderick Boys gang members were charged with various crimes related to the fight. The case was resolved as to the codefendants, and the matter proceeded to trial against defendant alone. A jury found

¹ Consistent with the parties' briefs, the names of the victims and certain witnesses in this action are abbreviated.

defendant guilty of conspiracy to commit a felony violation of Penal Code² section 245, subdivision (a)(1) (§ 182, subd. (a)(1); count 1); assault with a deadly weapon (a hammer) upon victim J (§ 245, subd. (a)(1); count 2); assault by means of force likely to produce great bodily injury upon victim J (*ibid.*; count 3); assault by means of force likely to produce great bodily injury upon victim R (*ibid.*; count 4); and participation in a criminal street gang (§ 186.22, subd. (a); count 5).³ The jury also found true allegations defendant committed counts 1 through 4 for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members (§ 186.22, subd. (b)(1)), personally used a deadly weapon in the commission of counts 1 and 5 (§ 12022, subd. (b)), and personally inflicted great bodily injury in the commission of counts 1 through 3 and 5. In a bifurcated proceeding, the trial court found true an allegation that defendant was convicted in 2009 of participating in a criminal street gang, a serious felony (§ 667, subds. (a)(1), (c), (e)(1)).

The trial court sentenced defendant to an aggregate term of 26 years 8 months in state prison as follows: 8 years (the upper term, doubled for the prior strike) for the assault with a deadly weapon on victim J (count 2), plus a consecutive 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C)); a consecutive 2 years (one-third the midterm, doubled for the prior strike) for the assault on victim R (count 4), plus a consecutive 1 year (one-third the midterm) for the gang enhancement (§ 186.22, subd. (b)(1)(A)); a consecutive 5 years for the prior serious felony conviction (§ 667, subd. (a)); and a consecutive 8 months on a prior unrelated matter (Yolo County case No. CRF 09-1349). The trial court stayed defendant's sentences on the remaining counts

² Further undesignated statutory references are to the Penal Code.

³ The jury also found defendant guilty of simple assault upon victim J; however, the trial court granted the prosecution's motion to dismiss that count.

pursuant to section 654 and ordered defendant to make restitution to the victims in the amount of \$930 (§1202.4, subd. (f)).

Defendant raises numerous issues on appeal, none of which were raised below. His primary contentions concern the use of physical restraints. While the record contains no affirmative evidence that defendant was physically restrained, the trial court instructed the jury that physical restraints had been placed on defendant and to disregard them in deciding the issues in this case. Defendant contends the trial court prejudicially erred either by permitting him to be placed in physical restraints without a manifest need for such restraints, or alternatively, by instructing the jury that he had been placed in physical restraints when in fact he had not. Defendant also contends the trial court committed other instructional and evidentiary errors that warrant reversal, and that the prosecutor committed misconduct during his closing argument. Finally, he claims that there is insufficient evidence to support the gang conviction and enhancements, and that the victim restitution order should be designated as a joint-and-several obligation.

We shall conclude that defendant forfeited his claims concerning the use of physical restraints by failing to object to either the use of such restraints or the trial court's instruction concerning the same, and shall reject defendant's claim that his counsel rendered ineffective assistance in failing to object. With the exception of his insufficiency of the evidence claim, we shall conclude that defendant forfeited his remaining claims by failing to raise them below, and in any event, they lack merit.⁴ As for the insufficiency of the evidence claim, we shall conclude that it too lacks merit. Accordingly, we shall affirm the judgment in its entirety and shall direct the trial court to correct an error in the abstract of judgment.

⁴ Because we conclude these claims lack merit, we necessarily reject defendant's claims that counsel rendered ineffective assistance in failing to object to the complained of errors below.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Events Preceding the Fight*

In early 2010, victim R, a 16-year-old high school student, was involved in separate altercations with two Broderick Boys gang members at school, BL and “Roach.” Following the altercations, Roach’s older brother Alex Valadez went to the school to fight victim R. He was accompanied by his girlfriend and AM. Valadez and AM also were Broderick Boys gang members. School officials called victim R’s father to pick up victim R from school. As victim R and his father left the school, Valadez and his girlfriend told them, “Oh, we got your block. We got your apartment. We got nines. We know where you live.” They also said, “It’s on,” “We from Broderick,” “We don’t play, we lay you down.”

Valadez, his girlfriend, Roach, and AM followed victim R and his father to their apartment complex and yelled things like, “It’s on,” and “I got a uncle who is bigger than you,” “We from Broderick,” “We got knives. We shoot.” Eventually, they left. A month or so later, after the victims began receiving text messages telling them to “be careful” and “watch out,” the victims’ father moved the family to another part of West Sacramento.

B. *The Fight*

On March 19, 2010, victim R’s older brother, victim J, got a call from AM’s cousin telling him that AM had a problem with victim R. Victim J and AM’s cousin agreed that victim R and AM would meet at a park near a 7-Eleven store next to AM’s house, and if they could not resolve the problem, they would fight one-on-one. Victim J believed that if victim R fought AM one-on-one, win or lose, the problem would be resolved.

The victims got a ride to 7-Eleven from their friend’s mother. When they arrived, they saw a group of Broderick Boys gang members, including AM, BL, Charles Dykes Dalby, and Benny Hammond standing next to the 7-Eleven. Afraid they would be

ambushed, the victims remained in the car, and returned home. As they drove off, victim J received text messages asking, “Where you guys going” and calling them, “Pussy, bitches.”

When they got home, the victims walked to Nugget Market, where they were confronted by defendant, who asked, “[Y]ou got a problem with my family?” Victim J said that the problem was between victim R and AM, and that there was no need for defendant or anyone else to be involved. Defendant responded, “Okay. We’ll meet you at the park.” Victim R had seen defendant around before, but he had never met him. Victim J had never seen defendant before.

Victim J’s friend LT and LT’s girlfriend drove the victims to Memorial Park. Defendant rode up on a bike a few minutes later and asked, “Which one of ya’ll want to fight?” Victim J responded, “You’re not going to fight my brother, because he’s young. I’ll fight you, because my brother, look at him, you are an adult, 20-year old maybe.”

Victim J and defendant proceeded to fight. A few minutes later, two to five cars pulled up, people got out, including Valadez, AM, Hammond, Dalby, BL and Jesus Sanchez, and rushed the victims. Victim J told victim R to run. Valadez, Dalby, and Sanchez chased victim R down the street. Valadez threw a knife at victim R but missed. When they caught up to victim R, they pulled him down and kicked him more than 20 times. Victim R sustained multiple blows to his face and head and was left dazed and vomiting. He had a red mark on his eyeball for about a week and suffered scrapes and bruises to other parts of his body.

Meanwhile, AM, Hammond and others rushed victim J, punched him, knocked him down, and kicked him. When victim J got up, defendant hit him in the forehead with a hammer, knocking him to the ground. While he was on the ground, he was struck in the back of the head three or four more times with a hammer; however, he did not see who hit him. While he was on the ground, AM and others kicked and punched him and yelled, “[D]on’t fuck with BRK. BRK is beating your ass.” “BRK” is shorthand for

Broderick. Victim J did not know where defendant got the hammer. He did not see defendant with the hammer when they were fighting one-on-one; nor did he see anyone else with a hammer. Victim J suffered a swollen face, a wound to his forehead, knots on the back of his head, and cuts and scars on his body. The wound to his forehead required four deep and eight superficial sutures. While waiting to be treated at the hospital following the incident, victim J identified defendant in photographic line-up as the person who struck him with a hammer.

LT watched victim J fight defendant, and then saw three or four cars pull up and “a lot” of people get out and rush the victims. He admitted knowing the names of about half of the people who participated in the fight, but refused to name them at trial. He saw victim J get knocked down and victim R being chased down the street but repeatedly testified that he did not see victim J being hit with a hammer. At one point, however, he testified, “Hell yeah. I was scared. Hell yeah. Hell yeah. I seen a fool get hit with a hammer.”

At the preliminary hearing, LT testified that he saw defendant hit victim J with a hammer and saw the hammer fly through the air. When asked about his prior testimony at trial, he said that he was told by others that defendant hit victim J in the head with a hammer, but he did not see it happen. He explained that he heard a collective “big ass, ooh” from the crowd around victim J, immediately ran over to him, and heard people say that defendant struck him with a hammer.

LT testified inconsistently at trial as to whether he was concerned for his safety. He acknowledged that he had been confronted, threatened, and assaulted as a result of this case, and that some “[o]lder people” told him that if he did not say defendant was not involved, he would be “blasted.”

LT’s girlfriend also watched victim J fight defendant, and then saw several cars arrive and people from the cars run towards the victims. She saw parts of what happened to victim J, including him being kicked against a fire hydrant. She heard, but did not see,

victim J get hit in the head with a hammer. She was apprehensive about testifying. She did not want to get involved and was afraid of being labeled a “snitch.” She denied knowing of any threats made against her, but acknowledged that her sister received text messages about the Broderick Boys and about her being a snitch.

A woman who lived near the park testified that she saw two or three boys fighting for approximately 20 minutes before a number of cars arrived and people began jumping out of the cars. She estimated she was 180 yards away from the area where she saw the fighting. She instructed her daughter to call 911. She went inside for a moment, and when she returned she saw people kicking and punching two boys; one of the boys was being attacked in front of her house. As people were leaving the park, she saw a boy wearing black pants and a white T-shirt, whom she later identified as AM, holding what she believed to be a gun, but could have been a hammer. Her daughter told police that she saw a male strike victim J in the head with an unknown object. She also told police that she saw someone wearing a white T-shirt get out of one of the cars with a hammer.⁵

The prosecution’s gang expert, Officer Labin Wilson, spent five years as a gang officer in West Sacramento. He opined that the Broderick Boys, a subset of the Norteño criminal street gang, is the “biggest and most notable” criminal street gang in West Sacramento. The acronym “BRK” stands for Broderick Boys. The gang also goes by the name “Broderick,” and the Budweiser “B” is a common symbol for the gang. Based on his training and experience as a gang officer and conversations he has had with gang members, Wilson opined that the Broderick Boys’ primary activities include assault with a deadly weapon, narcotics trafficking, robbery, burglary, car theft, and carjacking. Wilson further opined that the Broderick Boys had engaged in a pattern of criminal

⁵ Contrary to defendant’s assertion, she did not tell “police that the person who attacked [victim J] with a hammer wore a white t-shirt and had a hammer in hand when he exited the car.”

activity, including: a shooting on March 2, 2007; an assault on April 16, 2007; a retaliatory assault and robbery of a 14-year-old girl who contacted law enforcement about a Broderick Boys gang member; and the underlying assaults on March 19, 2010.

According to Wilson, AM, Hammond, Valadez, Sanchez, Dalby, and BL were active Broderick Boys gang members at the time of the underlying assaults and pleaded guilty or no contest to at least one offense related to the underlying assaults on the victims. He based his opinion that the individuals were active members of the gang on their associations with gang members, gang related clothing, displays of gang symbols and gang-related hand signs, self-admission, criminal histories, prior violent conduct, and possession of gang-related graffiti.

Wilson also opined that defendant was an active member of the Broderick Boys at the time of the underlying assaults based on his involvement in 14 different gang-related incidents between 2006 and 2010, his possession of gang-related material, and his own admission that he was a gang member.

In response to a hypothetical based on the circumstances of this case, Wilson opined that the perpetrator of the charged crimes was acting in association with the gang in carrying out the crimes, for the benefit of the gang, and with the intent to further, promote, or assist in criminal activity by the gang. Wilson explained that given the hypothetical, wherein the two victims demonstrated that they were not afraid to stand up to the gang, the gang had to make an example of them or risk having its reputation weakened. By perpetrating such crimes, a gang member increases his or her status within the gang. On cross-examination, he admitted that “a gang member can be involved in an altercation and not be part of a gang crime,” and that it is possible for a gang member to be in a fight without intending to further the reputation of his gang.

C. Events Following the Fight

The day after the incident, the victims’ father went to the West Sacramento Police Department to obtain a copy of the police report. While there, he saw Valadez and

notified police that he was one of the men that “jumped” his sons. In the victims’ father’s presence, Valadez made a telephone call during which he directed the person he was speaking with to “Come up here. Come deep. . . . [The victims’] . . . dad is here. . . . It is about to go down.” Valadez also told the victims’ father, “[Y]ou guys are going to get what you deserve” and referred to him and his sons as “snitches” and “rats.”

A few days later, Valadez drove up and down the victims’ street, gesturing with his hand as if it was a gun. He did this again the following day, and the victims’ father telephoned the police. Fearing for his family’s safety, the victims’ father moved his family out of West Sacramento.

Within the six-month period prior to trial, “the Broderick people” went to victim J’s work, Del Taco, on more than one occasion and were “throwing up” Broderick hand signs. Victim J believed they were telling him, “Now we know where you work.” Victim J stopped working at Del Taco “[b]ecause they came to my job.” Victim J also was told that “hits” had been placed on him and his brother and shared that information with victim R.

DISCUSSION

I

Defendant Forfeited His Claims Regarding the Use of Physical Restraints by Failing to Object Below

As the parties acknowledge, there is no affirmative evidence in the record that defendant was physically restrained. With the parties’ approval, however, the trial court, instructed the jury in the language of CALCRIM No. 204 as follows: “The fact that physical restraints have been placed on the defendant is not evidence. Do not speculate

about the reason. You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.”⁶

Defendant urges us to assume, based on the trial court’s instruction, that he was subjected to physical restraints that were visible to the jury, and based upon that assumption argues that the trial court abused its discretion in permitting him to be physically restrained when there was no evidence of a “manifest need” for such restraints. Should we decline to assume that defendant was subjected to physical restraints visible to the jury, defendant alternatively contends that the trial court prejudicially erred in instructing the jury that he was placed in physical restraints when there is no evidence in the record that such was the case.

“ ‘[A] defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury’s presence, unless there is a showing of a manifest need for such restraints.’ ” (*People v. Miller* (2009) 175 Cal.App.4th 1109, 1113-1114.) “ ‘[T]he trial judge must make the decision to use physical restraints on a case-by-case basis. The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses unless there is a showing of necessity on the record.’ [Citation.] And the decision whether to shackle a defendant may not be delegated to security or law enforcement personnel; the trial court must make its own determination regarding restraints. [Citation.] ‘Moreover, “[t]he showing of nonconforming behavior . . . must appear as a matter of record The imposition of physical restraints in the

⁶ Prior to instructing the jury, the trial court “provided counsel with copies of instructions in the 200 and 300 series of CALCRIM” and stated on the record that the court and the parties had “informally reviewed and discussed these instructions, so this formal discussion should be fairly abbreviated.” The trial court continued, “In the 200 series, I intend to give the following instructions: CALCRIM 200, 201, 204 [Defendant Physically Restrained], 220 . . .” and asked the parties whether they had “any objection to the instructions I’ve referenced in the 200 series,” and both parties responded in the negative.

absence of a record showing of violence or a threat of violence or other nonconforming conduct will be deemed to constitute an abuse of discretion.” ’ ’ (Ibid.)

“The defendant . . . must object to the use of physical restraints or the claim will be deemed waived on appeal. [Citations.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 95.) “It is settled that the use of physical restraints in the trial court cannot be challenged for the first time on appeal. Defendant’s failure to object and make a record below waives the claim here.” (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583; see also *People v. Ward* (2005) 36 Cal.4th 186, 206 (*Ward*)). “Defendant’s failure to press the court for a ruling [on the necessity for physical restraints] ‘depriv[ed] the trial court of the opportunity to correct potential error.’ [Citations.]” (*People v. Ramirez* (2006) 39 Cal.4th 398, 450.)

Here, there is no indication in the record that defendant objected to either the use of physical restraints or to the trial court’s giving of CALCRIM No. 204. Defendant’s failure to object deprived the trial court of the opportunity to correct any potential error and forfeited the issues on appeal. (*Ward, supra*, 36 Cal.4th at p. 206.) It also deprived us of any meaningful basis for reviewing defendant’s claims. Even if we were to assume that defendant was physically restrained and that such restraints were seen by the jury, as defendant urges us to do, it does not follow that the trial court committed reversible error. “The customary practice of utilizing physical restraints while transporting a prisoner from place to place, e.g., from jail to courtroom and back, is a matter of common knowledge and generally acknowledged as acceptable for the protection of both the public and defendant. It has, in fact, been established that it is legally permissible to transport a prisoner to the courtroom in physical restraints. (See, e.g., *People v. Duran* [(1976)] 16 Cal.3d 282, 289; *People v. Hillery* (1967) 65 Cal.2d 795, 806.) Moreover, our Supreme Court has noted that it has been generally recognized that brief observations of a defendant in physical restraints by one or more jurors or veniremen either inside or outside the courtroom do not constitute prejudicial error. (*People v. Duran, supra*, 16

Cal.3d at p. 287, fn. 2; see also, *People v. Rich* (1988) 45 Cal.3d 1036, 1083-1085.)” (*People v. Jacobs* (1989) 210 Cal.App.3d 1135, 1141.) Absent evidence concerning the type of restraints used, if any, the circumstances of their use, whether they were visible to the jury, and if so, for how long, we have no way of determining whether the trial court erred, much less whether defendant was prejudiced thereby.

In apparent recognition of the forfeiture problem, defendant argues that his trial counsel was ineffective in failing to object to the use of physical restraints and the giving of CALCRIM No. 204.

“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.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.)

Here, there is no indication in the record that counsel was asked why he failed to object to either the use of physical restraint or the trial court’s instruction concerning the same. Nor does the record affirmatively disclose that counsel had no rational tactical purpose for failing to object. Nor is this a case where there simply could be no

satisfactory explanation. To the contrary, there could be a satisfactory explanation for counsel's failure to object. One or more jurors could have seen defendant in physical restraints for only a brief period while being taken to or from the courtroom, and counsel could have made the tactical decision to allow the trial court to instruct the jury that the physical restraints on defendant had no bearing on the determination of guilt as a cautionary measure. (See *People v. Jacobs*, supra, 210 Cal.App.3d at p. 1141.)

Under these circumstances, defendant's claims that counsel was ineffective in failing to object to the use of physical restraints and/or the trial court's instruction regarding the same are more appropriately resolved in a habeas corpus proceeding. (See *People v. Mai*, supra, 57 Cal.4th at p. 1009.)

II

Defendant Forfeited His Claims of Prosecutorial Misconduct, and in Any Event, the Claims Lacks Merit

Defendant next contends that the prosecutor engaged in misconduct during closing argument by (1) telling jurors that "co-defendants' post-crime, post-conspiracy judicial confessions and admissions made during guilty pleas constituted evidence that [defendant] was guilty" and (2) "minimiz[ing] the degree of the jurors' responsibility" in the decision making process. As we shall explain, he forfeited his claims, and in any event, they lack merit.

During closing argument, the prosecutor argued that defendant "was actively participating in the gang" when he committed the underlying assaults. In doing so, he referred to, among other things, Officer Wilson's testimony: "And you heard the testimony of Officer Wilson. Almost every single other person had admitted to committing the crime -- or admitted to doing the act for the benefit of the gang. So it's like [defendant] is running with this group where we're expected to believe that everyone else is doing this thing, but just him by himself was on his own little island, and he is not.

[¶] Again, looking at the way he contacted [the victims] at the Nugget, he knew what was going on and was part of it because he set it up.”

During his rebuttal, the prosecutor responded to defendant’s trial counsel’s argument that defendant is a smart kid who “show[ed] . . . potential,” arguing: “Bias or sympathy. [Defense counsel] talked about the potential for [defendant]. You know, even me, in my icy little prosecutor heart, occasionally feel a twinge of regret at the decisions that people make, but that’s not my job and that’s not your job. You’re deciding guilt or innocence. One step in an entire system that is designed to make sure he is treated fairly.” At that point, defendant’s trial counsel indicated that he was “going to object,” and the trial court overruled the objection. The prosecutor continued, “If you’re concerned about what happens to [defendant], it’s not a cold system that decides it. It’s a person. A judge. You’re only deciding whether or not the law has been broken in this case, and keep that in mind.”

“The applicable federal and state standards regarding prosecutorial misconduct are well established. ‘ “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” ’ [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ‘ “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” ’ [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).

As a preliminary matter, defendant forfeited his claims of prosecutorial misconduct by failing to object below. He made no objection to the prosecutor's reference to codefendants' admissions. While his trial counsel indicated he was "going to object" to the prosecutor's argument that the jury was "deciding guilt or innocence," he failed to specify a basis for his objection. More significantly, he failed to object to the prosecutor's statement, "If you're concerned about what happens to [defendant], it's not a cold system that decides it. It's a person. A judge. You're only deciding whether or not the law has been broken in this case, and keep that in mind." By failing to object and ask that the jury be admonished, defendant forfeited his prosecutorial misconduct claims on appeal. (*Samayoa, supra*, 15 Cal.4th at p. 841.) Even if the issues had been preserved for appeal, they lack merit.

Defendant contends "the prosecutor exhorted jurors to [(1)] use . . . evidence [of co-defendants' pleas] beyond the apparent scope for which it was admitted, i.e., the basis of the gang expert's opinions on the gang involvement of the co-defendants and the alleged gang-related nature of the charged offenses for enhancement purposes," and (2) "penalize [defendant] for exercising his fundamental constitutional rights to Due Process, Jury Trial, Confrontation, Cross-Examination, and Counsel." He is mistaken.

As previously discussed, Wilson opined that codefendants were members of the Broderick Boys criminal street gang, relying in part on codefendants' pleas in this case. This was proper opinion testimony. (*People v. Valadez* (2013) 220 Cal.App.4th 16, 29 ["California law permits gang experts to rely on reliable hearsay evidence to form an opinion, even if the evidence would otherwise be inadmissible."]; see also *People v. Gardeley* (1996) 14 Cal.4th 605, 617-618 (*Gardeley*) [same].) The jury was admonished as to the limited purpose for which such evidence was being admitted.⁷ When the

⁷ After Wilson was designated as a gang expert, the trial court admonished the jury on "how [to] use the information" it anticipated Wilson would provide: "It's been my

prosecutor's comments are considered in context, it is clear that he, like Wilson, was relying on the involvement of other Broderick Boys gang members in the charged offenses to bolster his argument that defendant was actively participating in the Broderick Boys gang when he committed the crimes charged. He was reminding the jury of the basis for Wilson's opinion that the other participants were gang members, and based on that fact, argued that it was inconceivable that defendant, a Broderick Boys gang member, was not acting on behalf of the gang. Doing so did not constitute misconduct. Nor could the prosecutor's comments reasonably be understood as suggesting that defendant should be penalized for not pleading guilty and instead exercising his right to trial.

Defendant also contends that the prosecutor prejudicially erred by "minimizing the degree of the jurors' responsibility in the decision-making process." Again, he is mistaken. The prosecutor advised the jury that they were responsible for deciding guilt or innocence, and the trial court was responsible for sentencing defendant. The prosecutor's remarks were neither inaccurate nor misleading. There was no misconduct.

III

The Trial Court Did Not Err in Failing to Instruct the Jury in the Language of CALCRIM No. 418

Defendant claims that the trial court erred in failing "to give instructions necessary to curb consideration of co-defendants' guilty pleas." Specifically, he asserts the trial

experience that experts testifying about criminal street gangs tend to use various hearsay sources in rendering their opinions. Those sources may include, but are not limited to, police reports, . . . field interview cards, jail booking records, probation reports, and statements by or conversations with people who are identified as gang members, but people you haven't heard from here in court and are not likely to hear from here in court. [¶] Those statements, those hearsay statements are not offered, and you can't consider them, for the truth of the matter stated in the hearsay statements. They're only offered to the extent that they form the basis of Officer Wilson's expert opinions. They are not offered, and you cannot consider them, to show that the defendant is a person of bad character or that he had a disposition to commit certain crimes."

court erred in failing to sua sponte instruct the jury in the language of CALCRIM No. 418 (Coconspirator's Statements).⁸ We disagree.

“The court has a **sua sponte** duty to instruct on the use of a coconspirator's statement to incriminate a defendant if the statement has been admitted under Evidence Code section 1223.” (Bench Notes to CALCRIM No. 418 (2012) p. 200; see also *People v. Jeffery* (1995) 37 Cal.App.4th 209, 215; *People v. Herrera* (2000) 83 Cal.App.4th 46, 63.) Here, the challenged statements were not admitted under Evidence Code section 1223; they were admitted under Evidence Code section 801, subdivision (b), which provides that an expert witness may base an opinion on “on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from

⁸ CALCRIM No. 418 reads in pertinent part:

“In deciding whether the People have proved that (the defendant . . .) committed [any of] the crime[s] charged, you may not consider any statement made out of court by [coconspirators] unless the People have proved by a preponderance of the evidence that:

“1. Some evidence other than the statement itself establishes that a conspiracy to commit a crime existed when the statement was made;

“2. _____ <insert name[s] of coconspirator[s]> (was/were) members of and participating in the conspiracy when (he/she/they) made the statement;

“3. _____ <insert name[s] of coconspirator[s]> made the statement in order to further the goal of the conspiracy;

“AND

“4. The statement was made before or during the time that (the defendant[s]/Defendant[s] _____ <insert name[s] of defendant[s] if codefendant trial and this instruction does not apply to all defendants>) (was/were) participating in the conspiracy.”

using such matter as a basis for his opinion.” (Italics added.) The trial court did not err in failing to instruct the jury in the language of CALCRIM No. 418.

IV

Defendant Forfeited His Claim That the Gang Expert Improperly Testified as to Defendant’s Mental State, and in Any Event, the Claim Lacks Merit

Defendant next contends that “[p]rejudicially improper testimony of the gang officer regarding [defendant’s] subjective mental state requires reversal.” As we shall explain, he forfeited the claim, and in any event, it lacks merit.

On cross-examination, defendant’s trial counsel elicited the following testimony from the prosecution’s gang expert Officer Wilson:

“[DEFENSE COUNSEL]: Are all members of gangs willing members of that gang?

“[WILSON]: Did you say willing?

“[DEFENSE COUNSEL]: Willing. W-I-L-L-I-N-G.

“[WILSON]: I don’t know if I -- I’m not sure I understand your question.

“[DEFENSE COUNSEL]: In other words -- well, you know -- for example, are some -- do some gang members get in the gang because they think they need to get in the gang for their own safety?

“[WILSON]: I think their motivations and reasons for getting in the gang probably vary. I think oftentimes it starts by just -- they think it’s something that they want to be part of.

“I don’t think anybody’s forced into it. I think there probably are cases where you’re born into it because you’re a family, so it’s just part of the environment you grew up in. So that may be -- that’s definitely a huge factor in why they end up being part of the gang.

“But gangs don’t force somebody to be a member. As a matter of fact, you have to prove your loyalty and your worth to the gang before they’re going to accept you as a member.

“[DEFENSE COUNSEL]: Well, we see movies -- or I don’t know how accurate they are, and that’s why I’m asking you. Many of the neighborhoods and kids go join the gangs for their own self-protection because if they don’t, they’re picked on, they’re hurt, something like that.

“Have you ever experienced anything like that in your professional capacity?

“[PROSECUTOR]: Objection. Vague. In West Sacramento?

“THE COURT: I’ll let him use all of his experiences to answer the question.

“Go ahead.

“[WILSON]: Yeah, I think there’s some degree of -- or I think that’s a factor sometimes. It’s -- you know, like all young people, you associate with what you think is cool or -- you know, and the people that you look up to or admire.

“So with gangs, yeah, I think they look at being part of the gang as an opportunity to kind of be part of this thing that seems attractive to them at the time. They look at older gang members and they -- people respect them, people bow down to them, people get out of their way. You know, they go to parties. They have this group that everybody is loyal to each other and respects each other.

“. . . There is safety in it, because now you aren’t an individual. Now you have all these fellow gang members backing you up.

“And . . . they look at their victims, people who get beat up by the gang, and when given a choice, do I want to be part of this group or -- I can either be part of the group and have people fear me and, you know, respect me, or I can be somebody that’s potentially a victim to people because I’m standing on my own.

“Yeah, I think that’s part of the attraction.”

On redirect, the prosecutor asked Wilson, “[I]n all your dealings with [defendant], did you ever get the impression that he was conscripted or forced to be in this criminal street gang?” Wilson responded, “No. From all indications, I mean, *I think he was a willing participant in the gang.* And if anything, he was -- he did commit quite a few acts to demonstrate his commitment to the gang.” (Italics added.)

“[E]xpert testimony regarding the defendant’s guilt in general is improper. ‘A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] ‘Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.’” [Citations.]” (*People v. Vang* (2011) 52 Cal.4th 1038, 1048.)

As a preliminary matter, defendant forfeited his claim by failing to object below. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10, citing Evid. Code, §§ 353, 354.) Even assuming the claim had been preserved, it lacks merit.

Wilson opined that defendant was a willing participant in the Broderick Boys criminal street gang. He did not opine that defendant was actively participating in the gang when he committed the crimes charged or that he committed those crimes for the benefit of, at the direction of, or in association with gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. Thus, contrary to defendant’s assertion, he did not “express[] an opinion on [defendant’s] subjective intent with respect to the gang charge, gang enhancements, and other charged assault offenses.” Moreover, even assuming for argument’s sake that the challenged testimony was improper, the error was harmless under any standard because there is no evidence to support a finding that defendant was anything other than a willing participant in the gang.

V

Defendant Forfeited His Claim Concerning “Evidence of Third Party Misconduct,” and
in Any Event It Lacks Merit

Defendant next complains that “[u]nfairly prejudicial evidence that third parties threatened and intimidated witnesses was used against” him. Once again, he forfeited the claim by failing to raise it below, and in any event, it lacks merit.

Prior to trial, the prosecutor indicated that he intended to present evidence that one or more witnesses were afraid to testify or feared retaliation. Defendant’s trial counsel indicated that he was not prepared to argue the point because he had just been given the legal authority relied upon by the prosecutor. The trial court deferred ruling on the issue at that time, stating that “we’re going to be dealing with this issue sometime this morning.” Later that morning, the prosecution called the victims’ father as their first witness. When the prosecutor asked him whether he had “ever been threatened by members of the [Broderick Boys] gang,” defendant objected “to foundation.” The trial court overruled the objection and admonished the jury as follows: “Ladies and gentlemen, if a witness testifies that he or she was threatened, that evidence is only admissible so, that you can assess the witnesses’ credibility as he or she testifies here in court. It’s not admissible and is not intended to suggest that the threats were specifically made by the defendant to the witnesses. The point is, so, that you can assess how the witnesses’ reacting here in court, and there’s a rational basis for that reaction.”

Thereafter, the victims’ father testified that he and the victims had been threatened by alleged coconspirators both before and after his sons’ were assaulted. While he testified that he was concerned for his family’s safety, he denied altering his testimony due to the threats. Evidence also was adduced that the victims, LT, and LT’s girlfriend had been threatened in relation to this case, and that they feared retaliation.

Defendant asserts that that evidence third persons threatened witnesses was improperly admitted because “[t]here is no evidence that witnesses altered testimony

because of threats or intimidation. . . . [W]itnesses who claimed to have been subjected to threats and/or intimidation also said that they were not deterred from cooperating as witnesses with police and at trial. All swore they were telling the truth at trial.”

Defendant misapprehends the law.

“ ‘[E]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness . . . [as is an] explanation of the basis for the witness’s fear’ [Citations.] ‘A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony. . . . [¶] Regardless of [the source of the threat], the jury would be entitled to evaluate the witness’s testimony knowing it was given under such circumstances.’ [Citation.]” (*People v. Merriman* (2014) 60 Cal.4th 1, 86 (*Merriman*)). In *Merriman*, the defendant argued that our Supreme Court had limited “testimony [that a witness is nervous and reluctant to testify] to circumstances in which the witness hesitates in his or her responses or when nervousness or fear interferes with the witness’s ability to testify truthfully.” (*Ibid.*) In rejecting the defendant’s argument, our Supreme Court explained that “[a] witness’s hesitation in answering questions is only one of any number of reasons that evidence may be relevant to his or her credibility; our cases establish no such limitations. [Citation.] Indeed, . . . a trial court has discretion, within the strictures of Evidence Code section 352, to permit the prosecution to introduce evidence *supporting* a witness’s credibility even on direct examination, so long as the prosecution reasonably expects the defense to attack the witness’s credibility during cross-examination. [Citation.]” (*Ibid.*, italics added.)

As a preliminary matter, defendant forfeited his claim by failing to object to any of the challenged evidence below. (*People v. Valdez* (2012) 55 Cal.4th 82, 138; *People v. Burgener* (2003) 29 Cal.4th 833, 869.) In any event, the claim lacks merit. The prosecutor reasonably could expect the defense to attack the credibility of their key witnesses during cross-examination. Thus, evidence the prosecution’s witnesses had

been threatened and/or intimidated by members of the Broderick Boys was relevant to their credibility even in the absence of evidence they altered their testimony.

VI

There Is Sufficient Evidence That the Broderick Boys Has as One of its Primary Activities the Commission of One or More of the Criminal Acts Enumerated in Section 186.22, Subdivision (e)

Defendant contends there is insufficient evidence to support his conviction for participation in a criminal street gang (count 5) and the jury's findings that he committed counts 1 through 4 for the benefit of, at the direction of, or in association with a criminal street gang. In particular, he asserts that the prosecution failed to establish the Broderick Boys is a criminal street gang because there is insufficient evidence the Broderick Boys' primary activities consisted of committing one or more of the crimes listed in section 186.22, subdivision (e). We disagree.

In considering a challenge to the sufficiency of the evidence, “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We will reverse the judgment for insufficiency of the evidence only if the defendant demonstrates that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 610.)

A “ ‘criminal street gang’ ” is defined as “any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e)*, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.” (§ 186.22, subd. (f), italics added.) The acts set forth in subdivision (e) include: assault with

a deadly weapon; robbery; the sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; burglary; car theft; and carjacking. (§ 186.22, subd. (e)(1), (2), (4), (11), (21), (25).) “Sufficient proof of the gang’s primary activities might consist of . . . expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on ‘his personal investigations of hundreds of crimes committed by gang members,’ together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley*, *supra*, at p. 620.)”⁹ (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.)

Here, as in *Gardeley*, the prosecution’s gang expert, Officer Wilson, testified that the Broderick Boys’ primary activities included assaults with deadly weapons, narcotics trafficking, robbery, carjacking, car theft, and burglary, all statutorily enumerated offenses. (§ 186.22, subd. (e)(1), (2), (4), (11), (21), (25).) He based his testimony on his training and experience as a gang officer and on conversations he had with gang members.

This case is readily distinguishable from *In re Alexander L.*, *supra*, 149 Cal.App.4th at page 605, relied on by defendant. There, the prosecution’s gang expert was asked about the primary activities of the gang and replied: “ ‘I know they’ve

⁹ In *Gardeley*, “The prosecutor asked [the expert] for his opinion as to the primary purpose or activity of the Family Crip gang. [The expert] responded that based on investigations of hundreds of gang-related offenses, conversations with defendants and other Family Crip members, as well as information from fellow officers and various law enforcement agencies, it was his opinion that the Family Crip gang’s primary purpose was to sell narcotics, but that the gang also engaged in witness intimidation and other acts of violence to further its drug-dealing activities.” (*Gardeley*, *supra*, 14 Cal.4th at p. 612.)

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.' ” (*Id.* at p. 611.) “No further questions were asked about the gang’s primary activities on direct or redirect examination.” (*Ibid.*) In concluding that the prosecution presented insufficient evidence of the gang’s “primary activities,” our colleagues in Division Three of the Fourth Appellate District explained that the gang expert’s “entire testimony on this point is quoted above—he ‘kn[e]w’ that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information. He did not directly testify that criminal activities constituted [the gang’s] primary activities.” (*Id.* at pp. 611-612.) Even assuming that it reasonably could be inferred that the expert meant that the primary activities of the gang were the crimes he references, the court concluded that “his testimony lacked an adequate foundation,” explaining that “[w]e cannot know whether the basis of [the expert’s] testimony on this point was reliable, because information establishing reliability was never elicited from him at trial. It is impossible to tell whether his claimed knowledge of the gang’s activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay.” (*Id.* at p. 612, fn. omitted.)

In contrast, here, Wilson directly testified that criminal activities constituted the Broderick Boys’ primary activities, and that he based his testimony on his training and experience as a gang officer and conversations with gang members. Thus, the court knew where the information to which Wilson was testifying originated and was able to assess its reliability.

There is ample evidence to support a finding that the Broderick Boys’ primary activities included one or more of the statutorily enumerated offenses.

VII

The Trial Court Did Not Err in Failing to Designate the \$930 Restitution Order as a Joint-and-several Obligation

Finally, defendant contends that “[t]he court should have designated the [\$930] victim restitution order as a joint-and-several obligation to be shared by all the defendants in Yolo County Case No. CRF101890 instead of ordering [defendant] to pay the full amount alone.” As we shall explain, he forfeited the claim, and in any event, it lacks merit.

“The trial court is required to order restitution to crime victims, and the court has authority to make the obligation of multiple codefendants joint and several.” (*People v. Neely* (2009) 176 Cal.App.4th 787, 800; see also § 1202.4, subd. (f); *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535.)

Once again, defendant forfeited this claim by failing to raise it below. (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218.) In any event, the claim lacks merit. According to the probation report, the victims requested a total of \$930 in victim restitution, and the trial court “impose[d] restitution in the total amount of nine hundred and thirty dollars.” While trial courts have the authority to make the obligation joint and several, nothing in the restitution statute dictates that the restitution order must be designated joint and several in multi-defendant cases. (§ 1202.4, subd. (f); *People v. Neely, supra*, 176 Cal.App.4th at p. 800; *People v. Blackburn, supra*, 72 Cal.App.4th at p. 1535.) Moreover, defendant did not request and the prosecution did not agree that the restitution order should be designated a joint and several obligation. Defendant argues that failing to designate the restitution order as a joint and several obligation leaves open the possibility that the victims will be unjustly enriched. There is no evidence in the record, however, that any of the codefendants were ordered to pay victim restitution, and hence no evidence that the victims may be unjustly enriched. The trial court did not err in imposing \$930 in restitution in this case.

As the People point out, the abstract of judgment does not reflect the \$930 restitution order imposed by the trial court. We shall direct the trial court to amend the abstract of judgment to comply with the trial court's order.

DISPOSITION

The judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect the \$930 restitution fine imposed by the trial court and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

BLEASE, Acting P. J.

We concur:

HULL, J.

HOCH, J.