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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO AMBRIZ,

Defendant and Appellant.

F061401

(Super. Ct. No. VCF205565B)

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN RAMIREZ,

Defendant and Appellant.

F061579

(Super. Ct. No. VCF205565A)

THE PEOPLE,

Plaintiff and Respondent,

v.

NOEL AMBRIZ,

Defendant and Appellant.

F061676

(Super. Ct. No. VCF205565C)

OPINION

APPEAL from judgments of the Superior Court of Tulare County. Gary L. Paden, Judge.

John Hardesty, under appointment by the Court of Appeal, for Defendant and Appellant Marco Antonio Ambriz.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant Juan Ramirez.

Eric Weaver, under appointment by the Court of Appeal, for Defendant and Appellant Noel Ambriz.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Catherine Tennant Nieto, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellants Juan Ramirez, Noel Ambriz, and Marco Antonio Ambriz¹ (collectively, defendants) of shooting at an inhabited dwelling, shooting from a motor vehicle at a person, receiving stolen property, and eight counts of assault with a firearm. The jury also found true that they committed the offenses for the benefit of a criminal street gang. Defendants raise 10 separate challenges to their convictions, which fall into four categories: (1) error in admission of gang and firearm expert testimony; (2) insufficient evidence to support the assault and shooting from a motor vehicle convictions; (3) prosecutorial misconduct; and (4) instructional errors. We conclude there was no prejudicial instructional error and disagree with the other contentions. We thus will affirm the judgments.

¹We will refer to defendants Noel Ambriz and Marco Ambriz by their first names, not out of disrespect but to avoid any confusion to the reader.

FACTUAL AND PROCEDURAL SUMMARY

Around 4:00 p.m. on June 23, 2008, the Valdovinos family was startled by six gunshots fired at their home located on North Smith Road. When the shots were fired, Raquel was in the kitchen cooking with her husband Jose and her son Jesus. Raquel's daughter, Maria was in the living room breastfeeding her baby; Maria and her four children were visiting. Maria's daughter was inside watching television and her sons were outside in the backyard. Maria's brothers, Max and Juan Carlos, also were in the backyard. Jesus's girlfriend, Salina E., was resting in the garage, which had been converted into living quarters for Jesus and her.

The first three or four shots were in close succession; after a pause, more shots were fired. One of the shots hit the garage door and another shot hit near the cooler inside the garage next to where Salina E. was standing. The bullets that penetrated the garage made the mirror on the wall wobble.

Immediately upon hearing the shots, Juan Carlos ran to the chainlink fence on the north side of the property and saw a red car heading east on Olive Avenue at a high rate of speed. When Maria heard the shots, she stood up and, while holding her baby, she opened the front door. There was smoke in the air just outside the front door. Maria gathered her children and the entire Valdovinos family went outside to the front of the house, where they shortly were met by police officers.

Maria had parked her minivan directly in front of the Valdovinos house. After the shots were fired, she discovered a bullet hole in the back of the minivan. Juan Carlos's Camaro, also parked in the front of the house, had a bullet hole in it. There was a bullet hole in the garage and gunshot marks on the house. Several other vehicles were parked in front of the house.

At about the same time, Tulare County Sheriff's Detective Jesse Cox was conducting an interview at a nearby house on North Newman Road. After Cox finished the interview, he was walking back to his car when he heard six gunshots coming from a

northwest direction. As he was getting into his car, Sheriff's Deputy Javier Guerrero pulled alongside Cox in a marked patrol vehicle. Cox told Guerrero about the gunshots; Guerrero told Cox he had just seen a vehicle, which he identified in his report as a red, four-door Honda Accord, leaving the area where shots had been fired.

Before meeting up with Cox, Guerrero had seen the red four-door Honda Accord traveling northbound on North Smith Street headed toward Olive Avenue. The vehicle caught his attention because it failed to stop at a stop sign and was traveling in excess of 40 miles per hour. Inside the Accord were three Hispanic males, all with shaved heads. Guerrero observed the person in the back seat lean out the window and yell something toward the house on the corner of North Smith Road and Olive Avenue. Guerrero did not stop the vehicle because he was en route to meet Cox.

Cox advised dispatch of the firing of gunshots in the vicinity, while Guerrero broadcast a description of the Accord. The two officers drove toward North Smith Road and Olive Avenue, which was 15 to 20 seconds away. Guerrero stopped to speak with the people gathered outside the house; Cox drove off to attempt to locate the Accord.

Shortly after 4:00 p.m. that same day, Sheriff's Deputy Carl Bostai saw a reddish brown colored vehicle matching the description broadcast by dispatch. There were three people in the car. Bostai made a U-turn and activated his siren in order to make a traffic stop. Initially, the Honda Accord failed to stop and Bostai had to engage in a high-speed chase.

When the Honda Accord approached a residence on Road 136, it slowed and the passengers looked around. The rear passenger, Noel, looked back toward the deputy. Marco was the front seat passenger and Ramirez was driving the Accord. Bostai saw Marco reach out the front passenger window and throw an object towards the residence on Road 136. By this time, other officers had arrived on the scene and a felony stop of the vehicle was made.

Bostai searched the area where he had seen Marco throw an object out the window. He found a .357 revolver in a pile of grass clippings. When he opened the cylinder, there were six dispensed casings and no live ammunition in the gun.

Bostai also placed a brown paper bag over the suspects' hands to preserve any gunshot residue. A subsequent test of each of the suspects' hands was negative for gunshot residue.

Sheriff's Detective Bobby Saldana documented a total of five bullet holes at the house on North Smith Road. He located one in the minivan, one in the Camaro, and a total of three in the garage door and stucco. There were no casings, indicating the weapon might be a revolver because revolvers do not leave casings after being fired.

Ramirez was interviewed by Sheriff's Detective Rodney Klassen the evening of June 23, 2008, after waiving his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Ramirez admitted being a Sureno gang member, but denied having a gun or knowing anything about the events surrounding the shooting. Ramirez was aware something was thrown out of the car window when the police were chasing him, but denied knowing what was thrown.

Klassen also interviewed Marco after Marco waived his *Miranda* rights. Marco told Klassen one of his "homies" had been shot the week before by the people who lived in the house on North Smith Road. Marco acknowledged that the "Nortenos own the whole street" and you only go down the street to cause problems for the Nortenos. When asked if he had a gun, Marco responded, "I don't know."

The gun found on Road 136 was dusted for fingerprints, but none were recovered. The gun had been listed as stolen by the Department of Justice.

The Accord, which belonged to Ramirez's father, was towed and stored in an inside storage area. The day after the shooting the Accord was processed for gunshot residue, which was found on the exterior of the front passenger door and the headliner of the rear seat.

Ramirez, Marco and Noel were charged with (1) shooting at an inhabited dwelling, in violation of Penal Code section 246,² (2) shooting from a motor vehicle, in violation of section 12034, subdivision (c), (3) eight counts of assault with a firearm, in violation of section 245, subdivision (a)(2), and (4) receipt of stolen property, in violation of section 496, subdivision (a). It also was alleged that the crimes were committed for the benefit of a criminal street gang, in violation of section 186.22, subdivision (b), and that the defendants personally used a firearm in the commission of the assault offenses.

The information also alleged Noel was at least 14 years old and eligible to be prosecuted as an adult with respect to the count 1 offense, shooting at an inhabited dwelling. Initially, Noel's motion to sever his trial from that of his codefendants was granted; however, the trial court reconsidered the motion and, ultimately, all three defendants were tried jointly.

Department of Justice Senior Criminalist Nancy McCombs has been a forensic scientist for 20 years and previously has qualified as an expert witness in ballistics. McCombs examined three bullet fragments, a bullet, and a .357 revolver that had been sent to her for testing. McCombs was unable to determine if the fragments were fired from the revolver, but concluded that the bullet was fired from the revolver.

Max associated with Norteno gang members. He acknowledged that Sureno gang members were rivals. Max was aware that Ramirez was a Sureno. Max and Ramirez had gotten into a fistfight in September 2007. In February 2008, Max was involved in a Norteno-Sureno fight at a local high school. A student was stabbed and Max cooperated with the police in their investigation of the stabbing. Max's brother, Jesus, also associated with Nortenos.

Sheriff's Deputy Michael Yandell was qualified to testify as a gang expert. Yandell testified extensively about the Norteno and Sureno gangs and their activities.

²All further statutory references are to the Penal Code unless otherwise specified.

A jury convicted defendants of all charges and found the gang enhancements to be true. The jury could not reach an agreement on the personal use of a firearm enhancement.

All three defendants were sentenced to a term of 15 years to life for the count 1 offense, with the term for the count 11 offense to run concurrently. The terms for counts 2 through 10 were stayed pursuant to section 654. Various fines also were imposed and credits awarded.

DISCUSSION

Defendants raise numerous challenges to their convictions, including: (1) allowing the gang expert to testify in response to a “mirror” hypothetical; (2) the failure to hold a *Kelly*³ hearing or exclude the firearms expert testimony; (3) insufficiency of the evidence to support the eight assault with a firearm convictions; (4) insufficiency of the evidence to support the shooting at a person from a motor vehicle convictions; (5) prosecutorial misconduct by eliciting testimony in violation of a pretrial order; (6) systemic prosecutorial misconduct; (7) the denial of a mistrial based on prosecutorial misconduct; (8) the failure to give defense instructions addressing prosecutorial misconduct; (9) the failure to instruct that CALCRIM No. 370 did not apply to the gang enhancements; and (10) the failure to instruct sua sponte with CALCRIM No. 358 and issue a cautionary instruction with CALCRIM No. 357.

We categorize the challenges into four general areas: (1) the admission of gang and firearm expert testimony; (2) the insufficiency of the evidence supporting the assault with a firearm and shooting from a motor vehicle convictions; (3) prosecutorial misconduct claims; and (4) instructional errors.

³*People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

I. Admission of Expert Testimony

Defendants challenge the admission of the testimony of the gang expert in response to a hypothetical that mirrored the facts of the case and the testimony of the firearms expert. Both of these issues have been resolved adversely to defendants' position by the California Supreme Court.

Use of hypotheticals

Defendants allege the trial court abused its discretion and violated their due process rights when it permitted the gang expert to testify in response to a hypothetical that essentially mirrored the facts of the case. Defendants did object at trial and the objections were overruled. In response to the hypothetical, the expert, Yandell, answered that the offenses would benefit the gang and that all three men in the hypothetical were active participants in the shooting.

Defendants challenge this testimony because the "hypothetical was so thinly disguised that it had to be apparent to the jury that the prosecutor was asking about the facts of the current case." Allowing an expert to testify in response to a thinly disguised hypothetical is not error. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045 (*Vang*)). As the California Supreme Court noted in *Vang*, hypothetical questions "must be rooted in facts shown by the evidence" [Citations.]" (*Ibid.*) The reason, of course, is that a "hypothetical question not based on the evidence is irrelevant and of no help to the jury." (*Id.* at p. 1046.)

The *Vang* decision was issued on October 31, 2011, after defendants' appellate briefs were filed. In that decision, the California Supreme Court explains and limits the holding of *People v. Killebrew* (2002) 103 Cal.App.4th 644 and *Killebrew's* progeny, upon which defendants heavily rely. (*Vang, supra*, 52 Cal.4th at pp. 1047-1049.) *Vang* definitively decides this issue adverse to defendants and explains that *Killebrew*, *People v. Gonzalez* (2006) 38 Cal.4th 932, and *People v. Gardeley* (1996) 14 Cal.4th 605 do not

bar the questioning of expert witnesses through the use of hypothetical questions that closely mirror the facts of the case. (*Vang*, at pp. 1047, 1049.)

Also definitively resolved in the *Vang* decision is that allowing the expert to testify regarding the intent of hypothetical perpetrators in a thinly disguised hypothetical does not invade the province of the jury. (*Vang, supra*, 52 Cal.4th at p. 1049.) An expert also is not precluded from expressing an opinion on whether a crime was gang related. (*Id.* at p. 1052.)

In light of the holding of *Vang*, defendants' objections to the gang expert testimony fail.

Firearms testimony

Defendants filed a motion in limine to exclude or limit the testimony of the prosecution's bullet comparison expert. The motion asserted potential testimony that the ballistics expert was able to match one of the bullets found at the scene with a bullet test fired from the gun recovered by the police was unreliable because bullet comparison evidence generally is not accepted in the scientific community.

At the hearing on the motion in limine, defense counsel objected to the ballistics expert testifying that the bullet found at the shooting was fired from the gun recovered by the police. Defense counsel had no objection, however, to expert testimony that the bullet found at the scene had all the characteristics consistent with the rifling of the gun recovered by the police.

The trial court ultimately ruled that the firearms/ballistics expert could testify that the markings on the bullet recovered from the scene of the shooting were consistent with it being fired from the gun recovered by the police at the time of Marco's arrest. The trial court ruled that no *Kelly* hearing would be held. At a subsequent in limine hearing, the trial court ruled that the ballistics expert could testify that the recovered bullet was fired from the gun recovered by the police "or a gun just like this gun."

Under the *Kelly* doctrine, evidence based on a new scientific method must satisfy three requirements before it may be admitted: (1) the technique generally must be accepted in the scientific community; (2) the expert witness must be qualified to give an opinion; and (3) correct scientific procedures must have been used. (*People v. Leahy* (1994) 8 Cal.4th 587, 594 (*Leahy*).) The party offering the evidence has the burden of proof. (*People v. Diaz* (1992) 3 Cal.4th 495, 526.)

Defendants contend the trial court erred in not conducting a *Kelly* hearing prior to accepting testimony from the expert, McCombs. On appeal, defendants assert that none of the three prongs of the *Kelly* test were satisfied. In the trial court, however, no challenge was raised to the second and third prongs of the *Kelly* test; rather, only the first prong of the *Kelly* test was challenged. Any challenges to the second or third prongs of the *Kelly* test are forfeited for failure to raise them in the trial court. (*People v. Clark* (1993) 5 Cal.4th 950, 1018.)

With respect to defendants' contention that bullet comparison evidence generally is not accepted in the scientific community and therefore does not meet the first prong of the *Kelly* test, the California Supreme Court has decided this issue adversely to the defendants' position. In *People v. Cowan* (2010) 50 Cal.4th 401, the court found that the technique of ballistics comparisons is a procedure that isolates physical evidence whose existence, nature, appearance, and meaning laypersons are able to grasp and evaluate. (*Id.* at p. 470.) Under these circumstances, the reliability of the process used to process the physical evidence—the comparison of bullets—is not subject to a *Kelly* hearing. (*Ibid.*; see also *People v. Eubanks* (2011) 53 Cal.4th 110, 140-141; *People v. Venegas* (1998) 18 Cal.4th 47, 81.)

Kelly applies “to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law.” [Citation.]” (*Leahy, supra*, 8 Cal.4th at p. 605, quoting *People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) Ballistics and firearms comparisons are neither new to the law or the

scientific community. (See *People v. Benson* (1989) 210 Cal.App.3d 1223, 1227 [expert testimony on ballistics admitted without objection].)

Thus, defendants' contention that the trial court erred in not holding a *Kelly* hearing prior to allowing the expert to testify fails.

In a related claim, defendants contend that McCombs's testimony should have been stricken or a curative admonition given because it exceeded the scope of the pretrial order and eliciting the testimony constituted prosecutorial misconduct. This issue is addressed in part III., *post*.

II. Sufficiency of the Evidence

Defendants claim there was insufficient evidence to support the multiple assault with a firearm convictions because there was no evidence they had knowledge of all the occupants in the house at the time they committed the drive-by shooting, the gun was not powerful enough to penetrate the walls of the house, and the gun held only six bullets. In essence, they are contending that they had to have specific knowledge of the presence of all the occupants in the house and the present ability to inflict injury on all eight occupants in order to sustain the convictions.

Defendants also challenge the sufficiency of the evidence to support the shooting from a motor vehicle convictions because they did not aim at a specific person, which they contend is required by section 12034, subdivision (c).

Standard of review

In reviewing a challenge to the sufficiency of the evidence, we consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier reasonably could deduce from the evidence in support of the judgment. "The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432; see also *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if any rational trier of fact could have found

the essential elements of the crime beyond a reasonable doubt. (*People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.) “““““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.]” [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The assault convictions

A conviction for a violation of section 245, subdivision (a)(2) requires proof that (1) a person willfully committed an act which, by its nature, probably and directly would result in the application of physical force on another person; (2) the person committing the act was aware of facts that would lead a reasonable person to realize that, as a direct, natural, and probable result of this act, physical force would be applied to another person; (3) at the time the act was committed, the person committing the act had the present ability to apply physical force to the person of another; and (4) the assault was committed with a firearm. (CALCRIM No. 875.)

Defendants have mistakenly equated present ability to commit a violent injury with specific intent to injure another. The crime of assault does not require a specific intent to cause another injury or even a subjective awareness of the risk that an injury might result from the defendant’s conduct. In *People v. Williams* (2001) 26 Cal.4th 779 (*Williams*), the California Supreme Court determined the mental state that is necessary to commit this crime:

“Accordingly, we hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.” (*Id.* at p. 790.)

It is not necessary to point a firearm directly at the victim in order to commit an assault with a firearm. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) The act of drawing a gun into a position in which it could be used when a person is within its range is sufficient to support an assault conviction. (*Id.* at p. 266.)

In *People v. Lathus* (1973) 35 Cal.App.3d 466, this court upheld an assault with a firearm conviction where the defendant, who was a passenger in a moving vehicle, fired at a stalled vehicle. One of the bullets struck a person standing outside the stalled vehicle. The defendant claimed he did not know anyone was near the vehicle and therefore lacked knowledge that he was endangering anyone. This contention was rejected. We explained: “[W]hen an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the act transcends recklessness, and the intent to commit the battery is presumed; the law cannot tolerate a deliberate and conscious disregard of human safety.” (*Id.* at p. 470.)

In *People v. Thompson* (1949) 93 Cal.App.2d 780, evidence showing that the defendant pointed a revolver toward two sheriff’s deputies, aiming the gun between them while pointing the gun downward, was sufficient to support an assault with a firearm conviction because the gun “was in a position to be used instantly.” (*Id.* at p. 782.)

In *Williams*, the court clarified “that assault requires actual knowledge of the facts sufficient to establish that the defendant’s act by its nature will probably and directly result in injury to another.” (*Williams, supra*, 26 Cal.4th at p. 782.) “[A] defendant is only guilty of assault if he intends to commit an act ‘which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.’ [Citation.] Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that

would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.” (*Id.* at pp. 787-788.)

In *People v. Trujillo* (2010) 181 Cal.App.4th 1344 (*Trujillo*), the appellate court held that “a defendant who harbors the requisite mental state for assault while committing one or more *acti rei* such that a direct, natural, and probable result is a battery against two persons may be convicted of assault against each.” (*Id.* at p. 1354.) As the *Trujillo* court noted, “the gravamen of assault is the *likelihood* that the defendant’s action will result in a violent injury to another” and “it follows that a victim of assault is one for whom such an injury was likely.” (*Id.* at p. 1355.)

The drive-by shooting here was committed around 4:00 p.m. on June 23, 2008, a Monday. There were several cars parked in front of the Valdovinos house at the time shots were fired. It was obvious the location of the house was in a residential neighborhood. Defendants were aware people lived at the house; they believed the people who lived there had shot one of their “homies.” Six shots were fired from a .357 revolver directly toward the house. Two cars in front of the house suffered direct hits. Three bullets were fired toward the north side of the house and the kitchen.

Defendants committed multiple *acti rei* when they fired six shots at the Valdovinos residence. The bullets from the .357 revolver could have penetrated a window and injured or killed any one of the people inside, contrary to Ramirez’s allegation. One of the bullets penetrated the garage and nearly hit Salina E. One bullet landed in the minivan parked directly in front of the living room window. Had the bullet instead penetrated the living room window, Maria and/or her baby could have been shot. Raquel, Jose, and Jesus were in the kitchen, which had a window facing the street on which defendants’ car traveled. Juan Carlos and Max were in the backyard, protected only by a chainlink fence, and could see the street in front of the house.

Contrary to the claim of the defendants, the bullets were capable of, and did, penetrate the walls of the residence in that one bullet pierced the garage wall. A

defendant who fires multiple wall-piercing bullets at a residence where he knows multiple family members reside, clearly knows that his acts will probably result in a violent injury to the occupants and it can be inferred that he intended such a result. (*Trujillo, supra*, 181 Cal.App.4th at pp. 1354-1355.)

Furthermore, defendants' contention that the number of assault charges is correlated to the number of bullets fired has been rejected multiple times by multiple courts, and we reject it here. (See, e.g., *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690-691.)

The shooting from a motor vehicle convictions

The defendants' contention that they must have shot at a specific person from their vehicle in order to be convicted of shooting from a motor vehicle has been rejected by this court and we do so again here.

In *People v. Hernandez* (2010) 181 Cal.App.4th 1494, this court held that a violation of section 12034, subdivision (c) does not require a specific intent to shoot at a particular person. We held that the statute requires only shooting from a motor vehicle under facts or circumstances that indicate a conscious disregard for the probability that such a result will occur. (*Hernandez*, at pp. 1500-1502.) The term "at another person" includes the act of shooting "in such close proximity to the target that he shows a conscious indifference to the probable consequence that one or more bullets will strike the target or persons in or around it." (*Id.* at p. 1501.)

Here, defendants willfully and maliciously discharged a firearm six times from a motor vehicle at an occupied residence, which constitutes circumstances showing a conscious disregard for the probability such a result, shooting at a person, will occur. Moreover, assault with a firearm is not a lesser included offense of shooting from a motor vehicle; hence, convictions for both crimes stand. (*People v. Licas* (2007) 41 Cal.4th 362, 370-371.)

III. Prosecutorial Misconduct

Defendants contend the prosecutor committed misconduct when he elicited testimony from McCombs, in violation of a pretrial order, and that the prosecutor engaged in systematic misconduct warranting a mistrial. In a related argument, defendants claim the trial court erred in refusing to give defense-requested instructions on prosecutorial misconduct. We disagree.

Failure to object

When the prosecutor was eliciting testimony from McCombs, which defendants claim was elicited in violation of the pretrial order, no objection was raised that this constituted prosecutorial misconduct. The general rule is that a defendant may not complain on appeal of prosecutorial misconduct unless, in a timely fashion, the defendant “made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Consequently, any claim of prosecutorial misconduct based upon the questioning has been forfeited. (*Ibid.*)

Regardless, the trial court was well within discretionary bounds when it refused to issue a curative admonition crafted by defense counsel. (See *People v. Dykes* (2009) 46 Cal.4th 731, 809.) The prosecutor had moved to strike, and the trial court struck, McCombs’s statement—“[I] had no doubt”—of the identification of the weapon, which is the crux of the testimony complained of by defendants. After striking the testimony, the trial court denied a request that it issue a curative instruction crafted by defense counsel on the basis that issuing the proffered instruction would create further confusion and draw attention to the matter. Furthermore, the jury was instructed with CALCRIM No. 104, which includes the statement, “If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.”

Claim of systematic misconduct warranting mistrial

Defendants contend the prosecutor engaged in a pattern of systematic misconduct when he elicited detailed information about crimes committed by a Sureno gang member in an effort to establish the predicate offenses to show a pattern of gang activity.

Defendants objected to the level of detail elicited by the prosecutor, requested a conference outside the presence of the jury, and moved for a mistrial. The trial court expressed some concern over the level of detail, but denied the mistrial motion. The trial court struck all the testimony related to the Sureno gang member. The trial court instructed the jury to disregard the stricken testimony and further instructed the jury: “[I]t’s not to be considered by you for any purposes.” Defendants have failed to establish prosecutorial misconduct; consequently, we conclude the trial court did not err in denying their motion for a mistrial on this basis.

The standard for assessing claims of prosecutorial misconduct is well settled:

““[T]he applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.] ... [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)

First, the prosecutor’s elicitation of details about predicate offenses does not constitute misconduct. In the case of *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-614, the gang expert testified only to general offenses committed by the gang and to a predicate offense in which the alleged gang member actually was acquitted of the gang allegation. (*Id.* at pp. 611-612.) A second predicate offense involved a gang member

involved in an assault, but no direct link was made as to how the offense was connected to the gang. (*Id.* at pp. 612-613.) The appellate court concluded the expert’s “conclusory testimony cannot be considered substantial evidence as to the nature of the gang’s primary activities.” (*Id.* at p. 612.) Similar conclusions were reached by the appellate court in *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003 and *In re Leland D.* (1990) 223 Cal.App.3d 251, 259. The prosecutor need not restrict testimony on predicate gang offenses to conclusory and incomplete information.

Second, the trial court struck the testimony to which defendants had objected and admonished the jury not to consider the stricken testimony for any purpose. In the absence of evidence to the contrary, and there is none in the record, we presume the jury abided by the trial court’s admonition and instruction. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.)

The other instance which defendants claim constituted systematic prosecutorial misconduct was when the prosecutor was questioning the woman who lived at the house where the weapon was thrown after the shooting. The prosecutor asked a question of the witness, there was an objection, and the objection was sustained. The prosecutor attempted to rephrase the question, there was an objection, and the objection was sustained. The prosecutor then abandoned this line of questioning and commenced asking questions on an entirely different subject matter. Two questions, which were objected to on the grounds of relevance, and the objections were sustained by the trial court, simply do not qualify as misconduct. (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

There was no pattern of misconduct warranting a mistrial and the trial court properly denied the motion.

IV. Instruction Issues

Defendants raise three challenges to the instructions given or not given. First, they contend the trial court erred when it refused a defense proffered instruction that addressed

prosecutorial misconduct. Second, they argue the trial court erred because it failed to instruct that CALCRIM No. 370 (motive) did not apply to the gang enhancements. Lastly, they claim the trial court erred because it failed to instruct sua sponte with CALCRIM No. 358 (evidence of the defendant's statements) or to provide a cautionary instruction with CALCRIM No. 357 (adoptive admissions).

Instruction on prosecutorial misconduct

As discussed *ante*, there was no systematic prosecutorial misconduct. As to testimony that was elicited regarding predicate offenses and to which defendants objected, that testimony was stricken and an admonishment not to consider the stricken testimony was given to jurors. The final claim of prosecutorial misconduct, that of eliciting testimony from McCombs, in violation of a pretrial order, was not preserved for appeal, as discussed *ante*. Furthermore, the objectionable statement from McCombs was stricken and the jury received the general instruction to disregard stricken testimony.

CALCRIM No. 370⁴

Defendants contend the trial court's failure to instruct the jury sua sponte that CALCRIM No. 370 did not apply to the gang enhancements was error and they were denied due process. Defendants do not claim the pattern instruction is a misstatement of the law; rather, that this instruction, when read in conjunction with other instructions, may have confused the jury. If defendants believed the instruction to be confusing or misleading, they had an obligation to request clarifying instructions. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.) Having failed to do so, they have forfeited any claim of error. (*Ibid.*)

⁴CALCRIM No. 370 states: "The People are not required to prove that the defendant had a motive to commit (any of the crimes/the crime) charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

Regardless, it is not reasonably likely the jury misunderstood or misapplied the instruction. We addressed, and rejected, a similar claim in *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1139-1140. CALCRIM No. 370 applies to the charged crimes, not to enhancements. “In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given. [Citations.]” (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1129.)

Instructions on admissions

Marco was interviewed by Klassen at the Pixley station. Marco made statements to Klassen that were not recorded or transcribed. Marco never admitted involvement in the crimes. When asked if he had a gun, his response was “I don’t know.” Marco admitted that one of his “homies” had been shot in the leg a week earlier. Marco also stated that the Nortenos were known to “own” the street where the shooting took place and a person would not go down that street except to cause problems for the Nortenos.

CALCRIM No. 357

Defendants claim the trial court had a sua sponte duty to provide a cautionary instruction with CALCRIM No. 357 on adoptive admissions. CALCRIM No. 357 provides:

“If you conclude that someone made a statement outside of court that (accused the defendant of the crime/ [or] tended to connect the defendant with the commission of the crime) and the defendant did not deny it, you must decide whether each of the following is true: [¶] 1. The statement was made to the defendant or made in (his/her) presence; [¶] 2. The defendant heard and understood the statement; [¶] 3. The defendant would, under all the circumstances, naturally have denied the statement if (he/she) thought it was not true; [¶] AND [¶] 4. The defendant could have denied it but did

not. [¶] If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true. [¶] If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose. [¶] [You must not consider this evidence in determining the guilt of (the/any) other defendant[s].]"

The Bench Notes to CALCRIM No. 357 state: "The court has a **sua sponte** duty to instruct on the foundational requirements for adoptive admissions if such evidence is admitted." (Judicial Council of Cal., Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 357, p. 130; see also *People v. Vindiola* (1979) 96 Cal.App.3d 370, 382, citing *People v. Atwood* (1963) 223 Cal.App.2d 316, 332-334; *People v. Humphries* (1986) 185 Cal.App.3d 1315, 1336.)

At the conference on instructions, the trial court stated it would be instructing the jury with CALCRIM No. 357; defense counsel objected. Once the trial court stated it would be instructing with CALCRIM No. 357, thus overruling the objection, defendants did not offer or request any modification or clarification of CALCRIM No. 357. The burden was on the defendants to request appropriate clarifying or amplifying language if they felt it was necessary. (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) Having failed to do so, defendants' claim that the language of CALCRIM No. 357 should have been amplified or modified is not cognizable on appeal.

CALCRIM No. 358

Defendants claim the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 358, which states:

"You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]"

The trial court has a duty to instruct the jury sua sponte with CALCRIM No. 358 when there is evidence of an out-of-court oral statement by the defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455-456.) The portion of the instruction directing the jury to view with caution an out-of-court statement made by a defendant tending to show guilt also must be given sua sponte. (*Ibid.*) The admonition to view a defendant's statements with caution applies only to incriminating statements made by a defendant. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) The cautionary instruction is intended to assist a jury in determining whether or not a statement actually was made by the defendant. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393 (*Carpenter*).)

There was no request to give CALCRIM No. 358 and no discussion of this instruction in the trial court, perhaps because defendants took the position that the statements to Klassen were not admissions.

Assuming the trial court's failure to instruct the jury with CALCRIM No. 358 in this case was error, it was not prejudicial. Failure to provide the cautionary instruction is not prejudicial where it is not reasonably probable the defendant would have achieved a more favorable result absent the error. (*Carpenter, supra*, 15 Cal.4th at p. 393.) Where there is no conflict in the evidence, but simply a denial by the defendant of the statements attributed to him or her, the Supreme Court has found a failure to give the cautionary instruction to be harmless error. (*People v. Dickey* (2005) 35 Cal.4th 884, 905-907 (*Dickey*).)

In determining whether there has been any prejudice from failure to instruct with CALCRIM No. 358, we look to whether there was any conflict about whether the statements were made or accurately reported. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.) Here, there is no conflict in the evidence. There is no claim on appeal that the statements were not made or that Klassen's testimony regarding the statements was in any way inaccurate.

We also look to other instructions given to the jury in assessing prejudice. (*People v. Sanders* (1995) 11 Cal.4th 475, 536-537.) Here, the trial court instructed the jury on its responsibility to assess the credibility of witnesses (CALCRIM No. 226) and with CALCRIM No. 359, stating that a defendant cannot be convicted based on out-of-court statements alone.

There was no challenge to Klassen's veracity in the trial court and no challenge to his credibility is raised in this appeal. Consequently, there is no reason to assume the jury would have discredited Klassen's unchallenged testimony if CALCRIM No. 358 had been given. Therefore, it is not reasonably probable defendants would have obtained a more favorable verdict if CALCRIM No. 358 had been given and any error in failing to so instruct the jury was harmless. (*Dickey, supra*, 35 Cal.4th at p. 905.)

DISPOSITION

The judgments are affirmed.

CORNELL, Acting P.J.

WE CONCUR:

POOCHIGIAN, J.

DETJEN, J.