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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROGER JESUS GARCIA, Defendant and Appellant.	B229386 (Los Angeles County Super. Ct. No. BA354566)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rand S. Rubin, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Assistant Attorney General, Lance E. Winters and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Roger Jesus Garcia appeals the judgment entered following his conviction by jury of attempted murder, two counts of attempted second degree robbery, attempted carjacking, two counts of assault with a deadly weapon, receiving stolen property and attempted extortion. (Pen. Code, §§ 664/187, subd. (a), 664/211, 664/215, subd. (a), 245, subd. (a)(1), 496, subd. (a), 664/524.)[1] The jury found Garcia committed each offense, except receiving stolen property, for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), Garcia personally used a deadly weapon in the commission of attempted murder, attempted carjacking, one count of attempted robbery and both counts of assault with a deadly weapon (§ 12022, subd. (b)(1)), and Garcia personally inflicted great bodily injury in the commission of attempted murder, attempted carjacking, one count of assault with a deadly weapon and one count of attempted robbery (§12022.7, subd. (a)).

On appeal, Garcia contends the trial was marked by prosecutorial and judicial misconduct which deprived him of a dispassionate consideration of the impeachment of the victims, thereby denying him due process and a fair trial. However, none of the cited instances amounts to anything more than incivility and quite nearly all of the asserted misconduct occurred at the sidebar and thus could not have affected the jury.
We therefore affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. *The prosecution's evidence*.

   a. *The incident in Toberman Park*.

On January 29, 2009, at approximately 8:00 p.m., Carlos Arroyo drove his friends, Jose and Omar Garcia, Lillian Perez, Antonio Hernandez and Robert Ortiz in his Lincoln Navigator to Toberman Park in the City of Los Angeles to play basketball. Arroyo parked near the gate to the basketball courts. Another friend, Adam Buenrostro, drove separately and parked on the other side of the park. Jose Garcia had been to the park on numerous previous occasions to play basketball and had noticed Burlington gang graffiti

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[1] Subsequent unspecified statutory references are to the Penal Code.

in the area. When they arrived, a game was in progress on the main court so they went to another court. When the game ended, Jose Garcia and his friends moved to the main court to play the winners of the previous game.

Garcia, who had been standing next to the fence drinking with several other people, approached Jose Garcia and Robert Ortiz and asked where they were from, which they interpreted as a gang question. Jose Garcia responded they were not from anywhere and they just wanted to play basketball. Garcia said, "You guys better break bread," which Jose Garcia interpreted as a demand for property. Omar Garcia and Robert Ortiz testified Garcia said they had to pay "rent."

Garcia produced a box cutter and pulled Jose Garcia's silver chain from his neck but Jose Garcia was able to grab it back. Garcia swung the box cutter at Jose Garcia, causing him to step back to avoid being cut. Jose Garcia and his friends decided to leave. As they walked from the basketball court, Buenrostro saw Garcia and his friends in a huddle, "like a football team . . . ."

When they arrived at the Navigator, Buenrostro realized he had left his wallet and cell phone near the basketball courts. Arroyo asked a male on the other side of the fence if he could get the wallet and phone. Arroyo saw a group of individuals, including Garcia, running toward them. Buenrostro yelled, "Let's go, get in the car, they're coming." Everyone ran to the Navigator and got in.

Garcia and three or four others prevented the driver's door from closing. Garcia stuck his head inside the Navigator and demanded "cell phones, wallets, everything . . . ." The occupants responded they had nothing. Garcia tried to take Arroyo's keys, punched Arroyo and then dragged him from the Navigator with several others, including Castillo. Through the SUV window, Jose Garcia saw Garcia, Castillo and others beating and kicking Arroyo.

While Arroyo was being attacked outside the SUV, four other males rushed the driver's side passenger door and tried to pull Jose Garcia from the vehicle. At this point there were 11 to 13 people around car, trying to break the windows and open the doors. One individual was on the roof of the SUV attempting to break the moon roof.

Jose Garcia punched one of the individuals trying to pull him from the car. Jose Garcia eventually was able to close the door and lock it.

During the attack on Arroyo, Garcia stabbed Arroyo three times on the arm and once in the stomach. Arroyo pulled himself back into the SUV, saw he had been cut to the bone and started screaming. Garcia and his friends pulled him from the Navigator a second time, knocked him to the ground and again attacked him. Arroyo was able to reenter the SUV but again was pulled from it and pummeled

At about the time Arroyo was able to return to the vehicle the third time, Buenrostro yelled "cops" and most of the people around the car ran. Two or three of the attackers, including Garcia, did not. Garcia approached the driver's door of the SUV and swung the blade at Arroyo's head but cut the driver's seat head rest. Garcia swung again and cut Arroyo on the left side of the head near the eye. Blood was pouring from the wound. Garcia reached in and tried to take the car keys. When Arroyo leaned forward, Omar Garcia punched Garcia in the face. Garcia looked at Omar Garcia and said, "Oh, you hit me?"

Arroyo managed to start the Navigator and drive away but he was near fainting. His friends took him to California Hospital. On the way, Perez called 911. She became excited during the call and Jose Garcia spoke to the dispatcher. A recording of the 911 was played for the jury.

b. *Investigation*.

Los Angeles Police Officer Arroyo Escobar and his partner, Officer Anthony Lanza, received a radio call regarding the incident. They went to California Hospital to interview Arroyo but he was in surgery. They resumed patrol and saw Garcia, Castillo and Hernan Martinez on Burlington Avenue, a short distance from Toberman Park. Garcia gave Escobar permission to pat him down and, in Garcia's right rear pocket, Escobar found a box cutter that had wet stains on it. Garcia also had what appeared to be blood stains on his sweatshirt and the leg of his pants. All three were transported to Rampart Division.

When the officers returned to the hospital to interview Arroyo, they were advised Arroyo's friends were waiting in another area. Officer Escobar and Buenrostro went to the scene while Officer Lanza remained at the hospital and interviewed the other witnesses. When Escobar and Buenrostro returned, Buenrostro's wallet was found in Garcia's property, which remained in the patrol car, and the wallet was returned to him.

c. *Testimony of the gang expert*.

Los Angeles Police Officer Alfredo Aguayo testified as a gang expert. The Burlington Locos gang has 15 to 20 members and is one of the smaller gangs in the Rampart jurisdiction. Garcia was not a known member of the gang prior to this incident. The gang's territory is bounded by the 110 Freeway, Union Avenue, Pico Boulevard and Washington Boulevard. Burlington gang members congregate in the area of Toberman Park. The gang is able to maintain control of its territory despite its small size "through the use of violence." The primary activities of the gang are robbery, murder, possession for sale of narcotics, possession of handguns and carjackings.

Given a hypothetical based on the facts of this case, Aguayo opined an individual who asked where others were from, claimed an area for a gang and demanded rent, would be a gang member. If this individual were not a gang member, Aguayo would expect "serious consequences." Aguayo testified the victim's act of taking back the chain would be seen as disrespect.

Aguayo further opined the crimes were committed for the benefit of a criminal street gang and Garcia was an active member of the gang at the time of this incident. Aguayo based the latter opinion on Garcia's claim of the park as gang territory and Garcia's tattoos, which include a "BNLS" tattoo on his shoulder, which refers to Burlington Locos, and "street soldier" tattooed on the back of his neck. Also, the crime occurred at one of the gang's strongholds.

Castillo is a member of the Pico Union District Kings, a tagging crew that associates with the Burlington Locos gang. Aguayo has researched whether any of the victims in this case are gang members and, to his knowledge, none was.

2. *Codefendant Castillo's defense*.

Edwin Pineda testified he noticed Garcia arguing with Arroyo and two of Arroyo's companions. After the argument ended, Arroyo and his friends walked to the Navigator and entered the vehicle. Arroyo then exited, spoke to someone at the fence and yelled something at Garcia who was on the other side of the park. Garcia started walking toward Arroyo and three or four people followed him. A fight ensued on the far side of the SUV out of Pineda's view. Castillo tried to stop the fight and pulled people off.

Castillo testified in his own defense. He has known Garcia for over five years and has heard Garcia was a gang member before Castillo knew him. Castillo noticed Jose Garcia, Omar Garcia and Arroyo arguing with the players who lost the first game. Castillo recalls one of them was in the middle of the street yelling insults at people on the court. Garcia walked to the street, started arguing and someone struck him. When a fight started, Castillo ran to the scene and tried to separate the combatants.

3. *Garcia's defense*.

Garcia testified in his own defense. He was employed as a maintenance worker by the Pico Union Housing Corporation, which has corporate and maintenance offices in Toberman Park. When Garcia was in school, there was a gang war and most of Garcia's friends joined the Burlington gang but Garcia had friends in other gangs. When Garcia was 15 years of age, he had the name of his girlfriend tattooed on his left shoulder. He later tried to cover it with a BNLS tattoo but did not have the tattoo finished because he wanted no part of the gang. Garcia denied gang membership.

On the date of the incident, Garcia remained in the park after work, drinking. By 8:00 p.m., he was intoxicated. Garcia saw Arroyo, Jose Garcia and Omar Garcia arguing on the basketball court about who would play the next game. Garcia had seen all three in the park previously. Garcia told them if they could not wait, they should "just get the fuck out of here." After Arroyo and his friends walked away. Garcia saw Arroyo

at the fence talking to someone. Jose Garcia and Omar Garcia yelled challenges at Garcia from the street and called him a bitch. As Garcia and Arroyo walked toward the Navigator, Garcia felt a blow to the back of his head. Arroyo then punched Garcia in the left eye. Garcia momentarily lost consciousness, then produced a box cutter he uses at work and swung it blindly in self-defense until he was pulled away. Garcia denied trying to take Arroyo's keys or demanding property. Garcia received medical treatment for a head injury at the county jail and he had a black eye when he was arraigned.

Garcia denied that he possessed Buenrostro's wallet and claimed the police officers did not find a wallet when they searched him. Garcia also denied that he told the arresting officers he was a member of the Burlington Locos gang and denied he told a doctor at the jail the arresting officers struck him in the back of the head.

4. *Rebuttal.*

Officer Lanza testified that, after he recovered the box cutter from Garcia, he asked where Garcia was from. Garcia responded, "Burlington locos," and indicated he was called "Dirt." Garcia said he had been a member of the Burlington Locos for eight years and he did not have a job.

Wilbur Williams, M.D., treated Garcia at the Men's Central Jail on February 4, 2009. Garcia had a hematoma on the back of his head and said he was involved in an altercation with arresting officers.

5. *Verdicts and sentencing*.

The jury convicted Garcia as charged. The jury acquitted codefendant Castillo of attempted carjacking and attempted robbery of Arroyo, but convicted him of assault with a deadly weapon on Arroyo committed for the benefit of a criminal street gang.

At allocution, Garcia thanked the trial court for a fair trial and requested leniency. The trial court sentenced Garcia to state prison for 25 years and four months.

CONTENTIONS

Garcia contends numerous instances of judicial and prosecutorial misconduct resulted in a trial filled with open hostility which deprived him of a dispassionate consideration of the evidence, especially the impeachment of the victims, thereby denying him due process and a fair trial.

DISCUSSION

1. *Relevant principles.*

"The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case. [Citations.] [¶] Section 1044 provides that a trial court has the duty to control the trial proceedings. [Citation.] When an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. [Citation.] . . . [A] trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) A trial court commits misconduct if it creates the impression it is denigrating the defense or otherwise allying itself with the prosecution. (*People v. Blacksher* (2011) 52 Cal.4th 769, 824.)

"[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist ' "the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable." ' [Citation.]" (*People v. Freeman* (2010) 47 Cal.4th 993, 996.) "Indeed, '[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired . . . . Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 78.)

" 'A prosecutor commits misconduct when his or her conduct either infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.' [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1222.)

With these principles in mind, we turn to Garcia's contentions.

2. *None of the incidents cited by Garcia rises to the level of misconduct.*

Before addressing Garcia's claims specifically, we note Garcia did not object to any of the alleged incidents of judicial misconduct. Because a timely admonition could have cured any potential prejudice, Garcia has forfeited those claims. (*People v. Blacksher, supra,* 52 Cal.4th at p. 825; *People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) However, even if Garcia's failure to object is overlooked, his claims uniformly fail.

Garcia claims the trial court disparaged defense counsel's efforts on behalf of Garcia, frequently telling Garcia's attorney to move on, and scolding counsel for taking too much time. He claims the disorderly and rude trial proceedings tended to alienate the jury from Garcia's trial counsel and from Garcia, and it compromised the fairness of Garcia's trial. However, none of the cited instances supports Garcia's claim.

Garcia first complains the trial court called an objection by his counsel "ridiculous." However, the trial court made this remark in response to an objection interposed by counsel for codefendant Castillo, not counsel for Garcia, in which Castillo's counsel asserted the prosecutor was not referring to the witnesses and the parties by their full names. Moreover, the trial court referred to the objection as ridiculous outside the presence of the jury. Thus, the remark could not have been prejudicial. (See *People v. Guerra, supra,* 37 Cal.4th at p. 1112 [no judicial misconduct where all of the trial court's comments were made outside the presence of the jury]; accord *People v. Burnett* (1993) 12 Cal.App.4th 469, 475; *People v. Kagan* (1968) 264 Cal.App.2d 648, 662; see also *People v. Williams* (2009) 170 Cal.App.4th 587, 630 [prosecutor's statements made outside the presence of the jury could not have prejudiced the defense].)

Garcia further contends the trial court improperly advised defense counsel during a sidebar discussion that her questions were misleading. This incident occurred during cross-examination of Jose Garcia with respect to whether he knew, at the end of the 911 call, whether the police were coming to the hospital to speak to him. Garcia's counsel sought to impeach Jose Garcia with preliminary hearing testimony which indicated he did not know the police were coming. At the side bar, the prosecutor indicated Jose Garcia was asked at the preliminary hearing if he knew the police were coming "to interview you, your group, because Arroyo had been seriously injured." The trial court suggested Garcia's counsel ask the same question instead of changing it. The trial court also indicated, "I don't see a whole lot of relevance to this question. I mean, look at the jurors. You guys want bored jurors? I mean, I think you hit the major issue. I don't even see a lot of relevance to it. But if you're going to ask it, ask it the same way it's asked at the prelim."

This admonition did not amount to judicial misconduct and fell well within the trial court's ability to control the proceedings. (§ 1044.)

Garcia next complains the trial court told counsel the case was "dragging" and, in mid-trial, told the parties the case should by plea bargained. The record indicates that, outside the presence of the jury, the trial court inquired whether there was a chance of a disposition. The parties then discussed pending plea bargains. During this conference, the trial court noted an alternate juror would have to be released and complained the time estimate for the trial had been "at least four days low" and, at the pace the trial was proceeding, there was a risk other jurors would not be able to complete the trial. Nothing in these proceedings outside the presence of the jury caused Garcia prejudice. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.)

Garcia notes the trial court told his counsel to stop cross examination on "minutae" and thereafter advised the jury the trial would remain in session until 4:30 or 5:00 p.m. daily to complete the matter as expeditiously as possible. Garcia contends the trial court's indication to the jurors they would have to stay longer each day to make the trial move along conveyed the view the particulars of the testimony were unimportant.

At the pages cited by Garcia, outside the presence of the jury, the trial court observed the Sheriff's Department was not bringing the defendants into the courtroom in a timely manner and advised counsel it would try the case from 10:00 a.m. until 4:30 or 5:00 p.m. every day, "otherwise were going to lose some jurors." The trial court suggested questions related to where everyone was seated in the Navigator were more appropriate for argument and asked: "Why are we wasting so much time? Look at the jurors. You guys have the jurors so aggravated at you guys because they're sitting there for nothing. You are wasting their time. Get to the key issues and move on." Thereafter, the trial court advised the jury of the new timetable for the trial. Nothing in the trial court's remarks to the jury suggested the particulars of the testimony were unimportant. The suggestion that counsel focus on key issues and avoid aggravating the jury cannot have prejudiced Garcia. Moreover, the trial court justifiably was concerned with the length of the trial, given that two jurors were excused during the course of the trial because it exceeded time estimates and a third juror would have been lost had the trial not concluded when it did.

Garcia next complains the trial court disparaged Garcia's counsel for taking too much time. However, at the cited pages of the reporter's transcript, the trial court asked the prosecutor whether a break was appropriate and stated: "I thought we were finished with this witness 20 minutes ago." The trial court did not disparage anyone.

Garcia next asserts the trial court stated at a sidebar conference the prosecutor was engaging in "over-kill" with respect to gang photos and asked the prosecutor whether she was going to be like defense counsel. In fact, after the jury exited the courtroom, the prosecutor discussed the photographic evidence the People intended to use during examination of the gang expert, which previously had been addressed. During the discussion that followed, the trial court stated, "I thought you wanted to revisit it again . . . like [defense counsel]." Defense counsel responded, "Hey, hey now. I'm sitting here quietly." Nothing in this exchange suggests hostility toward the defense.

Garcia asserts the trial court told defense counsel she was "badgering" Arroyo and to "take it down a notch," and told defense counsel she presented impeachment in an improper form. The first incident occurred during defense counsel's cross-examination of Arroyo regarding whether anyone in his group made gang signs on the basketball court. The trial court interrupted and said: "Let's let the witness answer the questions. And let me see counsel about one other thing also." At the sidebar, the trial court stated "almost every question you're . . . yelling at the witness. It's really not appropriate. It's badgering the witness. I'm sustaining my own objection. Take it down a notch." These comments not only were made at the sidebar but also were well within the trial court's duty to control the proceedings and its discretion to reprimand counsel for inappropriate behavior. (*People v. Snow*, *supra*, 30 Cal.4th at p. 78; § 1044.)

At the end of the sidebar conference, the trial court asked defense counsel to show any photographs counsel intended to use during cross-examination to the prosecutor before they were presented to the jury. Defense counsel previously had asserted the defense had no obligation to disclose impeachment evidence. Garcia does not claim error in trial court's directive and no judicial misconduct appears.

Garcia next contends the trial court demonstrated anti-defense bias during a sidebar conference in which the trial court told defense counsel she purposely was confusing Arroyo on cross-examination and dismissed a claim by Garcia's counsel that Arroyo was arguing with her. This situation arose after Arroyo complained defense counsel's questions seeking to distinguish what he told the police from what happened on the evening of the incident were confusing him. At the sidebar, the trial court indicated the line of questioning was misleading because Garcia's counsel was not asking what Arroyo told the police but whether Arroyo made a specific statement. At the close of the discussion, the trial court told defense counsel to "go ahead with your line of questioning, but don't purposely confuse the witness." This exchange occurred outside the presence of the jury. Moreover, the trial court's comments were well within its duty to control the proceedings. (§ 1044.)

Garcia asserts the trial court also disparaged Arroyo, saying impeachment was meaningless, given that he was not "the brightest guy in the world." The trial court made this remark at the sidebar during defense counsel's cross-examination of Arroyo. Garcia's counsel sought to impeach Arroyo with his preliminary hearing testimony which indicated Garcia produced the box cutter after he snatched Jose Garcia's chain. The trial court agreed Arroyo had testified inconsistently as to when he first saw the box cutter and indicated Arroyo may not be "the brightest guy in the world." Garcia's counsel agreed. The trial court indicated defense counsel would not be foreclosed from arguing Arroyo "said two different things." Garcia's counsel responded, "fair enough," and thanked the trial court for its ruling. Certainly, this is not the stuff of judicial misconduct.

Garcia complains the trial court misread Arroyo's testimony to indicate he was struck 20 times rather than to indicate he landed 20 blows and thereafter made rulings based on this misconstruction of Arroyo's testimony. The relevant testimony came in response to defense counsel's question asking Arroyo how many blows he "g[o]t off." It appears Arroyo's answer, "around 20," was an indication of how many times he was struck, not the number of times he struck his assailants. Thus, the trial court's reading of the testimony was not unreasonable. Moreover, even if the trial court was mistaken in this regard, substantially more is required to demonstrate a violation of the right to a fair trial. (*People v. Freeman, supra,* 47 Cal.4th at p. 996.)

Garcia next complains that even witnesses butted heads with defense counsel, noting Officer Escobar told defense counsel to stop "yelling" at him. This occurred when Garcia's counsel cross-examined Officer Escobar with respect to who removed Buenrostro's wallet from Garcia's person. Escobar stated: "You don't need to yell at me." Garcia's counsel responded: "I'm not yelling. I've raised my voice, but I'm not yelling." Escobar then stated: "Okay. We're friends." It is difficult to imagine how this exchange adversely affected Garcia.

Garcia next asserts the prosecutor interrupted defense counsel's cross examination of Officer Lanza to admonish Garcia's attorney not to "glare" at Officer Lanza. The record indicates that, on direct examination, the prosecutor asked if Officer Lanza saw blood in various areas. Defense counsel objected the question required a conclusion as to whether blood was on the clothing. The trial court sustained the objection and advised the prosecutor to ask the officer whether he saw "what appeared to be blood." Thereafter, the prosecutor asked, "Just to be technical about it, is this one of the areas where you noticed what appeared to be blood?" The prosecutor then asked another question and, before Officer Lanza responded, the prosecutor asked defense counsel to "stop glaring at the witness." Garcia's counsel objected and requested a sidebar at which she complained the prosecutor's statement she would proceed "technically" had upset defense counsel. The prosecutor then indicated defense counsel had been "glaring at Officer Lanza . . . ." Garcia's counsel denied she had glared at Officer Lanza and indicated she had been glaring at the prosecutor. The prosecutor indicated she did not appreciate the defense making light of the case. The trial court stated, "I don't think there's a lot of light made of the serious case. I think that everyone does need to act professionally."

Given that defense counsel admitted she had been "glaring" at the prosecutor, it is difficult to discern how the prosecutor's statement prejudiced Garcia. Further, the trial court appropriately directed the parties to act professionally. No diminution of Garcia's right to a fair trial or prosecutorial misconduct appears.

Garcia next asserts that, in the presence of the jury, the trial court agreed defense counsel's questions with respect to whether Pineda had seen a physical confrontation were "misleading" and misstated the evidence. The trial court admonished defense counsel to: "Just be careful in asking the questions." In fact, during cross-examination with respect to Pineda's prior knowledge of Jose Garcia and Omar Garcia, the trial court sustained an objection on the ground defense counsel's question assumed facts not in evidence. The prosecutor then asked defense counsel to refrain from disclosing the names of witnesses. Shortly thereafter, Pineda testified he saw no physical fight on the

basketball court. Defense counsel then asked: "So . . . no physical confrontation at all? Just words?" The prosecutor objected the question misstated Pineda's testimony. The trial court responded, "it does misstate. He said he didn't see it." The prosecutor then asked the trial court to ask counsel "not to mislead." Defense counsel responded: "I'm not misleading. I object to editorializing by [the prosecutor]." The trial court then stated: "Just be careful in asking the questions."

This exchange is consistent with the trial court's duty to control the proceedings and nothing the trial court or the prosecutor said denied Garcia a fair trial.

Garcia next claims there was a hostile sidebar conference during which the prosecutor accused defense counsel of violating a court order by using Arroyo's last name. The court agreed Arroyo's name previously had been stated in the presence of the jury but sustained the objection and said counsel was "misleading" Pineda. The record indicates the prosecutor objected during defense counsel's examination of Pineda and asked to approach. At the sidebar, the prosecutor complained Garcia's counsel inappropriately was using the last names of the witnesses in violation of a protective order. The trial court agreed and, after further discussion of the issue, stated: "You want to know something, you're both doing what you can to drag this on." The prosecutor objected she had only been trying to protect the identity of the witnesses. The trial court responded it already had ruled defense counsel could not use last names. "But then we sit here and we talk for another five minutes. The questions are not to the point. The questions are not detailed. The questions are misleading, and counsel . . . [¶] . . . keeps going on and on."

This side bar was not hostile and, given that the jury was unaware of the content of the sidebar, nothing stated by the trial court could possibly have prejudiced Garcia. Moreover, the trial court's statements were entirely consistent with its duty to control the proceedings.

Garcia contends he was somehow prejudiced by a conference outside the presence of the jury during which the prosecutor declined to stipulate that only one 911 call had been placed. During the conference, defense counsel expressed outrage and asserted it was misconduct for the prosecutor "not to agree to the state of the evidence." Eventually, the prosecutor responded, "if the court thinks it's relevant . . . , I will be happy to stipulate to it. I do not think based on the state of the evidence it is relevant." The trial court agreed and indicated "it does nothing to the case one way or another."

Nothing in the prosecutor's refusal to stipulate only one 911 call was made caused Garcia prejudice. As there was no serious dispute with respect to how many 911 calls were placed, nothing in the tenor of the sidebar conference or the prosecutor's refusal to stipulate suggests the trial was unfair.

Garcia contends that, during the presentation of evidence related to Garcia's injuries, defense counsel stated at the sidebar, "I really don't like the giggling when we're trying to do argument. It's really hard not to respond angrily when there's a lot of argument. It's not funny." This incident occurred before the jury returned from the lunch recess. The record does not reflect that the prosecutor "giggled." Moreover, assuming the prosecutor did giggle, the jury was not present. Consequently, Garcia could not have been prejudiced.

In what Garcia refers to as a prime example of misconduct that must have led the jury to conclude the prosecutor hated Garcia and his counsel, Garcia cites the trial court's reversal of its ruling to exclude Garcia's statement to the arresting officers that he was a member of the Burlington gang. Garcia requested a mistrial when the prosecutor asked Garcia on cross-examination if he told the police he was a gang member. At the sidebar, the trial court agreed evidence of Garcia's statement had been excluded. However, after further cross-examination, the trial court ruled that if Garcia denied admitting to the police he was a member of the Burlington gang, he could be impeached with his prior inconsistent statement. Because Garcia took the stand and testified in his own defense, the trial court's ruling was correct. (See, e.g., *Harris v. New York* (1971) 401 U.S. 222, 225-226 [28 L.Ed.2d 1] [statements obtained in violation of *Miranda v. Arizona* (1966)

384 U.S. 436 [16 L.Ed.2d 694] may be used to impeach a testifying defendant]; *Walder v. United States* (1954) 347 U.S. 62, 65 [98 L.Ed. 503] [evidence obtained in violation of the Fourth Amendment]; *People v. May* (1988) 44 Cal.3d 309, 315 [statements obtained in violation of *Miranda*].) Thus, no improper prejudice to Garcia is shown.

Garcia next asserts that, during the prosecutor's cross-examination of Castillo, the trial court commenced a sidebar conference by telling Garcia's counsel to "change your attitude" and not to "yell" for a sidebar. During the conference, defense counsel accused the prosecutor of giggling and disputed the trial court's assertion that counsel was "too loud." This incident occurred on cross-examination of Castillo. The prosecutor asked whether Castillo told the police officers he had been at the park during the fight. Defense counsel objected and asked to approach. At the sidebar, the trial court stated: "The first thing I'm going to tell you is, change your attitude. . . . You don't yell that you need to approach the sidebar. Don't do that." When defense counsel complained the prosecutor's question was inappropriate, the trial court admonished defense counsel she was "talking too loud." Defense counsel stated, "my voice is as loud as yours." The trial court disagreed and stated "it was much louder." Defense counsel then stated: "Editorial comments and the giggling is so unprofessional and –" The trial court then advised the jury, "The attorneys can't keep their voices down. Let me have you all step in the jury room. I'll bring you out as soon as I finish with the attorneys."

After the jury left the courtroom, defense counsel protested the prosecutor improperly had asked Castillo whether he protested his innocence after being stopped by the police. The trial court disagreed and indicated the prosecutor asked whether Castillo told the police he had been in the park. After further discussion, defense counsel asserted the prosecutor's lack of familiarity with her professional responsibility gave defense counsel "grave concerns." The trial court stated, "Based on that question, there was no reason to go nuts and yell about immediately approaching. . . . I don't know why you're emotional about this case." Defense counsel responded the prosecutor was inexperienced and her conduct in the presence of the jury had been "very unprofessional." The trial

court indicated, "That is not on the record at any point." The trial court noted it had been "very tolerant of all counsel" and ruled the prosecutor's question was proper.

The prosecutor resumed cross-examination of Castillo with respect to whether he told the police he was at the park. When Castillo agreed he did not tell the police he helped to pull people off the fight, the prosecutor asked, "you were there; correct?" Defense counsel again requested a sidebar at which the prosecutor indicated Castillo wrote a statement in which he said he did nothing. Defense counsel noted this information was not elicited on direct examination and was "not something you can just bring up in front of a jury."

After further discussion, the trial court sustained the objection because the written statement was consistent with Castillo's testimony, "he didn't do anything in the park . . . ." When the prosecutor argued the People could question Castillo about the statement, defense counsel reiterated her objection and asserted the prosecutor "did exactly what I predicted she'd do and we now have a mistrial and I'm moving for one." The trial court denied the motion and stated, "It's not prosecutorial misconduct." When defense counsel insisted it was, the trial court stated, "Keep it down. Keep it down."

The record demonstrates none of the asserted incivility occurred in the presence of the jury. Moreover, the trial court's comments fall well within its duty to control the proceedings. Further, in the course of the colloquy, the trial court disagreed with defense counsel's assertion the prosecutor had acted inappropriately in the presence of the jury. The trial court observed: "That is not on the record at any point." Absent any contrary indication, we accept the trial court's characterization of the record. Thus, nothing in this sidebar exchange amounts to judicial or prosecutorial misconduct.

Garcia contends that, during defense argument, the prosecutor objected to argument by Garcia's counsel regarding Jose Garcia's MySpace page as "improper" and the trial court told defense counsel to "move" on. This incident occurred when defense counsel asserted the People had been unaware of information on Jose Garcia's MySpace page such as his nicknames, "until we were in court and you saw it." The prosecutor asserted defense counsel's argument was "incredibly improper." The trial court

immediately admonished the jury: "Ladies and gentlemen, its only argument of counsel. Listen carefully. You know what the evidence is. You heard the evidence." Neither the prosecutor's objection nor the trial court's ruling support Garcia's assertion of misconduct.

Immediately after the trial court's admonition, defense counsel argued, "Lord knows what's on [the private area of] Jose Garcia's MySpace page." The prosecutor asked to approach and, at the sidebar, objected there had been no evidence presented regarding the public versus the private aspects of the MySpace page. Thus, defense counsel's argument was "entirely improper. . . . She's referring to things that are not in evidence on purpose." The trial court agreed defense counsel's argument asked the jury to speculate about what might be on the private page, "so let's move on." Again, the prosecutor's objection and the trial court's ruling appear to have been proper. Consequently, no misconduct appears.

Garcia next points to the prosecutor's objection to defense counsel's argument that Garcia had no criminal record as misleading, which the trial court sustained. Garcia asserts this ruling was improper, given that the only evidence before the jury with respect to Garcia's criminal history consisted of his testimony he had been to prison within the past 10 years. Garcia claims that, because this testimony did not include the underlying criminal conviction, defense counsel's argument was proper. During a conference to discuss this matter, the trial court became angry when the defense called the trial a "dog and pony show" and responded, "The only dog and pony show here is you."

The record reflects that, at the sidebar, defense counsel asserted the trial court had excluded evidence of Garcia's prior convictions. Thus, there was no evidence of any criminal convictions before the jury. The trial court ruled defense counsel could argue there was no evidence of convictions before the jury but "don't mislead the jury." The trial court stated, "Whatever is in front of them is what you brought in front of them," referencing the fact that, on redirect examination, defense counsel asked Garcia whether he had been to prison in the last 10 years and he responded he had. Defense counsel continued: "The court knows it's appropriate to comment on the evidence, and this

sidebar has been a dog and pony show for the prosecution." The trial court responded: "It's not a dog and pony show. The only dog and pony show here is you."

At the next break, after the jury left the courtroom, the trial court stated: "I understand that emotions run high, and I don't want to say too much until I calm down a little bit. But I do want to say, I've gone out of my way to accommodate counsel in this case. I go out of my way to see that the defendants have a fair trial. [¶] I know the defense thinks that I'm all prosecution oriented, but I know that [the prosecutor] thinks I'm all defense oriented and . . . that tells me that I'm doing a fair job here. But for counsel to call this a dog and pony show, you are contemptuous of this Court. You are disrespectful of this Court. And that's all I'm going to say at this point in time."

The denigration of defense counsel appears to be nothing more than a reaction to defense counsel's injudicious "dog and pony show" comment. In any event, given that Garcia, in fact, had numerous prior convictions, defense counsel's argument was misleading. Further, because these proceedings occurred outside the presence of the jury, no prejudice to Garcia appears.

Garcia next claims misconduct occurred during final argument when the prosecutor referred to defense counsel's argument regarding the private area of Jose Garcia's MySpace page and told the jury it was "inappropriate to speculate about things that are outside of the evidence." At a sidebar conference, defense counsel objected the prosecutor had used the word "improper seven times in about 10 minutes, most of it directed towards me . . . ." Garcia's counsel asserted it was improper for the prosecutor to "act like we are trying to pull the wool over their eyes or play some game." "[S]he's left the impression . . . what we're doing is shady . . . ." Defense counsel claimed the defense had the right to comment on the private portion of Jose Garcia's MySpace page. In mid argument, defense counsel asked the prosecutor not to "snicker," apparently at defense counsel's argument, and claimed the prosecutor repeatedly had snickered and had made "vociferous head gestures" which were not reflected in the record. After further discussion, the trial court indicated "this is only argument of counsel" and thereafter admonished the jury that argument of counsel is not evidence.

It appears the prosecutor's point, that it is inappropriate to comment on matters outside the record, was well taken. Thus, the prosecutor properly could refer to defense counsel's argument as improper. Moreover, nothing in the record supports Garcia's assertion the prosecutor's repeated use of the word "improper" resulted in undue prejudice to Garcia. Regarding the claimed snickering and head gestures, Garcia failed to make a record in the trial court reflecting this conduct. Even had the record borne out Garcia's claim in this regard, the conduct attributed to the prosecutor would not have resulted in the denial of a fair trial.

3. *Conclusion*.

We have reviewed each of the claimed instances of judicial/prosecutorial misconduct and find none was prejudicial to Garcia's right to a fair trial. The overwhelming majority of incidents cited by Garcia occurred outside the jury's presence during sidebar conferences and thus could not have prejudice the jury. (See *People v. Guerra, supra*, 37 Cal.4th at p. 1112; *People v. Burnett, supra*, 12 Cal.App.4th at p. 475.)

In claiming otherwise, Garcia asserts the lack of civility prevented the jury from an impassionate consideration of the impeachment evidence, which included whether Garcia produced the box cutter before or after he snatched Jose Garcia's chain, whether 4 or 14 individuals attacked the SUV and whether the victims did not fight back, as they told the police on the night of the incident, or whether Jose Garcia and Omar Garcia each landed at least one blow and Arroyo "got off" 20 blows.

The first issue, regarding when Garcia produced the box cutter, was thoroughly explored at trial. Buenrostro and Arroyo testified Garcia tried to take Jose Garcia's necklace while holding the box cutter but each was impeached with prior testimony indicating Garcia produced the box cutter after the necklace was recovered by Jose Garcia. Nothing in the claimed instances of judicial and/or prosecutorial misconduct tainted the jury's consideration of this evidence.

With respect to whether there were 4 or 14 attackers, the defense was given free rein to develop this theory at trial. The defense elicited from the police officer witnesses that, at the hospital, none of the witnesses said the attackers tried to drag Jose Garcia from the SUV or that Jose Garcia or Omar Garcia threw a punch. Further, none of the witnesses mentioned 13 to 15 suspects, suspects on the roof of the SUV, suspects surrounding the SUV, or trying to do things to other doors and windows beside the driver's door.

However, the defense theory that the witnesses embellished the facts for trial by increasing the number of assailants was undercut by statements written by Jose Garcia and Robert Ortiz on the photographic lineup cards shown them at the hospital on the night of the incident. Each identified Garcia. Jose Garcia wrote Garcia was "the guy that started the fight and snatched my chain. . . . [T]he same guy was the one . . . with the blade that cut up my friend [Arroyo] and jumped him with about 11 to 15 others that tried to break the car windows and take me out." Robert Ortiz wrote Garcia was the individual who "basically started the whole confrontation, pulled Jose Garcia's chain, . . . , cut up Carlos Arroyo in multiple areas of the body, about 15 or more suspects all rushed us and tried to pull . . . all of us out of the car, threatened us all, and asked us for all our belongings."

Given these written statements made on the night of the attack, any incivility among the trial participants cannot be seen as a factor in the jury's rejection of the defense theory of the case.

Finally, the fact codefendant Castillo was not convicted as charged, cited by Garcia as evidence the unpleasant exchanges between the prosecutor and defense counsel, and between the trial court and defense counsel, affected how jurors viewed the evidence, is more appropriately explained by Castillo's secondary role in the incident.

Garcia's points on appeal are nothing more than a list of every contentious discussion that occurred during the trial. Taken in context, none of these incidents indicated bias or prejudice or created the impression the trial court had allied itself with the prosecution and was no longer an impartial arbiter. Even if improper, the trial court's remarks " 'fall short of the intemperate or biased judicial conduct [that] warrants reversal.' [Citation.]" (*People v. Geier* (2007) 41 Cal.4th 555, 614, overruled on another point in *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. 305 [174 L.Ed.2d 314]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1108.)

As noted in *People v. Guerra*, *supra*, 37 Cal.4th 1067, "[The] defendant's willingness to let the entire trial pass without [a] charge of bias against the judge . . . strongly suggests [the defendant's claims of judicial misconduct] are without merit. [Citation.]" (*Id.* at p. 1112.)

Indeed, the trial court issued many rulings that favored Garcia. It excluded from evidence Garcia's statement to the arresting officers, "Fuck, I got a kid. I can't go down for this." The trial court also excluded Garcia's admission of gang membership to the arresting officers, which became admissible as a prior inconsistent statement only after Garcia testified. At sentencing, Garcia personally thanked the trial court for affording him a fair trial. We agree with Garcia's assessment.

In sum, viewed singularly or collectively, the trial court's actions were appropriate responses to the various situations presented. None of the comments constituted judicial misconduct, discredited the defense theory of the case or created the impression the trial court had allied itself with the prosecution. "Although there were instances of judicial exasperation and unfiltered candor, the trial was protracted . . . . Much time was consumed on, at best, collateral matter. Questioning by counsel was imprecise, repetitious, and often obfuscating. Through it all the trial court was protective of [defendant's] rights . . . . We are satisfied that [defendant was] afforded a fair trial." (*People v. Burnett*, *supra*, 12 Cal.App.4th at p. 476.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.