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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. NELSON RINCON, Defendant and Appellant.	B277562 (Los Angeles County Super. Ct. No. KA110540)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Julie Jakubik, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Nelson Rincon of second degree robbery (Pen. Code, § 211),[1] and he thereafter admitted that he had suffered a 2006 conviction for assault with a firearm (§ 245, subd. (a)(2)) that qualified as a strike and a prior serious or violent felony conviction (see § 667, subds. (a)(1), (b)-(j); 1170.12, subds. (a)-(d)). The trial court sentenced Rincon to state prison for a total term of 15 years comprised of the upper term of five years for the robbery, doubled for the prior strike, plus five years for the prior felony. Rincon contends the trial court abused its discretion in denying his motion for a mistrial after a witness disclosed that Rincon made a statement indicating that he had a prison history and gang affiliation. We disagree and affirm.

FACTS

The People filed an information charging Rincon with second degree robbery. (§ 211.) The information further alleged that Rincon had suffered a conviction in 2006 for assault with a firearm (§ 245, subd. (a)(2)) that qualified as a strike and a prior serious felony conviction (§ 667, subds. (a)(1), (b)-(j); 1170.12, subds. (a)-(d)).[2] The following facts were presented at a trial by jury.

On June 10, 2015 at about 2:45 p.m., Miguel Paz arrived at Castanon Tires at 13130 Valley Boulevard in the Bassett area of Los Angeles County to have some tires repaired. A minute after Paz parked and got out of his car, Rincon approached him and asked for a dollar. As Paz recalled, Rincon was wearing gray

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[1] All further undesignated section references are to the Penal Code except as otherwise noted.

[2] Other conviction allegations in the information are not relevant to Rincon's present appeal.

sweats and a blue hoodie. When Paz said he wanted to talk to a worker about the tires, Rincon became "agitated," and responded, "I need the money. It was not only the dollar, I need the money." Rincon then pulled a firearm out of his sweatshirt pocket, and told Paz, "Don't do stupid things. Give me your money." The sight of the firearm scared Paz and he pulled out his wallet. Rincon took $2,000 in new $100 bills from Paz's wallet. As Rincon was leaving, he told Paz to turn around. When Paz turned around, Rincon ran away.

Paz turned back in time to see Rincon get into the passenger's side of a blue 2000 to 2002 Ford Expedition SUV waiting for him on a side street to Valley Boulevard. The Expedition made a U-turn, and headed to Valley. As Paz watched, the Expedition drove into the bed of a pickup truck, causing a tire on the passenger side of the Expedition to burst.[3] After the crash, the Expedition drove from the scene on Valley and went out of Paz's sight. Before Paz had an opportunity to call the police, a patrol car happened to pass by. Paz waved down the patrol car and reported that he had been robbed.

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[3] The pickup truck was driven by Roberto Sandoval. At trial, Sandoval testified that after being hit by the Expedition, he stayed at the scene. He watched the Expedition "weaving" or going "side to side" as it drove away down Valley Boulevard. Sandoval identified a photograph of an Expedition at trial as the one that hit his pickup truck. The Expedition was found shortly after the robbery at the curb on Valley Boulevard about one mile from the scene of the robbery.

Los Angeles County Sheriff's Department (LASD) Deputy Ivan Davanzo responded to the area of Valley Boulevard and 4th Street, about a mile from the scene of the robbery.[4] On arriving at the scene, Deputy Davanzo found a blue Ford Expedition, license plate 6KSN935, parked at the curb across the street from an auto-related business at 127 4th Street. The Expedition had "passenger side front end damage" and a "flat or blown tire."

LASD Deputy Luisa Basurto also responded to the location of the Ford Expedition. Deputy Basurto searched the Expedition and found gray pants and a blue t-shirt inside.[5] Deputy Basurto also found a wadded up $100 bill in the vehicle and "what appeared to be a handgun underneath the driver's seat."[6]

LASD Deputy Fernando Sarti was assigned to investigate the robbery. Deputy Sarti and his partner, Jaime Moran, went to the general area of the robbery, and began looking for any potential suspects that might match the description of the robber. They went to a McDonald's near the scene of the robbery. When they walked into the restaurant, the officers noticed an individual sitting near the back of the restaurant who matched the description of the robbery suspect. The deputies detained the individual and arranged for another officer to transport Paz to the McDonald's parking lot for field identification. When Paz arrived at the McDonalds's, he stayed in the patrol car, which had tinted windows, about 30 feet away from the suspect who

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[4] We take judicial notice of the street locations.

[5] A police detective who testified at trial explained that it is "very common" for people to change clothes following a crime.

[6] The firearm turned out to be a BB gun that "looks like a real gun."

had been detained by Deputies and Moran. Paz identified the individual who was detained as the robber. Surveillance tapes subsequently established that the suspect who Paz initially identified could not have been the robber.

LASD Detective Armando Orellana also responded to the McDonald's to assist Deputy Sarti with the ongoing investigation. He and Deputy Sarti went into the restaurant to talk to the manager to determine whether there was any videotape showing the patrons coming and going from the restaurant. When the officers walked into the restaurant, they saw two men sitting in a booth, and noticed that one of the men looked "a lot like [the] suspect" who had been detained. The officers "actually joked about" the close resemblance. At trial, Detective Orellana identified Rincon as the person whom the officers observed inside the McDonald's.

After leaving the McDonald's, Detective Orellana ran the plates on the Ford Expedition and learned the vehicle's registered owner lived in El Monte. When the detective contacted the registered owner, she stated that she had sold the vehicle to her cousin, Irene Beltran, who worked at Bassett Park. Detective Orellana then drove to Bassett Park to talk to Beltran. As Detective Orellana was walking into Beltran's classroom or office, he looked toward a bathroom with an open door, and saw Rincon in the bathroom. Detective Orellana "immediately recognized" Rincon as the person whom he and Deputy Sarti joked about earlier in the day at the McDonald's.

Given the confluence of events — the fact that the officers were going to Bassett Park to contact Beltran, the fact that the suspect vehicle belonged to Beltran, and that Rincon was at the park and fit the description of the robbery suspect — Detective

Orellana detained and handcuffed Rincon. After Rincon asked the officers to retrieve his property, Detective Orellana recovered a "baseball cap, along with [a] black paper bag and lottery tickets and seven $100 crisp bills" from inside the bathroom. At that point, Detective Orellana arrested Rincon and began arranging to transport him to the station.

Before Detective Orellana left Bassett Park with Rincon, another deputy transported a witness, Raymond Diaz, to the scene for a field line-up. Diaz worked at an auto-related business near the corner of Valley Boulevard and 4th Street. Sometime around 3:30 that afternoon, Rincon had walked into the premises and pulled out "a bunch of wrinkled" $100 bills from his pocket, and said that he wanted to buy a tire. When Diaz said that they did not sell tires, Rincon left. Diaz told the officers that Rincon was the same person who had come into his business earlier that day. [7]

After Diaz made the field show-up identification, as Detective Orellana was walking Rincon to the officers' car at Bassett Park, Rincon spontaneously stated, "This isn't going to go to jury trial because witnesses know that their wives will get killed."

Officers subsequently showed Paz a six-photo lineup, and Paz wrote "This is the person that robbed me" on Rincon's photo. At trial, Paz testified he had been "one hundred percent sure" of

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[7] At trial, Victor Aguirre also placed Rincon in the general area of the robbery, and near the abandoned Ford Expedition. Aguirre testified that he worked at an auto-related business next door to the business where Raymond Diaz worked (*ante*). Aguirre testified that Rincon entered Aguirre's shop on the afternoon of June 10, 2015, looking to buy a tire.

his photo identification at the time he made the identification. When an officer asked Paz why he had identified two different persons, he responded that he did so because the men looked "a lot alike."

Irene Beltran testified that she had been Rincon's girlfriend in June 2015. On the day of the robbery, Rincon dropped Beltran at her job at Bassett Park around 8:00 a.m., and then left in her Expedition. Beltran never saw her vehicle again that day. Later in the afternoon, Rincon dropped off the keys and said that the vehicle had a flat tire.

LASD Deputy George Meza testified Rincon made statements to him around the time he was booked. According to Deputy Meza, Rincon initially denied driving Beltran's Expedition on the day of the robbery, then changed his story from no to yes, and back to no. Rincon said he had borrowed the vehicle, but returned it around 1:00 p.m., before the robbery. Rincon also denied being in the area of Valley Boulevard, then changed his story and said he was, and gave different times as to when he was there. Rincon said he dropped off the Expedition by an "unknown park" in La Puente at around 1:00 p.m., then took a bus home. At one point, after Rincon said he was not in the area of the robbery, Deputy Meza asked Rincon whether he would be seen in surveillance videos in the area of the robbery around the time of the crime. At this suggestion, Rincon changed his story again, and said he was in the area at the time of the robbery. At another point, Rincon said that he had picked up an "unknown person" without asking questions, and had given the person a ride to the area where the robbery occurred. According to Rincon, the unknown person had gone into the "store," then returned to the vehicle. When Deputy Meza asked Rincon about the money

found in his possession, Rincon said that he "hustled," and would get money "here and there." He also said that he got the money at the unemployment office.

The prosecution presented evidence of tape-recorded jailhouse conversations between Rincon and Beltran. The first clip from the conversation included the following exchanges:

"Rincon: Listen, listen, listen, it says hit and run. It says hit and run.

"Beltran: Yeah.

"Rincon: And it says misdemeanor. It's a misdemeanor infraction. It ain't shit right.

"Beltran: Uh-huh.

"Rincon: The robbery one, they dropped it, they, they, well for right now they dropped it right.

"Beltran: Uh-huh.

"Rincon: They're not gonna pick that shit back up and shit, they ain't have no witness in the back of that car saying anything you know and they know that.

"Beltran: Yeah.

"Rincon: There was nobody sayin' anything you know."

The second clip from the conversation included the following exchanges:

"Rincon: Hey so that mother fucker went out of his way to fuckin' hit the pad?

"Beltran: Yes. I have pictures and the whole house was a mess. Like they didn't, they go, they wanted to arrest you for accessory and I'm like I've been here at work. I've been here at work.

"Rincon: I was hopin' that you didn't fuckin' like get all scared and fuckin' tell him that, yeah I left, or that I did this and I did that 'cause.

"Beltran: No, dad.

"Rincon: You already know . . . you were at work.

"Beltran: I was at work. I was like look at the log book, look, we had an incidence [*sic*] that happened you know what I mean, here at my work. There was another officer here, you know what I mean. They kept me, they kept me . . . .

"Jailhouse Operator: This call is being recorded.

"Beltran: You're going to go to jail right now. And I'm just like what the hell?

"Rincon: You willed something. You know you willed something right?

"Beltran: No, I did not.

"Rincon: You did will something.

"Beltran: Oh my god.

"Rincon: You know that right?

"Beltran: Don't start. Don't start this. Don't start this.

"Rincon: No, no, no, no, I'm gonna tell you. I'm gonna tell you one thing, look, when you think too hard about something ma, shut it down in your mind you know. That's all I can tell you. Shut it down in your mind. And it doesn't matter if your heart's still in there, if you're fuckin' thoughts are fillin' it, shut it down in your mind you know. You know no thoughts in your mind, you have no fuckin' feelings in your heart, you know, like you have nothing there. There's nothing there. What?

"Beltran: I know. I know. I know. I know.

"Rincon: You know how to quiet everything right? You hear me?"

Rincon was found guilty as charged. Rincon thereafter admitted the prior conviction allegations and the trial court sentenced Rincon as noted at the outset of this opinion.

Rincon filed a timely notice of appeal.

DISCUSSION

Rincon's sole contention on appeal is that the trial court abused its discretion in denying his motion for mistrial made after Deputy Meza testified that Rincon stated he had been to prison and was a "Sureno." We disagree and affirm.

The Trial Setting

At a break during the morning session on the first day of trial, Rincon's counsel stated he had "just wanted to make sure that . . . the deputy sheriffs [would] not inadvertently mention Mr. Rincon's parole status while they're testifying," and then noted that the prosecutor had given her assurance that she had "already spoken to them." The trial court stated: "I'd just ask the investigating officer to kind of remind everybody about that," and the investigating officer relied, "Yes, sir." At that point, the prosecutor added: "I've also asked them to not bring up any mention of gangs."

During Deputy Meza's testimony on direct examination, he testified about Rincon's inconsistent statements at the time he was booked, including Rincon's statements about an unidentified person who had been in the Ford Expedition on the day of the robbery. In the midst of this line of the deputy's testimony, the following exchanges transpired:

"[The Prosecutor]: And did you question him as to the person that he picked up?

"[Deputy Meza]: Yes, I did.

"[The Prosecutor]: And what did he say?

"[Deputy Meza]: First, he said he picked up an unknown person. He didn't ask no [*sic*] questions. He just gave him a ride to that location. The individual went into the store for a few minutes, then he returned to the vehicle, got in. He then drove away.

"[The Prosecutor]: Okay. And at some point, did his story about that unknown person change?

"[Deputy Meza]: Yes.

"[The Prosecutor]: How did it change?

"[Deputy Meza]: *Basically, he made a statement saying that he had been to prison. He's a Sureño and that he's not a snitch and that he don't* [*sic*] *give up his homies.*

"[Defense Counsel]: Your Honor, may I approach?

"[The Court]: Yes." (Italics added.)

An unreported discussion was held at sidebar. After Deputy Meza finished testifying, and out of the presence of the jury, the lawyers and the trial court engaged in a short discussion. The court reminded the lawyers that, at the unreported sidebar conference, it had noted that it did not want to "ring the bell twice" by commenting on the deputy's testimony, and that the court would give a jury instruction on the matter. Appellant's counsel expressed her surprise that Deputy Meza made such a statement, given that the parties had agreed there would be no mention of Rincon's parole status or gang affiliation. The prosecutor stated: "I did state at sidebar, also, that my witnesses were all asked not to mention that; however, I believe Deputy Meza showed up later in the day after that instruction,

and so he may have missed that instruction. And that's what happened."

After Deputy Meza finished testifying, two additional witnesses, Irene Beltran and LASD Deputy Jaime Moran, testified before the trial court took a break. After the jury left the courtroom, Rincon moved for a mistrial. The trial court denied a mistrial, "subject to a proposed remedy in terms of an instruction or direction to the jury to disregard." The court then offered three options to Rincon: "One, is . . . to tell the jury to disregard it and strike the testimony; second, is to tell them that he did go to prison [in] 2006 on a drug charge. . . . That's as innocuous as it gets. . . . And the third possibility is not to ring the bell and do [no]thing." After Rincon and his counsel conferred, counsel "reiterate[d]" the motion for mistrial. Short of that, Rincon agreed to "option number three, which is . . . leave it alone. No need to ring the bell again." When Rincon's counsel made one last inquiry whether his motion for mistrial was denied, the court stated that it had been denied.

The Governing Law

A trial court has authority to grant a mistrial when a defendant has been prejudiced by a trial event, and it cannot be cured by a jury instruction or other admonition to the jurors. (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986; *People v. Woodberry* (1970) 10 Cal.App.3d 695, 708.) "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.) Further, in reviewing a ruling on a mistrial motion, the appellate court may consider the context of the trial at the time of the allegedly prejudicial event. As stated by

Division Four of our court: "A motion for mistrial, if made in the early stages of a trial, is more likely to be granted since the judge, having heard little of the evidence, cannot then evaluate its prejudicial effect, if any, on the case as a whole." (*People v. Woodberry, supra*, 10 Cal.App.3d at p. 709.) On the other hand, when a mistrial motion is made after the trial is well along, the judge is able to view the situation and assess prejudice "from retrospective advantage." (*Ibid*.)

A trial court's ruling to deny a motion for mistrial is reviewed on appeal under the abuse of discretion standard. (*People v. Maury* (2003) 30 Cal.4th 342, 434; *People v. Bolden* (2002) 29 Cal.4th 515, 555.) Under this standard, a defendant bears the burden on appeal of demonstrating that the trial court, in denying his or her mistrial motion, exercised its discretion in an arbitrary, capricious, or absurd manner. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

Analysis

We are not persuaded by Rincon's arguments that the trial court's decision to deny his motion for mistrial was an abuse of discretion. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1113.)

The trial court appropriately found that any prejudice from Deputy Meza's single, fleeting reference to Rincon's admissions about his prison history and that he was a Sureno was not so prejudicial that it could not be addressed by a jury instruction or other admonition or direction. The comments were made well into the prosecution's development of the case. By the time Deputy Meza testified, the following witnesses had already testified: Victor Aguirre, Miguel Paz, Raymond Diaz, Roberto Sandoval, LASD Deputy Ivan Davanzo, LASD Deputy Luisa Basurto, LASD Detective Armando Orellana, and LASD Deputy

Fernando Sarti. In the overall context of the trial, which included exceptionally strong evidence demonstrating Rincon's guilt, Deputy Meza's improper testimony did not necessitate a mistrial. The court's decision to allow Rincon an array of remedies to address the situation was a reasonable approach to the situation. We do not see an abuse of judicial discretion.

Rincon's references to a line of cases recognizing the inefficacy of curative measures when a jury learns of a defendant's past criminal history do not persuade us to reach a contrary conclusion. First, the majority of the cases cited by Rincon do not directly address claims by the defendants that mistrial motions should have been granted, and, thus, do not consider the principle that a trial judge is in the best position to assess the potential prejudicial impact of an allegedly improper trial event.[8] Further, almost all of the cases cited by Rincon involve claims challenging trial court rulings to allow other crimes evidence or rulings involving other crimes. For example, in *U.S. v. Jones, supra*, 16 F.3d 487, the Court of Appeal ruled that a trial court abused its discretion in denying a request to

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[8] In order, Rincon cites *U.S. v. Jones* (2d Cir. 1993) 16 F.3d 487, 492; *U.S. v. Garza* (5th Cir. 1979) 608 F.2d 659, 666; *People v. Gibson* (1976) 56 Cal.App.3d 119, 129; *People v. Hill* (1998) 17 Cal.4th 800, 845; *People v. Albertson* (1944) 23 Cal.2d 550, 577; *People v. Griffin* (1967) 66 Cal.2d 459, 466; *Michelson v. United States* (1948) 335 U.S. 469; *U.S. v. Carrillo* (5th Cir. 1993) 981 F.2d 772, 774; *United States v. Avarello* (5th Cir. 1979) 592 F.2d 1339, 1346; *People v. Baskett* (1965) 237 Cal.App.2d 712; *United States v. Hodges* (9th Cir. 1985) 770 F.2d 1475, 1480; *People v. Daniels* (1991) 52 Cal.3d 815, 880; *United States v. Bailleaux* (9th Cir. 1982) 685 F.2d 1105, 1116; *United States v. Keating* (9th Cir. 1998) 147 F.3d 895, 900; and *Jeffries v. Blodgett* (9th Cir. 1993) 5 F.3d 1180, 1189.

sever a charge that the defendant was a felon in possession of a firearm charge from more direct charges that the defendant committed robbery. (*Id*. at. p. 492.) In short, the fact of a prior conviction was a core part of the prosecution's case in chief in *Jones*. This was plainly not the situation at Rincon's trial.

In *U.S. v. Garza, supra*, 608 F.2d 659, the Court of Appeal ruled that the cumulative effect of multiple instances of prosecutorial misconduct during argument, including references to other crimes, justified the reversal of the defendant's drug convictions. (*Id*. at p. 666.) *People v. Hill, supra*, 17 Cal.4th 800 (*Hill*) is similar to *Garza*. In *Hill*, our Supreme Court reversed a death penalty judgment for multiple instances of prosecutorial misconduct which rendered the defendant's trial fundamentally unfair, including misstating evidence and referring to facts not in evidence, including other crimes. (*Hill, supra,* at pp. 819-847.) As the court stated in *Hill*: "Here, the jury heard not just a bell, but a constant clang of erroneous law and fact." (*Id*. at p. 846.) However, both *Garza* and *Hill* recognized that the results in those cases might be different had only a single instance of misconduct occurred at trial. (*Garza, supra*, 606 F.2d at p. 665; *Hill, supra*, 18 Cal.4th at p. 845.)

In *People v. Gibson, supra*, 56 Cal.App.3d 119, the Court of Appeal reversed a murder conviction in a case in which the victim had been beaten to death. The appellate court found that admitting other crimes evidence under Evidence Code section 1101, along with photographs of the decedent, justified reversal. (*Id*. at pp. 128-131.) The other crimes evidence, which included evidence showing that the defendant robbed a female victim, and battered a disabled victim lying in bed, should have been

excluded under Evidence Code section 352, and resulted in prejudice.

Rincon also relies on *United States v. Avarello, supra*, 592 F.2d 1339, a case involving a mistrial. It does not further his cause. There, the Court of Appeal found no abuse of discretion in a trial court's decision to deny a mistrial based on one defendant's trial counsel's comment during opening statement that the defendant had a prior criminal history. (*Id*. at p. 1346.) As stated by the Court of Appeal: "Thus, the general reference to 'a misdemeanor or a felony offense' . . . in [the] opening statement, though clearly misconduct, could have had only scant impact, if any, on the subsequent verdict." (*Ibid*.)

In sum, we have reviewed all of the cases cited by Rincon, and we are not persuaded that the court here erred in denying the motion for mistrial. The court's conclusion that the jury could be fair and decide the case based on the evidence showing Rincon committed the charged robbery was well within its discretion.

Harmless Error

Even were we to assume the trial court erred in denying the mistrial motion, we find the error does not mandate reversal. Where, after the conclusion of a trial, an appellate court finds that it is not reasonably probable that the defendant would have obtained a more favorable outcome but for the admission of the material upon which a motion for mistrial was made, the appellate court may find the error in denying a mistrial to have been nonprejudicial under state law harmless error analysis. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 749-750 [denial of a mistrial based on the erroneous admission of evidence showing the defendant was a drug dealer reviewed for prejudice under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Here, we see no probability that the outcome of Rincon's case would have been different had Deputy Meza not disclosed that Rincon was a Sureno gang member who had been to prison. The evidence against Rincon was very strong. It was essentially undisputed that Rincon had his girlfriend's Expedition on the day of the robbery, and that the vehicle was used in the robbery. The victim, Miguel Paz, testified that the robber took $2,000 in $100 bills from him at gunpoint. Paz identified Rincon in a photo line-up and at trial. Two other witnesses identified Rincon as a person who came into their businesses near the scene of the robbery; one of those witnesses testified that Rincon pulled a "bunch" of $100 bills from his pocket. After the robbery, police recovered a $100 bill in the Expedition. Paz testified that the robber was wearing gray sweats and a blue hoodie; both gray pants and a blue shirt were found in the Expedition. In addition, a BB gun that "looked like a real gun" was recovered from the vehicle.

Police saw Rincon at a McDonald's restaurant near the robbery location shortly after the robbery occurred. Video showed Rincon in the area of the robbery around the time of the robbery. When Detective Orellana arrested Rincon, he had seven crisp $100 bills in his possession. While being walked to the police car to be transported to jail, Rincon spontaneously said the matter would not go to jury trial because "witnesses know that their wives will get killed," a statement that demonstrated consciousness of guilt.

Once at the jail, Rincon repeatedly made inconsistent statements about his whereabouts on the day of the robbery, all aimed at avoiding the increasing pieces of evidence the officer doled out to him disclosing what they knew about the crime.

Rincon's statements about where he got the $100 bills in his possession were fanciful. Finally, Rincon made various statements to Irene Beltran during jailhouse phone calls that suggested his guilt. The only weakness in the case against Rincon was Paz's initial misidentification of another person as the robber, and that issue was explored and explained by the evidence at trial.

We also note that the prosecutor made no attempt during argument to take advantage of Deputy Meza's disclosure; the prosecutor made no mention of Rincon's criminal past or gang membership during argument. Finally, no defense was presented.

In view of all this evidence, we find no reasonable probability that the outcome of Rincon's trial would have been different had the jury not heard Deputy Meza's wrongful testimony. (*People v. Welch*, *supra*, 20 Cal.4th at pp. 749-750.)

To the extent Rincon argues that we should examine the erroneous denial of his motion for a mistrial as an issue of constitutional magnitude, subject to the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, we disagree. Even so, our conclusion would be the same. It is beyond reasonable doubt that the outcome of Rincon's trial would have been the same had the jury not heard Deputy Meza's testimony about Rincon's admissions of a prison history and gang affiliation. We do not see this as a close case, and whatever may have occurred from Deputy Meza's testimony, it was not a factor in the jury's verdict. The evidence at trial convicted Rincon, not passion, prejudice, or unfairness arising from Deputy Meza's testimony.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.