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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

BENNY ROSS HARRIS, JR. et al.,

Defendants and Appellants.

E053353

(Super.Ct.No. FBA1000045)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. R. Glenn Yabuno, Judge. Affirmed with directions.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Benny Ross Harris, Jr.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant Jamaal Edwards Waiters.

Richard de la Sota, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Chambers, Jr.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant James Alexander Rials.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant Lasalle Ernest Kimbrough.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Christopher Beesley and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants and appellants Benny Ross Harris, Jr., James Alexander Rials, Jamaal Edwards Waiters, Anthony Chambers, Jr., and Lasalle Ernest Kimbrough were convicted of crimes arising from an armed bank robbery in Barstow. On appeal, they raise numerous issues, including whether: (1) there was sufficient evidence to support the conviction for street terrorism and a gang enhancement; (2) the court erred in refusing to inquire into juror bias when one juror allegedly began to cry during closing argument; (3) the court erred in denying a motion for mistrial when a witness stated that defendants' gang is a Muslim organization; (4) there was inadequate evidence of the chain of custody as to DNA samples; (5) the court erred in allowing evidence of two prior bank robberies and in its limiting instructions regarding such evidence; (6) the prosecutor committed misconduct; (7) certain jury instructions were erroneous; (8) there was sentencing error; and (9) there is a clerical error in Rials's abstract of judgment.

We agree with defendants that the imposition of certain enhancements and the staying of a firearm enhancement was error. For that reason, a new sentencing hearing is required. We will also direct that the clerical error in Rials's abstract of judgment be corrected. Otherwise, we reject defendants' arguments and affirm the judgments.

II. FACTUAL SUMMARY

A. *The Barstow Bank Robbery*

On October 22, 2009, a Beaumont police detective placed an electronic tracking device on Rials's green Cadillac in Moreno Valley. On October 27, 2009, the tracking device indicated that the Cadillac left the Moreno Valley area shortly after 7:00 a.m. and travelled to Barstow.

At approximately 10:20 that morning, three men dressed in black and wearing ski masks entered a bank in Barstow. One of the men waved a gun and ordered the bank employees and customers to get down on the floor. A second man jumped over the teller counter while a third went through a teller door and behind the line of tellers.

The man who jumped over the teller counter pointed a gun at a bank employee, grabbed her, swung her to the floor, said he wanted "all the money," and demanded the keys to the vault. The employee opened her cash drawer and retrieved the vault keys. The man took money from the cash drawer then dragged the employee about 44 feet to the vault room. The man took money from the vault and put it into a black bag.

Some of the money taken from the bank was attached to a dye pack designed to discharge smoke, dye, and tear gas when removed from the bank.

After the robbery, \$178,518 was missing from the bank.

Two witnesses outside the bank saw individuals wearing masks rush out of the bank and get into a white Honda. They provided police with the license plate number of the Honda.

A police officer responded to a report that the Honda had gone behind a nearby grocery store. He found the Honda behind the store with the engine running and the front passenger door open. The odor of pepper spray was coming from the Honda and red dye covered the left rear passenger area and the back of the driver's seat. Inside the car, there were two black "beanie" style caps that had cutouts where the eyes would be. Police also found two jackets with red stains on them.

Police recovered DNA from each of the ski masks. The DNA found in one mask matched Waiters's DNA; DNA found in the other mask matched Kimbrough's DNA.

The Beaumont detective who had been monitoring the location of the green Cadillac learned of the Barstow bank robbery and notified Barstow police to be on the lookout for the Cadillac. Shortly afterward, police stopped the green Cadillac about three-quarters of a mile from the bank. Harris and Rials were inside the car. While they were being detained, Harris's cell phone rang repeatedly. Police confiscated Harris's and Rials's cell phones.

Shortly before 1:00 p.m., San Bernardino County Sheriff's deputies stopped Harris's teal van as it headed southbound on Interstate 15, just north of Interstate 215. Tamela Travis was driving the van. Kimbrough, Chambers, and Waiters were inside.

Kimbrough was wearing a white T-shirt with a pink stain. A deputy collected their cell phones.

Inside the van there were two black bags, a black sweatshirt, a black long-sleeved shirt, an ice chest, and a St. Louis Cardinals baseball cap. One black bag was stained with red dye and contained a \$100 bill. The second bag contained a loaded nine-millimeter firearm, a shaved key, and some latex gloves with red dye on them. The ice chest contained \$178,568 in currency, much of it stained with red dye, plus \$20 bills that were part of the bank's dye packs.

Cell phone records for the defendants show numerous calls between them the night before the robbery and on the day of the robbery.

B. Summary of Gang Expert Testimony

Los Angeles Police Officers Cedric Washington and Kenneth Sanchez testified as gang experts. Each testified about the Black P Stone Bloods gang (BPS Bloods). The BPS Bloods gang is based in Los Angeles. However, there are BPS Bloods members who live in Moreno Valley and Riverside County. According to Officer Washington, the gang has between 800 and 900 members. Officer Sanchez testified that there are approximately 30,000 to 40,000 BPS Bloods members throughout the United States. BPS Bloods was aligned with other Bloods gangs, such as the Rollin 20's Bloods gang.

The primary activities of the BPS Bloods are committing crimes, including burglary, robbery, homicide, weapons possession, narcotics possession, vandalism, and carjacking. One purpose for committing crimes is to generate fear of the gang members

in the community so that people will be less willing to talk about them to the police.

Another purpose is to generate money for the gang. Officer Sanchez testified to certain “predicate offenses” committed by four BPS Bloods members.

Officers Washington and Sanchez testified to the gang’s use of hand signs, symbols, monikers, and tattoos. Among the symbols used by BPS Bloods is the St. Louis Cardinals baseball logo. They further testified to the hierarchical structure of the gang. Officer Sanchez compared the organization to the military or the police department. At or near the top of the structure are “original gangsters,” “OGs,” or “generals.” Other members may be sergeants, lieutenants, or foot soldiers.

Officer Washington testified that Harris is a general within the BPS Bloods. As such, he is considered a “shot caller”—“a person [who] could give orders, [as] opposed to having to take orders.” He would also have the authority to choose the people who will carry out a crime and can provide resources, such as a getaway vehicle, guns, or money.

Kimbrough told Officer Sanchez in 2009 that he was a member of BPS Bloods. There was also evidence that Kimbrough had tattoos associated with BPS Bloods and photographs on his cell phone showing him wearing a St. Louis Cardinals baseball cap and making a hand sign derogatory to a rival of BPS Bloods.

Rials had tattoos associated with membership in BPS Bloods. A photograph of the St. Louis Cardinals logo was found on his cell phone.

Chambers admitted being a member of the Rollin 20's Bloods, a criminal street gang allied with the BPS Bloods. He also has tattoos associated with the Rollin 20's Bloods.

Additional facts will be discussed below where pertinent to the issues raised in this appeal.

III. ANALYSIS

A. *Sufficiency of the Evidence Supporting Convictions for Street Terrorism and the Gang Enhancement*

Chambers and Waiters challenge the sufficiency of the evidence to support the convictions of being an active participant in a criminal street gang in violation of Penal Code section 186.22, subdivision (a).¹ Waiters also challenges the sufficiency of the evidence to support the gang enhancement under section 186.22, subdivision (b).²

1. Background Principles and Standard of Review

Section 186.22(a) provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a

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

² We will hereafter refer to section 186.22, subdivision (a) as section 186.22(a), and to section 186.22, subdivision (b) as section 186.22(b).

county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.”

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 [specified] criminal acts . . . , 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); see *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) A “pattern of criminal activity” can be established by evidence of two or more specified offenses committed on separate occasions or by two or more persons during the statutorily defined period. (§ 186.22, subd. (e).)

In addition to the substantive crime under section 186.22(a), section 186.22(b) provides a sentence enhancement when the defendant “is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members” (§ 186.22(b)(1).)

“In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate

court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) “[O]ur power begins and ends with a determination as to whether there is *any* substantial evidence to support [the jury’s findings]; . . . we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.’ [Citations.]” (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.) The same principles apply to a challenge to the sufficiency of the evidence to support the gang enhancements. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

2. Chambers’s Conviction Under Section 186.22(a)

Chambers acknowledges the evidence that indicates he is a member of the Rollin 20’s Bloods gang; he admitted to being a member of that gang and had tattoos associated with the Rollin 20’s Bloods. However, he asserts there is no evidence that the Rollin 20’s Bloods is a criminal street gang as defined in section 186.22. Indeed, if the Rollin 20’s Bloods are a separate and discrete gang, there is insufficient evidence in the record that it is a criminal street gang for purposes of section 186.22. There was no evidence, for example, that members of the Rollin 20’s Bloods, as such, committed two or more predicate crimes. (See § 186.22, subd. (e).)

The People contend the requirement of active participation in a criminal street gang is satisfied by evidence that BPS Bloods, a criminal street gang, is allied with

Chambers's gang—the Rollin 20's Bloods—and that both gangs are part of “the larger Bloods organization.”

People v. Williams (2008) 167 Cal.App.4th 983 (*Williams*) is instructive. In that case, the defendant was a member of the Small Town Peckerwoods. A police officer testified that the Peckerwoods are a criminal street gang, as defined by the Penal Code, and that smaller groups, such as the Small Town Peckerwoods, are all factions of the Peckerwood organization. (*Id.* at p. 988.) He testified further “that Peckerwood groups share a White pride or White supremacist ideology, and there is a hierarchy, with ‘shot callers’ who answer to a higher authority inside the prison system. . . . Peckerwoods are not typically organized like other criminal street gangs, however: for the most part, they have no constitution, and are a looser organization with a less well-defined rank structure. Peckerwood groups get together more for bragging than for strategizing, and one group of Peckerwoods will not necessarily know what another group is doing.” (*Ibid.*) The defendant was convicted of, among other crimes, active participation in a criminal street gang under section 186.22(a). (*Williams, supra*, at p. 985.) The Court of Appeal reversed.

The *Williams* court began by stating that “[e]vidence of gang activity and culture need not necessarily be specific to a particular local street gang as opposed to the larger organization. [Citations.] This does not mean, however, that having a similar name is, of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the smaller group.” (*Williams, supra*, 167 Cal.App.4th at p. 987.) The *Williams* court took

note of *People v. Ortega* (2006) 145 Cal.App.4th 1344, which rejected an argument that the prosecution had to prove which subset of a larger gang was involved in the case. The *Ortega* court stated: ““In this case there was testimony that it was not uncommon for members of different gangs to work in concert to commit a crime. In light of the nature of gang structure and the apparent willingness of members to work with other gangs to commit crimes, requiring the prosecution to prove the specific subset of a larger gang in which a defendant operated would be an impossible, and ultimately meaningless task.”” (*Williams, supra*, at p. 987, quoting *People v. Ortega, supra*, at p. 1357.) The *Williams* court also referred to *In re Jose P.* (2003) 106 Cal.App.4th 458, which rejected an argument that evidence of gang activity must be specific to a particular local street gang, not to the larger gang organization. (*Williams, supra*, at p. 987; *In re Jose P., supra*, at pp. 467-468.)

The *Williams* court concluded that “something more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. Instead, some sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*Williams, supra*, 167 Cal.App.4th at p. 988.) Such a showing was absent in *Williams*. (*Ibid.*)

Here, Officer Washington testified that BPS Bloods “align with other Bloods” and that, since the inception of the Bloods, Bloods gangs “have kind of joined together with

each other. They commit crimes together, no matter what set they are from. They . . . group together or associate themselves together in order to protect themselves against the larger and rival Crip gangs.” When asked if a crime can be committed with members of the BPS Bloods and other Bloods groups, Officer Washington said: “Yes. And traditionally you’ll have Black P Stones live in, for instance, the Rollin 20s neighborhood.” When asked, what is the Rollin 20’s?, Officer Washington stated: “The Rollin 20s is also another criminal street gang. It’s a Blood—criminal street gang that are also Bloods.”³

Officer Sanchez also testified that a BPS Bloods OG has the responsibility of talking with “allies, which would be other Blood sets.” As an example of such an alliance, he referred to “surrounding Blood gangs,” such as the neighboring “Rollin 20 Bloods.” The OG “would have some kind of connection with the neighboring gang just to make sure that the Crips aren’t trying to take their land or their territory to sell drugs, to purchase guns”

The testimony of Officers Washington and Sanchez provides evidence of alliances among Bloods groups and the joint commission of crimes among Bloods groups including, specifically, the BPS Bloods and the Rollin 20’s Bloods. This is evidence of the “sort of collaborative activities” that was lacking in *Williams*, and similar to the evidence of the “willingness of members to work with other gangs to commit crimes”

³ Although the Attorney General refers to Officer Washington’s comment that the Rollin 20’s Bloods are “another criminal street gang,” the People do not contend that this comment, by itself, is sufficient to establish that ultimate fact.

that was present in *Ortega*. The evidence indicates that the connection between the two gangs is more than merely a shared philosophy or a shared name (Bloods); they have, as Officer Washington stated, “joined together” to commit crimes and protect themselves from rival Crips gangs. We conclude that such testimony, combined with the evidence linking Chambers to the Rollin 20’s Bloods, constitutes substantial evidence that Chambers actively participated in a criminal street gang.

3. Sufficiency of the Evidence to Support Waiters’s Section 186.22(a) Conviction and Gang-related Enhancements

Waiters contends the evidence is insufficient to establish the substantive gang crime (§ 186.22(a)), the gang enhancement (§ 186.22(b)), or the gang firearm enhancement (§ 12022.53, subd. (e)(1)).⁴ We disagree.

Waiters focuses his analysis primarily on the gang enhancement. Section 186.22(b) provides a sentence enhancement for “any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members”

For purposes of this argument, it does not appear that Waiters disputes that his codefendants are members of a criminal street gang, that the bank robbery benefitted the

⁴ Section 12022.53 provides for a sentence enhancement for being a principal in the commission of an offense if the person violated section 186.22(b) and a principal in the offense if the person committed any of certain specified acts, including robbery. (§ 12022.53, subs. (a), (b), (e)(1).)

gang, or that his participation in the robbery promoted, furthered, or assisted such criminal conduct. Rather, he contends there was no evidence that in committing his crimes he *knowingly* acted “at the behest of a criminal street gang and . . . for the purpose of furthering the gang’s criminal conduct.” He points to the absence of evidence that he was a gang member or had any connection with the codefendants prior to the day of the robbery.

The People acknowledge that “there was no evidence presented at trial that [Waiters] had prior contacts with gang investigators, had previously admitted gang membership, or that he wore gang related clothing or had gang tattoos” Moreover, none of the prosecution’s gang experts opined that Waiters was a gang member; Officer Sanchez did not know Waiters and had never seen a field interview card about him. However, as Waiters acknowledges, evidence of a defendant’s gang membership is not required to establish the gang allegation under section 186.22(b). (See *In re Ramon T.* (1997) 57 Cal.App.4th 201, 206-207.)

There is sufficient evidence from which reasonable jurors could infer the requisite knowledge and intent. Each of his four codefendants were members of BPS Bloods (or the affiliated Rollin 20’s Bloods). One codefendant, Harris, was described by gang expert, Officer Washington, as a general and a shot caller in the BPS Bloods. As such, he had the authority to organize a team, or “crew,” that would commit a crime. He would not pick someone he does not know. In addition, Officer Sanchez testified that a primary consideration in choosing someone for a task is the person’s loyalty to the gang and the

leader's confidence that the person will not implicate the leader in the event the individual is caught.

Here, Waiters was selected to participate in a daytime armed robbery of a bank. The evidence of his DNA in one of the ski masks indicates he was one of the armed robbers, not merely an aider and abetter. Based on the testimony of the gang experts, the jury could reasonably conclude that Harris selected Waiters for this significant role and would not have done so unless he knew Waiters was loyal to the gang, even if not an actual member of the gang. The jurors could further infer that Harris would not have selected Waiters if Waiters was unaware of the gang-related nature of the crime. Moreover, the jurors could reasonably conclude that one in Waiters's position, i.e., directly participating in a sophisticated bank robbery with at least four gang member accomplices, would certainly know he is acting for the benefit of, at the direction of, or in association with a criminal street gang, and had the specific intent to promote further, or assist in criminal conduct by gang members. (See § 186.22(b).)

For the same reasons, the jury could reasonably conclude that Waiters, if not a gang member, had knowledge that his accomplices' gang, the BPS Bloods, engaged in a pattern of criminal activity, as required by the substantive gang crime under section 186.22(a).

Finally, the firearm enhancement under section 12022.53, subdivision (e)(1) is based, in relevant part, upon Waiters's violation of section 186.22(b). Because his

challenge to the sufficiency of the evidence supporting the section 186.22(b) enhancement fails, his challenge to the firearm enhancement fails as well.

B. Jury Instruction on Gang Allegation

Walters contends the jury instruction regarding the section 186.22(b) gang enhancement allegation was prejudicially deficient because it fails to require certain knowledge as the mens rea. We reject this argument.

Regarding the gang allegation under section 186.22(b), the jury was instructed with CALCRIM No. 1401, in relevant part, as follows: “If you find the defendant guilty of the crimes charged in Counts 1, 3, 4, 6, 7, you must then decide whether, for each crime, the People have proved the additional allegation that the defendant committed that crime for the benefit of, at the direction of, or in association with a criminal street gang. . . . [¶] To prove this allegation, the People must prove that: [¶] 1. The respective defendant committed the crime for the benefit of, at the direction of, or in association with a criminal street gang; [¶] AND [¶] 2. The defendant intended to assist, further, or promote criminal conduct by gang members. . . .

Walters argues that the instruction is deficient because it fails to instruct the jurors that defendant must *know* he is committing the offense for the benefit of, at the direction of, or in association with a criminal street gang. The requirement of knowledge as to the benefit/direction/association element, he asserts, is necessary to satisfy the criminal mens rea requirement that is fundamental to most penal statutes. (See generally *In re Jorge M.* (2000) 23 Cal.4th 866, 872.) However, section 186.22(b) does have a mens rea

requirement about which the jury was instructed: the defendant must act “with the *specific intent* to promote, further, or assist in any criminal conduct by gang members” (§ 186.22(b)(1), italics added; see *People v. Albillar, supra*, 51 Cal.4th at p. 66 [the specific intent element is “the scienter requirement in section 186.22(b)(1)”].) We therefore reject Waiters’s premise that the instruction lacks the requirement of a mens rea or mental state.

Waiters next argues that the instruction regarding the scienter element in section 186.22—“[t]he defendant intended to assist, further, or promote criminal conduct by gang members”—is ambiguous. Specifically, he contends that in order to intend to assist, further, or promote criminal conduct by gang members, he must be aware that the criminal conduct he is assisting, furthering, or promoting is committed by gang members. He argues, however, that the instruction permitted the jury to find that this element is satisfied if he intended to assist, further, or promote criminal conduct by persons who, *unknownst to him*, are gang members. We reject this argument for two reasons.

First, Waiters has forfeited the argument. The language defendant challenges mirrors the statutory language. Instructing with the statutory language “is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification.” (See *People v. Poggi* (1988) 45 Cal.3d 306, 327.) Waiters failed to object to the instruction as given or request a clarifying instruction on this point. He has therefore forfeited the argument on appeal. (See *People v. Valdez* (2004) 32 Cal.4th 73, 113.)

Second, it is not reasonably likely that the jury understood the instruction in the manner Waiters suggests. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525 [the test is whether there is a reasonable likelihood that the jury understood the instruction as the defendant asserts].) Although the ambiguity Waiters identifies is plausible, it is strained. A more reasonable and likely reading of the challenged language is that defendant's intent was related to criminal conduct *by gang members*, not merely to any criminal conduct (which happened to be committed by gang members).

Waiters further contends the gang enhancement instruction is deficient because it fails to instruct the jurors the defendant “must know that he is committing the offense ‘for the benefit of, at the direction of, or in association with a criminal street gang.’” We reject this argument for the reasons that follow.

Section 186.22(b) requires the People to prove that the defendant committed a felony “for the benefit of, at the direction of, or in association with any criminal street gang” (§ 186.22(b)(1).) Contrary to Waiters's premise, the plain language of the statute does not expressly require that the defendant *know* his crime is committed for the benefit of, at the direction of, or in association with a criminal street gang. He has not referred us to any authority suggesting that the enhancement requires such actual knowledge or that the enhancement instruction must expressly include a knowledge requirement not set forth in the statute.

Nonetheless, the statute arguably implies the requirement that defendant know his crime was committed for the benefit of, at the direction of, or in association with a

criminal street gang. The preposition “for” preceding the phrase “the benefit of . . . a criminal street gang” implies a purpose or intention on the part of the actor to benefit the gang. That is, it is not enough that the crime happens to benefit the gang; the defendant must commit the crime with the *purpose* of benefitting the gang. In order to harbor such a purpose, the defendant must know of the gang.

The alternative that the defendant commit the crime “at the direction of” the gang implies that the defendant received a direction from a criminal street gang and acted in accordance with the direction. Logically, it would seem that one must know of the gang if one acts in accordance with a direction from the gang. Finally, although one could conceivably act “in association” with a gang without knowing his or her associates are gang members, this possibility is unlikely and such knowledge could arguably be implied.

Even if the statute implies that the defendant has actual knowledge his crime was for the benefit of a gang, at the direction of a gang, or in association with a gang, the jury instruction, which uses the same language as the statute, necessarily includes the same implication. Here, as with the promote/further/assist instruction, the verbatim use of the statutory language is “an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification.” (*People v. Poggi, supra*, 45 Cal.3d at p. 327.) Because defendant did not object to the instruction or request any clarifying instructions, he has also forfeited the argument on appeal. (See *People v. Valdez, supra*, 32 Cal.4th at p. 113.)

C. Admission of Evidence of Prior Bank Robberies

Over defense objection, the court allowed the prosecution to introduce evidence of two prior bank robberies. One of the prior robberies took place in Beaumont on August 25, 2009, the other in Hesperia on September 22, 2009. The evidence was admitted under Evidence Code section 1101, subdivision (b), as evidence of a common plan or scheme.

Rials argues that the court should not have admitted the evidence of the robberies and should not have instructed the jury that it could use such evidence against him. We conclude there was no reversible error.

1. Additional Factual and Procedural Background

Before ruling on the admissibility of the evidence of the prior robberies, the court heard the following evidence outside the presence of the jury: Harris owned a white Ford Thunderbird and a teal green Plymouth van; in August 2009, Rials received a traffic citation while driving Harris's Thunderbird; a Beaumont bank was robbed by three masked men wearing black clothing; Harris's Thunderbird was involved in the Beaumont bank robbery; the day before the Hesperia bank robbery, a "[s]tocky" Black man was seen in a parked white Thunderbird watching the bank; this description also describes Rials and Harris; a green van was used in the Hesperia bank robbery; and in October 2009, shortly before the Barstow bank robbery, Harris's Thunderbird was found in Rials's garage during a parole search of his home.

In allowing evidence of the prior bank robberies, the court ruled that it could be used against Harris and Rials only, and that the jury would be so instructed.

At trial, the jury heard evidence regarding the Beaumont and Hesperia robberies, which we summarize as follows.

Rials received a traffic citation indicating that Rials was driving Harris's Thunderbird on August 1, 2009.

A bank teller testified that the Beaumont bank was robbed on August 25, 2009, by three men with guns. A witness who was across the street from the bank saw the robbers enter and leave the bank. According to him, the men "were wearing dark [clothing] from top to bottom." He saw someone in a light-colored Thunderbird wearing a jacket with a hood over his head. The man in the Thunderbird was looking at the bank. The robbers came out of the bank and drove away in a white Camry. The Thunderbird then drove away, following the Camry.

Another witness saw three men run out of the Beaumont bank and get into a white car. Although he lost sight of the car for awhile, he later saw the car he believed was involved in the robbery and noted its license plate number. He provided the license plate number to the police. It matched the license plate for Harris's Thunderbird.

Two witnesses testified that a bank in Hesperia was robbed on September 22, 2009. A customer of the bank saw three men dressed in black "from head to toe" enter the bank. One of them forced her to the ground as they robbed the bank. A teller at the bank testified that three people "wearing all black" robbed the bank.

A third witness of the Hesperia bank robbery testified that the day before the robbery he saw a man sitting in a white or silver Thunderbird facing the bank. The man in the car was a large, Black male with short black hair. The next day, before the robbery took place, the witness saw a turquoise or green van parked in the same spot. The same man he saw in the Thunderbird the day before was in the van. Another man was in the passenger seat. A few minutes after the robbery, the witness saw the van leaving the area and noticed at least four Black males inside.

Another witness ran outside the bank just after the robbery and saw a black Jeep leave the area. A stolen black Jeep was later found behind a nearby grocery store. The store's surveillance videotape showed a teal van in the same area behind the grocery store around the time of the robbery.

After witnesses testified regarding the prior robberies, the court admonished the jury that the evidence regarding the Beaumont and Hesperia bank robberies could be used against Harris and Rials only.

Over Rials's objection the court gave the following instructions, based on CALCRIM Nos. 304 and 375, regarding the evidence of the prior robberies:

"I instructed you during the trial that certain evidence regarding a robbery in Beaumont and Hesperia was being offered with respect to Benny Harris and James Rials. You must not consider that evidence against any other defendant."

“The People presented evidence of other behavior by certain defendants that was not charged in this case that certain defendants provided vehicles used in other robberies to show a common plan or scheme.

“You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the acts. . . .

“If the People have not met this burden, you must disregard this evidence entirely.

“If you decide that the defendant committed the uncharged acts, you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:

“The defendant had a plan or scheme to commit the offenses alleged in this case;
or

“The defendant has an increased level of responsibility within a particular organization.

“In evaluating this evidence, consider the similarity or lack of similarity between the uncharged acts and the charged offenses.

“Do not consider this evidence for any other purpose.

“Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

“If you conclude that the defendant committed the uncharged acts, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of Robbery or that the Gang or Firearm

allegations have been proved. The People must still prove each charge and allegation beyond a reasonable doubt.”

2. Analysis

“Evidence Code section 1101, subdivision (b), permits the admission of other-crimes evidence against a defendant ‘when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act.’ [Citation.] ‘[Evidence Code s]ection 1101 prohibits the admission of other-crimes evidence for the purpose of showing the defendant’s bad character or criminal propensity.’ [Citation.] As with other circumstantial evidence, its admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence or absence of some other rule requiring exclusion. [Citation.]” (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

“The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury.” (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

The trial court’s rulings on the admissibility of evidence under Evidence Code sections 1101 and 352 are reviewed for abuse of discretion. (*People v. Davis* (2009) 46 Cal.4th 539, 602.) We generally find reversible error only if the court’s exercise of

discretion was arbitrary, capricious, and resulted in a miscarriage of justice. (*People v. Williams* (2009) 170 Cal.App.4th 587, 606 [Fourth Dist., Div. Two].)

The court's initial decision to allow evidence of the prior robberies against Rials was not an abuse of discretion. Rials's traffic citation is evidence that Rials was driving Harris's Thunderbird in August 2009. The same car was in his garage in October 2009. This evidence permits a reasonable inference that Rials possessed the car throughout this two-month period. During that time, the Beaumont and Hesperia bank robberies took place. Harris's Thunderbird was involved in the Beaumont robbery and, the day before the Hesperia robbery, a man fitting Rials's description was seen parked in a white Thunderbird looking at the bank. These facts suggest that Rials was involved in some way with the Beaumont and Hesperia robberies, which were carried out in a manner sufficiently similar to the Barstow robbery to suggest a common plan or scheme. The evidence of Rials's involvement in the prior robberies thus reasonably implies his involvement in the Barstow robbery.

The probative value of the evidence linking Rials to the two prior robberies was not substantially outweighed by the risk of a serious danger of undue prejudice, jury confusion, or that the evidence would mislead the jury. (See Evid. Code, § 352.) Although Rials asserts there was a "substantial prejudicial impact of the evidence of the two other bank robberies," he does not elaborate. He may be referring to the prejudice to his defense due to the fact that the evidence supports guilt. However, "[t]he prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not

the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ The ‘prejudice’ referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues.*”” (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.)

Here, there was no evidence that any of the robbers fired a gun or that anyone was harmed in any way during the prior bank robberies. Nor was there other evidence regarding the prior robberies that would tend to evoke an emotional bias against Rials. The court could reasonably conclude that any possible prejudice did not substantially outweigh the probative value of the evidence. We therefore hold that the trial court did not abuse its discretion in permitting the jury to hear evidence of the two prior robberies.

Next, Rials argues that based on the evidence adduced at trial the court should not have instructed the jury that the evidence of the prior robberies could be used against him.⁵ He points out that although *the court* heard the evidence that Harris’s Thunderbird was found in Rials’s garage in October 2009, the jury did not. According to Rials, the only evidence connecting Rials to Harris’s Thunderbird was the traffic citation issued to him while driving the car on August 1, 2009. Thus, he contends, there was insufficient

⁵ The People assert that Rials forfeited this argument by failing to request clarifying language to the instruction. We disagree. The record reveals that Rials objected to the use of CALCRIM No. 375 and to the specific reference to him as one of the two defendants against whom the evidence of the prior robberies could be used.

evidence to support the inference that he provided the Thunderbird used in the Beaumont and Hesperia robberies.

We agree with Rials on this point. The evidence of the traffic citation issued in August 2009 and the fact that the car was in Rials's garage two months later creates a period of time defined by the two events. However, without the evidence that the Thunderbird was in Rials's garage in October 2009, there is nothing to suggest any extended period of possession. The fact that Rials was driving Harris's Thunderbird on one occasion reasonably suggests his possession of the car on, and perhaps close to, the date of the traffic citation, but not three weeks later when the Beaumont robbery took place. Without other evidence to establish ongoing possession, there is insufficient evidence to support a reasonable inference that Rials possessed the car at the time the Beaumont and Hesperia robberies took place.

The People contend the evidence of the traffic citation must be viewed together with evidence regarding Rials's and Harris's gang relationship. The argument appears to be as follows: Harris and Rials are fellow BPS Bloods members; Harris was a leader or shot caller of the gang who provides vehicles to selected persons for use in committing crimes; Rials's use of the Thunderbird on August 1, 2009 (when he received the traffic citation) indicates that Harris (the car's owner) provided the Thunderbird to Rials; therefore, the jury could infer that Harris provided the Thunderbird to Rials to commit robberies, including the Beaumont and Hesperia robberies. We reject this argument. Evidence that one gang member uses a gang leader's car on one day and that car is used

in a crime three weeks later is insufficient to establish the gang member's participation in the crime.

However, any error in instructing the jury that the evidence of the prior crimes could be used against Rials was harmless. Prejudice in this context is determined under the *Watson*⁶ standard. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018-1019.) Under this standard, we will reverse the conviction only if it “is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

First, the jury was instructed that it could consider the evidence “only if the People have proved by a preponderance of the evidence that the defendant in fact committed the acts. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely.” Because of the insufficient evidence linking Rials to the prior crimes, it is likely the jury concluded that the People failed to prove that Rials committed the prior acts and, as instructed, “disregard[ed] this evidence entirely.”

Second, the evidence of Rials's involvement in the Barstow robbery was strong. Harris was a leader or shot caller within the BPS Bloods gang. In the 24 hours before the robbery, there were numerous cell phone calls between the various defendants, including calls between Harris and Rials. About 7:00 on the morning of the robbery, Rials's green Cadillac left Moreno Valley and travelled to Barstow. About 10:20 that morning, the Chase Bank in Barstow was robbed. Shortly afterward, Harris and Rials were found in

⁶ *People v. Watson* (1956) 46 Cal.2d 818, 836.

the Cadillac less than one mile from the bank. Immediately after the robbery, numerous cell phone calls were made or attempted between Travis (the driver of Harris's van) and Harris and Rials. At approximately 1:00 in the afternoon, Harris's teal van was pulled over with Travis, Kimbrough, Waiters, Chambers, and the bank's money inside. Taken together (even without the evidence of the prior robberies) the evidence indicates that Harris and Rials participated in the Barstow robbery. Although they do not appear to have been among the armed robbers inside the bank, Harris's role as a gang leader, the frequent cell phone calls around the time of the robbery among those involved with the crime, Harris and Rial's trip to Barstow coinciding with the robbery, and their use of Rials's Cadillac all point convincingly to Rials's involvement with the crime.

For these reasons, we conclude it is not reasonably probable that a result more favorable to Rials would have been reached if the court instructed the jurors that the evidence of the prior robberies could not be used against Rials.

D. Waiters's Claims Regarding the Evidence of Prior Bank Robberies and the Court's Limiting Instruction

As explained in the preceding part, the court instructed the jury that the evidence of the prior bank robberies could be used against Harris and Rials only. Waiters argues that the evidence was inherently prejudicial and the limiting instruction was insufficient to protect him against the jurors' improper use of such evidence.⁷

⁷ Kimbrough and Waiters join in Chambers's arguments regarding the prior bank robbery evidence.

Generally, “[a]ny prejudice that the challenged information may have threatened must be deemed to have been prevented by the court’s limiting instruction to the jury. We presume that jurors comprehend and accept the court’s directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.’ [Citation.]” (*People v. Homick* (2012) 55 Cal.4th 816, 866-867.) Nevertheless, as Chambers notes, courts have also recognized that there are cases “in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” (*Bruton v. United States* (1968) 391 U.S. 123, 135.) This, however, is not such a case.

The evidence regarding the prior robberies was relatively brief. Although the evidence that Harris’s vehicles were used in the prior robberies implicates him, there was no evidence that Chambers, Waiters, or Kimbrough were involved in the prior robberies. We cannot conclude that the jurors were incapable of following the limiting instructions regarding such evidence.

Waiters further argues that the limiting instruction was too narrow in scope. He points out that the court, after informing the jurors that they “must not consider” the evidence regarding the Beaumont and Hesperia bank robberies against any defendant other than Harris and Rials, went on to instruct the jurors that the prosecution “presented evidence of other behavior by certain defendants that was not charged in this case . . . that

certain defendants provided vehicles used in other robberies to show a common plan or scheme.” Waiters interprets these instructions to mean “that the jurors may consider the evidence regarding vehicles only against Rials and Harris, but they are free to use the other evidence presented about the Beaumont and Hesperia robberies as they will, including to conclude . . . Waiters was one of those robbers.”

Initially, we note that Waiters forfeited this argument by failing to request additional or clarifying instructions. (See *People v. Valdez, supra*, 32 Cal.4th at p. 113.) Moreover, the instructions are not reasonably susceptible of Waiters’s interpretation. Reading the instructions as a whole, they are most reasonably construed as limiting the use of all evidence regarding the prior robberies to Harris and Rials. There was no error.

E. Denial of Motion to Exclude DNA Evidence

Waiters filed a motion during trial to exclude DNA evidence based on the prosecution’s alleged failure to establish an adequate chain of custody. Kimbrough joined in the motion. Following arguments, the court denied the motion. On appeal, defendants argue the court’s ruling was an abuse of discretion. We disagree.

“In a chain of custody claim, “[t]he burden on the party offering the evidence is to show to the satisfaction of the trial court that, taking all the circumstances into account including the ease or difficulty with which the particular evidence could have been altered, it is reasonably certain that there was no alteration. [¶] The requirement of reasonable certainty is not met when some vital link in the chain of possession is not accounted for, because then it is as likely as not that the evidence analyzed was not the

evidence originally received. Left to such speculation the court must exclude the evidence. [Citations.] Conversely, when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.” [Citations.]’ [Citations.]” (*People v. Catlin* (2001) 26 Cal.4th 81, 134.) ““While a perfect chain of custody is desirable, gaps will not result in the exclusion of the evidence, so long as the links offered connect the evidence with the case and raise no serious questions of tampering.”” (*Ibid.*, citing Mendez, Cal. Evidence (1993) § 13.05, p. 237.)

A trial court’s ruling regarding the adequacy of the chain of custody is reviewed on appeal for abuse of discretion. (*People v. Catlin, supra*, 26 Cal.4th at p. 134.)

The following facts are relevant to this issue. On December 14, 2009, Detective Ronan Colleoc collected samples of saliva on two buccal swabs from each of the defendants. The first sample was obtained at approximately noon; the last at approximately 4:00 in the afternoon. Each defendant placed their swab in a separate envelope and Detective Colleoc sealed the envelopes. On each envelope, he wrote identifying information regarding the sample, including the name and birth date of the person from whom the sample was taken and the place, date, and time the sample was taken. He placed the individual envelopes inside a larger envelope and sealed that envelope. He placed the envelope in the trunk of his car. Detective Colleoc testified that he handed the large sealed envelope to an evidence technician on the morning of December 15, 2009.

Evidence technician Deanna Schooler was asked by the prosecutor if she received the swabs from Detective Colleoc “on December 17th, 2009.” She responded: “I believe I did.” Later, counsel for Kimbrough asked her: “Didn’t you receive [the swabs on] December 15th?” She responded: “I am not sure.”

On December 18, 2009, Schooler, or crime scene technician Diana Francis, assigned crime lab bar codes to the swabs and entered information regarding the evidence into a computer system. That same day, the criminalist who performed DNA analysis of the swabs picked up the envelope with the swabs and placed them in her “temporary lab or evidence freezer.” She “processed” the evidence on December 21, 2009.

Defendants assert that the swabs were unaccounted for during two different periods. The first is the period between December 15, 2009—the date Detective Colleoc testified he delivered the swabs to an evidence technician—and December 17, 2009—the date Schooler initially testified she received the swabs from Detective Colleoc. Schooler, however, was not certain of the date she received the swabs from Detective Colleoc. Her initial answer was in response to the prosecutor’s leading question whether she received the swabs “on December 17th, 2009.” When subsequently asked if she received them on December 15, 2009, she stated she was not sure of the date. Because of her uncertainty regarding the date she received the swabs, the court could reasonably conclude that Detective Colleoc delivered them to Schooler on December 15, 2009.

The second alleged gap in the chain of custody is the period between the time the criminalist picked up the swabs for testing (December 18, 2009) and the date they were

processed (December 21, 2009). As noted above, the criminalist stated she placed them in her “temporary lab or evidence freezer.” On appeal, Kimbrough argues that “the record is not clear whether her ‘temporary lab’ and ‘evidence freezer’ were different, or one and the same location” and that “the swabs’ exact whereabouts during that three-day gap were not explained or otherwise identified.” Regardless of whether the criminalist’s temporary lab or evidence freezer are different, there is nothing in the record to indicate any gap in the criminalist’s chain of custody or any tampering of the evidence. The argument is based entirely upon speculation. It is therefore rejected. (See *People v. Diaz* (1992) 3 Cal.4th 495, 559 [“when it is the barest speculation that there was tampering, it is proper to admit the evidence and let what doubt remains go to its weight.”].)

F. Harris’s Motion for Mistrial Based on Reference to the BPS Bloods as a Muslim Organization

Harris argues that the court erred in failing to grant a defense motion for a mistrial after Officer Sanchez (one of the gang experts) testified that the BPS Bloods are related to “the Muslim organization.” We reject this argument.

1. Factual and Procedural Background

During a break in the trial proceedings, counsel for Waiters informed the court that a report written by prosecution witness Detective Leo Griego referred to “possible Islamic writing” on a tattoo on Rials’s left shoulder or arm. The attorney asked that the court direct the prosecutor to tell Detective Griego “not to mention anything about Islam in front of the jury under [Evidence Code section] 352.” In responding, the prosecutor

noted some connections between the founders of the BPS Bloods and Islam and indicated he had learned from Officer Sanchez that a symbol on a particular tattoo may be a reference to “Islamic propriety [*sic*].” The court asked the prosecutor if he intended to elicit from Detective Griego testimony as to the possible connection to Islam in Rials’s tattoos. The prosecutor said he did not. The court directed the prosecutor to instruct Detective Griego to not refer to such writing. The court noted that Detective Griego was sitting in the courtroom and was “sure he’s heard what we’ve discussed.” (It does not appear that Officer Sanchez was in the courtroom at that time.) The court added: “And then subject to the [Evidence Code section] 402 hearing regarding Officer Sanchez, we’ll address the issue again.”

Detective Griego testified without referencing Islam or Muslims.

During an Evidence Code section 402 hearing regarding Officer Sanchez’s qualifications as a gang expert, there was no mention of Islam or Muslims.

During Officer Sanchez’s testimony in front of the jury, the following colloquy took place:

“[Prosecutor]: Now is there—is there any organization as it relates to the Black P Stones?”

“[Sanchez]: Yes. It’s the Muslim organization.

“Q. It’s a Muslim organization?”

At that point, counsel for Waiters objected and moved to strike the testimony. The objection was sustained and the motion to strike granted. (There was no request for an admonishment to disregard the statement and no admonishment was given at that time.)

The prosecutor then asked questions regarding the organizational structure of BPS Bloods.

Counsel for Waiters thereafter moved for a mistrial “based on violation of direct order by the Court for the district attorney and the prosecution bringing out the fact that this was a Muslim organization.” After taking the matter under submission, the court denied the motion, stating: “[T]he order regarding any mention of Islam was specifically made to Detective Griego with the reservation of the right as to whether or not it would be relevant at all depending on what Officer Sanchez said. So, after review, the motion for mistrial is denied.”

In instructing the jury, the court informed the jurors: “If I ordered testimony stricken from the record, you must disregard it and you must not consider that testimony for any purpose.”

2. Analysis

A motion for mistrial in this context “should only be granted when a defendant’s ‘chances of receiving a fair trial have been irreparably damaged.’ [Citation.]” (*People v. Valdez, supra*, 32 Cal.4th at p. 128.) We review the trial court’s ruling on a motion for mistrial for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 459; *People v. Jenkins* (2000) 22 Cal.4th 900, 985-986.)

We hold there was no abuse of discretion for the following reasons. First, the trial court's reason for denying the motion is valid. Counsel's request for a limiting order was directed at the possibility that Detective Griego would mention that a tattoo on Rials indicated a connection to Islam, and the court's explicit order was directed at Detective Griego. The court did not direct the prosecutor to instruct Officer Sanchez to avoid any mention of Islam or Muslims. Indeed, no one requested a broader order. The trial court could reasonably conclude, therefore, that Officer Sanchez's statement that the BPS Bloods is a Muslim organization did not violate the court's order. Although the court's order regarding Detective Griego could have been understood by counsel as a more general direction to avoid references to any connection between the BPS Bloods and Islam, the trial court's conclusion, based on a narrower interpretation of its order, is well within its discretion.

Second, Officer Sanchez's statement appears to have been unintended and unanticipated by the prosecution, and was both brief and isolated. It appears from the transcript that the prosecution was beginning to question Officer Sanchez regarding the nature and structure of the BPS Bloods organization, i.e., its organizational hierarchy. The question that elicited the "Muslim organization" response was: "[I]s there any organization as it relates to the Black P Stones?" Officer Sanchez appears to have understood the question as calling for information about the relationship between the gang and the Muslim organization. After he gave his answer and it was stricken, the prosecutor clarified: "Is there any order in the Black P Stones?" Officer Sanchez then

appears to grasp what the prosecutor was getting at, and responds: “Oh, yes. It’s just they have an organization where . . . it’s kind of like the military where you have your sergeants, your corporals, and then your regular—it’s like the police department. . . .”

There was thereafter no mention of Islam or Muslims. Even if the court’s limiting order applied to Officer Sanchez, there is no reason to believe the prosecutor was attempting to avoid the letter or spirit of that order. Moreover, Officer Sanchez’s single reference to the Muslim organization was both brief and isolated. As such, the reference did not irreparably damage defendant’s chance of receiving a fair trial. (See, e.g., *People v. Valdez, supra*, 32 Cal.4th at p. 128 [unintended, brief, and isolated reference to interview of the defendant at “Chino Institute” in violation of court order did not require a mistrial].)

Third, the court granted the defense motion to strike Officer Sanchez’s statement and, in its final jury instructions, admonished the jury to disregard any stricken statements. We presume that the jury understood and followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Fourth, we reject defendant’s argument that the reference to the “Muslim organization” was “highly prejudicial.” Harris asserts that 43 percent of Americans admit being prejudiced against Muslims and suggests that Officer Sanchez’s statement made him guilty by association.⁸ Without expressing any view as to the accuracy of

⁸ To support his reference to 43 percent of Americans admitting prejudice, Harris cites to Mogahed, *A Gallup Poll Tells Us What Americans Think of Muslims*, the Daily Star (Feb. 9, 2010). He also refers us to Pew Research Center Survey Reports, *Public*
[footnote continued on next page]

Harris’s assertion of American prejudice toward Muslims, we do not believe that the word “Muslim,” in the context in which it was expressed in this case, is so inflammatory as to irreparably damage any defendants’ chance of receiving a fair trial.

For all the foregoing reasons, we reject the argument that the court prejudicially erred in denying the motion for mistrial.

G. *Prosecutorial Misconduct*

Harris contends the prosecutor committed misconduct in four ways: (1) failing to comply with mandatory discovery; (2) making an improper opening statement; (3) failing to control or admonish witnesses in accordance with court rulings; and (4) making an improper final argument. We will address each of Harris’s arguments.

A prosecutor violates the federal Constitution when he or she engages in a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Stanley* (2006) 39 Cal.4th 913, 951.) Conduct that does not render a criminal trial fundamentally unfair is misconduct under state law if it involves “deceptive or reprehensible methods” to persuade the jury. (*People v. Hill* (1998) 17 Cal.4th 800, 845.)

“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

[footnote continued from previous page]

Expresses Mixed Views of Islam, Mormonism (Sept. 25, 2007) for the assertion that 45 percent of Americans believe Islam is contrary to American values. Neither of these publications have been provided to us.

assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, a failure to object or request an admonition will not result in forfeiture if doing so would be futile. (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

Generally, any claim of prosecutorial misconduct related to the timeliness of the production has been forfeited on appeal. (See *People v. Stanley, supra*, 39 Cal.4th at p. 952; *People v. Dykes* (2009) 46 Cal.4th 731, 757.)

1. Discovery Obligations

Harris identifies five instances of the prosecutor’s failure to provide timely discovery. The first is that the prosecutor did not provide him with discovery far enough in advance of the preliminary hearing to allow his counsel to prepare adequately. We reject this claim.

At the outset of the preliminary hearing, counsel for Harris stated: “Just noting also for the record that I’m not announcing ready at this point, in that I’ve just been handed half a ream of papers that I haven’t been able to look at.” The prosecutor indicated that he provided each defense counsel with 103 pages of documents.

Initially, we note that although the production of documents at the time of the preliminary hearing was “not[ed] . . . for the record,” none of the defendants objected to the timeliness of the discovery presented at the preliminary hearing or made any motion or request pertaining to the discovery. Neither Harris’s attorney nor other defense counsel sought, for example, a continuance that might have cured any harm. (See, e.g.,

People v. Pinholster (1992) 1 Cal.4th 865, 941 [the defendant has burden of showing that a continuance would not have cured any harm from failure to timely comply with discovery order].) Nor does Harris explain why an objection would have been futile. Accordingly, any claim of prosecutorial misconduct related to the timeliness of the production prior to the preliminary hearing has been forfeited on appeal. (See *People v. Dykes, supra*, 46 Cal.4th at p. 757.)

Even if the argument had not been forfeited, it is without merit. Harris does not indicate what discovery order or statute was violated by the prosecutor's delivery of documents at the preliminary hearing. Nor does he say what documents were produced and how their production at that time caused any prejudice to the defense. Accordingly, the claim of prosecutorial misconduct as to the production of documents at the preliminary hearing is unsupported and, therefore, rejected.

The second example of the prosecutor's alleged failure to provide discovery appears to concern an alleged failure to provide the defense with discovery regarding a police officer's surveillance of Harris. The issue was raised during trial when the officer began testifying about his surveillance. Harris's attorney informed the court that he had not received any discovery regarding that subject. The prosecutor responded by saying that he has "no reports." That was the end of the matter. On appeal, Harris provides no basis for asserting a discovery violation on this issue.

The third example concerns Department of Motor Vehicle (DMV) records regarding the traffic violation citation Rials received while driving Harris's car. It

appears from the citations to the record provided by Harris that the prosecutor had certain DMV records, which were provided to Harris, and that Harris sought additional records that could only be obtained from the DMV. The prosecutor's office undertook efforts to obtain the additional records Harris sought, but ultimately could not produce what it did not have. The court pointed out that the prosecutor's office is not a custodian of records for the DMV and suggested that Harris's counsel subpoena the DMV. In short, the record does not indicate any discovery violation with respect to the DMV records.

The fourth example offered by Harris concerns the production of documents regarding gang expert, Officer Washington. The one citation to the record Harris provides for his example is to a page of the reporter's transcript in which the court expressed concern for a delay in the start of proceedings. Harris's counsel responded: "Your Honor, I was here—in fact the Court knows I was here fairly early. I was handed a stack of documents, which I then vacated the courtroom to go make copies for everybody. These are the very documents that I'm talking about with photographs apparently brought by the L.A.P.D. officer to court today. I think that's how [the prosecutor] got them. I was ready to go. I made these copies. I think everybody knew I was here ready to go at 9:30." No one made any objection to the production of documents or suggested that there was any violation of a discovery right or obligation. The claim is without merit.

The fifth example is an alleged failure to provide discovery on out-of-state robberies that gang expert, Officer Washington, attributed to Harris. Although the court

had struck Officer Washington’s testimony regarding the robberies, Harris’s counsel requested that the prosecution produce any documents that Officer Washington relied on for such testimony. The prosecutor said he would contact Officer Washington about the information. No other facts or citations to the record are offered to support this claim.⁹ There is no basis for finding a discovery violation.

2. Prosecutor’s Opening Statement

Prior to opening statements, counsel and the court addressed an issue concerning the admissibility of statements made by Travis, the driver of Harris’s teal van when it was stopped on Interstate 15 after the robbery. (Travis was originally charged in this case, but pleaded guilty prior to trial.) Defendants expressed concern that statements Travis made could implicate defendants’ Sixth Amendment confrontation rights under *People v. Aranda* (1965) 63 Cal.2d 518, *Bruton v. United States*, *supra*, 391 U.S. 123, and *Richardson v. Marsh* (1987) 481 U.S. 200.¹⁰

⁹ Harris does cite to pages 2923 and 2924 of the reporter’s transcript, but these pages reflect argument by counsel on motions pursuant to section 1118.1. They do not support Harris’s claim.

¹⁰ As our state Supreme Court recently stated: “*Aranda* and *Bruton* stand for the proposition that a “nontestifying codefendant’s extrajudicial self-incriminating statement that inculcates the other defendant is generally unreliable and hence inadmissible as violative of that defendant’s right of confrontation and cross-examination, even if a limiting instruction is given.” [Citation.] [Citation.] The United States Supreme Court ‘limited the scope of the *Bruton* rule in *Richardson v. Marsh* (1987) 481 U.S. 200 [95 L.Ed.2d 176, 107 S.Ct. 1702] The court explained that *Bruton* recognized a narrow exception to the general rule that juries are presumed to follow limiting instructions, and this narrow exception should not apply to confessions that are not incriminating on their face, but become so only when linked with other evidence introduced at trial.

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The prosecutor told the trial court that “[t]he People concede that the bulk of the statement by Tamla Travis that explicitly implicates codefendants would require redaction or exclusion in a joint trial.” After some further discussion, the court stated that it “sees no issue regarding admission of [Travis’s] statements. She’s not a party any longer to this particular proceeding, it’s not expected she’s going to testify in this proceeding; therefore, her statements would be inadmissible.”

During the prosecutor’s opening statement, the prosecutor spoke about how the teal van was stopped after the bank robbery. He stated: “That vehicle was registered to Benny Harris who was stopped here in Barstow. The driver of that vehicle, Pamela [*sic*] Travis. She was initially taken out of the vehicle and asked questions. She initially stated there was no one else in the vehicle.”

At that point, Harris’s counsel objected as “improper opening statements.” The court overruled the objection.

The prosecutor continued: “She then stated her nephew was in the vehicle when, in fact, there was [*sic*] three individuals in the vehicle: [Waiters, Kimbrough, and Chambers]”

Defendants later moved for a mistrial based on the prosecutor’s reference to Travis’s statements during the traffic stop. The court denied the motion, reasoning that the statements by Travis would not be offered for the truth of the matter asserted and did

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(*Richardson, supra*, at pp. 206–207.) . . .’ [Citations.]” (*People v. Homick, supra*, 55 Cal.4th at p. 874, fn. omitted.)

not implicate defendants' Sixth Amendment confrontation rights. Indeed, the statements referred to in the prosecutor's opening statement were eventually introduced at trial through the testimony of an officer involved in the traffic stop of the teal van.

The prosecutor's brief references to Travis's statements do not constitute prosecutorial misconduct. Even if the two statements attributed to Travis should not have been mentioned during opening statement, they are not so egregious that they infected the trial with unfairness. (See *People v. Stanley, supra*, 39 Cal.4th at p. 951.) Nor do they involve the kind of deceptive or reprehensible conduct that rendered the trial fundamentally unfair. (See *People v. Hill, supra*, 17 Cal.4th at p. 845.)

3. Failure to Control or Admonish Prosecution Witnesses

Harris contends the prosecutor failed to abide by trial court rulings by failing to control or admonish prosecution witnesses. He points to two instances. The first is Officer Sanchez's testimony that BPS Bloods is a Muslim organization. According to Harris, the "trial court had previously ruled there would be no reference to Black P Stone as an Islam or Muslim gang," and that Officer Sanchez's statement was a "direct violation of a court order."

Harris overstates the court's order and mischaracterizes the legal consequence of Officer Sanchez's statement. As explained above in our discussion regarding the motion for mistrial following Officer Sanchez's "Muslim organization" statement, the court's explicit order, as interpreted by the trial court, was directed at Detective Griego only. Officer Sanchez's subsequent statement, therefore, did not violate the court's order.

Moreover, as also explained above, it does not appear that the prosecutor intentionally elicited the comment from Officer Sanchez, but intended to inquire into the organizational structure of the gang. The prosecutor may have been guilty of asking a poorly phrased question, but not misconduct.

The second instance of failing to control a witness involves certain documents and photographs that were brought into court by gang expert, Officer Washington. Some of the documents indicated they were an exhibit in a criminal case. The prosecutor indicated that Officer Washington might rely on the documents in forming his opinions, but that he (the prosecutor) did not intend to introduce them into evidence. The court ordered the documents “not be shown in any manner to the jury subject to a proper foundation and admission being made.”

During a break in Officer Washington’s testimony, Harris’s counsel told the court that Officer Washington had “flashed” the documents, or “at least the top one,” to the jury. The court asked the prosecutor if he had admonished Officer Washington about the documents. The prosecutor responded that Officer Washington was in court when the matter was discussed. After some further discussion, the court concluded the matter with the following comments: “The Court will note that [Officer Washington’s documents] were contained within a manila folder. It was not even apparent to the Court what they were. There was only one photograph that’s partially visible. Even from the Court’s vantage point, which is approximately eight feet away, the photograph is undiscernible.

But the Court had made a previous ruling, so when you return to the stand, Mr. Washington, please refrain from bringing that up with you.”

Harris’s argument on this point is without merit. The prosecutor’s comment that Officer Washington was in the courtroom when the court made its order implies that Officer Washington heard the order. If so, there would be no reason for the prosecutor to repeat the admonishment. Moreover, there is nothing to indicate that the sight of the document, which the court found indiscernible, had any effect on the trial. There is, in short, nothing to suggest any possible misconduct by the prosecutor.

4. Prosecutor’s Final Argument

Harris contends the prosecutor committed misconduct during his final argument to the jury in two respects. First, he asserts that the prosecutor started to cry during the argument, which caused one juror to begin to cry. The reporter’s transcript does not indicate if or when anyone began to cry. The alleged displays of emotion were mentioned by counsel for Rials when he told the court the following: “During the course of his argument, probably 15, 20 minutes ago, [the prosecutor] became emotional. I don’t know why, but he actually started to cry, in my opinion. He took his glasses off. His eyes were watery. His voice was quaking. And I believe that was an emotion of crying. It caused a response in Juror Number 12. She started crying. She put her book in front of her face. [The courtroom deputy] saw her crying . . . [and] took tissue over to her and specifically passed it to her.” The record does not otherwise reflect or corroborate Rials’s counsel’s opinion regarding the prosecutor’s emotions. Nor can we tell what the

prosecutor was saying at the time he allegedly became emotional. Counsel for Rials moved for mistrial, which the court denied.

Assuming the prosecutor began to cry as described by Rials's counsel, no one objected or requested an admonition, and there is no showing that an admonition would have been futile. The argument is therefore forfeited. (See *People v. Hill, supra*, 17 Cal.4th at p. 820.) Even if not forfeited, the argument is without merit. Although appeals to the passions and sympathies of jurors are inappropriate (*People v. Kipp* (2001) 26 Cal.4th 1100, 1129-1130; *People v. Fields* (1983) 35 Cal.3d 329, 362), the mere appearance of watering eyes and a quaking voice, without more, does not constitute prosecutorial misconduct.

Harris further argues that during closing argument the prosecutor showed the jury a PowerPoint slide, which was described by Harris's counsel at trial as stating that the defendants: "[H]ave not shown any evidence to show innocence. . . . Did not make any reason or inference to show innocence." The prosecutor responded that the slide asked the question: "[D]id [counsel for Rials] show one reasonable inference from the evidence that pointed to innocence, no not one." Harris's counsel moved for a mistrial.

Because of defendants' failure to object to the slide at the time it was presented and request an admonishment, they have forfeited the argument on appeal. (See *People v. Hill, supra*, 17 Cal.4th at p. 820.) Even if not forfeited, there was no misconduct. The challenged statement was made in connection with the prosecutor's discussion of a jury instruction regarding the drawing of inferences from circumstantial evidence. The

prosecutor referred to Rials’s counsel’s statement that the jury instructions required the jury to accept an interpretation of circumstantial evidence that pointed to innocence if there are two or more reasonable interpretations of that evidence. (See CALCRIM No. 224.)¹¹ After discussing the evidence, the prosecutor continued: “Did [Rials’s counsel] show you one reasonable inference from the evidence that pointed to innocence? No. He didn’t give you a single one.”

Contrary to defendants’ argument, the prosecutor’s statement, viewed in its context, clearly referred to the circumstantial evidence instruction and could not have been reasonably understood as shifting the burden of proof to the defense. (See *People v. Samayoa, supra*, 15 Cal.4th at p. 841.) Moreover, to the extent that possibility existed, the court cured any uncertainty regarding the burden of proof by reinstructing the jury on the burden of proof pursuant to CALCRIM No. 355.

H. *Failure to Inquire as to Juror Bias*

As noted in the preceding part, Rials’s counsel told the court that a juror began to cry during the prosecutor’s closing argument. Rials’s counsel moved for a mistrial and, in the alternative, requested that the court replace the juror with an alternate. The court denied the motion and the alternative request.

¹¹ CALCRIM No. 224 states, in part: “If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.”

On appeal, defendants Harris, Chambers, and Rials argue that once the court was informed of the crying juror, the court should have made an inquiry into possible juror bias. The other defendants join in these arguments. We reject them.

Under our state and federal Constitutions, a defendant in a criminal case has the right to a trial by a fair and impartial jury. (*Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6; Cal. Const., art. I, § 16.) To protect this right, section 1089 provides for the replacement of a juror with an alternate juror when, upon “good cause shown to the court is found to be unable to perform his or her duty” (§ 1089; see *People v. McNeal* (1979) 90 Cal.App.3d 830, 840.) A hearing to determine whether a juror should be replaced “is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties and would justify his [or her] removal from the case.” (*People v. Ray* (1996) 13 Cal.4th 313, 343.)

“The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial.” (*People v. Ray, supra*, 13 Cal.4th at p. 343.) Here, defendants have failed to establish an abuse of discretion.

The record does not establish whether Juror No. 12 cried and, if she did, why it might indicate bias. Other than Rials’s counsel’s vague and unsworn description that the

juror “started crying” and “put her book in front of her face,” there is nothing in the record to indicate that any juror shed a tear. No one asked that the record reflect such fact, the court did not acknowledge it, and none of the other attorneys corroborated Rials’s counsel’s observation. Even if we assume that a juror started to cry, the absence of any other comments and the failure of any defense counsel to bring the matter to the court’s attention as it occurred strongly suggests that any emotional display was inconsequential. There is, quite simply, nothing in the record upon which we could base a finding that the court abused its discretion in refusing to investigate the matter.

I. Cumulative Effect of Errors

Defendants contend the cumulative effect of the errors deprived them of a fair trial and violated their rights to due process. For the reasons set forth above, we find no errors in the trial proceedings other than the error regarding the instruction concerning the use of the evidence of the prior bank robberies as to Rials. There is, therefore, no multiplicity of errors to aggregate and no cumulative prejudicial effect to consider. We therefore reject this argument.

J. Error in Imposing Enhancement Sentences Under Section 12022.53, Subdivision (j)

As to the two robbery counts (counts 1 & 2), the jury found true gang enhancement allegations (§ 186.22(b)), armed principal enhancement allegations (§ 12022, subd. (a)(1)),¹² and firearm enhancement allegations (§ 12022.53, subd.

¹² The applicable version of section 12022 provides: “[A]ny person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless
[footnote continued on next page]

(e)(1)).¹³ In sentencing defendants, the court stayed the sentence on the firearm enhancements and imposed punishment on the gang and armed principal enhancements. Defendants contend that this is an unauthorized sentence requiring a new sentencing hearing. The People agree.

Subdivision (b) of section 12022.53 provides for a 10-year sentence enhancement when the defendant commits certain crimes armed with a firearm. Subdivision (j) of that statute provides: “When an enhancement specified in this section has been admitted or found to be true, the court shall impose punishment for that enhancement pursuant to this section rather than imposing punishment authorized under any other provision of law, unless another enhancement provides for a greater penalty or a longer term of imprisonment.” Thus, the 10-year firearm enhancement must be imposed unless another enhancement provides for a greater penalty or a longer term of imprisonment.

The court imposed sentence enhancements of 10 years (or one-third thereof pursuant to § 1170.1) for counts 1 and 3 pursuant to section 186.22(b)(1)(C).¹⁴ The

[footnote continued from previous page]

the arming is an element of that offense. This additional term shall apply to any person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.” (Stats. 2004, ch. 494, § 3, p. 3157.)

¹³ See footnote 4, ante.

¹⁴ The true finding on the gang enhancements resulted in 10-year enhancements on count 1 for Kimbrough and Waiters because count 1 was used as the principal term for those defendants. The true finding on the gang enhancements for other defendants and other counts resulted in additional consecutive terms of one-third of 10 years, or three years four months, pursuant to section 1170.1, subdivision (a).

imposition of the gang enhancement is thus not a greater penalty or a longer term than the firearm enhancement. Thus, section 12022.53, subdivision (j) would appear to compel the imposition of the firearm enhancement, and not the gang enhancement.

However, in addition to the gang enhancement, the court also imposed the one-year (i.e., four months, pursuant to § 1170.1) armed principal enhancement under section 12022, subdivision (a).

If the 10-year gang enhancement and the one-year armed principal enhancement are added together, the combined term (11 years) exceeds the 10-year firearm enhancement. The question is whether, under section 12022.53, subdivision (j), the gang and armed principal enhancements can be imposed when their collective term (but not their separate terms) exceeds the term of the firearm enhancement.

This question was addressed in *People v. Sinclair* (2008) 166 Cal.App.4th 848 (*Sinclair*). Faced with an essentially identical sentencing situation as presented here, the court held that the singular phrase, “another enhancement” in section 12022.53, subdivision (j), “does not encompass combinations of enhancements” (*Sinclair, supra*, at p. 853.) Thus, in that case, “subdivision (j) of section 12022.53, by its plain language, mandated the imposition of the 10-year gun use enhancement.” (*Id.* at p. 854.)

As for the armed principal enhancement, the *Sinclair* court noted that subdivision (f) of section 12022.53, which provides that an enhancement involving a firearm under section 12022 (among other statutes) “shall not be imposed on a person in addition to an enhancement imposed pursuant to this section.” (*Sinclair, supra*, 166 Cal.App.4th at p.

854.) The word “impose” in section 12022.53, the court explained, means ““impose and then execute.”” (*Sinclair, supra*, at p. 854, quoting *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127.) Although the court must not impose and execute, it must still impose *and stay* the enhancement term. (*Sinclair, supra*, at p. 854; *People v. Gonzalez, supra*, at pp. 1129-1130.)

Regarding the gang enhancement, the court explained that subdivision (g) of section 186.22 gives the trial court discretion to strike the gang enhancement ““where the interests of justice would best be served.”” (*Sinclair, supra*, 166 Cal.App.4th at p. 855, fn. omitted.) Because of such discretion, the *Sinclair* court directed “the trial court to impose and stay the gang enhancement . . . , unless the court exercises its discretion to strike the enhancement under section 186.22, subdivision (g).” (*Ibid.*)

We agree with the reasoning in *Sinclair* and with the parties in this case that the court erred by staying the firearm enhancement while imposing and executing the armed principal and gang enhancements. To apply the principles set forth in *Sinclair*, the trial court must impose and execute the firearm enhancements on counts 1 and 3, impose and stay the armed principle enhancement, and (in its discretion) either (1) impose and stay or (2) strike the gang enhancement.

K. *Correction of Rials’s Abstract of Judgment*

The abstract of judgment for Rials states that he was convicted by the court. He points out that this is wrong—he was convicted by a jury—and the error must be corrected. We agree.

An appellate court has the inherent power to correct any clerical errors in the abstract of judgment to reflect the true nature of the judgment or proceedings. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183.) Accordingly, we will direct the trial court to correct the error.

IV. DISPOSITION

Following remand, the trial court must impose and execute the firearm enhancements on counts 1 and 3, impose and stay the armed principle enhancement, and either (in its discretion) impose and stay or strike the gang enhancement.

The trial court is directed to prepare an amended abstract of judgment with respect to Rials to reflect the fact that he was convicted by a jury. The trial court is further directed to forward copies of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

The judgments are otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.