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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO SOTO et. al., Defendants and Appellants.	B225594 (Los Angeles County Super. Ct. No. KA087884)

APPEALS from judgments of the Superior Court of Los Angeles County. George Genesta, Judge. Affirmed.

Joanna L. Rehm, under appointment by the Court of Appeal, for Defendant and Appellant Francisco Soto.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Ivan Ernesto Diaz.

Lawrence R. Young & Associates, Lawrence R. Young; Defenders Law Group and Paul R. Peters for Defendant and Appellant Juan Jose Martinez.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez, Robert S. Henry, and Louis Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Soto (Soto), Juan Jose Martinez (Martinez) and Ivan Ernesto Diaz (Diaz) (collectively appellants) appeal from the judgments entered upon their convictions by juries[1] of first degree robbery (Pen. Code, § 211, count 1).[2] Martinez also appeals from his conviction of possession of cocaine for sale (Health and Saf. Code, § 11351, count 2). As to all appellants with respect to count 1, the jury found to be true the allegations that they committed the robbery in an inhabited dwelling, while acting in concert with two or more other persons, within the meaning of section 213, subdivision (a)(1)(A) and the allegation that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). As to Soto and Diaz with respect to count 1, the jury also found to be true the allegation that they personally used a firearm within the meaning of section 12022.53, subdivision (b), and as to Martinez with respect to count 2, the allegation that he was personally armed with a firearm within the meaning of section 12022, subdivision (c). The trial court imposed aggregate state prison terms of 19 years four months, nine years four months and 16 years, on Diaz, Martinez and Soto, respectively.

Martinez contends that (1) the trial court erred in declaring a mistrial as to Diaz but not as to him, thereby entitling him to a new trial, (2) the trial court erred in allowing a police officer to testify that the officer was with a gang unit when no gang allegation was alleged, and (3) evidence of Martinez's involvement in the home invasion robbery was so weak that a new trial should be granted. Diaz contends that (4) his use of a toy gun did not support the personal gun-use enhancement, and (5) juror misconduct requires reversal. Soto's counsel has filed a *Wende*[3] brief raising no issues.

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1 During trial, a motion for mistrial was granted only as to Diaz. Trial continued to judgment as to Soto and Martinez. Diaz was later tried by a separate jury, in a separate trial.

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

3 *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

Diaz joins in the contentions of the other appellants to the extent applicable to him. (Cal. Rules of Court, rule 8.200(a)(5); see *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

We affirm.

FACTUAL BACKGROUND

The Soto/Martinez trial

The prosecution's evidence

The robbery

On July 25, 2009, Nicholas Ibarra (Nicholas) and his brother Mark Ibarra (Mark) lived in a house on Vassar Street, in the City of Pomona (the house), with their roommate, Kevin Del Toro (Del Toro). The three roommates had returned home from a fishing trip at approximately 5:00 a.m. that morning.

Between 6:30 and 7:00 a.m., Nicholas was sitting on the front couch when he heard a car drive up. He looked out the window and saw an old, white, four-door Toyota parked in front of his driveway.[4] He had seen the same car a couple of days earlier. He saw Soto, a childhood friend of his and Mark's, exit the front passenger door holding what appeared to be a gun. He then saw Diaz, with a long, black revolver, which looked like a real semiautomatic "cop gun," exit the rear driver's-side door and Martinez exit the rear passenger door.[5] As Soto got closer to the house, Nicholas determined that he indeed had a silver revolver, with a spinning wheel that appeared loaded. Nicholas did not see Martinez with a gun.

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4 Police later determined that the car was registered to Diaz's wife.

5 Nicholas had never seen Martinez before. He did not know Diaz, but had caught a glimpse of him a few days earlier when Diaz had come to the house, and Mark had gone outside to talk with him. Nicholas was unaware of what Mark and Diaz discussed. Before the day of the robbery, Nicholas had had no negative interaction with any of the appellants.

Nicholas warned Mark to run. Mark ran out the back door and jumped a fence. He knew who was coming to the house and what they came to do to him.[6] Through a crack in the fence, he was able to see Martinez standing in his living room, but could see no one else.

Nicholas opened the door, believing he could talk to Soto and that the gun was only to scare them. But Soto shoved the door into Nicholas and demanded, while putting the gun in Nicholas's face, "Where the fuck is your brother at, homey." Nicholas told Soto that Mark did not live there anymore, as he put his hands up to protect his face. Soto told his associates to grab the television. Diaz and Martinez took the living room television, the X-Box attached to it, and the television cable box and put them in the car. They returned and took another television from Mark's room. Appellants then left, Soto stating, "This is your fucking brother's fault."

Mark returned to the house 10 minutes later. Nicholas then told Del Toro that Soto had just "jacked" everything. Fearing retaliation, Nicholas and Mark debated going to the police, but did go later that day.

The investigation

Pomona Police Officer Greg Freeman, assigned to the gang suppression unit, went to the crime scene and interviewed the victims. On August 14, 2009, a search warrant he prepared was executed at Martinez's residence, where officers seized a loaded .22-caliber silver revolver found in a dresser drawer, two boxes of .38-caliber ammunition, a realistic-appearing black, replica semiautomatic hand or pellet gun found under the bed, cell phones, 16.6 grams of powder cocaine, a digital scale and approximately $1,800 cash in a closet.

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6 Mark had known Soto since he was 13 years old and used to live down the street from him and knew Martinez because he and Soto used to obtain marijuana from him. A couple of days before the robbery, Diaz had come to the house with bats and threatened Mark, stating that he was going to "jack everything in the house," beat Mark up and that Mark should come with them in their car. Mark denied that Soto owed him money for marijuana. Mark believed that Soto was angry at him for "hanging out" with Andrea Stevenson (Andrea), Soto's girlfriend.

Martinez was arrested and, after being *Mirandized*,[7] admitted that the money, cocaine and both guns seized were his. He said that he used drugs and did not sell them and that he had had the $1,800 for years. Officer Scott Hess, also assigned to the Pomona gang violence suppression unit, opined in response to a hypothetical based upon the evidence uncovered during the search, that the cocaine was possessed for sale.

At trial, Nicholas was shown the gun recovered from Martinez's residence and testified that it was not the gun that Soto had used in the robbery. Soto's gun was newer and shinier, the barrel was smaller, and holes in the wheel were bigger. It also did not have tape on the handle as did the gun recovered in the search. The black and orange replica gun looked similar in shape and color to the gun Diaz had.

Nicholas identified Soto and Martinez in photographic six-packs.

The defense's evidence

Martinez called four witnesses, in addition to himself, to establish an alibi defense. In July 2009, he lived with his and Diaz's mother, Francisca Diaz (Francisca), in Baldwin Park. His sister, Alejandra Martinez (Alejandra), also lived with him. Diaz lived in Montebello with his family.

On July 24, 2009, between 6:30 and 7:30 p.m., Richard Mejia (Mejia), Martinez's close friend who lived three blocks away, drove to Martinez's home and picked up Martinez. They drove to Mejia's house, where Martinez stayed all night. Juan Torres (Torres), a friend of Martinez and Mejia, lived next door to Mejia and was with them at Mejia's house until 2:00 a.m., when he went home. According to Torres, Martinez was sleeping at that time. Torres saw Mejia and Martinez leave the next morning at approximately 8:00 a.m.

On July 25, 2009, Francisca saw Martinez arrive home between 7:30 and 8:30 a.m. Alejandra also saw him at home between 8:00 or 8:30 a.m. He was still there between 9:30 a.m. and 10:00 a.m. Mejia picked Martinez up again later that morning, and Francisca did not see Martinez again until that evening.

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Martinez testified, denying participation in any robbery on Vassar Street. He claimed that the last time he saw Mark was when Martinez was with Diaz in front of Mark's residence on Vassar Street, approximately a month and a half before Martinez's August 14, 2009 arrest. Martinez and Diaz went there to purchase an ounce of marijuana for Diaz. The interaction was friendly, and there was no bad blood between them and Mark.

Martinez claimed that he had been addicted to cocaine for two and one-half years and that the cocaine in his room was for personal use. The scale was to enable him to ration his stash and not ingest it all in one day. Martinez also testified that he bought the .22-caliber revolver taken from his room off the street for $40 shortly before his arrest. He also bought the .38-caliber bullets confiscated in the search. He thought they would fit in the .22-caliber gun because they were both revolvers. The plastic gun recovered from his room belonged to his brother, Carlos. It only shot plastic, BB-type bullets.

Francisca testified that she had given Martinez the $1,800 found by the police during the search of his room to fix Martinez's car.

Soto also testified on his own behalf. He was arrested on July 28, 2009, in Orange County. He was a drug user and seller. While in custody, Officer Freeman *Mirandized* him, after which, Soto denied involvement in the robbery, claiming he was at a park in West Covina with his girlfriend.

Soto attempted to establish that Mark had reasons to frame him. Soto knew both Nicholas and Mark. He lived with Mark in West Covina and La Puente where they were dealing narcotics. He did not maintain contact with Mark because they argued about marijuana. Soto owed Mark $4,000 and two pounds of marijuana. Soto also knew Mark's girlfriend, Andrea, with whom Soto had a relationship when Mark was going with her, upsetting Mark.

Soto has never owned any firearms. He did not take part in any home invasion robbery and did not receive any television, X-Box, cable box or cable wires. He denied ever being at the house.

The Diaz trial

After Diaz's request for a mistrial was granted, he was later retried alone. The People's evidence at the retrial was substantially the same as the evidence admitted at the Soto/Martinez trial and is not repeated here, except for the evidence germane to the gun Diaz was holding during the robbery.

Diaz testified in his own behalf. He had been to the house only once. On that occasion, about a month before the robbery, he and his wife had met Mark at the Montebello Mall and followed him back to the house to buy marijuana from him. Diaz did not go inside, as Mark brought the marijuana out to him.

Diaz denied being at the house a few days before the robbery and threatening Mark. But he told Officer Freeman that he went to Mark's house a second time, possibly on July 25, 2009, the day of the shooting, to purchase marijuana. Diaz, however, specifically denied having anything to do with the robbery.

Nicholas testified that the orange and black plastic gun seized from Martinez was the same shape and color as the gun Diaz held during the robbery, but Diaz's gun was only black. Nicholas could not say for certain if it was the same gun, and it could have been a different gun. Diaz's gun looked like it was metal, though Nicholas never touched it. The revolver taken from Martinez's room was not the same as the gun Soto held. Soto's gun was shinier, did not have electrical tape on it as did the exhibit, and had larger bullets than the gun at trial.

DISCUSSION

I. Request for mistrial

A. Background

Before trial began, the prosecutor indicated that he would not present evidence of any statements made by any of the appellants, except for Martinez's statement to police regarding the items seized in the search of his residence. During Mark's testimony, however, the prosecutor indicated to the trial court that he wanted to introduce evidence that a couple of days before the charged robbery, Diaz was at the house and there was an argument. The prosecutor argued that this evidence helped witnesses identify Diaz as a

robber and explained why Mark was frightened while testifying. The trial court allowed the prosecutor to establish the limited facts that there was a meeting at which there was an argument. Mark testified that a few days before the charged robbery Martinez and Diaz had been to the house.[8]

After the jury was released for the midafternoon recess, the prosecutor told the trial court that because the defense had introduced evidence that Nicholas had identified both Soto and Martinez in photographic six-packs, and was never shown a six-pack containing Diaz's photograph, he now wanted to introduce Diaz's statement to Officer Freeman that he might have been to the house on July 25, 2009. The prosecutor argued that Diaz's statement was the reason that Nicholas was not shown a six-pack containing a photograph of Diaz. The trial court did not believe that the failure to show Nicholas a six-pack including Diaz's photograph opened the door to Diaz's statement to Officer Freeman, though the court left open the possibility that the statement might be admissible in rebuttal.

During the prosecutor's questioning of Mark, he asked why Mark ran as the three men approached the house, when he did not see them. Mark responded that he "already knew who it was in my head, because the day a couple days before it happened, the messages that—." Diaz's attorney interrupted the response and interposed hearsay and speculation objections. When the trial court asked to see counsel at the sidebar, the prosecutor said, "I can move on . . ." The judge told him to "just move on."

The following questioning ensued. "Q. [PROSECUTOR]: Now, a couple days before they came into the home—let me ask it this way. You keep talking about what happened a couple days before. Tell us what happened on those days or that day. [¶] [DIAZ'S COUNSEL]: Object to the form of the question. It's too broad. [¶] [THE COURT]: Overruled. [¶] [PROSECUTOR]: Tell us what happened. [¶] [MARK]: We were hanging out at the house, and [Diaz] comes to the house trying to punk all of us,

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[8] The testimony that Martinez and Diaz were at the house just days before the robbery did not indicate that they were there at the same time, or even on the same day.

saying he's going to jack us for everything in the house, telling me to fucking watch out, jack everything in the house, saying all this stuff. I told him if—he had bats on him. They were all saying they were going to beat me up and stuff, told me to jump in their car and stuff."

The trial court then ordered counsel to the sidebar. It admonished the prosecutor stating, "Well, you said you were going to move on, and the very thing we were talking about necessitated coming to sidebar to deal with the issues of prior statements of— . . . [Diaz], and now that's exactly what you did. And now the jury's heard it." Diaz's counsel immediately moved for a mistrial, arguing that the prosecutor "violated the court order by eliciting statements of [Diaz] over the instructions of the court." Soto's counsel joined in the motion, believing that Mark testified that "they," referring to Soto and Martinez, not only Diaz, made the threatening remarks. Martinez's counsel later joined in the motion.

The trial court found Mark's testimony about Diaz's threats to be "pregnant with so much incriminating direct statements and inferences" and granted Diaz's mistrial motion. With respect to the motion for mistrial of Martinez and Soto, the trial court stated: "What the jury heard in regards to this statement was [Diaz] came over. Diaz said this. He did not identify any other person present or any other person who was going to carry out a threat. Even if he, at the end of the statement, had said 'all these guys,' there's no reference to who 'all those guys' were at that time. [¶] I believe that both your clients stand in different shoes than [Diaz] in terms of that statement, [Diaz] did not lay out your clients. [Diaz] didn't lay out any inferences that can be drawn that your clients were present and were part of that threat or a future threat. [¶] The court, I believe, can fashion, you know—simply go on the record and then strike that witness's answer, to disregard it for all purposes. That is different than how I would be able to do it as to [Diaz] being specifically named versus whether there was even other persons present other than [Diaz] at the time the threat was being made. But I don't see anything in that statement where it could, one, implicate your client specifically, and, two, whether that admonishment to the jury upon striking that testimony would in any way prejudice your

clients in terms of their own independent theories or reasons for being there or not being there."

The trial court gave the prosecutor the option of not opposing Martinez's and Soto's motions for mistrial and retrying the case against all of the defendants. The prosecutor indicated that he required some time to make the decision, ultimately indicating that he was opposing all motions for mistrial.

The trial court then instructed the jury: "Ladies and Gentlemen, the last answer given by this witness is stricken by the court and stricken from the record. You shall not consider that answer for any purpose whatsoever, and you shall, in effect, treat it as if it had never been said. It shall not enter into your deliberations or be considered by you for any purpose whatsoever." The jury was then dismissed for the day.

B. Contention

Martinez contends that the trial court erred in failing to grant his motion for mistrial. He argues that the prosecutor acted improperly by eliciting Mark's testimony that Diaz came to Mark's residence a few days before the robbery and threatened him, when the prosecutor had represented before trial that he would not introduce such statements. There was prejudice to Martinez that could not be cured because Diaz said that "they" were going to do something to Mark, and, in context, "they" could only refer to appellants. Martinez also contends that "[b]ecause the Defendant MARTINEZ, was not allowed a hearing on the question of prejudice resulting from the mistrial as to defendant, DIAZ, a mistrial should have been declared . . . ." This contention is without merit.

C. Standard for granting motion for mistrial

The abuse of discretion standard applies to our review of the denial of a mistrial motion. (*People v. Cowan* (2010) 50 Cal.4th 401, 459; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Maury* (2003) 30 Cal.4th 342, 434.)

D. When granting a mistrial is appropriate

A trial judge has broad control over the proceedings during criminal trials. (§ 1044.) "A mistrial should be granted if the court is apprised of prejudice that it judges

incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555 [affirmed denial of mistrial request, finding it insignificant in context of entire trial that a witness referred to "parole office"].)

E. No substantial prejudice here

The trial court did not abuse its discretion in denying Martinez's motion for a mistrial. The statement that led to the mistrial motion was Mark's statement that: "We were hanging out at the house, and [Diaz] comes to the house trying to punk all of us, saying he's going to jack us for everything in the house, telling me to fucking watch out, jack everything in the house, saying all this stuff. I told him if—he had bats on him. They were all saying they were going to beat me up and stuff, told me to jump in their car and stuff."

That statement names Diaz as having threatened Mark just days before the robbery. Diaz had "bats on him," indicating his capacity to follow through on his threat. Most of the statement suggests that Diaz was the person making the threats. Mark testified that, "[Diaz] comes to the house," Diaz said "*he's* going to jack us," (italics added), Mark "told *him*." (Italics added.) These comments indicate that only Diaz was at the house making threats.

Martinez points to the portion of Mark's testimony wherein Mark said, "*They* were all saying *they* were going to beat me up" (italics added) and told him to "jump in *their* car . . . ." (Italics added.) While these comments suggest that there were multiple persons threatening Mark, as the trial court concluded, the other persons were unidentified, unlike the direct reference to Diaz. This justified the trial court's different rulings on the mistrial motions.

Given the ambiguity in Mark's testimony, any prejudice to Martinez was far more conjectural than the prejudice to Diaz. Consequently, the trial court's admonition to the jury not to consider the statement for any purpose was adequate to mitigate any prejudice that might have resulted. Furthermore, it is doubtful that conducting a hearing on the prejudice would have provided Martinez with any benefit.

F. Harmless error

In any event, even if the trial court erred in denying Martinez's motion for a mistrial, that error was harmless by even the most stringent beyond a reasonable doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The evidence against Martinez was overwhelming. Nicholas identified him at trial as one of the robbers who he saw exit from the rear passenger door of the white Toyota parked outside the house. Nicholas also testified that Diaz and Martinez were the ones who took the televisions and other items and brought them to the car while Soto held the gun on Nicholas. Mark also identified Martinez, whom Mark observed in his house from a hole in the fence that he had jumped when he ran from the house. Mark knew Martinez, giving added credibility to his identification. A search of Martinez's residence, uncovered a replica black semiautomatic gun and a .22-caliber silver revolver. When Martinez was arrested, he was in the same car used in the charged robbery.

II. Admission of evidence that investigating officer was in gang unit

A. Background

Officers Freeman and Hess, when testifying to their background and employment, stated that they were assigned to the gang suppression unit.

B. Contentions

Martinez contends that allowing Officer Freeman to testify that he was from the gang unit, when there was no gang allegation alleged in this matter, prejudiced him by suggesting to the jury that he was a gang member.

The People contend that Martinez forfeited this contention by failing to object to the challenged evidence in the trial court. We agree with the People, and conclude that, in any event, there was no prejudice.

C. Forfeiture

Generally, objections to evidence on the specific grounds asserted must be made or the objection is forfeited. (*People v. Derello* (1989) 211 Cal.App.3d 414, 428; Evid. Code, § 353 [finding shall not be set aside by reason of erroneous admission of evidence unless, inter alia, there appears of record an objection that was timely and specifically made]; see also *People v. Szeto* (1981) 29 Cal.3d 20, 32.) Martinez made no objection in the trial court to Officer Freeman's background-foundational information that he was in the gang suppression unit. Moreover, at the time Officer Freeman so testified, Officer Hess had already testified without objection to his affiliation with the gang suppression unit. On appeal, Martinez does not even mention Officer Hess's similar testimony. These facts establish that Martinez forfeited this contention.

D. Gang evidence

Even if this contention had been preserved for appeal, we would reject it. There was no error in allowing the officers to testify that they were in gang suppression units. Evidence related to gang membership is not insulated from the general rule that evidence is admissible if it meets the test of relevance to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. (*People v. Perez* (1981) 114 Cal.App.3d 470, 477; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192.) However, because gang evidence creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense, and has "a highly inflammatory impact on the jury[,] trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193.)

But here, the challenged evidence was not gang evidence at all, but merely evidence of the officers' background. There was no evidence that this was a gang case. There was no evidence that any of the suspects or victims were in gangs, and there was no evidence of monikers, gang tattoos or other indicia of gang affiliation. The crime itself did not have the earmarks of a gang-related offense, but only a dispute between drug dealers.

E. Harmless error

Even if the evidence that Officer Freeman was in the gang suppression unit was improperly admitted, the error was harmless in that it is not reasonably probable that had that evidence been excluded a result more favorable to Martinez would have ensued. We evaluate the prejudice caused by the erroneous admission of evidence under the *Watson*[9] standard. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019.)

First, the evidence against Martinez was strong, with two eyewitness identifications. Second, the evidence of Officer Freeman's affiliation with a gang unit was brief and given only as background information regarding his employment and experience. This testimony was not highlighted by the prosecution in closing or at any other time. Third, when Officer Freeman testified, Officer Hess had already testified without objection that he was in a gang unit, making Officer Freeman's testimony merely redundant. Finally, there was not a hint that this was a gang case, as discussed in part IID, *ante*. Rather, the evidence suggests that the robbery was the result of either jealousy between Soto and Mark over a mutual girlfriend or unpaid monies from a drug transaction.

III. Sufficiency of the evidence

A. Martinez's involvement in the robbery

1. Contention

Martinez contends that a new trial should be ordered because the evidence of his involvement in the charged robbery was weak.[10] This contention lacks merit.

2. Standard of review

We review the trial court's ruling on the sufficiency and the weight of the evidence under the abuse of discretion standard. (*People v. Lindsey* (1951) 105

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

10 The People construe this contention as challenging the sufficiency of the evidence. While not well articulated, we construe it as challenging the trial court's denial of Martinez's motion for new trial on the ground that the verdict was against the weight of the evidence. In either event, this contention must fail.

Cal.App.2d 463, 465 [an order denying a motion for new trial "may be reversed on appeal only when there is a lack of substantial evidence to support the conclusion reached by the trial court"].) "'"[W]here there is evidence tending to support a verdict, we cannot disturb the verdict upon the ground it is not sustained by the evidence; and the application of this rule is strengthened in a case where, as here, the trial court has refused a new trial."'" (*People v. Whisner* (1950) 99 Cal.App.2d 845, 848; *People v. Westek* (1948) 31 Cal.2d 469, 473.)

"A challenge to the sufficiency of the evidence requires us to determine, after review of the whole record, whether the evidence is such that a reasonable trier of fact could have found beyond a reasonable doubt that defendant was the perpetrator of the charged crime." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1019.) "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

3. Sufficient evidence Martinez involved

In the trial court, Martinez made a motion for new trial on the ground, among others, that the verdict was against the weight of the evidence. The trial court, which had the opportunity to hear the testimony and assess the credibility of the witnesses, denied that motion. We are compelled to concur.

Compelling evidence supports Martinez's conviction. Nicholas identified him at trial and in a photographic six-pack as one of the three men who exited the white Toyota and entered the house. He also identified him as one of the two intruders who carried

away two televisions and other items. Mark, who had run from the back door of the residence and jumped a fence, looked back through a hole in the fence and saw Martinez in the house. A search of Martinez's residence uncovered two guns, one being a replica, which looked similar to the guns used by the robbers. When arrested he was in a car identified as the car involved in the robbery. Given this substantial evidence and the trial court's denial of the motion for new trial on the very ground presented here, we likewise reject this claim. (*People v.Westek, supra,* 31 Cal.2d at p. 473.)

B. Diaz gun-use enhancement

1. Contention

The trial court imposed on Diaz a 10-year personal firearm-use enhancement within the meaning of section 12022.53, subdivision (b). Diaz contends that there is insufficient evidence to support that enhancement. He argues that the orange and black toy gun recovered from the search of Martinez's home was not a "firearm" as required for the enhancement. This contention is without merit.

2. Standard of review

The standard of appellate review set forth in part IIIA2, *ante*, also applies when determining whether the evidence is sufficient to sustain a jury finding on an enhancement. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456–1457; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 321–322.)

3. Sufficient evidence supports the firearm enhancement

A firearm for purposes of section 12022.53, subdivision (b) is a device used as a weapon from which a projectile is discharged by the force of an explosion. (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*); former § 12001, subd. (b).)[11] The gun need not be in working order (*People v. Grandy* (2006) 144 Cal.App.4th 33, 42) but cannot be a toy, BB or pellet gun (*Monjaras, supra,* at p. 1435; *People v. Law* (2011) 195 Cal.App.4th 976, 983).

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11 Section 12001 was repealed effective January 1, 2012. It was readopted as part of section 16520.

The fact that an object used by a robber was a "firearm" can be established by direct or circumstantial evidence. (*Monjaras, supra,* 164 Cal.App.4th at pp. 1435–1436.) "Most often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation. And since the use of what appears to be a gun is such an effective way to persuade a person to part with personal property without the robber being caught in the act or soon thereafter, the object itself is usually not recovered by investigating officers." (*Monjaras, supra,* at p. 1436.)

The circumstantial evidence here was sufficient to support the firearm enhancement. First, Diaz was not involved in a childhood game of cops and robbers. The robbery was real and valuable items were taken. This alone supports an inference that a real gun was used.

Second, there is no contention that the firearm Soto carried was only a toy gun. The use of a real gun by one of the robbers supports a reasonable inference that Diaz's gun was also real.

Finally, Nicholas's testimony supports the inference that Diaz held a real gun. Nicholas testified that on April 23, 2009, he saw a white, four-door Toyota pull up next to his driveway and appellants walk toward the house. Soto and Diaz had guns. Nicholas described Diaz's gun as being metal, "solid black" and looking like a "cop's gun." He was 100 percent certain that Diaz was present at the robbery and holding a gun. When shown the replica gun recovered from the search of Martinez's house (exhibit 10), Nicholas testified that it was similar in color and shape to the gun Diaz was carrying. He said the replica gun also looked like metal before he handled it. But, he did not recall seeing any orange on the gun Diaz was holding, as was on the replica taken from Martinez's residence. While Nicholas said that the gun seized from Martinez's residence looked similar to the gun carried by Diaz, he said it could be a different gun. "The jury was not required to give defendant the benefit of the victim's inability to say conclusively

the pistol was a real firearm. This is so because 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].'" (*Monjaras, supra*, 164 Cal.App.4th at pp. 1436–1437.) This evidence fully supports the true finding on the firearm enhancement.

It is also noteworthy that Diaz's own trial counsel acknowledged in closing argument that there was sufficient evidence to support the firearm enhancement. He stated: "So regardless of your verdict as to whether my client is guilty of the robbery or not, I want—I wanted to just focus on that gun for a moment so that when you get into the jury room and start deciding whether, in fact, the person had a real gun or a toy gun, *I submit to you that the evidence is equal as to either way*." (Italics added.) If the evidence was equal, it was sufficient for the jury to draw either inference.

IV. Juror misconduct

A. Background

1. Juror's "He's guilty" statement

During trial, Diaz told the trial court that he had had a telephone conversation with his daughter, Crystal Diaz (Crystal), after court the previous day. She told him that while the jury was deliberating, she heard one juror tell another, "Oh well, he's guilty." The second juror responded, "Oh, well, I don't think he's guilty." Defense counsel stated that Crystal said that she would be able to identify those jurors.

The trial court questioned Crystal under oath about the incident. At first, she said that she told Diaz that when she was sitting on the bench outside the courtroom during a break the previous afternoon, she heard a male juror talking in the hallway to another juror and say, "He's guilty." The juror to whom the comment was made did not respond. She said that she thought she could identify the juror who made the comment, but not the juror to whom the comment was made. Later in the questioning, she testified that she did not know if she could identify the juror who made the comment because she only heard him and did not see him. She also qualified her earlier response and said that she only heard a single word, "guilty." She did not hear, "He is guilty." She did not hear any

words describing what was guilty or who was guilty. She did not know if the comment was part of a conversation. She said she could not identify the person who said it.

Defense counsel requested that he be allowed to question Crystal regarding her ability to identify the juror. The trial court responded, "We've covered that." Defense counsel wanted to bring the jury out and have Crystal identify the person she heard and saw speaking. The trial court responded that Crystal stated that she did not see the person, but only heard him. She identified the person as a male only by his voice. Defense counsel then asked for a mistrial on the ground that "my client is being denied an opportunity for me to examine a key witness."

Defense counsel was allowed to question Crystal. He asked her if she thought she could point out the male that said the word "guilty" if the jury were brought back into the courtroom. She responded, "No, because I wasn't looking straight to see who it was." Defense counsel had nothing further to ask and the trial court released Crystal, admonishing her not to talk to anyone about her testimony.

Crystal's mother, Diane Diaz (Diane), was then questioned under oath. She testified that after the jurors had already passed by to go to the elevators, Crystal told her that one of the jurors said, "He was guilty." Diane heard nothing from the jurors directly. She told Diaz what her daughter said. Diane said that Crystal told her that the juror making the "guilty" comment was wearing a brown coat and orange shirt and gave her a dirty look when she walked out of the courtroom.

Crystal was then recalled to the stand. She testified that the incident where the juror said "guilty" and the incident when the juror gave her a dirty look were unrelated. She said that the juror who gave her a dirty look was an older man seated near the end of the jury box. When asked if she told her mother that he was the one who said "guilty," Crystal testified that "Well, I was thinking it was him because I told her he gave me a dirty look. And once he—when people passed right there, I was thinking maybe it was him because, like, he was, like, giving me a dirty look right here already. But I didn't really know the person that passed, so I didn't see the person who was talking." Crystal simply assumed that it was the same person. The trial court asked Crystal whether the

juror said “guilty,” as she testified to earlier, or “He’s guilty,” as Diane testified to. Crystal repeated that he only said “guilty.”

Defense counsel argued that the juror should have said nothing but that the mere statement of the word “guilty” “is in and of itself the purpose of what a juror is selected for.” The prosecutor argued that there was no context to the statement, and it could have had absolutely nothing to do with this trial. He said that it was too vague and speculative.

While the trial court agreed that it was too speculative, it decided to bring out each of the jurors and alternates individually. They were questioned without variation, as follows: “THE COURT: I have a very specific inquiry. At the end of the day yesterday as you exited the courtroom and were walking in the hallway heading towards the elevators, with your fellow jurors, did you ever say the word ‘guilty?’ THE COURT: Did you overhear anyone say the word ‘guilty?’ THE COURT: Thank you very much. Please do not discuss this conversation with anyone else. Please have juror number [next in order] come out.” Each of the jurors and alternates testified that they had not spoken or heard the word “guilty.”

Defense counsel then requested that Juror No. 3 be brought back and asked if he was wearing a brown jacket and an orange shirt in order to see if he was the person who said the word “guilty.” The trial court denied the request because “[Crystal] never said he was the one who did it or she saw him in the location of saying it. She just made an assumption because he was the man that gave her a dirty look. She heard the word. Didn’t say who said the word but assumed it.”

Diaz’s counsel moved for a mistrial because Crystal was a young woman who “backed off in what she was saying that the juror said” and her mother “amplified what she had told her yesterday.” The trial court denied the motion, stating: “[Y]ou’re assuming that the mother is relating accurately what she was told by Crystal rather than Crystal accurately relating to the court what she said to her mother.” Defense counsel said that the motion for mistrial was based upon the refusal of the trial court to allow him to confront the witnesses. The court said that this was a jury issue, and there was no right to confrontation.

The trial court made the following finding: "Based upon the testimony of Crystal, who is the only person who allegedly heard the word 'guilty' as the jurors passed and as she was involved in a conversation with other family members, I believe she was either mistaken or misunderstood. And the court is satisfied with the inquiry of the individual jurors, looking at their body language and their response to the court's inquiry specifically as to them or what they may have said or didn't say or what they heard or didn't hear, and no one gave me an indication to believe that anyone was hiding information, was being evasive or was in any way being less than candid with the court. The court finds credibility with all those jurors, that not any one of them had said that word or overheard anyone else saying that word. [¶] Most importantly, is that the manner in which that word was allegedly heard by Crystal, that she's being about nine feet away from the jurors as they pass by, yet those jurors were walking as a group, that if she was in a position to hear the words that she thought she heard, the people who are in the best position to hear it—in fact, whether those words were said—were the people walking in the group with the person who had allegedly said that word, if it had been said. [¶] The fact that no one heard it who were in the best position to hear that word being said or that word being directed to them or seeing that the word was being directed towards Crystal and the family, that there's no reason or motive that any other juror would not acknowledge that. [¶] Having said that, based upon the court's previous admonitions, the court finds that there's no credible basis for the—that the word was actually spoken by a juror and that Crystal, giving her the benefit of the doubt, thought she might have heard something to that effect or wished she heard something to that effect or mistakenly heard a word to that effect, but did not, in fact, hear the word as the jurors passed based upon this court's inquiry and other jurors being closer to the source or alleged source of such a statement. [¶] So the court finds there's no need for additional inquiry, nor has anyone prejudged this case and ignored the court's admonishments or instructions not to form or express an opinion on this matter nor to discuss the issue of guilt or innocence unless directed to by this Court."

Defense counsel noted for the record that Juror No. 3, who Crystal thought had given her a dirty look, was now the foreman.

2. Juror No. 8's fear of appellant's relatives

The following day, the trial court received a note from Juror No. 8 that stated: "I am wondering if I can speak with someone re the trouble I'm having as a juror in coming to a conclusion. [¶] I realized when I left the courtroom today I am somewhat afraid of the defendant's relatives. I don't know if this is considered relevant." The trial court told counsel about the note and that the jury had just reached a verdict.

Before taking the verdict, the trial court decided to bring out Juror No. 8 and ask her whether anything she said in her note affected how she arrived at her verdict. The prosecutor suggested that the trial court add to that question whether her "conclusion [was] based on the evidence you heard?"

Juror No. 8 was brought to the courtroom and the following questioning occurred: "THE COURT: Okay. You sent a note to this court in which you indicated some concerns that you have. Listen very carefully. [¶] Before the court was able to address those concerns that you indicated in your note, I have received information now that the jury has a unanimous verdict in this case. [¶] I'm going to pose the question to you this way—I don't know what the verdict is, and I'm not going to ask you what the verdict is. [¶] Simply, was your verdict based upon the evidence and the law that applies to this case only, or was your verdict influenced by the concerns that you expressed in your note to this court? [¶] JUROR NO. 8: My verdict was based upon the evidence. [¶] THE COURT: So whatever concerns that you had expressed in your note did not affect your verdict in this case? [¶] JUROR NO. 8: Correct." After the trial court finished questioning Juror No. 8, it asked defense counsel if any further inquiry was necessary. Defense counsel said that there was not, did not request a mistrial, object to accepting the verdict, ask for removal of the juror or otherwise say anything to suggest dissatisfaction with the trial court's finding.

B. Contentions

Diaz contends that the trial court erred in denying his motion for a mistrial after three jurors committed misconduct. He argues that Juror No. 3 told Crystal that Diaz was guilty "outside the courtroom before all of the evidence had been presented." The juror with Juror No. 3 said, "He's not guilty," also improperly expressed an opinion on Diaz's guilt, and Juror No. 8 indicated that she feared appellant's relatives, many of whom had testified at trial for the defense. She was thereby influenced by matters outside of the evidence presented at trial.

The People contend that Diaz forfeited[12] this claim with respect to Juror Nos. 3 and 8. The People argue with respect to both jurors that Diaz accepted the verdict, failed to move to have the verdict set aside, and failed to have the jurors replaced with alternates and have the deliberations restarted.

C. Forfeiture

Regarding Juror No. 8, the trial court questioned that juror, with questions pre-approved by counsel, and was told that Juror No. 8's vote of guilty was based on the evidence presented, uninfluenced by the concerns reflected in that juror's note to the court. Both counsel indicated that they did not believe further inquiry of Juror No. 8 was required, neither requested that the verdicts, which had just been rendered but were not as yet accepted by the trial court, be set aside and the jury asked to deliberate again, no other request was made to challenge the juror's participation in the verdicts and no request for a mistrial was made. Consequently, defendant forfeited this claim. (*People v. Foster* (2010) 50 Cal.4th 1301, 1341; *People v. Lewis* (2009) 46 Cal.4th 1255, 1308.)

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12 While the People sometimes use both the terms "waive" and "forfeit" in reference to Diaz's failure to preserve aspects of his juror misconduct claims for appeal because they did not raise them in the court below, the correct term which we use in this opinion is "'forfeiture.'" "'Waiver'" is the express relinquishment of a known right whereas "'forfeiture'" is the failure to object or to invoke a right. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn. 1.)

Diaz argues that there was no forfeiture because it would have been futile to make a motion for mistrial as "the trial court had already denied the mistrial motion for juror misconduct." We disagree. The previous mistrial motion for juror misconduct did not relate to the asserted misconduct of Juror No. 8 and hence has little bearing on whether such a motion would have been futile as to Juror No. 8's conduct.

We reach a different conclusion with respect to the juror who said "guilty." That juror's identity could not be established. It therefore would have been impossible for Diaz to make any motion or request with respect to removing that juror. A motion for mistrial was made with respect to that juror's alleged statement, preserving the claim.

D. Standard of review

As set forth in part IC, *ante*, the abuse of discretion standard applies to the denial of a motion for mistrial. (*People v. Cowan, supra,* 50 Cal.4th at p. 459.)

E. Right to verdict without juror misconduct

"A defendant accused of a crime has a constitutional right to a trial by unbiased, impartial jurors. [Citations.] A defendant is 'entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with a crime has a right to the unanimous verdict of 12 impartial jurors [citation], it is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Nesler* (1997) 16 Cal.4th 561, 578.)

Jurors must decide guilt or innocence of a defendant based on the evidence adduced at trial. (*People v. Nesler, supra*, 16 Cal.4th at p. 578; *People v. Conkling* (1896) 111 Cal. 616, 628.) It is misconduct for a juror to consider factors outside of the evidence in rendering a verdict. Jurors should not form or express any opinion until the case is submitted and should only deliberate when they are all together. (Code of Civ. Proc., §§ 611, 613; *Bormann v. Chevron USA, Inc.* (1997) 56 Cal.App.4th 260, 263 ["'deliberation' by a jury means a collective process, not the solitary ruminations of individual jurors"].) A juror who shares improper information with other jurors commits misconduct. (*People v. Tafoya* (2007) 42 Cal.4th 147, 192.)

Jury misconduct raises a presumption of prejudice which entitles the defendant to a new trial, unless the prosecution rebuts that presumption. (*People v. Vigil* (2011) 191 Cal.App.4th 1474, 1487.) This presumption of prejudice can be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party. (*Ibid.*)

We need not consider whether Diaz suffered any prejudice from jury misconduct because we conclude that juror misconduct was not established. Juror No. 8 wrote a note stating that she was fearful of Diaz's relatives, who were in court and testified. That juror did not specify that the relatives did anything to engender the fear. It is doubtful that a juror's fear of a friend or relative of the defendant, which we suspect is not atypical, constitutes consideration of matters outside the evidence or juror bias. In any event, Juror No. 8 was questioned regarding the fear expressed in her note and testified that it had no impact on her vote in the already rendered verdict and that her decision was based solely on the evidence presented at trial. Thus, appellant failed to establish any wrongdoing by Juror No. 8.

Similarly with respect to the "guilty" comment by another juror, Diaz failed to establish that there was any wrongdoing. That juror was never identified. Crystal testified that she could not say that the juror who gave her a dirty look was the juror who made the "guilty" comment because she did not see the person making the comment. Furthermore, the only thing she heard was the word "guilty." She did not know if it pertained to Diaz, to this case or in what context it was used. Thus, Diaz failed to establish that the comment was improper. (*People v. Kramer* (1897) 117 Cal. 647, 649 [no misconduct when unclear what juror was talking about].)

V. Wende Brief on behalf of Soto

We appointed counsel to represent Soto on appeal. After examination of the record, counsel filed an "Opening Brief" in which no issues were raised.

On April 13, 2011, we advised Soto that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. On May 11,

2011, he filed a letter brief (1) relying on *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*) to contend that the prosecutor's use of a PowerPoint presentation was improper and "affected the outcome of the jury . . . ," and (2) that his sentence was too harsh as he had no criminal record.

Soto has forfeited the claim that the PowerPoint presentation was improperly used by the prosecution. He fails to provide any record references as to where this presentation was improperly used (*Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799–801 [points forfeited if no appropriate record references provided]), fails to adequately explain in what respect the PowerPoint presentation was improperly utilized (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1276, fn. 7 [issues unsupported by adequate legal argument are forfeited]) and fails to provide any record reference indicating that this contention was raised in the trial court (*Dietz v. Meisenheimer & Herron, supra,* at pp. 799–801).

Further, we find *Katzenberger* inapposite here. In that case, the prosecutor made a PowerPoint presentation during closing argument to illustrate the reasonable doubt standard. "The . . . presentation consisted of eight puzzle pieces forming a picture of the Statue of Liberty. The first six pieces came on to the screen sequentially, leaving two additional pieces missing. The prosecutor argued it was possible to know what was depicted 'beyond a reasonable doubt' even without the missing pieces. The prosecutor then added the two missing pieces to show the picture was in fact the Statue of Liberty." (*Katzenberger, supra*, 178 Cal.App.4th at p. 1262.) Defense counsel, after unsuccessfully objecting to the presentation, said during his argument to the jury that the presentation was "'a travesty and . . . not reasonable doubt at all.'" (*Id*. at p. 1265) The trial court then reread the reasonable doubt instruction "to 'clarify things.'" (*Ibid*.) The appellate court concluded that the presentation "misrepresented the 'beyond a reasonable doubt' standard." (*Id*. at p. 1266.) *Katzenberger* was not a wholesale indictment of all uses of the PowerPoint presentation. It only restricted the improper use of that presentation to dilute the beyond a reasonable doubt standard. Soto does not suggest that the PowerPoint presentation here was used in that fashion.

Soto has also forfeited any claim that his sentence was too harsh. Our Supreme Court has stated: "We conclude that the waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (*People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*).) "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Id.* at p. 354.) *Scott* identified among those discretionary sentencing decisions, the decision to order probation, to impose the upper, lower or middle term, and to impose consecutive rather than concurrent sentences. (*Id.* at p. 349.) Soto failed to raise in the trial court the argument he now asserts, which is the precise type of discretionary claim that *Scott* specifically indicates is forfeited if not preserved.

We have examined the entire record and are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*Wende, supra,* 25 Cal.3d at p. 441.)

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ