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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ISIDORO MATA,

Defendant and Appellant.

F061132

(Super. Ct. No. 1219225)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Timothy W. Salter, Judge.

Lynne S. Coffin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Tia M. Coronado, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

One evening in June 2006, Isidoro Mata (appellant) drove his car into a Modesto neighborhood and stopped in front of four different residences, while his front seat

passenger, Angel Cabanillas (Angel), pointed and fired a rifle at various people, resulting in the death of one victim and injury to another. Angel's brother Pedro Cabanillas (Pedro) was riding in the backseat of appellant's car during the incident. At trial, the parties stipulated that Angel and Pedro were both documented members of the Sureño criminal street gang in Modesto known as South Side Trece (SST). A gang expert opined that appellant was also an active SST member and testified that the neighborhood where the shootings occurred was claimed by the rival Norteño gang known as Deep South Side Modesto (DSSM).

Following a jury trial, appellant was convicted of 11 offenses, including first degree murder (Pen. Code,¹ § 187; count I), attempted murder (§§ 664, 187; counts II, III, & VII), shooting at an occupied building (§ 246; counts IV-VI), shooting at a person from a motor vehicle (§ 12034, subd. (c); count VIII), assault with a firearm (§ 245, subd. (a)(2); counts IX-X), and active participation in a criminal street gang (§ 186.22, subd. (a); count XI). The jury also found numerous sentence enhancement allegations to be true, including allegations the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)). Appellant was sentenced to prison for an aggregate term of 117 years to life.

On appeal, appellant contends: (1) the trial court erred by failing to give the jury accomplice instructions with respect to Angel's out-of-court statements about the SST gang, which he made to a police officer several months prior to the commission of the offenses in this case; (2) the trial court erred by allowing the prosecution's gang expert to testify about appellant's specific intent; (3) the trial court erred by admitting a blue sawed-off shotgun into evidence and sending it into the jury room during deliberations; (4) the prosecutor committed misconduct by eliciting false testimony from one of the victims, denying his membership in the rival DSSM gang; (5) appellant's trial counsel

¹ Further statutory references are to the Penal Code unless otherwise specified.

rendered ineffective assistance by failing to object to Angel's out-of-court statements on confrontation clause grounds; and (6) the trial court erred in its imposition of a restitution fine and direct victim restitution. We affirm.

FACTS

The Prosecution

On June 10, 2006, around 6:00 p.m., members of the Marquez family, including a number of children, were in the front yard of their house on Montavenia Drive. Alicia Marquez was wearing a red shirt and sitting on a car parked in the driveway. A teal Honda Accord drove slowly by the house. Three Hispanic males with "bald heads" were in the car. Monica Marquez assumed the car's occupants were Sureños. Someone in the car made a gang sign of the number "13" with his hand. The Honda returned and stopped in front of the house. Angel pointed a rifle at Alicia and then at the others in the front yard. He also commented on Alicia's red shirt and cursed at her in Spanish.

After leaving the house on Montavenia Drive, the Honda stopped at a house two doors down on Parducci Drive. Esteban, who was known to associate with Sureños, approached the car and spoke with the Honda's occupants. Esteban's sister, Azalia Berumen, came out of the house and started hitting the Honda and arguing with Angel. Angel pointed a rifle at Berumen and said, "South Side." Then the Honda drove away. Shortly thereafter, witnesses heard gunshots which sounded like they came from Almaden Way, the street above Montavenia Drive and Parducci Drive.

The same evening, a large birthday party for Robert Alcazar was in progress at his house on Almaden Way. The party was attended by numerous adults and children, none of whom were known to be connected with any gang. Activities were set up in front of the house, including a basketball court and bounce house. Sometime around 6:00 p.m., the Honda drove slowly by Alcazar's house. Alcazar observed that there were three "bald" Hispanic males in the Honda. Angel leaned out of the window and made a "What's up?" gesture with his hands.

The Honda drove by and stopped in front of the house several more times. During these stops, Angel pointed his rifle at Johnny Silva, who was wearing a red and white San Francisco 49ers jersey. He also fired the rifle multiple times into the open garage of Alcazar's house, where partygoers were attempting to take cover. Alcazar's close friend, Manuel Rayas, was struck and collapsed.

Rayas died from a single gunshot wound to his chest. The bullet fragment extracted during Rayas's autopsy was consistent with a .22-caliber bullet. The "clean" shape of Rayas's wound indicated the bullet did not hit any other object before hitting his body.

Lisa Averell, a witness who attended the party on Almaden Way, identified Angel from a photograph as the shooter and identified appellant in court as the driver of the Honda.

Finally, around 6:10 p.m., the Honda car stopped at a house on Spokane Street, where Andres Esparza was standing in the driveway talking on a portable telephone. Esparza's father was also sitting outside the house. One of the car's occupants said, "We're scrapas." Esparza answered, "What do I have to do with [them]?" A rifle came out of the passenger window and was aimed at Esparza. Esparza threw himself down on the ground and was shot in the leg. The Honda then took off.

The parties stipulated to the following facts: At 6:11 p.m., on June 10, 2006, the first of a series of 911 calls was made to Stanislaus County emergency dispatch regarding the shooting on Almaden Way. At 6:14 p.m., a 911 call came in reporting the shooting on Spokane Street. At 6:23 p.m., a Modesto Police Department patrol car reported that it was following a teal Honda. The Honda was followed until it was stopped at 6:27 p.m., by three police patrol cars. When the Honda was stopped it was being driven by appellant, Angel was the right front passenger, and Pedro was in the backseat. The Honda previously had been purchased for appellant by his father.

According to police testimony, at the time of the traffic stop, appellant, Angel, and Pedro all had shaved heads; Angel and appellant both wore white T-shirts, and Pedro wore a dark colored shirt.

Gang Evidence

Officer Pouv's Testimony

Modesto probation officer Ra Pouv, who participated in appellant's arrest on June 10, 2006, testified he knew appellant from previous contacts and had prepared field identification cards on him. On February 19, 2006, appellant told Officer Pouv that he was a member of the Sureño gang and, on April 1, 2006, told the officer he associated with the Sureño gang.

Officer Gumm's Testimony

Modesto police officer Robert Gumm testified regarding conversations he had with Angel prior to the commission of the current offenses. In late December 2005, Angel contacted Officer Gumm in juvenile hall and told the officer he wanted to talk to him. Angel wanted to give him information in exchange for having gun charges dropped. Officer Gumm made arrangements to conduct a gang debriefing of Angel. Officer Gumm explained that a gang debriefing occurs when a gang member gives law enforcement information about his gang and its activities. Officer Gumm subsequently debriefed Angel on January 4 and March 28, 2006.

During their conversations, Angel provided Officer Gumm with information about the SST gang, including "basic information of the members, current membership, the area that they claim, Sureño sets they get along with, Sureño sets they don't get along with, and then Norteño sets that they're having big issues with." The SST gang's enemies included the DSSM gang. Angel identified himself as an active SST member and said his gang moniker was "Shadow" or "Little Shadow." Angel also identified appellant as an SST member and said appellant's moniker was "Creeper" or "Little Creeper."

Angel told Officer Gumm about his involvement in a drive-by shooting. He said he and two other SST members drove by and shot at the house where the Orejel brothers lived and that the Orejel brothers were both Norteño gang members.² Angel said the .22-caliber revolver used in the drive-by shooting was the same gun officers found in December 2005, after an incident in which he was shot in the head on Bystrum Road. Angel said the .22-caliber revolver was in his waistband when the ambulance arrived to pick him up.³ He was subsequently charged with possession of the gun and taken to juvenile hall, which was where he first contacted Officer Gumm.

During their conversations, Angel also gave Officer Gumm information about SST member Jose Tejada. Angel said Tejada kept a handgun in his car and had a sawed-off shotgun.⁴ Officer Gumm paid Angel \$100 for providing the information about the shotgun.

In April 2006, Officer Gumm went to Angel's home to conduct a probation search. Angel told Officer Gumm that he had ammunition he wanted to turn over and gave the officer a box containing three different types of ammunition, including .22-caliber ammunition.

² Modesto Police Officer Gary Guffey went to investigate a shooting at this location on November 26, 2005. Officer Guffey confirmed that Serafin Orejel lived at the residence along with other family members. There were bullet holes on the residence and on a car parked in the driveway.

³ On December 25, 2005, Stanislaus County sheriff deputy Casey Hill found a .22-caliber revolver and a significant amount of blood on Bystrum Road. Deputy Jesse Reulas was dispatched to the hospital to look for someone with a gunshot wound and found Angel with a gunshot wound to the head. Angel told Deputy Reulas that he associated with Sureños and that, while walking behind a donut shop, he had been shot by four tall Norteños. Deputy Hill asked Angel about the .22-caliber revolver and Angel said it was his personal handgun.

⁴ On February 14, 2006, Officer Gumm conducted a probation search of Tejada's residence and found a sawed-off shotgun. The shotgun was painted blue, a color associated with Sureños.

Officer Sharpe's Testimony

Stanislaus County probation officer Samuel Sharpe testified as the prosecution's gang expert. Officer Sharpe testified about gang culture, including gang-associated numbers, names, colors, and signs. According to his testimony, there are roughly 1,000 Sureño gang members in Stanislaus County. The Sureño gang is divided into subsets, which include the SST gang. The SST gang has between 30 and 45 members. Sureños associate with the number "13", the color blue, and variations of the word "south."

The Norteño gang in Stanislaus County is also divided into subsets, which include the DSSM gang. Norteños associate with the number "14," and the color red. They commonly wear their hair in a "Mongolian haircut, which can be ... a long braid or just long hair coming out from the top of their head."

Officer Sharpe confirmed that shooting victim Andres Esparza had a Mongolian haircut and a gang tattoo on his chest reading "DSSM." Through the gang task force, Officer Sharpe was aware that in 2006, Esparza was documented as a Norteño gang member. However, in the officer's experience, gang members do not generally come into court and admit they are gang members.

Officer Sharpe testified that the Norteño and Sureño gangs in Stanislaus County are "mortal enemies." Drive-by shootings are common in the ongoing war between the two gangs. The four addresses where the crimes occurred in this case were all located in territory claimed by the DSSM gang.

The parties stipulated that Angel and Pedro were "in fact documented members of the Sureños, specifically the set of [SST], as of the date of this incident." The prosecutor next elicited Officer Sharpe's opinion that appellant was a member of the SST gang. In reaching this opinion, Officer Sharpe testified that he conducted the following review:

"I requested and reviewed numerous police reports, police contacts, probation reports, probation contacts, regarding [appellant]. From there, I compared the activities in the reports in the various contacts with our

criteria, and determined that [appellant] was in fact an active [SST] gang member.”

Officer Sharpe testified that one of the criteria appellant met for gang membership was that he “[p]roclaims to be a gang member.” In support of his testimony, Officer Sharpe referred to the field identification card Officer Pouv prepared regarding appellant’s admission of Sureño gang membership in February 2006.

Officer Sharpe confirmed only two criteria were necessary to establish gang membership and testified that a second criterion appellant met was that he had been “[a]rrested alone or with other gang members.” In support of this criterion, Officer Sharpe referred to the circumstances of the instant case, in which appellant was arrested with Angel and Pedro. Officer Sharpe further testified that if the jury found appellant committed the crime charged in the case, it would qualify as a predicate offense for purposes of defining a criminal street gang under the STEP Act (Street Terrorism Enforcement and Prevention Act).⁵

Another incident in which appellant was arrested with another gang member occurred on December 11, 2005, when appellant and Angel were arrested after being stopped in a stolen car. Officer Sharpe confirmed that, as a result of the incident, Angel had a juvenile petition sustained for the commission of unlawfully taking a vehicle (Veh. Code, § 10851), which also constituted a predicate offense under the STEP Act.⁶ For his

⁵ Regarding predicate offenses, the jury was instructed pursuant to CALCRIM No. 1400, in part, as follows: “A *pattern of criminal gang activity*, as used here, means: [¶] 1. The commission of, conviction of, or having a juvenile petition sustained for the commission of: [¶] any combination of two or more of the following crimes: Burglary, Theft and Unlawful Taking of a Motor Vehicle, Felony Vandalism, Homicide, Manslaughter, Assault with a Deadly Weapon or By Force Likely to Cause Great Bodily Injury, Shooting at Inhabited House, Shooting from a Motor Vehicle at another Person, or Possession of Concealable Firearms; [¶] 2. At least one of those crimes was committed after September 26, 1988; [¶] 3. The most recent crime occurred within three years of one of the earlier crimes; AND [¶] 4. The crimes were committed on separate occasions, or were personally committed by two or more persons.”

⁶ Officer Sharpe testified to a number of other predicate offenses committed by SST members, and the court received into evidence certified adjudication/conviction records of some

part in the incident, appellant had a juvenile petition sustained for receiving stolen property (§ 496d).

Officer Sharpe provided further examples of other gang criteria appellant met and concluded: “It is my opinion, based on the associations, admissions, the reliable sources, [and] untested sources, that [appellant] is in fact a member of [SST].”

Finally, the prosecution elicited an opinion from Officer Sharpe that the crimes in this case “did directly benefit the criminal street gang [SST], a subset of the Sureño gang.” Officer Sharpe explained:

“It benefited them ... at two levels. At the group level it benefited them by increasing their reputation for violence.... [¶] Individually, the benefit was an increase in your personal status amongst the gang. It showed that you had the willingness to do violence or to do whatever it took to represent your gang, [SST].”

The Defense

Yollanda Guevara testified that appellant was a friend of her children and that she saw him almost daily during 2003 and 2004. Nothing about appellant ever indicated that he associated with a gang.

Veronica Leon was a manager of a McDonald’s restaurant. She hired appellant towards the beginning of 2006. Appellant worked 20 to 30 hours per week. She never had any issues with him. He was always polite, never complained, did his job, and obeyed every policy. Leon never saw anything that would indicate appellant was in a gang.

Modesto Police Officer Robert Hart interviewed Lisa Averell following the shooting. When given the opportunity to identify appellant, Averell said he did not look

of these offenses. For example, Pedro pled guilty to felony charge of vandalism, which occurred on September 16, 2005, and Angel was found to have committed burglary on August 1, 2005.

familiar. However, she was able to identify Angel immediately. Averell said she did not get a good look at the driver but focused on the passenger.

Police Officer Craig Grogan interviewed Robert Alcazar following the shooting. Alcazar said that he and Rayas were standing near each other when he heard a gunshot and the sound of the bullet impacting against either the washing machine or dryer. He then heard Rayas say, “They got me,” and saw Rayas’s legs collapse under him.

Alcazar told Officer Grogan that the shooter was the right front passenger. Alcazar said he saw two people in the car but had information there might have been a third. He thought one of the people in the car had dark hair, “which was possibly long.”

DISCUSSION

I. Failure to Give Accomplice Instructions

Appellant contends the trial court prejudicially erred by failing to give accomplice instructions regarding Angel’s out-of-court statements to Officer Gumm about the SST gang. Assuming without deciding the court erred, we conclude there was no prejudice.

A. Applicable Legal Principles

Section 1111 prohibits conviction based solely on the uncorroborated testimony of an accomplice.⁷ (§ 1111; *People v. Davis* (2005) 36 Cal.4th 510, 543 (*Davis*).) “When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices. [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 965-966 (*Frye*), disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

⁷ Section 1111 states: “A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.”

“The rationale for instructing a jury to view with caution an accomplice’s testimony that incriminates the defendant is the accomplice’s self-interest in shifting blame to the defendant. [Citation.]” (*People v. Cook* (2006) 39 Cal.4th 566, 601.) Thus, in this context, ““testimony” ... includes ... all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police.’ [Citation.] ‘On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as “testimony”’ [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 153, 245, quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218; see also *People v. Brown* (2003) 31 Cal.4th 518, 555 [accomplice’s declaration against own penal interest was not “testimony”]; *People v. Williams* (1997) 16 Cal.4th 635, 682 [accomplices’ statements made in course of and in furtherance of conspiracy were not “testimony”]; *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [accomplice’s excited utterance was not “testimony”].)

“Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.]” (*People v. Williams* (2010) 49 Cal.4th 405, 456.) “Any error in failing to instruct the jury that it could not convict [a] defendant on the testimony of an accomplice alone is harmless if there is evidence corroborating the accomplice’s testimony. “Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.” [Citation.]” (*Ibid.*)

Corroborating independent evidence ““need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the

accomplice is telling the truth....” [Citations.]’ [Citations.]” (*Davis, supra*, 36 Cal.4th at p. 543, italics omitted.)

B. Analysis

It is undisputed that Angel was an accomplice in the current offenses, but the parties disagree as to whether his out-of-court statements to Officer Gumm, which were voluntarily made during gang debriefings predating the current offenses, were made under suspect circumstances and, therefore, qualified as “testimony” within the meaning of section 1111. The parties also disagree as to whether the corroboration requirement applies generally to enhancements, and whether it would have applied here to all the charges or just the substantive gang offense. We need not decide these questions because the claimed error was harmless in any event.

In claiming he was prejudiced by the absence of accomplice instructions, appellant notes that Angel’s statements to Officer Gumm connected appellant directly to the SST gang and that the prosecution relied on crimes Angel described as proof of predicate offenses under the STEP Act. Appellant asserts:

“Without [Angel], there would have been no predicate crime evidence, and no blue, sawed-off shotgun. [¶] Given the incredible importance of [Angel’s] statements to the prosecution’s case, the failure to give the accomplice corroboration instruction prejudiced [appellant]. Without the instruction, the jury had no way of knowing that it should view these voluminous statements ‘with caution.’”

Appellant’s prejudice argument overlooks the applicable legal principles, set forth above, that the failure to give accomplice instructions constitutes harmless error if there is evidence corroborating the accomplice’s testimony, and that sufficient corroborating evidence may be slight or circumstantial, and need not corroborate every fact to which the accomplice testifies. Here, there was sufficient corroborating evidence for Angel’s statements identifying appellant as a member of the SST gang. As respondent observes, Officer Pouv testified that in February 2006, appellant told him he was “a member of the

Sureño gang.” In his reply brief, appellant complains “[h]e neither gave Pouv any additional details nor told him which of the many Stanislaus County Sureño gangs he belonged to.” However, the fact appellant, an admitted Sureño gang member, committed the crimes here in the company of two documented SST gang members, was strong circumstantial evidence that the SST gang *was* the particular Stanislaus County Sureño gang to which appellant belonged. Moreover, it was not the first time appellant committed a crime in the company of an SST gang member. Officer Sharpe testified that in December 2005, appellant and Angel were both arrested after being stopped in a stolen car, and both had juvenile delinquency petitions sustained against them as a result of the arrest.

In sum, appellant’s admission of Sureño gang membership, combined with independent evidence of his commission of crimes in the company of SST gang members, sufficiently connected appellant to the SST gang to satisfy a reasonable jury that Angel was telling the truth when he identified appellant as a member of the same gang.⁸ Thus, any error in failing to give accomplice instructions concerning Angel’s statements identifying appellant as a SST gang member was harmless.

We reach the same conclusion regarding Angel’s statements describing predicate offenses and other activities engaged in by SST gang members. The prosecution

⁸ Appellant also takes issue with photographs Officer Sharpe relied on to support his opinion that appellant associated with other SST gang members. Although there was sufficient evidence corroborating Angel’s statements even without the photographs, we note that the record belies appellant’s assumption that Officer Sharpe’s ability to identify SST gang members in the photographs depended on information obtained from Angel’s conversations with Officer Gumm. For example, Sharpe described one photograph in which appellant was wearing a blue bandana and making a Sureño gang handsign. Sharpe’s cross-examination testimony indicates that his ability to identify at least one of the SST gang members in the photograph was based on his own personal knowledge. Thus, Sharpe testified: “Based on my conversation with Gabriel Pedroza, a documented SST member who went by Grumpy, who I’ve identified in previous pictures, Gabriel indicated the photo was taken approximately September 25[, 2005] at a Baby Wicked concert in Bakersfield.”

presented independent corroborating evidence for many of the crimes Angel described to Officer Gumm. Thus, the November 26, 2005, drive-by shooting at a residence on Amador Street, and Angel's subsequent admission that he possessed the .22-caliber revolver used in that shooting, after he suffered a gunshot wound to the head on December 25, 2005, was corroborated by the testimony of the officers that investigated the underlying incidents (i.e., Officer Guffey, Deputy Hill, and Deputy Reulas).⁹ Similarly, Officer Gumm's own testimony that he conducted a probation search and uncovered a blue, sawed-off shotgun in Jose Tejada's residence provided corroboration for Angel's statements identifying Tejada as an SST member in possession of a sawed-off shotgun.¹⁰ In light of the existence of corroborating evidence, not to mention evidence of predicate offenses wholly independent of Angel's out-of-court statements, including certified adjudication/conviction records of offenses committed by SST members Angel and Pedro, it is not reasonably probable the jury would have reached a different result had it been instructed to view with caution accomplice Angel's out-of-court statements to Officer Gumm.

II. Gang Expert Testimony

Appellant contends the trial court abused its discretion in permitting the gang expert "to opine on whether [appellant] specifically intended to 'aid and abet the criminal street gang the Sureños'" in violation of this court's decision in *People v. Killebrew* (2002) 103 Cal.App.4th 644, to the extent it prohibits a gang expert from offering an opinion on a specific individual's subjective knowledge or intent. As we shall explain, the real thrust of appellant's claim concerns the non-hypothetical form of the questions posed by the prosecutor to the expert and their explicit reference to appellant and the other participants in the crimes; the expert never specifically offered an opinion as to

⁹ See footnotes 3 and 4, *ante*, page 6.

¹⁰ See footnote 5, *ante*, page 8.

appellant's subjective intent but generally opined that the crimes in this case benefited the gang. Because appellant did not object to the prosecutor's failure to phrase his questions in the form of hypothetical questions, appellant forfeited such a claim as a basis for reversal on appeal. However, even if the claim was not forfeited, any error in permitting the prosecutor's questions was harmless in this case.

A. *Additional Factual Background*

The following sets forth the questioning highlighted by appellant:

“[PROSECUTOR]: Q. All right, turning to the crime charged in the Information, the killing of Manuel Rayas at [the] Almaden [address], the other two shootings which occurred at [the] Almaden [address], and the circumstances of the three to four passes by the house, the drive-by at [the] Montavenia [address], with the pointing of a gun at the members of the Marquez family, followed by the stopping in front of [the] Parducci [address] and the pointing of a gun at Azalia Berumen, the use of—I believe it was the term ‘South Side’ at the, the Berumen address, pointing of a gun at Montavenia at someone who was wearing red, specifically Alicia Marquez, gang—or apparent gang symbols being thrown with a ‘What’s up’ as part of the first pass at [the] Almaden [address], all of which was followed then by driving over to [the] Spokane [address], pointing a gun at Andres Esparza, yelling ‘We’re scrapas,’ and then firing and shooting at him.

“You’re familiar with the facts of the events that I’ve just described, is that correct?

“[OFFICER SHARPE]: That’s correct.

“Q. Are you familiar with the police reports in this case?

“A. Yes, I am.

“Q. Based on the facts that I’ve just described and using all of the information that you have just relayed to us with regard to the gang you’ve described as South Side Trece, a set of Sureños, as well as the stipulation that Angel Cabanillas and [Pedro] Cabanillas are South Side Trece members, and your finding that [appellant] Mata is a South Side Trece member, do you have an opinion as to whether or not these offenses were committed for gang purposes; specifically, to aid and abet the criminal street gang the Sureños.

“A. My opinion is that—

“[DEFENSE COUNSEL]: Same objection. Just for the record.[¹¹]

“[OFFICER SHARPE]: My opinion is that these crimes at the locations previously mentioned did directly benefit the criminal street gang South Side Trece, a subset of the Sureño gang.”

B. Applicable Legal Principles

Recently, in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), our Supreme Court held that “[h]ypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence.” (*Id.* at p. 1051.) “[A] hypothetical question must be rooted in facts shown by the evidence....’ [Citations.]” (*Id.* at pp. 1045-1046.) “[T]his rule means that the prosecutor’s hypothetical questions had to be based on what the evidence showed *these* defendants did, not what someone else might have done. The questions were directed to helping the jury determine whether *these* defendants, not someone else, committed a crime for a gang purpose. Disguising this fact would only have confused the jury.” (*Id.* at p. 1046.)

Although approving an expert’s express reliance on and consideration of the evidence presented at trial, *Vang* nonetheless carefully reiterated and reaffirmed the rule which prevents an expert from offering an opinion as to a defendant’s actual guilt or the actual truth of an alleged enhancement. The court stated: “A witness may not express an opinion on a defendant’s guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion testimony often goes to the ultimate issue. [Citations.] “Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of

¹¹ Defense counsel appears to have been referring to an earlier objection that the prosecutor’s questions were “going to an ultimate issue, which is for the trier of fact.” Shortly thereafter, the court recognized that defense counsel was making “an ongoing objection.”

fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.” [Citations.]” (*Vang, supra*, 52 Cal.4th at p. 1048.) The court pointed out that the expert had no personal knowledge as to whether any of the defendants had committed the underlying assault “and, if so, how or why; he was not at the scene. The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose.” (*Ibid.*)

The court emphasized that hypotheticals which closely track evidence presented at trial and are, as a practical matter, indistinguishable from the case presented against a defendant, are quite distinct from direct opinions about a defendant’s guilt or innocence. (*Vang, supra*, 52 Cal.4th at p. 1049.) Unlike questions of guilt or innocence, hypotheticals do not invade the province of the jury because: “First, [the jury] must decide whether to credit the expert’s opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions.” (*Id.* at p. 1050.) The court noted with approval that the jury was instructed with a version of CALCRIM No. 332, which stated: ““In examining an expert witness, the expert witness may be asked a hypothetical question. A hypothetical question asks a witness to assume that certain facts are true and then give an opinion based on those facts. *It’s up to you to decide whether an assumed fact has, in fact, been proved.* If you conclude that an

assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.' [Citations.]" (*Vang*, at p. 1050.)¹²

C. Analysis

Initially, we note that the prosecutor's questions were not objectionable on the grounds they were based on the evidence in this case or that Officer Sharpe was asked for his opinion on ultimate issues, but because the prosecutor failed to use hypothetical questions that avoided explicit identification of appellant. By identifying appellant immediately before asking the gang expert his opinion as to whether the crimes in this case "were committed for gang purposes" or "to aid and abet" appellant's gang, the prosecutor's question implicitly asked the expert to opine that this *particular* defendant committed crimes for a gang purpose and, thus, the prosecutor's question was improper. (See *Vang*, *supra*, 52 Cal.4th at p. 1049 [emphasizing the "critical difference between an expert's opinion expressed in response to a hypothetical question and the expert's opinion expressed about the defendants themselves"].)¹³ However, defense counsel's ongoing

¹² Appellant's jury was similarly instructed, pursuant to CALCRIM No. 332, as follows: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the expert relied was true and accurate.* You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence. [¶] An expert witness may be asked a hypothetical question. A hypothetical question asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. *It is up to you to decide whether the assumed fact has been proved.* If you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion." (Italics added.)

¹³ In a footnote, the *Vang* court acknowledged a decision holding that in some circumstances expert testimony regarding the particular defendants was proper, but the Supreme Court decided *Vang* on the express assumption that "the expert could not properly have testified about defendants themselves." (*Vang*, *supra*, 52 Cal.4th at p. 1048, fn. 4.)

objection that the prosecutor's questions went to an ultimate issue did not alert the trial court to the real defect in the questions—invasion of the jury's duty to determine the underlying facts—and thus did not preserve the issue for appeal. (Evid. Code, § 353, subd. (a).)

Even assuming no forfeiture, we would conclude appellant has failed to demonstrate prejudice. Contrary to appellant's contention, the gang expert did not offer an opinion on appellant's specific intent. In response to the prosecutor's request for his opinion as to whether the crimes were committed for gang purposes or to aid and abet the gang, Officer Sharpe did not testify directly about appellant but opined generally that the crimes benefited the gang. He then explained how the crimes benefited the gang, avoiding express references to appellant. Thus, Officer Sharpe testified that the crimes benefitted the gang "by increasing their reputation for violence" and "[i]ndividually, the benefit was an increase in your personal status amongst the gang." The expert's testimony, in and of itself, was not improper. "Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the Penal Code section 186.22, subdivision (b)(1), gang enhancement. [Citation.]" (*Vang, supra*, 52 Cal.4th at p. 1048.)

To the extent Officer Sharpe's testimony was problematic, it was only because it followed a question which seemed implicitly to ask the expert to opine whether appellant *himself* committed the crimes in this case to benefit or aid his gang. We have little doubt that in the absence of the improper question, or if an objection had been made and the prosecutor had been required to rephrase his questions in the form of hypothetical questions, the jury nonetheless would have been presented the expert's reasoning concerning the gang-benefits of the crimes.

Moreover, we strongly disagree with appellant's assertion that "[o]ther than the expert's improper testimony about [appellant's] specific intent, there was very little properly admitted evidence from which the jury could infer [appellant's] subjective

thoughts, or intent.” Appellant notes the lack of evidence that he personally called out a gang name, displayed gang signs, or wore gang clothing during the commission of the offenses. However, the fact appellant, an admitted Sureño gang member, committed the crimes in the company of two documented SST gang members in rival gang territory, was powerful evidence that he was an active gang member, that the current crimes were gang related, and he acted with the requisite specific intent. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 412-413 [commission of crime accompanied by gang members or associates supports inference defendant intended to benefit gang]; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [non-gang member’s commission of crime in association with known gang member supports inference crime was gang related]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198-1199 [commission of crime with fellow gang members supports inference crime was committed in association with gang].)

As appellant notes, the improper admission of evidence is reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. O’Shell* (2009) 172 Cal.App.4th 1296, 1310, fn. 11.) Under *Watson*, an error is reversible only if “it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.” (*Watson, supra*, 46 Cal.2d at p. 836.) Here, there is no reasonable likelihood of a more favorable outcome for appellant if the prosecutor had not asked the gang expert for a specific opinion regarding appellant, as Officer Sharpe’s reasoning would have been presented to the jury in any event, and there was considerable evidence establishing appellant’s subjective motives were gang related. In sum, appellant has shown no reversible error in connection with Officer Sharpe’s testimony.

III. Evidence of Sawed-off Shotgun

The trial court admitted into evidence the blue sawed-off shotgun described by Officer Gumm in his testimony about his probation search of SST gang member Jose Tejada’s residence. Appellant now claims the court had no discretion to admit the shotgun into evidence because it was not relevant to any of the disputed issues at trial.

Appellant also claims the record fails to show the trial weighed the prejudice against the probative value as required under Evidence Code section 352, before allowing the evidence into the jury room. We conclude appellant's claims are forfeited because he did not specifically object to the court's actions on the grounds he now asserts on appeal. We also conclude any error in admitting the sawed-off shotgun was harmless.

A. Additional Factual Background

During Officer Gumm's testimony, this exchange occurred:

“[THE PROSECUTOR]: Q. Showing you what's been marked as Number 90, is this the sawed-off shotgun you found at Jose and Aurelio Tejada's home?

“[OFFICER GUMM]: A. Yes, it is.

“Q. Where did you find it?

“A. It was under a mattress in the bed.

“Q. At the time that you found it, did it look like it does now? And specifically by that I mean that it was painted blue, the barrel had been sawed back about the beginning of the stock, the handle—looks like had been sawed, and then wrapped in black electrical tape with a little bit of—actually, it's duct tape and then black tape.

“A. Yes. That's how we found it. [¶] ... [¶]

“[THE PROSECUTOR]: I would offer in Number 90, subject to the stipulation that following the close of the jury's business the shotgun can be removed from evidence and replaced with a photograph. As we had previously agreed.

“[DEFENSE COUNSEL]: I object. I think the jury's seen it. I think it's prejudicial if it goes in the jury room with them.

“[THE PROSECUTOR]: It's purely up to them, or they can ask not to see it, that's up to them.

“THE COURT: All right. I'll reserve a ruling on that later. [¶] ... [¶]

“[DEFENSE COUNSEL]: It just—so it’s clear, this gun has nothing to do with why we’re on trial today.

“[THE PROSECUTOR]: This is a predicate.

“[DEFENSE COUNSEL]: Right.

“[THE PROSECUTOR]: I began this testimony with the information that we were giving gang information.

“[DEFENSE COUNSEL]: Okay, thank you.”

Later in the proceedings, this exchange occurred:

“[DEFENSE COUNSEL]: And I want to go on the record about the blue gun. We had talked about it yesterday, and over my objection you had said that the actual physical gun would go into the jury room.

“THE COURT: Well, as I recall what [the prosecutor] said, he was going to substitute a photograph.

“[THE PROSECUTOR]: What I asked for was permission to put it into evidence and withdraw it after the jury had completed its task. I absolutely want them to see it, I think they’re entitled to see it. It goes to showing the reality of what occurred. That’s a predicate I’m proving, I can prove the predicate in any possible way—

“THE COURT: All right. Well, as I said yesterday, my tentative decision was to allow it in, and I’m still feeling that way, but I wanted to make sure—is that sawed-off shotgun in a safe condition to go into the jury room?

“THE BAILIFF: It is.

“THE COURT: All right. I will receive it. It will be in.”

B. Analysis

Appellant’s claims concerning the admissibility of the shotgun and its introduction into the jury room during deliberations have been forfeited for purposes of appeal by appellant’s failure to make in the trial court the specific objections he now makes on appeal. (See e.g., *People v. Bennett* (2009) 45 Cal.4th 577, 606-607 [more prejudicial than probative under Evid. Code, § 352]; *People v. Richardson* (2008) 43 Cal.4th 959,

1002 [relevance]; *People v. Gurule* (2002) 28 Cal.4th 557, 626 [Evid. Code, § 352]; *People v. Seaton* (2001) 26 Cal.4th 598, 642-643 [foundation]; *People v. Garceau* (1993) 6 Cal.4th 140, 179 [relevance], disapproved on other grounds in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118; *People v. Flores* (1992) 7 Cal.App.4th 1350, 1359-1360 [relevance; not proper subject for expert testimony; witness was not qualified expert; inadmissible character evidence; failure to exercise discretion under Evid. Code, § 352; admission of evidence denied defendant due process].)

As we have seen, after initially objecting to the admission of the shotgun into evidence, defense counsel accepted the prosecutor's explanation that the shotgun was being offered as evidence of a predicate offense. Appellant now asserts "the prosecutor's understanding of the law was wrong: possession of a sawed-off shotgun is not a STEP act predicate" and "[t]herefore, the shotgun was not relevant to the charged STEP act predicate." This claim was forfeited by the failure to object on this ground below. Likewise, defense counsel did not specifically invoke Evidence Code section 352 either in objecting to the admissibility of the evidence or in requesting that the evidence be excluded from the jury room during deliberations. Thus, appellant forfeited his claim that the court failed to fulfill its duty of weighing the prejudice against the probative value before sending the shotgun into the jury room.

However, even assuming appellant's claims were properly preserved for appellate review, in light of the other powerful evidence supporting the gang aspects of the case discussed above, it is not reasonably probable the jury would have reached a more favorable result if the shotgun evidence had been excluded from evidence or prohibited from going into the jury room. In finding the asserted errors harmless, we disagree with appellant's suggestion that the shotgun evidence was so inflammatory the jurors likely convicted him, not based on the other evidence properly admitted at trial, but to stop gang the gang violence symbolized by the gun. The jury was properly instructed on the limited purpose of evidence of gang activity pursuant to CALCRIM No. 1403. That instruction

told the jury, among other things, that “You may not conclude from this evidence that the defendant is a person or bad character or that he has a disposition to commit crime.” We presume the jury followed this instruction.

IV. Prosecutorial Misconduct Claim

Appellant contends the prosecutor committed prejudicial misconduct by eliciting false testimony from Andres Esparza that he was not a gang member. Appellant asserts the prosecutor should have known Esparza would lie about his gang membership because he did so several months earlier at Angel’s criminal trial. Appellant asserts he did not forfeit the issue by failing to object during trial because the prosecutor did not provide defense counsel with a gang injunction the prosecutor’s office had recently obtained, naming Esparza and other members of his gang.¹⁴ Thus, appellant asserts, “[d]efense counsel did not know the extent of Esparza’s gang ties” and “did not have the opportunity to object.” We need not resolve the forfeiture issue because, even assuming appellant’s prosecutorial misconduct claim was properly preserved, it fails on the merits. For this reason, we also reject appellant’s related ineffective assistance of counsel claim.

A. Additional Factual Background

The prosecutor questioned Esparza about his gang connections as follows:

“Q. Okay. All right. Let me ask you, Mr. Esparza, do you know what the name Norteño means?

“A. No.

“Q. You don’t know.

“A. No.

“Q. Do you know if there is a group in the area you used to live in called the Deep South Side Modesto or Deep South Side Norteños?

¹⁴ Because we conclude it is unnecessary to resolve the forfeiture issue, we deny appellant’s September 27, 2011 request for judicial notice of documents relating to the gang injunction referenced in his argument.

“A. No.

“Q. Okay. You’ve never heard of DSSN or DSSM?

“A. No.

“Q. Okay. Well, I want you to go back and take a look at Number 59. You have a tattoo on your chest, right?

“A. Yes.

“Q. What is the tattoo on your chest?

“A. DSSM.

“Q. DSSM?

“A. Yeah.

“Q. What does that stand for?

“A. Deep South Side Modesto.

“Q. Why do you have the initials on your chest Deep South Side Modesto?

“A. It’s just where I was born, or raised, you know.

“Q. Okay. How big are these tattoos?

“A. About four inches.

“Q. The letters are four inches in height?

“A. (Nod of head) Four to five inches.

“Q. Okay. And about how wide; two, three inches, four inches?

“A. Yes.

“Q. Now, in this same picture you have a little bit of an unusual haircut. Right?

“A. Yes.

“Q. What’s the name for that kind of haircut?

“A. I don’t know.

“Q. You ever heard the term ‘Mongolian’?

“A. No.

“Q. Would you describe to the jury your haircut there?

“A. Just, it’s just a haircut.

“Q. Well—

“A. Long hair.

“Q. The top of your head is shaved on the sides, correct?

“A. Yes.

“Q. And your hair is cut short on the top of your head?

“A. Yes.

“Q. And the back of your head it’s grown out long?

“A. Yes.

“Q. Why did you get that kind of haircut? Was that something your friends were wearing?

“A. No. It was really supposed to be a mullet.

“Q. A mullet?

“A. Yes.

“Q. Okay.

“Q. And you’ve never heard of the Norteños?

“A. No.

“Q. How about the Sureños?

“A. No.

“Q. You’ve heard of criminal street gangs, right?

“A. Yeah.

“Q. People that wear red, people that wear blue?

“A. Yes.

“Q. Had you ever heard that people that belong to criminal street gangs are not supposed to say that they belong to criminal street gangs.

“A. No.

“Q. You never heard that.

“A. No.

“Q. You don’t wear your hair cut like that anymore, do you?

“A. No.

“Q. You’ve moved—don’t tell me your address, but you’ve moved, haven’t you?

“A. Yes.

“Q. You’re totally out of the neighborhood, right?

“A. Yes.

“Q. Have you looked into removing the tattoo?

“A. Yes.

“Q. So it’s fair to say you don’t want to associate the way you used to associate.

“A. Yes.

“Q. In fact, you work now, right?

“A. Yes.”

B. Applicable Legal Principles

“Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.’

[Citations.] Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. [Citations.] This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution [citation], and applies even if the false or misleading testimony goes only to witness credibility [citations]. Due process also bars a prosecutor's knowing presentation of false or misleading argument. [Citations.] As [the California Supreme Court has] summarized, 'a prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process.' [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717; accord, *Napue v. Illinois* (1959) 360 U.S. 264, 269.)

C. Analysis

None of the forgoing principles were violated in this case. A fair review of the record makes it clear the prosecutor was attempting to elicit truthful testimony from Esparza concerning his ties to the DSSM gang, and that the prosecutor promptly sought to correct Esparza's false testimony denying knowledge of the gang by questioning him about contradictory details of his appearance. Thus, when Esparza claimed ignorance of Norteños in general and Deep South Side Modesto Norteños in particular, the prosecutor elicited testimony from Esparza that he had the gang's initials "DSSM" prominently tattooed across his chest in four-inch lettering. The prosecutor also questioned Esparza closely about his hairstyle at the time of the offenses and later presented gang expert testimony that Esparza's hairstyle was one worn by DSSM gang members. The gang expert also testified that Esparza was a documented DSSM gang member in 2006. On this record, there is no basis to conclude the prosecutor committed misconduct by intentionally presenting false evidence or failing to correct testimony he knew to be false or misleading.

Moreover, we are aware of no authority supporting appellant's claim that a prosecutor commits "misconduct by per se" by calling a witness and attempting to elicit

truthful testimony from that witness because the witness has lied in a previous trial involving a different defendant and, therefore, the prosecutor is on notice the witness will probably lie again. The case appellant cites does not support such a rule. (See *People v. Seaton, supra*, 26 Cal.4th at p. 650 [“A prosecutor who, before trial, seriously doubts the accuracy of an expert witness’s testimony should not present that evidence to a jury, especially in a capital case”].) Here, the prosecutor attempted to elicit truthful testimony from Esparza and immediately made efforts to correct Esparza’s feigned denials of knowledge of the DSSM gang. The prosecutor did not commit misconduct.

Because appellant fails to demonstrate prosecutorial misconduct in eliciting or failing to correct false testimony, it follows that defense counsel did not render ineffective assistance in failing to object to the evidence. Defense counsel is not required to make fruitless objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

V. *Ineffective Assistance of Counsel Claim*

Appellant claims he was denied effective assistance of counsel as a result of defense counsel’s failure to object to Officer Gumm’s testimony regarding Angel’s out-of-court statements on the ground it violated the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36. We reject appellant’s ineffective assistance of counsel claim because appellant cannot demonstrate prejudice.

To establish ineffective assistance of trial counsel, a defendant must demonstrate (1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation subjected appellant to prejudice, i.e., there is a reasonable probability that, but for counsel’s deficiencies, the result of the proceedings would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) A reasonable probability is one sufficient to undermine confidence in the outcome. (*Id.* at p. 694.) Appellant must make this evidentiary showing by a preponderance of the evidence. (*Ibid.*; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

We do not find it necessary to address whether defense counsel's failure to object to Officer Gumm's testimony on confrontation clause grounds fell below the performance of a reasonably competent counsel. In order to establish ineffective assistance of counsel, appellant must satisfy both prongs of the *Strickland* test. If either prong fails, the claim must be rejected.

“In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

There was ample evidence, independent of Officer Gumm's testimony, that appellant, like Angel and Pedro, was an active SST gang member and that their offenses were gang-related to support the true finding of the gang allegations against appellant. Based on the evidence in this case, we do not find a reasonable probability of a different outcome, even had appellant's defense attorney objected to Officer Gumm's testimony on confrontation clause grounds.

VI. Restitution Fine

Appellant contends the trial court erred in imposing the maximum restitution fine of \$10,000 under section 1202.4, subdivision (b) because the court failed to consider his ability to pay. Appellant did not object to the restitution amount in the trial court. By failing to object below, he has forfeited this claim on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 351-353; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469; *People v. Forshay* (1995) 39 Cal.App.4th 686, 689.)

In any event, subdivision (d) of section 1202.4 provides that “[a] defendant shall bear the burden of demonstrating his or her ability to pay.” “This express statutory command makes sense only if the statute is construed to contain an implied rebuttable presumption, affecting the burden of proof, that a defendant has the ability to pay a

restitution fine. Whatever is necessarily implied in a statute is as much a part of it as that which is expressed. [Citations.] The statute thus impliedly presumes a defendant has the ability to pay and expressly places the burden on a defendant to prove lack of ability.

Where, as here, a defendant adduces no evidence of inability to pay, the trial court should presume ability to pay, as the trial court correctly did here. Since here defendant's ability to pay was supplied by the implied presumption, the record need not contain evidence of defendant's ability to pay." (*People v. Romero* (1996) 43 Cal.App.4th 440, 448-449.)

VII. Direct Victim Restitution

The trial court ordered appellant to pay \$7,500 in direct restitution for the funeral expenses of the murder victim. (§ 1202.4, subd (f).) Appellant claims the court erred by "failing to impose direct restitution jointly and severally" with Angel.¹⁵ Again, appellant forfeited his claim by failing to object in the trial court.

"[A]ll 'claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review. [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.) Section 1202.4, subdivision (f), states in relevant part, that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order" The court in *People v. Blackburn* (1999) 72 Cal.App.4th 1520 (*Blackburn*), held that a trial court has "the authority to order direct victim restitution paid by both defendants jointly and severally." (*Id.* at p. 1535.) Neither *Blackburn* nor the other case cited by appellant, *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052, however, state that the court *must* order joint and several liability. Because appellant's claim that

¹⁵ At sentencing, the trial court noted "the shooter [(i.e., Angel)], was convicted of second degree [murder]" and commented "[t]hose are the vagaries of the jury system." However, as appellant acknowledges, our record does not disclose whether Angel was ordered to pay direct victim restitution in his separate criminal proceedings.

the trial court should have made its discretionary sentencing choice in a manner that avoids multiple reimbursement for a single expense is made for the first time on appeal, it is not subject to appellate review. (*People v. Smith, supra*, 24 Cal.4th at p. 852.)

Moreover, appellant's reliance on *Blackburn* is misplaced. There, the Court of Appeal found that it was "glaringly obvious" from the record that the trial court actually ordered the direct victim restitution to be paid jointly and severally by the codefendants. (*Blackburn, supra*, 72 Cal.App.4th at p. 1535.) Thus, the modification of the judgment was actually nothing more than a clarification made in "an excess of caution." (*Ibid.*)

DISPOSITION

The judgment is affirmed.

HILL, P. J.

WE CONCUR:

CORNELL, J.

GOMES, J.