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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LORENZO ROSS et al.,

Defendants and Appellants.

D058377

(Super. Ct. No. SWF026083)

APPEALS from judgments of the Superior Court of Riverside County, Timothy F. Freer, Judge. Affirmed.

I.

INTRODUCTION

Defendants Lorenzo Ross and Joel Armine Arnold appeal from judgments of conviction after a joint jury trial. Ross and Arnold contend that the trial court (1) erred in failing to instruct the jury on the issue of whether a "special relationship" existed between one of the victims and his sister and her boyfriend, who were the owners of a PlayStation

game system that the defendants stole from the victims, such that defendants could be convicted of robbery as to that victim; (2) abused its discretion in limiting defense counsel's cross-examination of one of the victims concerning compensation that she received for expenses related to relocating from the apartment where the crime occurred; and (3) erred in permitting the prosecutor to elicit testimony from the gang expert regarding their prior contacts with police, on the grounds that the information was inadmissible hearsay, and that its introduction was more prejudicial than probative, as well as on the grounds that the admission of this evidence violated their confrontation clause and due process rights.

Ross separately contends that the trial court erred in instructing the jury on the aiding and abetting doctrine, as applied in this case, by telling the jury that he was "equally guilty" of the crime as the direct perpetrator, even though he could have been found guilty of a lesser crime than the direct perpetrator. Finally, Ross contends that there is insufficient evidence to uphold his conviction for assault with a firearm on an aiding and abetting theory.

We conclude that none of the defendants' claims on appeal provides a ground for reversal or modification of the judgments. We therefore affirm the judgments of the trial court.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution case*

Jane Doe,¹ who was 22 years old at the time of the incident, lived in an apartment in Hemet with her boyfriend, Christopher T., her 17-year-old brother, Gerald H., and her two children. Doe had known Arnold since early 2004. She also knew Ross. Arnold's nickname was "Man-Man," and Ross went by the nickname "Jersey." Doe, Arnold and Ross had hung out together with other people in the past, and had gone to movies, parties and out to eat together. Gerald knew Arnold and Ross through his sister. Christopher knew Ross, but had not met Arnold prior to the night of the incident.

On the evening of July 14, 2008, Doe and her mother went to a casino. Doe won \$400 that night. She returned home at approximately 12:20 a.m. Gerald was in the apartment, watching television with a neighbor.

That night, Doe had in her possession about \$1,700 in cash, since she had recently been paid, had cashed a stimulus check, and also had her new gambling winnings. While Doe was counting her money, Ross, Arnold, and another man, Tyshawn Lewis, appeared at the front door of her apartment. Because it was hot outside at the time, the apartment door had been left open. A child's safety gate was blocking the doorway.

¹ The trial court ordered that the female victim's name in this case be reflected in the reporter's transcript and court minutes as "Jane Doe." The court also ordered that the two male victims be identified by their first names and last initials, only.

From the doorway, Ross said, "That's a lot of money." Doe explained that it was to be used to pay a lot of bills. Ross asked Doe if he could have some of the money, and Doe gave him a single dollar bill. Doe placed about \$1,000 of the money in her purse, and hid the rest in a bedroom drawer and other places in the apartment. Ross, Arnold and Lewis left and went downstairs, where they hung out with another man at the back of the apartment complex.

At approximately 3:00 a.m., Gerald, who slept on the living room couch, was awakened when he heard a knock on the apartment door. Gerald looked out a window, but did not see anyone. Gerald opened the door and saw Ross, Arnold, and a third man. The third man was carrying a shotgun and had a dark blue bandana covering his face. One of the men punched Gerald in the face, causing him to take a few steps back. Someone told Gerald to get on the ground, and the man with the shotgun shoved him down. Gerald lay on the ground, face down.

Two of the men walked past Gerald and into the bedroom of the apartment. Christopher awoke to a double barrel shotgun being pushed against his cheek. Doe believed that the man with the shotgun was Tyshawn Lewis, based on the man's build, skin color, and height.² The man asked Christopher where the money was. Christopher responded that he did not have any money. The man with the gun repeated the question a number of times, and Christopher responded each time that he did not have any money.

² As it turned out, Tyshawn Lewis had been arrested earlier that evening, so the third man could not have been Lewis.

The man hit Christopher in the face with the shotgun "a lot" of times and then told Christopher to awaken Doe.

Doe awoke to Christopher's screaming. At that point, the shotgun was about three inches from her nose. The man with the shotgun asked, "Bitch, where's the money at?" and shouted at Doe, "Give me your fucking money." Doe got out of bed and walked toward the door of the bedroom to get her purse. While she was walking toward the door, Arnold grabbed her by her hair and forced her to look down.

As Doe was retrieving her purse, she saw Ross standing at the front door of the apartment in a "security-style" position. His hands were down, and he was holding a gun in one hand.

Doe picked up her purse, threw it on the floor and said, "Take the fucking money. Get the fuck out of here. Get out of my house." Arnold pushed Doe over the armrest of the couch so that she was leaning forward, bent over. Ross came into the apartment and forced Doe to look down. One of the men put a towel over her face. Doe then felt two sets of hands on her, touching her breasts, thighs, hips and shoulders. Doe was scared. She counted to five to try to gather some strength, and then swung at the men with her fists.

In the meantime, Christopher jumped on top of the man with the shotgun when that man turned around. The man bit Christopher on the hand, broke loose and ran out the front door of the apartment. Arnold and Ross followed the man with the shotgun out the door. Christopher chased them until he stepped on a rock with his bare foot.

Doe told Gerald to call 911, which he did. Doe spoke with the 911 operator. Doe told the operator that Arnold, Ross, and Lewis—men whom she knew from down the street—had just held a shotgun to her face and robbed her.

The men escaped with all of the money that had been in Doe's purse, and a PlayStation that had been in Doe's apartment.

Doe had bruises on her arms and thighs. Christopher suffered bite marks on his hand and some cuts in his mouth. Gerald had a lump on his face, and suffered injuries to his shoulder and arm. All three left the apartment after the police left that morning, and returned only to gather their belongings. Doe eventually moved out of the state.

After being advised of, and waiving, his *Miranda* rights, Arnold spoke with police detectives. Arnold initially denied any involvement in the crime. However, he eventually admitted that Gerald had opened the door and that he had punched Gerald in the face. Arnold also admitted that he entered the apartment and took the PlayStation, which he said he sold the following day for \$100. Arnold denied having taken any money, although he admitted that he had gone to the apartment to get money because he knew that Doe had won some money at the casino. Arnold claimed that he had touched Doe only on the arm. He refused to say whether anyone else had committed the crime with him.

Hemet Police Officer Takashi Nishida testified as a gang expert at trial. He described how gangs function, and explained that they instill fear in the community and that they will retaliate if someone reports a crime. He also explained that gangs have territories, use graffiti, often use nicknames or monikers, and use intimidation as a tactic.

Nishida testified that the Blocc Boyz Crips, also identified as BBC, was a predominately black gang in Hemet that originated in the late 1990's. BBC used the color blue, and the gang's territory included the area where the victims' apartment was located. BBC's primary activities were engaging in drug sales, possessing weapons, and committing shootings, robberies and other thefts. In Nishida's opinion, BBC was a criminal street gang.

Nishida also was of the opinion that Ross and Arnold were members of the BBC gang. Nishida noted that both men had told Doe that they were in the gang. In addition, the jury was shown photographs that depicted Ross wearing a blue bandana, blue shoes, and a blue cap with the letter "B" on it. Ross could also be seen demonstrating gang signs. Other photographs were introduced that depicted Arnold demonstrating gang signs and wearing blue apparel, including a blue cap with the letter "B" on it. In addition, police seized gang-related items from Arnold's house, including blue bandanas, a rap song list, and a piece of paper with rap lyrics written in blue ink. Arnold had his moniker, "Man Man," tattooed on his left arm, and a tattoo of the grim reaper and the words, "Hated by Many," on his right arm.

In order to demonstrate a pattern of criminal gang activity engaged in by BBC members, Nishida testified that BBC members LeQuan Miller, Dominick Davis, and Jamal Goudeau were present when police responded to a call of shots having been fired on December 26, 2007. Miller was in possession of a firearm, and was later convicted for this offense. BBC member Roshan Thomas had been convicted of being a felon in possession of a firearm arising from his arrest on October 28, 2007.

Nishida knew the defendants from personal contacts with them. In addition, Nishida had reviewed various field interview cards and reports pertaining to the defendants. According to Nishida, Ross had been contacted by law enforcement 63 times over a four-year period. Nishida described some of these contacts, explaining the nature of the contact, and whether Ross was in BBC territory and with whom he was associated at the time of the contact.³ Nishida similarly described Arnold's contacts with law enforcement.

The prosecutor presented Nishida with a hypothetical based on the facts of this case. Nishida opined that the crime presented in the hypothetical would have been committed for the benefit of, and in association with, the BBC criminal street gang. Nishida believed that the hypothetical crime was committed in association with the gang because more than one gang member had been involved in the commission of the crime, and the crime benefitted the gang because it fostered intimidation and fear in the community, which is one of the goals of the gang. Nishida explained that when members of the community are fearful of the gang, they are less likely to cooperate with law enforcement, and gang members are then more easily able to continue to commit crimes and sell drugs without being caught. In addition, committing crimes that instill fear in the community enhances the reputation of gang members.

³ Ross's defense counsel and the prosecutor stipulated that most of Ross's contacts with police had not resulted in his arrest, and that he had not suffered any convictions as a result of the contacts.

2. *The defense case*

Ross presented no evidence. Arnold called his mother and two Hemet police officers to testify. Arnold's mother testified that the blue bandanas that police found at Arnold's house belonged to her and said that she had never witnessed her son engaging in gang activities or hanging out with gang members.

Arnold's defense attorney asked Officer Jaime Gonzales about statements that the three victims made at the time of the incident, presumably in order to draw out inconsistent statements that would impeach the victims' testimony. Defense counsel also elicited from Gonzales that when he interviewed Doe on the morning of the robbery, she did not tell him that she had been sexually assaulted. Gonzales also admitted that officers did not have the scene processed by forensic technicians, did not take photographs, and did not interview neighbors. Gonzales also testified about the fact that Christopher had not identified any of the defendants in the photographic lineup that Gonzales presented to Christopher just after the incident.

Defense counsel asked Officer Douglas Klinzing about Doe's contacting him on the afternoon of July 15, 2008, when she provided him with the serial number of the PlayStation that had been stolen, and also told him for the first time that she had been touched inappropriately by the assailants. Doe explained to Klinzing that she had been too embarrassed to report the sexual battery to the officers who responded at the scene after the incident.

B. *Procedural background*

On March 29, 2010, a jury convicted Ross and Arnold of the following offenses in connection with the July 15, 2008 home invasion incident: robbery of victim Jane Doe (Pen. Code,⁴ § 211, count 1); robbery of victim Christopher T. (§ 211, count 2); robbery of victim Gerald H. (§ 211, count 3); burglary (§ 459, count 4); assault with a firearm (§ 245, subd. (a)(2), count 5); battery⁵ (§ 243, subd. (a), count 6); and active participation in a criminal street gang (§ 186.22, subd. (a), count 8).

The jury also found true a number of enhancement allegations. As to the robberies charged in counts 1 through 3, the jury found that both defendants voluntarily acted in concert with two or more persons (§ 213, subd. (a)(1)(A)). As to counts 1 through 5, the jury found that both defendants committed the crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)). The jury also found that Ross personally used a firearm in the commission of counts 1 through 3 (§ 12022.53, subd. (b)), and found that Arnold was a principal in the commission of counts 1 through 3, and at least one principal personally used a firearm (§ 12022.53, subd. (e)).

The trial court sentenced Ross to an indeterminate term of 50 years to life, and sentenced Arnold to an indeterminate term of 45 years to life.

⁴ Further statutory references are to the Penal Code unless otherwise indicated.

⁵ The jury convicted the defendants of battery as a lesser included offense of sexual battery, as charged in count 6.

III.

DISCUSSION

A. *The trial court was not required to instruct the jury on the issue of a "special relationship" between Gerald and Doe or Christopher with respect to the count that charged the robbery of victim Gerald*

Arnold and Ross contend that the trial court erred by failing to instruct the jury, sua sponte, that in order to convict them of robbing Gerald in count 3, it had to find that there was a special relationship between Gerald and Doe or Christopher.⁶ According to the defendants, because the property that was taken did not belong to Gerald and was not controlled by Gerald, in order to convict the defendants on count 3, there must have existed a special relationship between the owner of the stolen property and the victim, such that "constructive possession" exists sufficient to justify a finding that the property was taken from the victim's possession.

1. *Additional background*

With respect to all of the robbery counts, the trial court instructed the jury with CALCRIM No. 1600 as follows, in relevant part:

"To prove that the defendants are guilty of [the] crime [of robbery], the People must prove that:

"1. The defendant took property that was not his own;

⁶ Although only Arnold makes this argument in his briefing, Ross joined in the arguments raised by Arnold that would also affect the judgment as to him. Because a reversal of the robbery count with Gerald as the victim could inure to Ross's benefit as well as Arnold's, we address the contention as if both defendants had raised the argument on appeal.

"2. The property was taken from another person's possession and immediate presence;

"3. The property was taken against that person's will;

"4. The defendant used force or fear to take the property or to prevent the person from resisting;

"AND

"5. When the defendant used force or fear to take the property, he intended to deprive the owner of it permanently.

"[¶] . . . [¶]

"The property taken can be of any value, however slight. Two or more people may possess something at the same time.

"A person does not have to actually hold or touch something to possess it. It is enough if the person has . . . the right to control it, either personally or through another person."

During closing argument, with respect to count 3, the prosecutor argued that Gerald was a victim of the robbery because the defendants took the PlayStation from his immediate presence. The prosecutor argued that Gerald slept in the living room, the room in which the PlayStation was kept, and that he was "always watching movies using that PlayStation."

2. *Analysis*

"Robbery is defined in section 211 as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' " (*People v. Scott* (2009) 45 Cal.4th 743, 749 (*Scott*)). "Robbery is a crime of violence committed against a person. [Citation.] Robbery of a particular person has not occurred unless property was taken from the

person's immediate presence and the defendant used force or fear to take the property or to prevent the person from resisting. [Citation.]" (*Ibid.*)

"A person from whose immediate presence property was taken by force or fear is not a robbery victim unless, additionally, he or she was in some sense in possession of the property. 'It has been settled law for nearly a century that an essential element of the crime of robbery is that property be taken from the possession of the victim.' [Citation.]" (*Scott, supra*, 45 Cal.4th at p. 749.)

"A person who owns property or who exercises direct physical control over it has possession of it, but neither ownership nor physical possession is required to establish the element of possession for the purposes of the robbery statute. [Citations.] '[T]he theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims.' [Citation.] Two or more persons may be in joint constructive possession of a single item of personal property, and multiple convictions of robbery are proper if force or fear is applied to multiple victims in joint possession of the property taken. [Citation.]" (*Scott, supra*, 45 Cal.4th at pp. 749-750.)

"[A] person who has the right to control property has constructive possession of it. [Citations.] For constructive possession, courts have required that the alleged victim of a robbery have a 'special relationship' with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner." (*Scott, supra*, 45 Cal.4th at p. 750, citing *Sykes v. Superior Court* (1994) 30 Cal.App.4th 479 and *People v. Galoia* (1994) 31 Cal.App.4th 595.)

The defendants argue that the "jury was not instructed as to how a person not the owner nor physically possessing the property could be impressed with a right of control." According to the defendants, "[f]or well over a century . . . possession of the property by the victim has been 'an essential element' of robbery," and if a victim did not own the property or have custody or physical control of it, then such a victim would have to have a " 'special relationship' " with the owner of the property, " 'such that the victim had authority or responsibility to protect the stolen property on behalf of the owner.' " The defendants contend that the trial court should have provided the jury with guidance as to how to determine whether a person who does not own or directly control certain property nevertheless has a "special relationship" with the owner of the property that gives that person implied authority to protect the property when it is threatened during a robbery.

At the outset, we note that the defendants do not challenge the correctness of CALCRIM No. 1600—the instruction that the trial court provided to the jury with respect to the offense of robbery. Rather, they maintain that the trial court should have provided a clarifying instruction that would have given the jury additional guidance on a matter that defendants claim is unique to this particular situation. However, where jury instructions correctly state the law, but a defendant claims that the instructions were too general or incomplete, such claim of error is forfeited absent a request for a clarifying instruction. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1140.) Having failed to request a clarifying instruction on the issue of victim Gerald's "special relationship" to the owners of the property or the property itself, Arnold and Ross have forfeited this argument.

Even assuming that the defendants had not forfeited this argument, we do not agree with the premise of their contention that the court should have instructed the jury with respect to the question of Gerald's "special relationship" to Doe and/or Christopher. In making this argument, the defendants essentially assume that because Gerald did not own the PlayStation and did not have the PlayStation in his immediate possession at the time of the robbery, the court was required to instruct the jury that in order to convict the defendants for robbery of Gerald, the jury had to find that Gerald had a "special relationship" with the owners of the PlayStation. Specifically, the defendants argue that "language comparable to that found in CALCRIM No. 1600 for employee situations^[7] before the *Scott* decision must still be included for non-employee situation: do the facts

⁷ Earlier cases that considered whether a particular individual who is not the owner of the property and is not at the moment in immediate control of the property could nevertheless be a victim of a robbery were often considering robberies of businesses where the alleged victim was an employee of the business. (See, e.g., *People v. Nguyen* (2000) 24 Cal.4th 756, 761, and cases cited therein.)

show that the person who neither owns nor directly controls the property had implied authority from the owner to protect the property when it is threatened during a robbery."⁸

The defendants have cited no authority for the proposition that a trial court must instruct the jury on a particularized meaning of "special relationship"—even outside the context of an employee/employer situation—in order for the jury to properly convict a defendant of robbery where the victim in question is not the owner and did not directly possess the property. On the contrary, courts have relied on the existence of a "special relationship" between a victim and other victims and/or property in upholding convictions in the absence of any specialized instruction to the jury as to how to determine whether a "special relationship" existed. In fact, in *People v. Weddles* (2010) 184 Cal.App.4th 1365, 1370, the court upheld the defendant's conviction for robbery as to Armando, the brother of Alex, who was the apartment tenant and the individual whose

⁸ The optional jury instruction language regarding the special relationship involved in employee robbery victim cases that had been provided in CALCRIM No. 1600, to which the defendants refer, was cited by the Supreme Court in *Scott, supra*, 45 Cal.4th at page 750, footnote 5, as follows: "If the facts show that the employee was a representative of the owner of the property and the employee expressly or implicitly had authority over the property, then that employee may be robbed if property of the store or business is taken by force or fear." [Citation.] In *Scott*, however, the Supreme Court determined that in every instance in which an employee is present during a robbery at his or her place of employment, a "special relationship" exists between the employee and employer, such that the employee has constructive possession of the employer's property. (See *id.* at p. 754.) As a result, the optional jury instruction regarding employee/employer robbery situations that had been offered with CALCRIM No. 1600, as cited by the *Scott* court, is no longer applicable in situations involving the robbery of a business where an employee is present, and instead the following optional instruction is offered: "A store or business employee who is on duty has possession of the store or business owner's property." (See CALCRIM No. 1600 (2011) [optional punctuation and spaces omitted].)

money was taken by the defendant. Both Alex and Armando were in the apartment on the night of the robbery, but the money was taken from Alex's bedroom. Armando did not live in the apartment, and there was no indication that Armando had ever possessed the money or had been given the right to control the money that the defendant took from Alex's bedroom. (See *id.* at pp. 1367-1371.) Despite the defendant's claim on appeal that Armando had neither possession of, nor an interest in, the money that belonged to his brother, the appellate court affirmed the conviction as to Armando as a victim of robbery. The court cited the fact that Armando had a "close familial relationship with the owner of the property," had a "regular presence at the apartment, " and had "knowledge of where the property was hidden by Alex" to support the conclusion that "Armando had constructive possession of the cash" that was conferred on him as a result of his "special relationship with Alex." (*Id.* at pp. 1370, 1371.) Although the appellate court in *Weddles* relied on Armando's "special relationship" that "endowed [him] with constructive possession of his brother's cash" (*id.* at p. 1370), there is nothing to suggest that the jury in that case had been specially instructed as to how to determine whether a "special relationship" existed between the brothers.

Further, in this case, it is clear that there was evidence that Gerald's sister and her boyfriend had given Gerald the right to use and control the PlayStation, and the jury was instructed that it could find that Gerald possessed the stolen property if he "ha[d] . . . the right to control" the property in question. This was a sufficient basis for the jury to determine that Gerald had constructive possession of the PlayStation, such that he could be expected to resist the taking of the property, as opposed to being merely a casual

visitor to the apartment with no greater interest in the property than any other visitor. (See *Scott, supra*, 45 Cal.4th at pp. 757-758 ["By requiring that the victim of a robbery have possession of the property taken, the Legislature has included as victims those persons who, because of their relationship to the property or its owner, have the right to resist the taking, and has excluded as victims those bystanders who have no greater interest in the property than any other member of the general population"].) Unlike *Weddles*, where the victim in question did not live in the apartment and there was no evidence that he had ever been given the right to control the money that was stolen from his brother, in this case there was evidence that Gerald lived in the apartment (thereby giving him constructive possession of the items in the joint living space of the apartment), and that he had been given the right to control the PlayStation by virtue of his access to and use of the PlayStation. In fact, Gerald testified that he had been watching television and "playing a game" earlier on the night of the incident. Because of the nature of the evidence, it was clear that the jury was fully instructed with respect to how to determine whether the defendants unlawfully took property of which Gerald had constructive possession. No further instruction with respect to Gerald's "special relationship" to the other victims or the stolen property was necessary.

B. *The trial court did not abuse its discretion in limiting defense counsel's cross-examination of Doe concerning her compensation for relocation expenses*

The defendants⁹ contend that they were denied their Sixth Amendment right to confront witnesses against them as a result of the court's ruling that defense counsel would not be permitted to inquire of Doe about matters related to compensation for relocation expenses that the district attorney's office may have provided to her.

1. *Additional background*

During Arnold's defense attorney's cross-examination of Doe, counsel asked Doe whether she had gone to the police department to obtain a copy of the police report pertaining to the incident. Doe replied that she had. Counsel then asked, "Before you do that, you go to the district attorney's office. You talk to a victim witness person, and you apply for some special money, don't you?" Doe responded, "Not before that." Counsel then asked Doe whether she had applied to receive some money on July 22. The prosecutor objected on relevance grounds and the trial court sustained the objection.

Counsel proceeded to ask Doe whether she had received \$2,043 from the district attorney's office prior to August 8, 2008, the date on which she talked with an officer. The prosecutor again objected on relevance grounds. After an unreported bench conference, the trial court sustained the objection.

The trial court and the attorneys later memorialized on the record what had occurred at the bench conference. Arnold's attorney argued that the question he posed to

⁹ As with the previous argument, this argument was initially raised by Arnold. Because Ross has joined in all arguments made by his codefendant that apply to him, we address the issue as having been raised by both defendants.

Doe was relevant because it went to Doe's bias and interest, and showed her state of mind. He asserted that Doe had made inconsistent statements, and that by receiving money from the district attorney's office, she became "locked into" a position. The prosecutor responded that the matter of Doe being paid was irrelevant unless the defense could demonstrate that Doe knew, at the time she placed the 911 call and initially spoke with police officers, that she would be receiving money and/or assistance in relocating. The prosecutor further stated that the fact that Doe agreed to have photographs taken on the day after the incident showed that she intended to cooperate with law enforcement, and therefore, anything that occurred after that point in time was not relevant.

Ross's attorney argued that the issue of Doe's relocation compensation was relevant because she was testifying in court after having received the compensation, and the fact that she had been compensated tended to establish bias. Counsel maintained that the jury should be permitted to decide whether it believed the compensation had influenced Doe's testimony.

The trial court indicated that it had sustained the objection on relevance grounds, and also pursuant to the court's analysis under Evidence Code section 352. The court determined that although there was some "logical relevance" of the testimony that defense counsel was attempting to elicit, the legal relevance of the information was minimal, in that there was nothing else that would suggest that Doe had at any point been uncooperative with law enforcement. In addition, the court stated that allowing counsel to question Doe about the matter of compensation would "open[] cumulative testimony that the court doesn't believe is necessary nor necessarily going to assist the fact finder at

all with respect to assessing her credibility." According to the trial court, Doe had been cross-examined about "the events [of] that night, the 911 dispatch call, and the application for paying for funds [sic], number one. [¶] And in terms of just the question of what is the level of cooperation would require a number of questions to describe whether or not she was or was not cooperating prior to any signed agreement, [and] after she signed an agreement."

The trial court also noted its concern that eliciting testimony from Doe on the matter of her compensation for relocating would actually be prejudicial to the defendants because the fact that the district attorney's office had assisted Doe in relocating after the incident would imply that the defendants were dangerous. The court concluded that the minimal probative value of the evidence did not outweigh the potential prejudice to the defendants of allowing it in.

The following day, the prosecutor asked Gerald, "After July 15th of 2008, when all this happened, did you continue living in that apartment?" Gerald replied that he had not continued to live in the apartment. When the prosecutor asked him why he had not stayed in the apartment, Ross's attorney objected. The attorneys and the court proceeded to discuss the objection at an unreported sidebar conference. After going back on the record, the trial court requested that the prosecutor repeat the question and that defense counsel repeat the objection. The prosecutor asked, "Gerald, why did you move out?" Ross's attorney, joined by Arnold's attorney, objected on relevance and Evidence Code section 352 grounds. The trial court overruled the objection. Gerald proceeded to testify that after the incident, he had moved out of the apartment because "they were still out

there. I didn't want to stay there in case they came back." Gerald testified that he never returned to the apartment after the night of the incident.

Later that day, the trial court allowed defense counsel to make a record regarding his objection to the prosecutor's questioning Gerald about his having left the apartment after the incident, and specifically, defense counsel's objection to the court's having allowed the prosecutor to pursue this line of questioning after prohibiting defense counsel from asking Doe about compensation she had received for relocation expenses. Outside the presence of the jury, Ross's attorney argued that based on the court's ruling the previous day with respect to Doe's testimony, it would be improper to allow the prosecutor to use the same fact pattern (i.e., the fact that the victims had relocated) to benefit the prosecution's case, and yet not allow the defense to "try to impeach the witnesses based upon financial gain." The prosecutor responded that in light of the fact that there was no other evidence that would suggest that the victims knew they would be compensated for relocating at the time they called 911 to report the crime, the court's rulings were appropriate. The trial court reaffirmed its earlier conclusion that the defense attorneys would not be permitted to question the witnesses about any reimbursement they received for relocation expenses.

2. *Analysis*

"A trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207 (*Whisenhunt*)). However, certain restrictions on cross-examination may violate the federal Sixth Amendment right to confront witnesses: " "[A] criminal

defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citations.] " (*People v. Hillhouse* (2002) 27 Cal.4th 469, 494 (*Hillhouse*)).

" 'However, not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citations.] California law is in accord. [Citation.]' [Citation.]" (*Hillhouse, supra*, 27 Cal.4th at p. 494.)

" '[A] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded

cross-examination been permitted.' [Citation.]" (*Whisenhunt, supra*, 4 Cal.4th at p. 208.)¹⁰

On the facts of this case, we cannot conclude that a reasonable jury "might have received a significantly different impression" of Doe's credibility if the court had permitted defense counsel to pursue his proposed line of cross-examination concerning reimbursement for relocation expenses. From the beginning, Doe identified the defendants as the perpetrators of the crime. At the time she placed the 911 call and when she originally spoke with police officers about the incident, she had no financial incentive to implicate the defendants. There was no evidence that Doe fabricated the fact that the crimes had occurred or that these defendants participated in the crimes. The fact that Doe may have been provided compensation for expenses she incurred in moving away from

¹⁰ Other courts have stated the rule in a different way, suggesting a slightly different standard for determining whether a trial court's limitation of cross-examination violates the confrontation clause. For example, in *Hillhouse*, the Supreme Court stated the rule as follows: "[U]nless the defendant can show that the prohibited cross-examination *would have produced* "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (*Hillhouse, supra*, 27 Cal.4th at p. 494, italics added.) As the defendants point out, however, there is no explanation in *Hillhouse* or other cases (see, e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 374; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1051; and *People v. Frye* (1998) 18 Cal.4th 894) for their deviation from the United States Supreme Court's description of the rule as being whether "[a] reasonable jury *might have* received a significantly different impression of [the witness's] credibility had . . . counsel been permitted to pursue his proposed line of cross-examination." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, italics added.) The People cite to *Whisenhunt* as providing the appropriate standard for addressing the defendants' contention in this case. Because the result in this case would be the same under either standard, we presume for purposes of this opinion that the correct standard is the one that the Supreme Court returned to in *Whisenhunt, supra*, 44 Cal.4th at page 208—i.e., whether a reasonable jury "might have received a significantly different impression of the witness's credibility."

the area where the incident occurred was of marginal relevance, if any. Further, the jury had already been made aware of the fact that Doe may have received some financial assistance from the district attorney's office. Defense counsel was permitted to ask Doe whether she had applied "for some special money" when she spoke with a "victim witness person." Her answer, "Not before that," implicitly indicated that Doe had applied for some money. Given the fact that Doe had been cooperating with law enforcement prior to the time of the application, and that she had shown no indication that she would not cooperate at any time before applying for or receiving victim assistance to relocate, the elicitation of other information about the precise nature of this assistance would have done little to add to the picture of Doe's credibility with respect to this incident. In addition, Doe's testimony about what occurred, and her identification of the defendants, was corroborated by the other victims.

Under these circumstances, it is simply not reasonable to conclude that the jury might have found Doe's testimony to be less credible if the court had permitted defense counsel to ask her questions about any compensation she may have received for her relocation expenses. The trial court's decision to limit the cross-examination of Doe on the issue of relocation compensation thus did not violate defendants' confrontation rights.

C. *The trial court did not err in admitting the gang expert's testimony concerning Ross's contacts with law enforcement*

Ross contends that the trial court erred in allowing Officer Nishida to testify regarding a number of Ross's contacts with law enforcement in explaining the basis of his expert testimony on the subject of Ross and Arnold's gang affiliation. Specifically, Ross

argues that the admission of this testimony violated state law hearsay rules, constituted an abuse of the court's discretion under Evidence Code section 352, violated his right to due process, and violated his right to confront adverse witnesses. Ross acknowledges that his attorney did not object to the admission of this portion of Nishida's testimony on the ground that it violated Ross's confrontation clause rights, but instead, objected only on hearsay, prejudice, and due process grounds. In this regard, Ross contends that his attorney's failure to object on confrontation clause grounds constituted ineffective assistance of counsel, and that we should therefore consider the contention on the merits.

Ross argues that the admission of the testimony was so prejudicial that it requires reversal of all of his convictions, or, at a minimum, reversal of his conviction for actively participating in a gang, as charged in count 8, as well as all of the gang enhancements as to which the jury returned true findings.

1. *Additional background*

Before the prosecutor called Nishida to testify, Ross's defense attorney moved to limit the prosecution's gang evidence. The parties discussed with the court a report that Nishida had prepared in which Nishida listed all of Ross's contacts with law enforcement. Defense counsel objected that the gang evidence was irrelevant and more prejudicial than probative. Counsel objected to any testimony that Nishida might provide regarding the reasons for Ross's contacts with law enforcement, and any resulting arrests.¹¹ However, counsel did not object to the mention of any particular incident in which Ross had been

¹¹ The parties did not dispute that Ross had never been convicted as a result of the contacts with law enforcement that Nishida described in his report.

contacted by law enforcement, nor did counsel object to Nishida discussing with whom Ross had been at the time of each contact. Ross's attorney later joined in Arnold's attorney's objections to the gang expert's testimony on hearsay and due process grounds.

The prosecutor explained that the reason she wanted to elicit this testimony from Nishida was to demonstrate that BBC was a criminal street gang, noting that she had the burden to show both what the primary activities of the gang members were, as well as that the members of BBC engaged in a pattern of criminal behavior. The evidence concerning Ross's contacts with law enforcement could establish that the gang members associated with each other, and that the defendants knew that other gang members engaged in criminal activities. In considering defense counsel's objection on the grounds that allowing Nishida to discuss all of the contacts would be unduly cumulative and prejudicial under Evidence Code section 352, the court noted that the prosecutor planned to limit the number of contacts about which she would inquire, and would not ask about all 63 contacts that were described in Nishida's report. The court also commented that it intended to give a limiting instruction to the jury prior to the gang expert's testifying, to explain to the jury the limitations on its use of the testimony. The court agreed with defense counsel that the jury should be informed in some manner, either by stipulation or by questioning by the attorneys, which of the contacts with law enforcement had not resulted in an arrest, and the fact that none of the contacts had resulted in a conviction.

The court ruled that one of the contacts, a contact that resulted from a civilian call to law enforcement about suspicious activity, was not admissible because there was no foundation for the information that the civilian provided. The court otherwise permitted

the prosecutor to examine Nishida about all of Ross's contacts with law enforcement that the prosecutor had indicated she wanted to introduce.

Before Officer Nishida testified, the trial court instructed the jury with CALCRIM No. 1403 as follows:

"You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related crimes and enhancements charge or the defendant had a motive to commit the crimes charged.

"You may also consider this evidence when you evaluate the credibility or believability of a witness, and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."¹²

Officer Nishida testified that Ross had been contacted by law enforcement officers 63 times in a four-year period. Nishida was asked about, and described, 36 of these contacts, including whom Ross was with at the time of each contact, and the circumstances of the contact.

The parties stipulated that Ross had not been arrested for most of the contacts, and that he had not suffered any convictions as a result of the contacts.

2. *Analysis*

Ross argues that the trial court's decision to permit the prosecutor to elicit information about 36 of Ross's contacts with police from the gang expert was an abuse of

¹² The trial court reread this instruction to the jury, along with the other jury instructions, after all parties had rested.

the court's discretion under state law because the evidence was based on hearsay, and the admission of this hearsay evidence was more prejudicial than probative under Evidence Code section 352. Ross also maintains that the introduction of this evidence violated his due process and confrontation rights.

a. *Ross's hearsay objection and Evidence Code section 352 contention*

Ross argues that the trial court abused its discretion under Evidence Code section 352 "by admitting Nishida's testimony recounting numerous prior contacts with law enforcement because the court utterly failed to control the form in which the expert was questioned to prevent the jury from learning of incompetent hearsay." Ross contends that "the hearsay statements at issue here, although elicited from an expert witness, were elicited in such a manner that the result was to place before the jury a prejudicial amount of incompetent hearsay, all of which was submitted for the truth of the matter asserted," and that the trial court "compounded the prejudicial effect of the error by instructing the jury in a manner that required the jury to somehow determine the truth and accuracy of each hearsay statement."

We reject Ross's suggestion that the trial court abused its discretion in allowing Nishida to testify as to the bases of his opinions, even if this meant that the prosecutor was permitted to elicit some of the hearsay information on which Nishida relied in forming those opinions. Gang experts may rely on hearsay police records in forming an opinion that defendants are gang members who committed the charged crimes for the benefit of a criminal street gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 619-620 (*Gardeley*)). Although Ross refers to the hearsay information that Nishida related as

"incompetent hearsay," the basis for Ross's assertion that the particular hearsay content of Nishida's testimony was "incompetent" is unclear. Although the police reports and records on which Nishida relied for his opinion are hearsay, they are among a category of hearsay evidence that is considered to be reliable. (See *People v. Vy* (2004) 122 Cal.App.4th 1209, 1223, fn. 9.) In fact, in *Gardeley*, the Supreme Court approved of a gang expert relying on, and describing during his testimony, "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.*" (*Gardeley, supra*, at p. 620, italics added.)

In addition, the court found it significant that the prosecutor intended to introduce information regarding only some of Ross's contacts with police. The court concluded that allowing Nishida to discuss this narrowed set of contacts would be probative of Nishida's opinions as a gang expert, and would not be unduly prejudicial to Ross. Given that the prosecutor sought to introduce only some of Ross's prior police contacts, the court's ruling that only a limited number of contacts would be admitted, and the fact that the court properly weighed the probative value of this evidence against its potential for prejudice, we conclude that the court did not abuse its discretion in allowing the prosecutor to elicit from Nishida the bases for his opinions in the form of information related to Ross's contacts with police, even if this information may have been obtained through hearsay sources.

Ross is correct in pointing out that the trial court did not provide a limiting instruction with respect to this particular hearsay information. Specifically, the court did

not inform the jury that it was to use this evidence solely for the purpose of considering the bases of the gang expert's opinions. In *Gardeley*, for instance, before the trial court permitted a gang expert to relate hearsay statements made by the victim of an alleged gang attack as well as hearsay concerning other attacks by the same gang, the trial court admonished the jury that it could " 'not consider those [hearsay] statements for the truth of the matter, but only as they give rise . . . to the expert opinion in which questions will be asked which will follow.' " (*Gardeley, supra*, 14 Cal.4th at p. 612.) However, it was incumbent on Ross to request that the court give a limiting instruction to guide the jury with respect to how to use this evidence; the court does not have sua sponte duty to provide a limiting instruction. (See Evid. Code, § 355; see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 [only where request is made for limiting instruction on gang evidence must the trial court provide one].) The record demonstrates that Ross made no such request. We therefore reject Ross's contention that the trial court abused its discretion with respect to its handling of Nishida's use of hearsay materials in explaining the basis for his opinions.

b. *Ross's confrontation and due process contentions*

The People maintain that Ross has forfeited his confrontation argument by failing to raise it in the trial court. Ross responds that his attorney's failure to bring a confrontation clause objection constituted ineffective assistance of counsel, and that we should therefore address this contention on its merits. Because considering Ross's claim of ineffective assistance of counsel would require that we consider the merits of the

contention to a certain degree, we address the contention regarding the confrontation clause directly, and conclude that it is without merit.

Ross contends that in admitting Nishida's testimony concerning Ross's contacts with law enforcement, the trial court violated Ross's rights under the confrontation clause of the United States Constitution. (U.S. Const., 6th Amend.) In making this contention, Ross relies on *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), in which the United States Supreme Court held that out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had an opportunity to cross-examine the declarant. (*Id.* at p. 54.)

Ross does not identify any particular out-of-court statement that Nishida repeated during his testimony. Instead, Ross appears to be complaining that Nishida referred to information obtained from hearsay sources in explaining the bases for his opinions that Ross was a member of the BBC criminal street gang and that the crimes were committed for the benefit of a gang. Nishida's knowledge concerning the existence of Ross's contacts with police, as well as the facts of the circumstances of those contacts, was clearly based on statements and writings made by other officers. However, Nishida was testifying as an expert, and was giving opinion testimony based on this hearsay evidence. This was permissible.

Ross nevertheless argues that "[t]he fact that the testimonial hearsay at issue here was offered to prove the truth of the matter distinguishes the instant case from *People v. Thomas* (2005) 130 Cal.App.4th 1202 [*Thomas*]." In *Thomas*, the defendant contended that the introduction of hearsay statements as to what other gang members had told the

expert violated his Sixth Amendment rights under *Crawford*. (*Thomas, supra*, at p. 1210.) The *Thomas* court rejected this contention, explaining, "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. *Crawford* itself states that the confrontation clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' [Citation.]" (*Thomas, supra*, at p. 1210.)

Ross contends that this case is unlike *Thomas* because here, unlike in *Thomas*, the hearsay was elicited for its truth, rather than merely to provide information as to the bases of the expert's opinions. Despite Ross's suggestion, however, the hearsay evidence of Ross's prior contacts with police was *not* admitted for its truth, but, rather, to provide the jury with information regarding the bases of the expert's opinion so as to permit the jury to assess the weight of Nishida's opinion regarding Ross's affiliation with a criminal street gang.¹³ As the court in *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426 (*Ramirez*), explained, the fact that the jury would have had to believe that all of those police contacts occurred, and that the circumstances were as Nishida described them, in

¹³ The fact that no limiting instruction was requested or given in order to ensure that the jury would, in fact, use the evidence only in this manner does not alter the fact that the evidence was admitted for this limited purpose.

order for the jury to give credence to Nishida's opinion, does not mean that the hearsay was elicited for its truth. "[A]ny expert's opinion is only as good as the truthfulness of the information on which it is based." (*Id.* at p. 1427.) Thus, even if a jury must conclude that the hearsay information is truthful in order to give credit to an expert's opinion, "[h]earsay [offered] in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned. [Citation.]" (*Ramirez, supra*, at p. 1427.)

Ross also contends that in admitting Nishida's testimony, the trial court deprived him of his due process right to a fundamentally fair trial—a claim he makes based on his assertion that the court's ruling violated state evidentiary rules against admitting hearsay and unduly prejudicial matter, and violated the confrontation clause. In other words, Ross relies on his other arguments with respect to the admission of Nishida's testimony about Ross's contacts with law enforcement to support his contention that his trial was fundamentally unfair. Because we have rejected Ross's other arguments challenging the court's admission of this evidence, Ross's due process argument falls, as well.

c. *Arnold's argument concerning hearsay contained in the expert's testimony also fails*

Although Arnold wrote a paragraph in his opening brief in which he joined in all of his codefendant's arguments, the Attorney General's brief responded only to Ross's contentions with respect to the hearsay evidence concerning Ross's law enforcement contacts that the prosecutor elicited from the gang expert. It was reasonable for the Attorney General to limit the People's discussion of this issue to Ross's contention, since

this argument was specific to Ross, and identified only the law enforcement contacts that Nishida discussed that were introduced as to Ross. Despite these facts, in his reply brief Arnold contends that he joined in this issue as well, and argues that all of the same points that Ross raised with respect to the gang expert's testimony regarding Ross's prior contacts with law enforcement apply with equal force to the court's ruling with respect to the gang expert's testimony regarding Arnold's prior contacts with law enforcement.

For the same reasons we reject Ross's contentions that the trial court erred in allowing the prosecutor to question the gang expert concerning Ross's contacts with law enforcement, we similarly reject Arnold's contentions on this point.

D. *Ross has forfeited his contention that the trial court erred in instructing the jury on aiding and abetting, pursuant to CALCRIM No. 400*

Ross contends that the trial court erred in instructing the jury on his potential liability as an aider and abettor in the assault with a firearm charge. Specifically, Ross maintains that the court erred in informing the jury that an aider and abettor is "equally guilty" of the crime committed by the direct perpetrator. According to Ross, an aider and abettor can also be guilty of a crime that is a lesser offense than the direct perpetrator's crime, and, therefore, the court had a sua sponte duty to revise the instruction and clarify that the jury could find him guilty of a lesser offense than assault with a firearm in count 5 if the jury found that he had a less culpable state of mind than the actual perpetrator.

1. *Additional background*

The trial court instructed the jury with CALCRIM Nos. 400 and 401 regarding aiding and abetting liability as follows:

"CALCRIM [No.] 400

"A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

"CALCRIM [No.] 401

"To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"1. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

"If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor.

"A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

"1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime.

"AND

"2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory."

2. *Analysis*

CALCRIM No. 400 is the introductory instruction to a series of instructions on aiding and abetting. Ross takes issue with the fact that the instruction includes the words "equally guilty." He complains that this language is misleading because the jury could have found, under the particular facts of this case, that he was guilty of some lesser crime than assault with a firearm.

"Generally, a person who is found to have aided another person to commit a crime is 'equally guilty' of that crime." (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 (*Lopez*), citing § 31 and 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122–123.) "However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. [Citations.]" (*Ibid.*)

Because it is generally true that an aider and abettor is equally guilty of the crime committed by the direct perpetrator, the instruction that the court gave was generally accurate. Given that the instruction was generally accurate, but potentially incomplete under certain circumstances, it was incumbent on Ross to request a modification if he thought that giving the general instruction would be misleading under the facts of this case. Ross's failure to request a modified instruction means that he has forfeited this claim. (See *Lopez, supra*, 198 Cal.App.4th at p. 1118; see also *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 [because CALCRIM No. 400 is generally an accurate statement of the law with respect to an aider and abettor being "equally guilty," the defendant was obligated to request modification or clarification].)¹⁴

E. *The evidence is sufficient to uphold Ross's conviction for assault with a firearm in count five under an aiding and abetting theory*

Ross contends that the evidence is insufficient to support his conviction on count 5 for assault with a firearm. Ross maintains that he was convicted of this offense based on an aiding and abetting theory, but that there is no evidence that he was aware that the gunman would strike Christopher with the firearm, or that Ross intended that such a crime occur. After reviewing the record, we conclude that the evidence is sufficient to support Ross's conviction for assault with a firearm on the theory that he aided and abetted the direct perpetrator of the offense.

¹⁴ CALCRIM No. 400 has since been amended to remove the word "equally" from before the word "guilty" in this portion of the instruction, so that the proposed instruction now reads: "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator." (Judicial Council of Cal., Crim. Jury Instns. (2011) p. 167.)

1. *Additional background*

With respect to the charge against Ross in count 5, the jury was instructed with CALCRIM No. 875 (assault with a firearm), as well as CALCRIM Nos. 400 and 401 (general principles of aiding and abetting), which we previously discussed in part III.C.1., *infra*. The instruction that the court provided with respect to assault with a firearm was as follows:

"CALCRIM [No.] 875

"The defendants are charged in Count 5 with assault with a firearm in violation of Penal Code section 245.

"To prove that the defendants are guilty of this crime, the People must prove that:

"1. The defendant did an act with a firearm that by its nature would directly and probably result in the application of force to a person;

"2. The defendant did that act willfully;

"3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"AND

"4. When the defendant acted, he had the present ability to apply force with a firearm to a person.

"Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

"The touching can be done indirectly by causing an object or someone else to touch the other person.

"The People are not required to prove that the defendant actually touched someone.

"The People are not required to prove that the defendant actually intended to use force against someone when he acted.

"No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and, if so, what kind of assault it was."

At the request of the prosecutor, the trial court did not instruct the jury on the natural and probable consequences doctrine.

During closing argument, the prosecutor made the following contention with respect to count 5:

"Assault with a firearm: We're talking about Christopher in this count. To show that there was an act done with the firearm that would result basically [in] an application of force to a person.

"So when the man with the shotgun takes the firearm and hits Christopher in the face with it, that's the application of force to his face with the firearm. And when he is acting—when the person with the shotgun is acting, he knew that the nature of the act, would lead a reasonable person to know that the result would be the application of force; right?

"So he goes to hit Christopher with the gun. He knows that is—that's going to be hitting him in the face, and that's exactly what he does.

"On this count, although it's the man with the shotgun that hits Christopher in the face—remember that we talked about aiding/abetting. Once you start committing all these crimes, and you have all three of these people in this house, they're aiding/abetting each other now with what's going on.

"[Ross] is standing in the doorway watching guard. Okay. And the man in the—the bedroom with the shotgun, that has it and is hitting Christopher. You also have Geraldo saying—["]and I hear someone beg like "[H]it him with it. Hit him with it," ' before they ever wake him up. All these three men know exactly what they went there for and what is going to go down when they're in that apartment. [Ross] is there to guard that doorway, and the other two are in there doing whatever needs to be done to get that money."

2. *Analysis*

"Substantial evidence is evidence that is ' "reasonable in nature, credible, and of solid value." ' [Citation.] 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.' " [Citation.]' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.)

Ross does not challenge the fact that another perpetrator committed an assault with a firearm in the bedroom during the incident at Doe's apartment. Rather, he contends that there is insufficient evidence that he (1) knew that the gunman had the purpose to assault Christopher with a firearm, (2) had the intent to commit, encourage or facilitate the commission of an assault with a firearm on Christopher, or (3) by act or advice aided, promoted, encouraged or instigated an assault with a firearm on Christopher. Specifically, Ross maintains that there is no evidence that he knew that the gunman

intended to "commit the crime of assault with a firearm *by bludgeoning Christopher*" or that Ross "intended to aid and abet the gunman in assaulting Christopher *by bludgeoning him [with] the firearm.*" (Italics added.)

Ross concedes that there was sufficient evidence for him to have been convicted of this crime under a natural and probable consequence theory, but notes that the jury in this case was not instructed that an accomplice may be found guilty not only of the intended crime, but also any offense that is a natural and probable consequence of the target crime, and the prosecutor never argued this theory. It is true that for reasons that are unclear, the prosecutor withdrew her initial request that the court instruct the jury on the natural and probable consequence doctrine. Because this theory was not presented to the jury, and because the jury was not instructed under this theory, we agree with Ross that we cannot uphold his conviction for assault with a firearm on this ground.

However, we disagree with Ross's conclusion that there is insufficient evidence to support his conviction for assault with a firearm as an aider and abettor. Contrary to Ross's contention, the jury was not required to find that he knew that the gunman would commit the offense of assault with a firearm in a particular manner, i.e., *by bludgeoning* one of the victims with the weapon, and that he intended to aid or assist the gunman in *bludgeoning the victim*. Rather, as the instruction informed the jury, the jury had to be convinced only that Ross knew of the gunman's purpose to commit *an assault with a firearm*.

"[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider

and abettor's mens rea—knowledge of the direct perpetrator's *unlawful intent* and an intent to assist in achieving those *unlawful ends*, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime. [Citation.]" (*People v. Perez* (2005) 35 Cal.4th 1219, 1225 (*Perez*), italics added.)

Assault is defined as "an unlawful attempt, coupled with present ability, to commit a violent injury on the person of another." (§ 240; see also *People v. Williams* (2001) 26 Cal.4th 779, 784.) Despite the use of the word "attempt" in the definition of assault, which would imply that proof of specific intent is required, the crime of assault is a general intent crime. (Citation.) As stated in CALCRIM No. 875, "[t]he People are not required to prove that the defendant actually intended to use force against someone when he acted." All that is necessary is an "act [that] by its nature [would] probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) Similarly, assault with a firearm is a general intent crime. (See *People v. Colantuono* (1994) 7 Cal.4th 206, 214-215 [considering defendant's conviction under § 245, subd. (a)(2) and noting that the governing principles of law on intent are the same for simple assault and assault with a deadly weapon, including a firearm].)

Because, as a general intent crime, the crime of assault with a firearm has as its gravamen the defendant's act and not his intent in committing that act, a defendant need not even point a weapon at the victim to constitute an assault, but need only hold the weapon in such a way as to effectively use it. (See *People v. McMakin* (1857) 8 Cal. 547; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) Further, "when a defendant

equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) Thus, it is not necessary for the defendant to harbor a specific intent to harm a particular person in order to be guilty of assaulting that person. The defendant need only have intentionally placed himself in a position "and equipped himself with sufficient means that he appears to be able to strike" the person. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 112.)

Under these authorities, in order for Ross to be liable for assault with a firearm as an aider and abettor, the gunman had to have committed an assault with a firearm. Ross concedes this element. Second, Ross had to know of the gunman's unlawful intent—i.e., that the gunman intended to commit an assault with a firearm—and Ross had to have intended to assist the gunman in achieving the commission of an assault with a firearm. Ross did not have to know precisely how the gunman was going to attempt to commit a violent injury on one of the victims with the firearm, but only that the gunman intended to assault a victim with the firearm. (See *Perez, supra*, 35 Cal.4th at p. 1225 [an aider and abettor need have knowledge only of the direct perpetrator's *unlawful intent* to commit the target crime].)

The evidence showed that the defendants, who were gang members, together with a third man, went to the victims' apartment to rob and intimidate the victims. Gerald saw the third man holding a shotgun in his hands immediately upon opening the door to the apartment. Thus, Ross had to have known that the man was armed with a shotgun at that

time. As the two other men barged into the house, armed with a firearm, and demanded money from the victims, Ross stood guard at the door to the apartment. During the incident, the man with the shotgun not only attempted to apply force to one of the victims, but actually *did* apply force to a victim by hitting him with the gun. From this evidence, one could reasonably infer that Ross not only knew that the three were engaged in a robbery, but also that that the gunman intended to assault the victims with the firearm. One could also readily infer that Ross intended to assist the gunman in this criminal purpose by joining the gunman in the forced entry of the apartment and by standing guard, thereby ensuring that no one would be able to leave the apartment and that no one would be able to come to the victims' aid by entering the apartment, and that in so doing, Ross assisted the gunman in carrying out their criminal purpose.

Although there may not have been sufficient evidence that Ross knew specifically that the gunman was going to use the gun to hit Christopher, the evidence *is* sufficient to support the jury's finding that Ross knew the gunman's intent was to assault one or more of the victims with the firearm, and that Ross intended to assist the gunman in that wrongful purpose.

IV.

DISPOSITION

The judgments of the trial court are affirmed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.