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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. ANGEL GARCIA, Defendant and Appellant.	B237694 (Los Angeles County Super. Ct. No. TA118655)

APPEAL from a judgment of the Superior Court of Los Angeles County, Paul A. Bacigalupo, Judge. Affirmed.

Thomas K. Macomber, 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, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Angel Garcia appeals his convictions for making criminal threats, and misdemeanor assault. The trial court sentenced Garcia to a term of three years eight months in prison. Garcia contends the trial court erred by improperly admitting evidence that he made "gang-related statements." He also requests that we review the sealed record of the trial court's *Pitchess*[1] examination of police personnel records to determine whether the court abused its discretion by failing to order disclosure. (*People v. Mooc* (2001) 26 Cal.4th 1216.) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's evidence.*

Appellant Garcia and Ariana Uribe had dated since they were in high school, and had four children together. Ariana[2] had their first child when she was 15 years old. The couple were married in approximately March 2009, after they had been together for seven years. For much of that period they lived with Garcia's family. Garcia "cheated" on Ariana and had a child with another woman in 2007. In April 2011, Garcia left Ariana. Ariana and the couple's four young children vacated the apartment in which they had been living and moved in with Ariana's parents and siblings in a house located on East Bliss Street in Los Angeles. Ariana did not tell Garcia she had vacated their former apartment. Ariana's family did not approve of Garcia's associates and behavior, and repeatedly urged Ariana to leave him.

When Garcia and Ariana broke up, Garcia took a car that the couple had been sharing, but left some wheel rims that had been on the car at the Uribe home. In approximately May 2011, Ariana's father, Artemio, drove to Garcia's residence to ask him to remove the rims from the property. When Artemio arrived at Garcia's residence, Garcia was outside with his brother and another man. Artemio told Garcia that if he did

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

2 For ease of reference, and with no disrespect, we hereinafter sometimes refer to members of the Uribe family by their first names.

not remove the rims, Artemio would leave them on the street. Garcia told Artemio that he would kill Artemio's family if Artemio did so. Garcia's brother said nothing, but shook a knife at Artemio. Artemio took the threats seriously.

On June 17, 2011, Ariana, her four young children, her parents, her sisters Izela and Margarita, her brother Hector, her cousin Vanessa, and her younger brother, were all sleeping at the Uribe home. Vanessa and Hector were both asleep in the living room. At approximately 1:00 a.m., Garcia knocked loudly and then kicked in the front door. He burst into the living room demanding to know where Ariana was, repeatedly screaming, " 'Where's Ariana?' " and " 'Where's that bitch?' " He said he had been to their former apartment and learned she had moved, and demanded to know where she had been. He then headed towards the bedroom where she was sleeping. The rest of the Uribe family awoke. Ariana, Hector, and Vanessa told Garcia to leave and pushed him out the front door. Izela screamed at him, telling him to "get the fuck out of [my] house." He spit in her face. She swung at him but missed, and he hit her in the neck and face.

Artemio came outside and told Garcia to leave. Garcia repeatedly threatened to kill him, stating, " 'I'm gonna kill you, motherfucker.' " Garcia appeared very angry, and Artemio believed Garcia was serious. Especially in light of his previous encounter with Garcia regarding the wheel rims, Artemio was "very nervous." Artemio and Garcia approached each other as if they were about to fight, but Vanessa and Ariana held them back. Ariana began hitting Garcia; he did not return her blows.

During the melee, Garcia variously stated that he had a gun; he was going to kill " 'you guys,' " that is, the Uribe family; and he was going to call his brother, who was in the car, to bring a gun. Hector and Artemio observed that Garcia's car was parked on the street, with the lights on and music blaring; his brother was drunk and passed out in the front seat. Vanessa, Hector, Izela, and Ariana testified that Garcia made references to a criminal street gang, "117," during the incident.[3] None of the Uribe family members actually saw a gun.

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[3] This evidence is discussed in more detail *post.*

Meanwhile, Margarita called 911 and Izela spoke to the operator. Police eventually arrived and arrested Garcia.

Ariana believed Garcia might make good on his threat to kill her father. She also believed that Garcia's brother, who had a bad temper, would hurt the family if he observed them fighting. She was frightened until police came. Izela was likewise afraid Garcia would hurt Ariana or her family. She remained frightened for a week. Hector also believed Garcia was capable of shooting the family.

b. *Defense evidence.*

Los Angeles County Deputy Sheriff Ricardo Burgos, who responded to the 911 call and wrote a police report, was called as a witness by the defense. Burgos spoke to Ariana, Izela, Hector, and Artemio at the scene. His written police report indicated that only Ariana claimed to have been threatened by Garcia. The report did not indicate any of the witnesses heard Garcia claim to have a gun or threaten to shoot them. Deputies did not find a gun in Garcia's car or on his person. Burgos's report listed the offense as assault with a deadly weapon and making criminal threats, but the report did not specify a weapon or otherwise mention a gun. Burgos admitted that he had failed to interview everyone present, and failed to include some of the witnesses' statements in the report.

Deputy Sheriff Adam Kirste was subsequently assigned to the investigation. Izela told him Garcia had mentioned "something about a gun" during the incident. Other than that, none of the witnesses told him Garcia claimed to have a gun or had threatened to shoot them. In regard to the earlier incident concerning the wheel rims, Artemio told Kirste that Garcia's brother, not Garcia, had threatened him.

Garcia testified in his own behalf, as follows. Ariana's family did not like him. Ariana supported herself and the children; Garcia did not. He left Ariana at some point after March 2011 to move in with a new girlfriend. A few days before the incident Garcia called Ariana and asked if he could come get his wheel rims. She told him to come after midnight on June 17, when the family would be asleep. As Garcia was walking up to the house, Ariana came outside and began screaming, " 'how could you do this to me?' " and " 'why are you late?' " She was hysterical and screamed, " 'If I don't

have you, ain't nobody going to have you.' " The rest of the family came outside and told Garcia to leave. Ariana's family began beating him up. Ariana hit him, and Izela spit in his face. He never said he had a gun, never threatened Artemio or the other members of the Uribe family, and never referenced the 117 gang. He was not affiliated with a gang. He did not knock on, or break down, the front door to the residence. As to the previous incident regarding the wheel rims, Artemio had demanded Garcia return the car to Ariana and threatened to shoot Garcia. Garcia did not threaten Artemio during the incident.

2. *Procedure.*

Trial was by jury. Garcia was convicted of two counts of making criminal threats (Pen. Code, § 422)[4] and misdemeanor assault (§ 240), a lesser included offense of the charged crime of battery. After the jury rendered its verdicts, Garcia admitted serving a prior prison term within the meaning of section 667.5, subdivision (b). The trial court reduced one of the criminal threats counts to a misdemeanor, and sentenced Garcia to a term of three years eight months in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security fee, and a criminal conviction assessment. Garcia appeals.

DISCUSSION

1. *The trial court did not err by admitting evidence Garcia made gang references during the offense.*

a. *Additional facts.*

Prior to trial, the prosecutor sought to introduce, and Garcia sought to exclude, testimony that he made references to a criminal street gang during the encounter with Ariana and her family on the night of June 17, 2011. At an Evidence Code section 402 hearing, Garcia argued that the witnesses had not mentioned the purported gang references when speaking to deputies, or at the preliminary hearing, and the evidence was

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[4] All further undesignated statutory references are to the Penal Code.

" 'very prejudicial.' " The trial court expressly weighed the probative value of the evidence against its potential for undue prejudice, and concluded it was admissible. The court explained: "It's something that was discovered late. Your explanation for it will make a wonderful closing argument to attack the witnesses and their credibility. You'll have the opportunity to confront them about why they are bringing this up at such a late point. And it's the jury's job to weigh that." The court opined the testimony was probative of the victims' state of mind. Moreover, the evidence would not be offered for its truth, and the court offered to give a limiting instruction so stating.[5] The court ruled that evidence regarding whether Garcia actually was a member of a criminal street gang was unnecessary and inadmissible.

At trial, Vanessa testified that Garcia referred to " '1-1-7' " and was "throwing up gang signs" during the incident. Vanessa believed " '1-1-7' " was a criminal street gang. Garcia's reference to the gang frightened her, because she knew "gang members do bad things." Hector testified he heard Garcia reference the numbers 7 and 1, but was not sure whether this was a gang reference. Izela heard Garcia say "something about [the] 1-1-7 gang, . . . that he'll kill us, like saying that he was from there, that he will kill us." However, the gang reference did not have an effect on her. She explained, "He already said, 'I'm going to kill you guys,' so if he is [a gang member] or not, what difference does it make? . . . I don't need to know that he's from [a gang]—if he's going to carry out the threat. So . . . at that point it didn't come to my head, 'oh, he's saying gang-related things.' [¶] Before he said that, he threatened that he was going to kill us and that he had a gun, so what difference did it make at that point." Ariana testified that Garcia kept telling her that he loved her, and "it's on the hood." "[O]n the hood" usually meant one was from a gang, and is a promise.

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[5] It does not appear that such an instruction was requested or given.

b. *Discussion.*

Garcia contends the trial court abused its discretion by admitting the gang references, which he contends were "irrelevant and highly inflammatory." He complains the evidence lacked probative value because only one of the witnesses testified she was afraid of gangs; there was no evidence his alleged gang comments made any impression on the Uribe family; and the evidence only served to suggest he had a criminal disposition and a bad character.

We conclude the evidence was properly admitted and, in any event, was not prejudicial. Only relevant evidence is admissible. (Evid. Code, § 350.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Lee* (2011) 51 Cal.4th 620, 642; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Williams* (2008) 43 Cal.4th 584, 633-634.) Even if relevant, evidence may be excluded in the trial court's discretion if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (*Lee,* at p. 643.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*Mills,* at p. 195; *Williams,* at p. 634.) Rulings regarding relevancy and Evidence Code section 352 are reviewed under the abuse of discretion standard. (*Lee*, at p. 643; see also *People v. Hamilton* (2009) 45 Cal.4th 863, 929-930; *People v. Harris* (2005) 37 Cal.4th 310, 337.)

Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167; *People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.) It is inadmissible if introduced only to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. (*Avitia,* at p. 192.) Evidence of gang membership "is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]" (*People v.*

Hernandez (2004) 33 Cal.4th 1040, 1049; see also *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345.) Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, "trial courts should carefully scrutinize such evidence before admitting it. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; *Carter*, at p. 1194; *People v. Gurule* (2002) 28 Cal.4th 557, 653.)

To prove a violation of section 422, the prosecution must establish that (1) the defendant willfully threatened to commit a crime which would result in death or great bodily injury to another person; (2) the defendant made the threat with the specific intent that the statement would be taken as a threat, even if he or she did not intend to carry it out; (3) the threat, on its face and under the circumstances made, was so unequivocal, unconditional, immediate, and specific as to convey to the victim a gravity of purpose and immediate prospect of execution; (4) the threat actually caused the victim to be in sustained fear for his or her own safety, or for that of the victim's immediate family; and (5) the victim's fear was reasonable under the circumstances. (*In re George T.* (2004) 33 Cal.4th 620, 630; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228; *People v. Bolin* (1998) 18 Cal.4th 297, 337-340.) The totality of the circumstances, including the parties' prior contacts and the manner in which the communication was made, are relevant to prove that the communication conveyed to the victim a gravity of purpose and an immediate prospect of execution of the threat. (*In re Ryan D.* (2002) 100 Cal.App.4th 854, 860; *People v. Butler* (2000) 85 Cal.App.4th 745, 753-754; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013.)

Here, evidence Garcia referenced a criminal street gang when making the threats was potentially highly probative on the second, third, fourth, and fifth elements of the section 422 charge. (See generally *People v. Toledo*, *supra*, 26 Cal.4th at pp. 227-228; *In re George T.*, *supra*, 33 Cal.4th at p. 630.) We think it self-evident that the fact a person threatening violence claims to be a member of a criminal street gang tends to support a finding that the threat was specific, unequivocal, and unconditional; that it caused the victim to actually experience sustained fear; and that the victim's fear was reasonable. It is a matter of common knowledge in Los Angeles that gang members often engage in

violent behavior and are frequently armed. (See generally *In re H.M.* (2008) 167 Cal.App.4th 136, 146.) A juror might well find a threat more genuine and serious if made by a gang member. (Cf. *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1341.) That Garcia made gang references also lends credence to the prosecution's theory that he made the threat with the specific intent that it would be taken as a threat.

Garcia complains that the evidence lacked probative value because neither of the two named victims (Ariana and Izela) testified that the gang references had any effect on their perceptions of the threat.[6] Indeed, as we have explained, Izela specifically disavowed the notion that the gang references increased her fear or caused her to take the threats more seriously than she otherwise would have. This circumstance was no doubt not what the prosecutor had hoped the evidence would prove. Nonetheless, at the time the trial court made its ruling, the relevance and probative value of the evidence appeared manifest. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176 [we normally review a trial court's ruling based on the facts known to the court at the time of the ruling].) In any event, this circumstance tends to demonstrate that the gang references had little potential for prejudice. Furthermore, the witnesses' testimony regarding the gang references was brief and not inflammatory. There was no further evidence Garcia was a gang member, and no evidence regarding the activities or proclivities of Garcia's purported gang, or gangs in general. Under these circumstances, the court did not abuse its discretion by concluding the probative value of the evidence outweighed any potential for prejudice.

People v. Cardenas (1982) 31 Cal.3d 897, cited by Garcia, does not compel a different result. In *Cardenas*, the defendant offered testimony from several alibi

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6 Garcia also complains admission of the evidence was improper because there was no showing he was a gang member. However, the prosecutor represented during the Evidence Code section 402 hearing that Detective Kirste had determined Garcia was a member of the Compton Varrio 117 gang. Evidence of Garcia's gang membership was excluded by agreement of the parties and the court, which recognized such evidence was unduly prejudicial.

witnesses. The prosecution was allowed to offer evidence that the defendant and the alibi witnesses were all members of the same gang. *Cardenas* found the gang evidence should have been excluded under Evidence Code section 352. (*Cardenas*, at p. 904.) The probative value of the gang membership evidence was minimal at best. It was offered to establish that the witnesses and defendant lived in the same neighborhood and had the same circle of friends, and therefore the alibi witnesses were biased in favor of the defendant. These facts, however, had already been "amply established" by other testimony. Therefore, the evidence was cumulative and lacked probative value. (*Id*. at p. 904.) Here, in contrast, evidence of the gang references was not cumulative, and was not offered to show witness bias. Instead, it was offered to demonstrate the victims' state of mind, a crucial element of the charged offense. Nor does Garcia's citation to our opinion in *People v. Avitia, supra,* 127 Cal.App.4th 185, suggest error, as that case is readily distinguishable on its facts.

Moreover, even assuming arguendo that the gang evidence was admitted in error, we discern no prejudice. "The erroneous admission of gang or other evidence requires reversal only if it is reasonably probable that appellant would have obtained a more favorable result had the evidence been excluded." (*People v. Avitia, supra,* 127 Cal.App.4th at p. 194; Evid. Code, § 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878.) As we have discussed, the evidence here was brief and not overly inflammatory. The two named victims did not appear to attach particular significance to the statements. Our review of the record as a whole demonstrates that while the evidence painted Garcia as an irresponsible, unfaithful, immature spouse, it did not portray him as a violent or vicious gang member, either by virtue of the gang references or any other evidence. Furthermore, the fact the jury acquitted Garcia of the battery charged in count 3, and instead convicted him of the lesser included offense of assault, tends to suggest the jury did not accept the gang evidence uncritically. (See *People v. Williams* (2009) 170 Cal.App.4th 587, 613.) In sum, we discern no prejudice.

2. *Review of in camera Pitchess examination of peace officer records.*

Before trial, Garcia sought discovery of peace officer personnel records pursuant to *Pitchess v. Superior Court, supra*, 11 Cal.3d 531. He sought, as to Deputy Burgos, information related to complaints regarding "conduct that amounts to moral turpitude," including allegations of making false arrests, coercing confessions, planting evidence, fabricating police reports or probable cause, giving false testimony, perjury, writing false police reports, and "other acts of dishonesty and fabrication." The trial court found good cause for an in camera review of Deputy Burgos's records related to complaints regarding dishonesty. On August 25, 2011, the trial court conducted an in camera review and ordered discoverable material provided to the defense. Garcia requests that we review the sealed transcript of the trial court's *Pitchess* review to determine whether the court abused its discretion by failing to order disclosure of additional information. (See *People v. Mooc, supra*, 26 Cal.4th 1216.)

Trial courts are vested with broad discretion when ruling on motions to discover peace officer records (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086), and we review a trial court's ruling for abuse (*People v. Mooc, supra*, 26 Cal.4th at p. 1228; *People v. Hughes* (2002) 27 Cal.4th 287, 330). We have reviewed the sealed transcript of the in camera hearing conducted on August 25, 2011. The transcript constitutes an adequate record of the trial court's review of any documents provided to it, and reveals no abuse of discretion. (*Mooc*, at p. 1228; *Hughes*, at p. 330.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.