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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. DAVID SARGSYAN, Defendant and Appellant.	B227226 (Los Angeles County Super. Ct. No. LA061846)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael K. Kellogg, Judge. Affirmed as modified.

Suzann E. Papagoda, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant David Sargsyan guilty in count 2 of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))[1] and in count 3 with assault with a semi-automatic firearm (§ 245, subd. (b)).[2] As to count 3, the jury found defendant personally used a firearm within the meaning of sections 1203.6, subdivision (a)(1), and 12022.5, subdivision (a). Defendant admitted suffering a prior felony conviction under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667, subd. (a)(1)).

The trial court sentenced defendant to the mid-term of six years on count 3, which it then doubled as a result of the prior felony conviction under the three strikes law. The court imposed an additional five years pursuant to section 667, subdivision (a)(1) and three years for the firearm use finding under section 12022.5, subdivision (a) enhancement, for a total of 20 years in state prison. The sentence as to count 2 was stayed under section 654.

Defendant argues the trial court erred by admitting irrelevant and prejudicial gang evidence through the testimony of Los Angeles Police Officer Ben Ellis. He further contends that the error deprived him of a fair trial in violation of his due process rights. Defendant also asserts that the abstract of judgment and minute order must be corrected to properly reflect the court's oral ruling at the sentencing hearing. The Attorney General disputes the substantive claims but concedes that the abstract of judgment and minute order should be corrected.

We direct the trial court to correct the errors in the abstract of judgment and minute order to conform to the trial court's pronouncement at sentencing but otherwise affirm the judgment.

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[1] Unless otherwise indicated, all statutory references are to the Penal Code.

[2] Count 1 of the original information was not included in the amended information and was later dismissed by the trial court. The remaining counts were not re-numbered.

FACTS

On April 17, 2009, Vitalys Zemengue was collecting recyclable materials behind a marble and granite company at the corner of Wyandotte Street and Varna Avenue in Los Angeles when a Mercedes SUV pulled into the alley. Zemengue thought he heard someone from the SUV calling to him, so he approached the vehicle on the driver's side. There were four men in the SUV, who were all wearing black with the exception of the driver. Defendant was in the back seat on the passenger's side of the vehicle. The driver asked Zemengue if he was collecting recyclables. Zemengue answered that he was. Defendant yelled, "Get the fuck out of here!" at Zemengue. Zemengue tried to explain that he knew the owner of the building and had permission to collect recyclables, but defendant kept telling him to "[G]et the fuck out of here."

Zemengue noticed that defendant had a gun tucked into his waistband. Defendant got out of the SUV, walked over to Zemengue, and pointed the gun at his head from about a foot away. The two other passengers got out of the SUV. One of the passengers grabbed defendant, but defendant freed himself. The other passenger told Zemengue to leave but prevented him from doing so by standing on his feet. Zemengue asked him, "What do you think this is, a movie?" Defendant pointed the gun at Zemengue's head a second time. After a while, the passenger who had been standing on his feet led Zemengue away from the SUV while the other passenger walked defendant to an office in the building. Both the driver and the man leading defendant were yelling at defendant in Armenian. As he walked away, Zemengue said, "I could call the police and have you guys arrested." The driver responded, "Don't call the police. You didn't see no gun." After the men went inside the marble and granite company, Zemengue called the police.

Officer Ellis and his partner responded to Zemengue's call. As the officers approached Zemengue, defendant and one of the other men returned to the alley. Zemengue pointed at the men and identified them as "the guys . . . that put the gun to my head." Defendant was standing about 15 feet behind the other man when the officers ordered them to stop and put their hands in the air. Officer Ellis testified that defendant

had a "surprised" look on his face. The man closer to the officers complied, but defendant moved his hands to his waistband and ran down the alley. Officer Ellis observed the outline of a handgun at defendant's waistband. He also noted that defendant ran with a limp, which Officer Ellis explained is common when a person runs with a gun tucked in his waistband. The officers did not follow defendant down the alley but instead called for backup. A third man came out of the building, and the officers took him into custody.

Police backup arrived on the scene, as did a police helicopter. Officer Christopher Kelley checked the alley behind the building and discovered a semi-automatic nine-millimeter handgun in the grass beside a fence. Officer Kelley collected the gun, unloaded the single bullet in the magazine, and put it in the trunk of his patrol car. Later, Officer Kelley discovered two additional bullets in the same area of the alley.

The officers ordered anyone remaining in the building to surrender and warned that they would release a police dog if anyone failed to comply. When no one responded to the warnings, the police dog was released. The dog alerted the officers to defendant's presence under a woodpile. Defendant was wearing a white tank top when he was apprehended. The officers recovered a sweaty, black, long-sleeved shirt covered in what appeared to be dust from wood shavings near defendant.

Zemengue identified defendant at the scene as the man who assaulted him. He also identified the gun used by defendant. Forensics was unable to pull any identifiable fingerprints from the gun or the bullets.

During cross-examination, counsel questioned Officer Ellis concerning defendant's booking as follows:

"[Defense counsel]: And you take a picture of [defendant] also, correct, at the station?

"[Officer Ellis]: You know what? Due to --

"COURT: I'm confused. A picture of [defendant] or a picture of property?

"[Defense counsel]: No, no. You take a picture of the actual individual at the station.

"[Officer Ellis]: Yes. [¶] Due to the fact that he's an active gang member, I'm not allowed to take pictures of him.

"[Defense counsel]: Objection, Your Honor. [¶] I did not invite the question.

"COURT: Stricken.

"[Defense counsel]: Your Honor, I would like to have the jury admonished about this particular statement. It's very, very prejudicial. The jury did not need to hear that comment. . . .

"COURT: I just struck the answer, which means that they've been instructed in pre-instruction that if I struck an answer not to consider it for any purpose at all. [¶] So be careful as to the way that the questions were worded. The questions are worded in a way to a direct answer. Did you take a picture? I already know what the answer is going to be. [¶] So I'm going to ask the question: [¶] Did you take a picture of defendant during the booking process?

"[Officer Ellis]: No, sir. I'm not allowed."

Later, defense counsel questioned Officer Ellis as to defendant's physical appearance in contrast to one of the other men who was apprehended:

"[Defense counsel]: Do you recall any difference in physical appearance of these two individuals? Height? Weight? That sort of thing.

"[Officer Ellis]: Yes.

"[Defense counsel]: What exactly do you recall?

"[Officer Ellis]: I remember Mr. Muradyan being a little bit smaller build, thinner, and Mr. Sargsyan or the defendant has the Hollywood tattoo on his neck, which is real distinct.

"[Defense counsel]: Do you recall any difference of the individuals in terms of a noticeable difference in height?

"[Officer Ellis]: Mr. Sargsyan, nothing distinct I can think of right now, no."

DISCUSSION

I. *Whether the Trial Court's Admission of Gang Evidence was Prejudicial Error and/or Violated Defendant's Constitutional Right to a Fair Trial*

Defendant first contends the trial court erred in admitting irrelevant and prejudicial gang evidence through the testimony of Officer Ellis on cross-examination. Defendant asserts the error was not harmless because it is "'reasonably probable' that [he] would have obtained 'a more favorable result had the evidence been excluded.' [Citations.]" He also argues the error violated his constitutional right to a fair trial.

A. *Whether the Trial Court Erred*

In general, evidence is admissible if its probative value is not substantially outweighed by the probability that it will unduly consume time, "create substantial danger of undue prejudice," confuse the issues, or mislead the jury. (Evid. Code, § 352.) "[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).) The courts recognize, however, that gang evidence may have a "highly inflammatory" impact. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*).) Where no gang enhancement is involved "evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal." (*Hernandez, supra,* at p. 1049.) Nevertheless, gang evidence may be admitted "if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative." (*Samaniego, supra,* at p. 1167.) "[T]he decision on whether evidence, including gang

evidence, is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-25 (*Albarran*).) We review the trial court's ruling for abuse of discretion. (*Id*. at p. 225.)

Defendant first asserts the trial court erred by (1) failing to strike Officer Ellis's statement that he did not take defendant's photograph at booking because defendant was an active gang member, and (2) refusing to admonish the jury not to consider the statement in its deliberations. Defendant argues the statement was immaterial to the case and was made for the sole purpose of creating an inference that defendant had a "criminal disposition and [was] therefore guilty of the charged offense[s]." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1167.) Defendant contends that although the court attempted to mitigate the situation by instructing the jury, "If I sustained an objection, you must ignore the question," it was too late to "unring the bell," especially given the passage of time between the error and the instruction. (Judicial Council of Cal. Crim Jury Instns. (2011-2012) CALCRIM No. 222.)

This argument lacks merit, because as the Attorney General argues, defendant's assertion that the trial court failed to strike Officer Ellis's answer is inaccurate. The record shows the court struck Officer Ellis's answer immediately, and the statement was not admitted into evidence for any purpose, improper or otherwise. Although the court stated that it would not grant defense counsel's request that it instruct the jury with respect to Officer Ellis's answer, the court proceeded to admonish the jury directly after the request was made. Contrary to defendant's assertion, there was not a prolonged passage of time between Officer Ellis's answer and the court's statement that the answer must not be considered. The admonition was made before any further testimony was given. Furthermore, the court previously admonished the jury to disregard any answers that were stricken and instructed the jury to the same effect again prior to deliberations. Although the jury heard the answer, there is no reason to believe that it did not follow the court's instructions—which were relayed to it three times—as it is presumed to have done. (*See People v. Cruz* (2001) 93 Cal.App.4th 69, 73 (*Cruz*) [jury is presumed to "'meticulously follow[] the instructions given.' [Citation.]"].)

Second, defendant argues that Officer Ellis's statement that defendant had a "Hollywood tattoo," which was "real distinct" served no permissible purpose. In his opening brief, defendant concedes that counsel did not object to the response at trial, but defendant explains in his reply that counsel was not required to object because his "previous objection and request for admonition were wrongly denied, [so] a renewed objection would have been futile and an admonition after three references to [defendant's] gang affiliations would have been ineffective."[3]

These arguments also fail. As defendant admits, counsel did not object to Officer Ellis's response at trial. Having failed to object to the statement that defendant had a Hollywood tattoo before the trial court, defendant has forfeited the option to raise the issue now. (Evid. Code, § 353, subd. (a); *People v. Lindberg* (2008) 45 Cal.4th 1, 48.) Officer Ellis's statement was also responsive to the question posed by defense counsel, and probative of identity. Counsel asked whether there was anything distinctive about defendant's appearance, presumably to elicit the response that defendant had several tattoos, including a "Skellington" tattoo on his hand, which Zemengue failed to notice.[4] Defendant unreasonably asserts that a response identifying the Skellington tattoo would be probative of identity, but a response identifying the Hollywood tattoo was highly prejudicial and not relevant to the issue. Additionally, no evidence was admitted that

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[3] The "third" gang reference to which defendant refers was not mentioned in his opening brief, but it is ostensibly Officer Ellis's statement that he was "not allowed" to take defendant's picture at booking without any explanation for the restriction. The reply brief emphasizes: "[t]his needless reference to what he was not allowed to do brought the jury's attention right back to the 'stricken' evidence and reminded it that appellant was a gang member, even though gang issues had nothing to do with this case." Although defendant does not make a direct argument that admission of this statement was prejudicial error, he mentions the statement in the reply to demonstrate the cumulative effect of prejudicial gang evidence on admonishment. Because neither issue was raised even tangentially in the opening brief, we will not address them further here. "[S]uch consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

[4] Defendant's brother, a witness for the defense, later testified that defendant had a Skellington tattoo on his hand as well.

would connect the Hollywood tattoo with gang affiliation. Defendant's argument that the jury would infer the Hollywood tattoo connected defendant with a gang is mere speculation.

With respect to defendant's argument that he was not required to object because an objection would be futile and an admonition ineffective, we do not consider arguments made for the first time in the reply brief, as is the case here. (See *Save the Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181, fn. 3.) In any event, defendant's contention that an objection would have been futile and an admonition ineffective is belied by the record. As discussed above, the trial court promptly struck Officer Ellis's statement that defendant was an active gang member and reminded the jury that it was to disregard any stricken evidence directly after it struck the statement. These actions show that the court was responsive to defendant's concerns. With respect to the effectiveness of an admonition, because there was nothing connecting the Hollywood tattoo to gang membership and the jury is presumed to follow the instruction not to consider evidence outside the record, there is no reason to believe that an admonition would have been ineffective.

Also in his reply brief, defendant argues that Officer Ellis's statements should be subject to the standard for prosecutorial misconduct applied in *People v. Price* (1991) 1 Cal.4th 324, 455. Defendant argues that in contrast to *Price*, where the prosecutor's conduct was held not to have been prejudicial, here, the trial court's response to the jury was not "prompt and forceful" and there was more than one incident rather than an isolated occurrence. In addition to not considering the issue as it was not raised until the reply brief, we further hold that it fails on the merits. The court's response was sufficiently "prompt and forceful," as we have discussed, and the only evidence connecting defendant to a gang was Officer Ellis's stricken testimony that he could not photograph an active gang member. This isolated incident could not have been prejudicial.

B. *Whether Any Error Was Prejudicial Under State or Federal Law*

Assuming the trial court did err, defendant has failed to establish prejudice under any applicable standard of review. Citing to *Albarran*, *supra*, 149 Cal.App.4th 214, defendant argues the error under California evidentiary rules was of such magnitude that it rendered his trial fundamentally unfair in violation of his federal right to due process. The Attorney General counters that any error did not rise to the level of a constitutional violation, and the evidence of defendant's guilt was so strong as to render any error under state law harmless.

Where the defendant argues, as here, that admission of gang evidence violates his federal due process rights as well as violating the rules of evidence and prejudicing the verdict under California law, we first examine the defendant's constitutional claim. (*Albarran*, *supra*, 149 Cal.App.4th at pp. 228-229.) The Ninth Circuit has articulated that "failure to comply with the state's rules of evidence is neither a necessary nor a sufficient basis for granting [federal] relief." (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) To determine whether the defendant's due process rights were violated, the court instead focuses on "whether the admission of the evidence so fatally infected the proceedings as to render them fundamentally unfair." (*Ibid*.) *Albarran* held that a defendant's due process rights were violated where there was a "real danger" that the jury would draw improper inferences from the gang evidence admitted. (*Albarran*, *supra*, at p. 230.)

If the defendant establishes the trial was fundamentally unfair, he is not required to demonstrate prejudicial error under state law. (*Albarran*, *supra*, 149 Cal.App.4th at p. 229.) The burden shifts to the prosecution to "prove beyond a reasonable doubt that the error did not contribute to the verdict." (*Ibid*.) If the prosecution does not meet its burden, the verdict must be reversed. (*Ibid*.) Conversely, if the defendant is unable to demonstrate the evidence rendered the trial fundamentally unfair in violation of his due process rights, we examine whether its admission constituted prejudicial error under state law. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The state law standard for

determining whether error is harmless, articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), is whether "the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

Here, defendant makes the same argument in support of his contentions under state and federal law. Specifically, defendant asserts the case was "very close on the issue of identity." In support of this assertion, he notes that all four of the men in the SUV were of the same ethnicity, three of the men were wearing black hoodies at the time of the assault, and two of the men were wearing black caps. Defendant also notes that at the time they were apprehended, three of the four men were wearing white shirts. Defendant points out that although Zemengue did not notice any tattoos on the man who assaulted him, Officer Ellis testified defendant had "several tattoos," including a Skellington tattoo on his right hand. Defendant calls attention to the fact that only defendant was presented to Zemengue in the field show-up and alleges that Zemengue inaccurately identified defense counsel as the perpetrator at trial. Finally, defendant mentions that Zemengue and the officers testified inconsistently with respect to the color of the gun. Defendant asserts that as a result, the jury perceived discrepancies and requested five read backs of the testimony relating to identification.

We reject defendant's constitutional claim. As the appellate court described in *Albarran*, there, the jury was presented with "[e]vidence of threats to kill police officers, descriptions of the criminal activities of other gang members, and reference to the Mexican Mafia [that] had little or no bearing on any other material issue relating to Albarran's guilt on the charged crimes and approached being classified as overkill." (*Albarran, supra,* 149 Cal.App.4th at p. 228.) After determining that the trial was rendered fundamentally unfair due to the admissions, the appellate court held that it was not convinced beyond a reasonable doubt that the admission of gang evidence did not contribute the jury's verdict when taking into consideration the "nature and amount of this gang evidence at issue, the number of witnesses who testified to Albarran's gang

affiliations and the role the gang evidence played in the prosecutor's argument . . . ." (*Id*. at p. 232.)

Here, defendant's trial was not fundamentally unfair. The single statement that Officer Ellis could not take a picture of defendant because he was an active gang member is not of the same nature as the admissions in *Albarran.* Officer Ellis only stated that defendant was a gang member. He did not detail any threats by defendant or other past criminal actions, did not describe criminal activities that other gang members participated in, and did not associate defendant's gang membership with the name of a specific, exceedingly well-known gang distinguished by its violence, as numerous witnesses did in *Albarran*. Officer Ellis was also the only witness who made any reference to defendant's gang membership, and unlike *Albarran*, his testimony was not compounded by the testimony of others. Finally, the prosecution here did not elicit or exploit the statement made by Officer Ellis. The statement was made in response to a line of questioning by defense counsel, which arguably led to confusion as to whether counsel was asking for the officer's general procedure or the procedure followed with respect to defendant. Most importantly, Officer Ellis's statement was not admitted into evidence. The trial court struck it immediately and reminded the jury that it could not consider statements that the court had stricken. An isolated statement that was stricken from the jury's consideration is not comparable to the testimony deemed damaging and irrelevant by the court in *Albarran*. Defendant here received a fair trial.

With respect to defendant's claim under state law, any error was harmless in light of the strength of the prosecution evidence. Defendant's identity was established by exceptionally strong evidence. During the assault, Zemengue had a clear view of defendant's face and observed him from just a few feet away. Zemengue pointed out defendant and another man to police as "the guys . . . that put the gun to my head," immediately upon their arrival at the scene. When the police ordered the men to put their hands up, the other man surrendered, but defendant fled, demonstrating a consciousness of guilt. (*See People v. Wallace* (2008) 44 Cal.4th 1032, 1074.) Officer Ellis testified that he saw the expression of surprise on defendant's face right before defendant turned

around and ran. As defendant fled, Officer Ellis was able to discern the outline of a gun under defendant's waistband. Officer Ellis also noted that defendant ran with a limp as he fled, which is a common characteristic of persons who attempt to run with a gun tucked in their waistband. Zemengue identified defendant as the man who held a gun to his head in a field show-up that took place right after defendant's apprehension at the scene. Zemengue was unequivocal in his identification of defendant. Zemengue also identified the gun that was pointed at his head and identified defendant as the perpetrator at trial.[5] The gun was recovered from an area in the alley in which defendant fled, and a black shirt consistent with the one defendant wore during the charged offenses was found near him at the time of arrest. Given this overwhelming evidence, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error.

II. ***Whether the Minute Order and Abstract of Judgment Must be Corrected***

Although the trial court imposed a three-year term on the section 12022.5 subdivision (a) firearm enhancement and stayed the sentence as to count 2 at the sentencing hearing, the minute order and abstract of judgment state that the court selected the upper term of three years as to count 2. Neither document reflects that any term was imposed as to the section 12022.5, subdivision (a) firearm enhancement or that the count 2 sentence was stayed. We agree with the parties the minute order and abstract of judgment do not accurately reflect the court's oral ruling as to sentencing and must be corrected to conform to the court's pronouncement. (*See People v. Sharret* (2011) 191

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[5] Although defendant attempts to cast doubt on Zemengue's identification of defendant in court, a reading of the record supports the prosecution's interpretation that Zemengue misspoke, indicating that defendant was wearing a tie, when in fact he was wearing a suit without a tie. When the trial court asked Zemengue if defense counsel, seated next to defendant and wearing a suit and tie, was the perpetrator, Zemengue stated that he was not and clarified that defendant was the perpetrator.

Cal.App.4th 859, 864 [trial court's oral pronouncement controls where there is a conflict between the pronouncement and the minute order or abstract of judgment]).

DISPOSITION

Upon issuance of the remittitur, the trial court is instructed to correct the abstract of judgment and minute order from sentencing to properly reflect the imposition of a three-year term for the firearm enhancement under section 12022.5, subdivision (a), and the stay of the sentence as to count 2. The clerk of the superior court shall send a copy of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.