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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ARMANDO LOPEZ,<br><br>Defendant and Appellant. | B268624<br><br>(Los Angeles County Super. Ct. No. BA415100) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Joseph Brandolino, Judge. Affirmed.

Andrew Flier for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Armando Lopez appeals from a judgment of conviction after a jury trial. He raises issues regarding prosecutorial misconduct, instructional error, insufficient evidence, discovery violation, denial of a pretrial severance motion, and excusing a juror who became ill during trial. Finding no error, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

This case involves two incidents. On October 17, 2012, defendant, who was on parole, was riding in a vehicle that was stopped by police. When asked to exit the vehicle, defendant ran away and allegedly pointed a firearm at a police officer. He was arrested and released on bail.

Several weeks later, on December 3, 2013, police gathered outside defendant's home for a parole compliance check. An officer saw the rear door open, and defendant and another man (Samuel Perez) were standing in the doorway. Perez went outside while holding his waistband. The officer ordered Perez to stop, but he jumped over a fence. Perez was apprehended as he came out of a neighboring yard. Defendant was arrested after a gun was found in the neighboring yard.

A grand jury returned an indictment containing multiple counts. As to the October 17, 2012 incident, defendant was charged in count 1 with assaulting a police officer with a

semiautomatic firearm (Pen. Code, § 245, subd. (d)(2), count 1).[1] Count 1 included firearm, criminal street gang, and prior serious and/or violent felony conviction allegations. (§§ 12022.53, subd. (b), 12022.5, subds. (a), (d), 186.22, subd. (b)(1)(A), 1170.12, subds. (a)-(d), 667, subds. (b)-(j).) Defendant also was charged with possession of a firearm by a felon (§ 29800, subd. (a)(1), counts 2 & 6),[2] carrying a loaded firearm with a prior conviction (§ 25850, subd. (a), count 3), and exhibiting a deadly weapon to a police officer to resist arrest (§ 417.8, count 7). Each count included a criminal street gang allegation. (§ 186.22, subd. (b)(1)(A).)

As to the December 13, 2013 incident, defendant was charged with conspiracy to commit an act injurious to the public (§ 182.5, count 4),[3] and possession of a firearm with a prior violent conviction (§ 29900, subd. (a)(1), count 5). Both counts included a criminal street gang allegation. (§ 186.22, subd. (b)(1)(A).)

Defendant opposed the joint trial of the counts for the two incidents and moved for severance. The trial court denied the motion, finding that joinder was proper due to cross-admissible evidence regarding gang enhancements and firearm possession charges.

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

[2] Count 6 was later stricken as duplicative of count 2.

[3] Count 4 was later dismissed under section 1118.1.

*Prosecution's Evidence of the October 17, 2012 Incident*

At trial, Los Angeles Police Officer Anthony Smith testified that the traffic stop arose from a surveillance operation. On October 17, 2012, Smith and a team of plainclothes surveillance officers were following Susan Amador, an associate of Michael Torres, a Pelican Bay inmate and Mexican Mafia member with ties to the San Fernando Valley ("San Fer") criminal street gang. Amador was driving a BMW owned by "Sweet Cheeks," a "high level cartel member" with ties to the San Fer gang. Amador's passengers were Marcos Espinoza, a "high level Mexican Mafia facilitator," and defendant (also known as "Bad Boy"), a San Fer gang member who had corresponded with Torres.[4]

Smith requested assistance from Los Angeles Police Officers Brett Kane and Greg Gonzalez, who were in full uniform and driving a marked patrol car. Kane and Gonzalez stopped the BMW to inquire about the driver's use of a cell phone and the vehicle's lack of license plates. After a "DMV and want-and-warrant check" of the BMW's occupants showed that defendant was on parole, he was asked to step out of the car. When Kane began to frisk defendant for weapons, defendant ran away. Kane identified himself as a police officer, ordered defendant to stop, and ran after him.

A video of the foot pursuit was played at trial. Kane testified that climbed a fence and fell to the other side, got up, and continued running. As Kane was catching up to defendant, a

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[4] Defendant had a tattoo—consisting of two bars and three dots—which stands for "the 13th letter of the alphabet, "M," for Mexican Mafia.

member of the surveillance team, Officer Pablo Rivera, who was in plain clothes, approached defendant from another angle. Kane heard Rivera say that defendant had a gun. Kane had his weapon drawn but did not see a gun.

Rivera testified that he was watching from a distance as defendant scaled the fence and ran away from Kane. Rivera stated that he ran after defendant, intending to tackle him, but was caught off guard when defendant dropped a handgun, picked it up, and pointed it at him. Fearing that he would be shot, Rivera took cover behind a lamp pole.

Officer Fred Torres, also on the surveillance team, testified that he saw defendant running toward an apartment complex carrying a handgun. After defendant dropped the handgun on the other side of a gate, Torres directed another member of the surveillance team, Officer Santiago Casillas, to retrieve it. The handgun, which was entered into evidence at trial, contained one round in the chamber and eight rounds in the magazine.

Metro K9 Officer Jason Schwab testified that defendant was found by a police dog beneath an apartment building and surrendered after gas was deployed.

*Prosecution's Evidence of the December 3, 2013 Incident*

Los Angeles Police Officer Alonso Menchaca testified that he went with a team of officers to defendant's home to conduct a parole compliance check on December 3, 2013. Menchaca was observing the rear of the house when the back door opened. There were two men (defendant and Samuel Perez) in the doorway. One of the men (Perez) went into the back yard while holding his waistband. He ignored Menchaca's order to stop,

jumped over a wall and went into the neighboring yard. Defendant remained inside and closed the door.

Officer Philip Ruiz saw Perez, who matched the description of the man who had jumped over the wall, coming from the neighboring yard. Perez was apprehended.

Defendant opened the back door and made contact with Menchaca, who identified himself as a police officer. Defendant replied, "'Oh, I didn't know you were the police. Why didn't you just come knock on the front door?'" Defendant complied with Menchaca's instruction to open the front door. Menchaca found a sophisticated home surveillance system inside one of the bedrooms.

Officer Raymond Leduc recovered a disassembled firearm and cleaning materials for the firearm from the neighboring yard where Perez had been. Defendant was arrested for unlawful possession of a firearm.

At trial, Leduc testified that he ran the serial number and discovered the firearm was stolen. Defense counsel immediately objected and moved to strike Leduc's testimony that the firearm was stolen. The trial court sustained the objection, stating: "I'll strike it. I'll order our jurors to disregard the last question and answer. They will be stricken."

Leduc then testified that the firearm in the courtroom (People's exhibit 30) was the same firearm that was recovered from the neighboring yard, and that its serial number matched the number on the property report for the December 3, 2013 incident.

*Defendant's Motion for Mistrial*

Defense counsel Andrew Flier moved for a mistrial based

on Leduc's testimony that the firearm was stolen. Mr. Flier argued the defense had successfully moved to exclude that information under Evidence Code section 352, and that striking the testimony would not cure the prejudice because "[t]his jury is thinking . . . that my client now is part of a stolen gun."

The prosecutor, Adan Montalban, argued that the issue "wasn't completely litigated." According to Mr. Montalban, the parties had stipulated off the record that the owner of the firearm (a police officer) would not testify, and Mr. Flier "would stipulate it was his gun." Denying any misconduct, Mr. Montalban explained that Officer Leduc's testimony about the gun beings stolen was inadvertent—"we did not cover that when we spoke with this officer about whether or not he should not say that it was stolen or not." When asked whether the fact the gun was stolen was relevant to the felony possession charge, Mr. Montalban replied, "[w]e never actually got to litigate that point."

Based on the court's recollection that the parties had agreed to withhold the fact that the gun was stolen from a police officer, the court accepted Mr. Montalban's explanation that Officer Leduc's testimony about the firearm being stolen was entered by mistake. Finding that the testimony was unlikely to create undue prejudice in light of the charges in this case, the court denied the motion for mistrial.

Mr. Flier objected to the ruling on lack of prejudice. He argued that there were two different gun cases involving prejudicial gang evidence regarding the Mexican Mafia, the Van Nuys Boyz, and the San Fers, and his client was being characterized as a "Big Bad Wolf" who was "stealing guns or around people who steal guns." Defense counsel argued that under the circumstances, it was not sufficient to strike Officer

Leduc's testimony about the stolen gun: "You cannot just unring a bell."

The trial court agreed that in some instances it is impossible to unring the bell, but this was not one of them. The motion was denied.

*Prosecution's Gang Evidence*

Officer Katherine O'Brien testified as the prosecution's expert witness on gangs in the San Fernando Valley. During her previous encounters with Perez, he had admitted being a member of the Van Nuys Boyz gang. She believed that his tattoos were consistent with membership in that gang.

To establish that the Van Nuys Boyz is a criminal street gang within the meaning of section 186.22, O'Brien testified that two of its members were convicted of robbery (§ 186.22, subd. (e)(2)): Perez in December 2010 (LA070576), and Marcos Isaac Mendez in November 2011 (PA072348). O'Brien testified that in her expert opinion, the Mexican Mafia is affiliated with the Van Nuys Boyz gang.

Additional expert testimony regarding the Mexican Mafia was provided by John Castanedo of the California Department of Corrections and Rehabilitation.[5] Castanedo related the history of

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[5] Castanedo was a last-minute replacement for the prosecution's original expert witness on the Mexican Mafia when that witness became unavailable the night before he was to testify. Defendant sought to exclude Castanedo's testimony on the ground that the last minute substitution was improper. Based on the prosecutor's assurance that Castanedo's testimony would be substantially similar to that of the original expert witness, the court allowed his testimony subject to any further

the Mexican Mafia, its organizational structure, and its criminal activities in and out of prison. He explained that the Mexican Mafia uses "Southern California Hispanic street gangs or the 'Surenos' to assist them in their criminal activity . . . ." The street gangs benefit from the relationship because when their members are imprisoned, they will be protected by the Mexican Mafia.

According to Castanedo, wives or girlfriends of Mexican Mafia members act as secretaries or facilitators who pass along information to a "crew chief." The information is disseminated by the crew chief to the "'Surenos' and gang members out on the street." When working on behalf of the Mexican Mafia, rival gang members stop their "day-to-day gang banging" because their allegiance to the Mexican Mafia is greater than their allegiance to their neighborhood

Castanedo identified Torres as a Mexican Mafia leader who utilizes local gangs to control the San Fernando Valley area, and Amador as a facilitator or secretary for Torres. In Castanedo's opinion, defendant was serving the Mexican Mafia as Amador's bodyguard, which explained why he was accompanying her on October 17, 2012. On cross-examination, Castanedo conceded that Mexican Mafia secretaries try to avoid being with someone who is armed.

*Defense Evidence*

Martin Flores testified for the defense as an expert witness on criminal street gangs. Like Castanedo, Flores testified that

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objections by the defense in light of the last-minute substitution. There were no further objections.

Torres is a member of the Mexican Mafia. Flores described the Mexican Mafia as a "very selective group of individuals" that has its own vetting process, and that someone cannot join by simply writing to a member.

Flores was presented with a hypothetical set of facts patterned on the October 17, 2012 incident, and was asked whether the individual with the gun ran away solely to benefit the gang or for some other reason. Flores responded that the person was trying to benefit himself by avoiding arrest and incarceration. Flores stated that the Mexican Mafia has rules against fleeing from police. The rules are designed to avoid problems with police so the organization can conduct its operations without interference.

Flores was presented with a different hypothetical based on the December 3, 2013 incident, and was asked whether the man who opened the back door so someone else could leave with a firearm was doing so for the benefit of a gang or his own benefit. Flores responded that because the man who opened the door "may not want to get caught with that weapon in that residence" he was acting for his own personal benefit.

As to defendant's tattoo, known as a "G shield," Flores testified that it does not signify membership in the Mexican Mafia. It simply means "that the individual put in some work while incarcerated" and did something that was "recognized." When a soldier (someone who is putting in work) commits a crime, the act benefits not only the gang but the soldier who committed the crime.

Rodolfo Gonzalez, defendant's childhood friend, testified as a percipient witness to the December 3, 2013 incident. According to Gonzalez's testimony, he was at defendant's house when Perez

arrived. A few minutes later, defendant's dogs began barking in the backyard and Perez ran to the back door. Perez said, "'hey the police are here,'" and unlocked and opened the back door. Gonzalez did not see a gun in the house and did not know that Perez had a gun. Gonzalez did not see defendant talking to someone through the back door.

Defendant, who testified in his own defense, stated that Perez is the father of his cousin Joanna's baby. Defendant testified that he was not expecting Perez to come over on December 3, 2013, and did not know Perez was armed. Defendant stated that he would not have allowed Perez to come inside if he had known about the gun. When his dogs began barking, defendant was heading to the bedroom where the security camera monitors were located when Perez ran past him and out the back door. Startled, defendant grabbed the door and closed it before going to look at the security camera monitors. When he saw there were police officers outside, he opened the back door and spoke with one of them. He did not see what Perez had in his hands and did not know Perez was armed. He stated that the surveillance system was already in place when he moved into the house.

Defendant testified that on October 17, 2012, his friend Espinoza, who was dating Amador, invited him along to run some errands. Defendant testified that he brought the gun for his own protection because he did not want to be a victim of a crime. There were crimes in his neighborhood, including a home invasion robbery, and he had been mistaken for a gang member because he is bald and has tattoos. He explained that he knows Torres through family connections having nothing to do with gangs.

Defendant explained that when the officer began to frisk him, he ran away to avoid being caught with a gun. But when he landed on the other side of the fence, the gun fell from his clothing and bounced off his shoe. He picked it up and kept running, but when he saw several officers pointing guns at him, he threw his gun away and hid inside an apartment complex. He denied pointing his gun at Officer Rivera. Although he knew Kane was a police officer, he did not realize Rivera was an officer. Rivera was wearing shorts, a shirt, and a baseball cap.

Defendant explained that he had gotten the Mexican Mafia tattoo in prison after beating up a child molester at the direction of "four guys" who had threatened to beat him up unless he complied. He stated that the tattoo was not meant to benefit the Mexican Mafia, but was a "shield" that showed he did what he had to do.

On cross-examination, defendant was asked if had been convicted of a crime moral turpitude. The question was phrased in compliance with an earlier ruling that excluded the nature of the prior conviction (assault with a deadly weapon). (Evid. Code, § 352.) Defendant answered, "I don't really understand what 'turpitude' means; but yes, I committed a crime."

*Lesser Included Offense to Count 1*

On count 1, the jury was instructed in terms of CALCRIM No. 860 (titled "Assault on firefighter or peace officer with deadly weapon or force likely to produce great bodily injury (Pen. Code, §§ 240, 245(c) & (d))"), which requires the prosecution to prove the defendant knew or should have known that the person assaulted was a police officer who was performing his or her duties.

At the prosecution's request, the jury was instructed on assault with a semiautomatic firearm (§ 245, subd. (b)) as a lesser included offense to count 1. Unlike the charged offense, the lesser offense does not require proof that the defendant knew or should have known the person assaulted was a police officer who was performing his or her duties. The lesser included offense was given over defendant's objection that the request was untimely made after both sides had rested.

*Jury Verdict and Judgment*

On count 1, the jury acquitted defendant of the charged offense, and convicted him of the lesser included offense of assault with a semiautomatic firearm (§ 245, subd. (b)). The jury found the personal firearm use allegation to be true, but did not reach a verdict on the criminal street gang allegation.

On counts 2, 3, and 5, the jury convicted defendant of the firearm possession charges, but did not reach a verdict on the criminal street gang allegations (it was split 5 to 7). The jury also did not reach a verdict on count 7 (it was split 9 to 3), exhibiting a deadly weapon to a police officer to resist arrest (§ 417.8).

After waiving a bench trial on the prior conviction allegations, defendant admitted a prior strike conviction of section 245, subdivision (a)(2) in PA058955 on October 30, 2008. He also admitted a prior serious felony conviction (§ 667, subd. (a)(1)) and a prior prison term (§ 667.5, subd. (b)).

Defendant's motions for new trial and to dismiss a prior strike conviction were denied. (*People v. Superior Court* (*Romero*)

13 Cal.4th 497.) The trial court imposed a sentence of 16 years and 4 months.[6] This timely appeal followed.

## DISCUSSION

### I

Defendant contends the prosecutor committed prejudicial misconduct during voir dire and closing argument. We disagree.

"'A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' (*People v. Morales* (2001) 25 Cal.4th 34, 44.) When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) To preserve a claim of

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[6] On count 1, the base term, the court imposed a 15-year sentence: the midterm of 3 years, doubled to 6 years under the Three Strikes law, plus enhancements of 4 years (§ 12022.5, subds. (a) & (d)) and 5 years (§ 667, subd. (a)(1)). The court imposed concurrent sentences on counts 2 and 3. On count 5, the court imposed a consecutive sentence of 8 months (1/3 the midterm of 2 years), doubled to 1 year and 4 months under the Three Strikes law.

prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.)" (*People v. Gonzales* (2011) 52 Cal.4th 254, 305.)

*A. Statements During Voir Dire*

During voir dire, Mr. Montalban told prospective jurors that the prosecution's burden of proof is not proof beyond all doubt, but proof beyond a reasonable doubt. He presented a hypothetical example of a crime that was committed in the jury's presence. He asked whether the jurors believed a defense attorney would concede that the client was guilty because the crime occurred in their presence or argue the client was innocent. Defense counsel, Andrew Flier, objected that the question was improper. The trial court requested that it be rephrased.

Mr. Montalban then described a scenario in which the prosecution's evidence included a video of the crime, DNA and fingerprint evidence, and testimony from 100 witnesses. He asked whether the jurors believed defense counsel would argue that the client was innocent in the face of all that evidence. Mr. Flier objected that this question also was improper. The trial court suggested that Mr. Montalban move on. Before doing so, Mr. Montalban explained that the point he was trying to make was that "the standard is beyond a reasonable doubt. It's not beyond all doubt. There is always room to argue. Okay? There is always room for some doubt. There is always room for some shadow of a doubt."

Shortly thereafter, Mr. Flier requested a new panel of prospective jurors based on prosecutorial misconduct. He argued that despite Mr. Montalban's clarification—"his point was to try

to say that it's just beyond a reasonable doubt, not all doubt"—that was not "how it came out." Mr. Flier argued that his integrity had been impugned by Mr. Montalban's suggestion that even if the prosecution proved its case, he would "do whatever it takes to say it wasn't proved."

The trial court stated that it understood Mr. Flier's concern, but believed that Mr. Montalban's clarification was comprehended by the prospective jurors. The court stated that although it did not see a need for a corrective instruction, one would be given upon request. When Mr. Flier submitted the matter without requesting a corrective instruction,the court stated that things would be left as they were, and there were no grounds for a mistrial.

On appeal, defendant argues that a mistrial should have been granted because Mr. Flier's integrity was impugned by Mr. Montalban's remarks. We disagree. We conclude that the clarification provided by Mr. Montalban was adequate to cure any prejudice to the defense. Moreover, the trial court offered to provide a corrective instruction upon request, but there was no request. Because the record supports the inference that the remarks were "understood by the jury as an admonition not to be misled by the defense interpretation of the evidence" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003), we conclude there was no improper personal attack on defense counsel's integrity (see *People v. Taylor* (2001) 26 Cal.4th 1155, 1167).

*B. Personal Remarks*

In rebuttal to the defense's closing argument, Mr. Montalban argued that the defense had relied on "[s]moke screens," "red herrings," and "[e]verything but the evidence. And you know why? Because Mr. Flier – he's the one that doesn't like

the evidence. I love the evidence. Just go ahead and ask me out of all the trials I've ever done how many of the cases included the crime on video? I love this case."

Mr. Flier objected that this was improper rebuttal. The trial court sustained the objection stating, "Let's not make it personal. It's not what you think."

Later, Mr. Montalban argued that "when I'm listening to this, you know, it's really hard on me sometimes personally." Mr. Flier promptly objected, and the trial court sustained the objection. The court admonished Mr. Montalban to "[p]lease keep away from personal things."

On appeal, defendant contends that Mr. Montalban committed misconduct by discussing his personal views of the evidence. (*People v. Ghent* (1987) 43 Cal.3d 739, 772 [prosecutor should not express personal views which might unduly inflame the jury]; see *People v. Bolton* (1979) 23 Cal.3d 208, 212 – 213 [prosecutor engaged in misconduct by referring to facts outside record and claiming to have superior knowledge based on sources unavailable to jury].)

Given that prosecutors may not argue their own personal views of the evidence, the trial court correctly sustained the objections to Mr. Montalban's remarks that "I love the evidence" and "it's really hard on me sometimes personally." But we do not believe the remarks were so egregious as to constitute reversible error. The statements were improper only because they reflected the personal views of the prosecutor, not that they suggested the prosecutor had superior knowledge or secret information of defendant's guilt. (See *People v. Ghent*, *supra*, 43 Cal.3d at p. 772 [prosecutor's personal view—that defendant was the worst he had seen during his many years of practice—should not have

been mentioned but did not suggest he possessed special information unknown to the jury that would make the death penalty appropriate for defendant].)

*C. Moral Turpitude*

In his rebuttal argument, Mr. Montalban stated that defendant was not a credible trial witness due to his prior felony conviction, which was "not just any random felony," but "a crime of moral turpitude." When Mr. Montalban began to define the phrase "moral turpitude," defense counsel objected, but the objection was overruled. Mr. Montalban then defined the phrase "moral turpitude" as "a crime of an individual who is ready to do evil." This prompted another objection and motion to strike, which also were overruled. Mr. Montalban concluded his remarks on this point by stating that "moral turpitude crime is a crime where the individual has the readiness to do evil. That word — ' evil.' That's the defendant when he took the stand. That's him sitting right over there. We should believe him?"

Defendant argues that it was improper for the prosecution to wait until the rebuttal argument, when the defense had no ability to respond, to define a term that was not defined in the jury instructions. He states that because "moral turpitude can easily be construed as some kind of deviant behavior," defining it as "evil" was particularly inappropriate.

The difficulty with this argument is that the definition, "readiness to do evil," has been in use for over 100 years. According to *People v. Castro* (1985) 38 Cal.3d 301, 314: "The classic statement of the rationale for felony impeachment is that of Justice Holmes, written when he was still a member of the Supreme Judicial Court of Massachusetts: '[W]hen it is proved that a witness has been convicted of crime, the only ground for

disbelieving him which such proof affords is the *general readiness to do evil* which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in a particular case, and thence that he has lied in fact. . . .' (*Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78; italics added.)"

Even were we to assume the word "evil" was inappropriate, we are required to presume that the jury followed the instructions given by the trial court. (*People v. Wilson* (2008) 44 Cal.4th 758, 834.) It was instructed that nothing the attorneys say is evidence, the jury must follow the law as explained by the trial court, and it alone must "judge the credibility or believability of the witnesses." The jury also received a cautionary instruction on the use of prior convictions: "If you find that a witness has been convicted of a felony or crime of moral turpitude, you may consider that fact in evaluating the credibility of the witness's testimony," but "[t]he fact of a conviction does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable."

Viewed in the context of the instructions given as a whole, we are not persuaded that the word "evil" was unduly prejudicial or that jury was misled by the prosecutor's remarks to place undue emphasis on the fact of a prior conviction.

*D. Mental State*

In his rebuttal closing argument, Mr. Montalban argued that the People are not required to prove criminal intent. Mr. Flier objected, stating "[t]hey have to prove criminal intent." The objection was overruled. Upon resuming his argument, Mr. Montalban stated that the People are not required "to prove why

he did this." He also recited an excerpt from CALCRIM No. 860 on willfulness: "It is not required that he or she intend to break the law, hurt someone else, or gain any advantage."

On appeal, defendant argues the prosecutor committed misconduct by arguing that the People are not required to prove criminal intent. We do not agree. The prosecutor 's subsequent statements demonstrated that he was referring to motive (the People are not required to prove "why he did this") rather than criminal intent. Because the jury had a complete set of instructions, including CALCRIM No. 860, it could weigh the prosecutor's statements against the instructions. In light of the presumption that the jury followed the instructions given by the trial court (*People v. Wilson*, *supra*, 44 Cal.4th at p. 834), we assume the jury followed CALCRIM No. 860 as well as the standard instruction that nothing the attorneys say is evidence.

In addition, because the jury was given specific instructions on the requisite intent and mental state for each crime or allegation, there is no reasonable possibility that it was misled to believe that the People are not required to prove criminal intent. The jury was given a modified CALCRIM No. 252 instruction on the specific intent and mental state required for each count, plus the following instructions: CALCRIM No. 860 (assault with semiautomatic firearm on a peace officer in violation of § 245, subd. (d)(2), count 1); No. 875 (assault with a semiautomatic firearm in violation of § 245 as a lesser offense to count 1); No. 2511 (possession of firearm in violation of § 298000, subd. (a)(1), count 5); Nos. 2530 & 2540 (carrying loaded firearm in violation of § 25850, subd. (a), count 3); No. 982 (brandishing a firearm to resist arrest in violation of § 417.8); No. 1401 (crime committed for benefit of criminal street gang in violation of § 186.22, subds.

(b)(1) or (d)); and No. 3146 (personal use of a firearm in violation of §§ 667.61, subd. (e)(4), 1203.06, 1192.7, subd. (c)(8), 12022.3, 12022.5, 12022.53, subd. (b)).

**II**

Defendant contends the request to give a lesser included offense instruction for count 1 was untimely and resulted in unfair surprise to the defense. We do not agree.

The general rule is that a trial court must instruct on a lesser included offense if there is substantial evidence that only the lesser offense was committed. (*People v. Birks* (1998) 19 Cal.4th 108, 112 (*Birks*); *People v. Breverman* (1998) 19 Cal.4th 142, 148-149 [superseded on another ground by amendment of § 189 not relevant here].) In that situation, because the stated charge encompasses the lesser charge, the defendant already is on notice of the elements that comprise the lesser charge. Accordingly, instructing on the lesser charge does not result in unfair surprise. (*Birks*, *supra*, 19 Cal.4th at p. 112.)

Here, the stated charge—assault with a semiautomatic firearm of a peace officer (§ 245, subd. (d)(2))—placed defendant on notice of each of the elements at issue in the lesser charge—assault with a semiautomatic firearm (§ 245, subd. (b)). The lesser charge contains the elements of the charged offense except the knowledge requirement. Knowledge that the person assaulted was a police officer who was performing his or her duties is not an element of the lesser offense.

Defendant testified that he did not realize Officer Rivera (who was in street clothes and did not take part in the traffic stop) was a police officer, and the jury found that the charged offense was not proven. Correctly anticipating this

result, the trial court granted the prosecution's motion to instruct on the lesser included offense of assault with a semiautomatic firearm, which does not require proof that the defendant knew the person assaulted was a police officer. Given that the charged offense provided notice of the elements at issue in the lesser offense, the instruction on a lesser offense did not result in unfair surprise. (See *Birks*, *supra*, 19 Cal.4th at p. 112.)

**III**

Defendant contends his conviction of the firearm possession offense (§ 29900, subd. (a)(1), count 5) must be reversed for insufficient evidence that he possessed the firearm. We disagree.

"Our review of this issue is limited to determining whether substantial evidence supports the verdict. Substantial evidence is defined as evidence that is reasonable, credible, and of solid value. [Citation.] A reviewing court must accept logical inferences the jury might have drawn from the circumstantial evidence. [Citation.] '"A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."' [Citations.]' [Citation.]" (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416–1417 (*Sifuentes*).)

The jury was instructed that in order to establish a violation of section 29900, subdivision (a)(1), the People must prove that defendant possessed a firearm and knew he possessed the firearm, that a firearm may be possessed by two or more people at the same time, and that a person need not actually hold or touch a firearm in order to possess it. (*Sifuentes*, *supra*, 195

Cal.App.4th at p. 1417.) The jury was instructed that possession may be based on a person's control or right to control the firearm either personally or through someone else. (*Ibid.*) It also was instructed on aiding and abetting.

Defendant contends that at most, the evidence showed that he was standing next to Perez who had possession of the firearm, which was insufficient to prove defendant had personal or constructive possession of the firearm. He relies on *Sifuentes* for the proposition that "mere proximity to the weapon, standing alone, is not sufficient evidence of possession. [Citations.]" (*Sifuentes*, *supra*, 195 Cal.App.4th at p. 1417.)

*Sifuentes* involved the search of a hotel room. The room was occupied by two convicted felons, defendant (Sifuentes) and another man, and two female companions. Sifuentes was charged and convicted of unlawful possession of a firearm that was found under the mattress of a bed occupied by one of the women. Sifuentes, who was on the other bed, successfully argued on appeal that the facts were insufficient to prove that he had personal or constructive possession of the firearm. (195 Cal.App.4th at p. 1417.)

*Sifuentes* is distinguishable. In this case, the evidence showed that the firearm was inside defendant's home moments before police arrived. Unlike a hotel room, a person is presumed to have control over his or her own private residence. This means that when "a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed[, the] parolee is in possession of the firearm, because it is under his dominion and control." (*People v. Osuna* (2014) 225 Cal.App.4th 1020, 1030.)

The prosecution's evidence showed that Perez—who had a prior robbery conviction and thus could not lawfully possess a

firearm—removed the firearm from the house immediately after stating, "'hey, the police are here.'" Assuming the gun belonged to defendant, the evidence supported a reasonable inference that he remained in constructive possession of the firearm prior to and during its removal from the home by Perez. (See *People v. White* (2014) 223 Cal.App.4th 512, 525–526 [constructive possession of firearm sufficient to support conviction of firearm possession offense]; *People v. Mason* (2014) 232 Cal.App.4th 355, 367 [unlawful firearm possession is continuing offense].)

Assuming the gun belonged to Perez, the evidence supported a reasonable inference that defendant aided and abetted Perez in his unlawful possession offense. "'Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. . . . [¶] . . . [¶] Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' (*In re Lynette G.* (1976) 54 Cal. App. 3d 1087, 1094, citations omitted.) ""When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.'" (*People v. Hill* (1998) 17 Cal.4th 800, 848–849.) 'Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054–1055.)

In *Sifuentes*, the inference of constructive possession failed because there was no evidence to support the prosecution's theory that the firearm was shared by gang members to commit their crimes. (*Sifuentes*, *supra*, 195 Cal.App.4th at p. 1417.) In contrast, the evidence in this case supported a reasonable inference that defendant was supporting Perez—who had fathered a child with defendant's cousin—to avoid being caught with a firearm. Defendant aided Perez's exit through the back door. Defendant's self-serving statement—"'Oh, I didn't know you were the police. Why didn't you just come knock on the front door?'"—was inconsistent with Perez's extrajudicial statement, "'hey, the police are here.'" This circumstantial evidence, coupled with defendant's testimony that he ran away during the traffic stop to avoid being caught with a firearm, supported a finding that he constructively possessed the firearm through Perez. (See *People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1054–1055; Evid. Code, § 1101.) We defer to the jury's finding that defendant's version was not credible. (See *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 364–365.)

**IV**

Defendant argues that he was entitled to a mistrial based on Officer Leduc's improper testimony that the firearm was stolen. He contends the testimony was introduced in violation of a court ruling. We conclude the record does not support this contention.

According to the transcript of the limine hearing, Mr. Montalban stated that he would not introduce evidence that the owner of the gun was a police officer, but would revisit the issue if the owner "testifies and Mr. Flier asks questions that allude to

the fact that he is a police officer." The trial court replied, "[y]es[,] [a]nd like everything else, if you want, you can bring it to my attention outside the presence of the jury if something changes."

When Officer Leduc testified that firearm was stolen, the trial court promptly ordered the testimony stricken and instructed the "jurors to disregard the last question and answer." In denying the motion for mistrial, the trial court found that the testimony was accidentally introduced, irrelevant to the firearm possession charge, and, in light of the nature of the charges in the case, did not result in undue prejudice.

"A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' [Citations.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934–935.) "The finding of exceptional circumstances depends upon the facts in each case. 'An improper reference to a prior conviction may be grounds for reversal in itself (citation) but is nonprejudicial "in the light of a record which points convincingly to guilt . . . ."' [Citation.]" (*Id.* at p. 935.)

The trial court's finding that the evidence of the stolen gun was introduced unintentionally is supported by the record; there is no evidence that the prosecution was acting in bad faith. The accidental admission of improper testimony does not provide grounds for reversal unless there are exceptional circumstances. (*People v. Allen*, *supra*, 77 Cal.App.3d at p. 935.) We find none in this case. We therefore apply the general resumption that the

jury followed the court's admonition to disregard testimony that the gun was stolen.

Defendant contends that a mistrial was required because the evidence on count 5 was "marginal." We do not agree. As previously discussed, the evidence supported a reasonable inference that defendant possessed the firearm that was inside his residence when police arrived. The weapon's removal from the residence did not eliminate defendant's culpability, as the evidence supported a reasonable inference that defendant remained in constructive possession of the firearm when it was removed from the home. Alternatively, the evidence supported a reasonable inference that by assisting Perez to flee with an unlawful firearm, defendant was guilty of aiding and abetting the commission of the unlawful possession offense. (See *People v. Nguyen*, *supra*, 61 Cal.4th at pp. 1054–1055.)

**V**

Defendant contends the trial court erred by allowing Castanedo to replace an expert witness who suddenly because unavailable during trial. The trial court allowed Castanedo to testify subject to any further objections by the defense in light of the last-minute substitution. Because there were no further objections, defendant's reliance on section 1054.5, which requires reciprocal pretrial discovery and disclosure of witnesses, is unavailing. (Cf. *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1106 [failure to take advantage of trial court's proposed remedy for discovery violation results in forfeiture of issue on appeal].) Moreover, given the jury's failure to find the gang allegations true, there is no reasonable probability that exclusion of

Castanedo's testimony would have resulted in a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 835.)

**VI**

On Monday, September, 28, 2015, the fourth day of trial, the parties were informed that juror No. 7 had called in sick. The juror told the court that she had been sick all weekend and was unable to eat or drink. She was "worse this morning," and was going to the doctor the next day, the earliest available appointment. She did not expect to be able to return that day.

The trial court informed counsel that it was considering excusing the juror for good cause. Mr. Flier objected, stating that although he had empathy for anyone who does not feel well, "a stomachache" was not a sufficient basis to excuse someone who had not been to the doctor, but if the juror did not return tomorrow "because she truly is sick, then I might change my belief, but not today." Mr. Flier stated that he liked juror No. 7 and wanted her on the panel. Mr. Montalban indicated that he would defer to the trial court.

The trial court stated that if there were any reasonable chance the juror would return the next day, it would wait another day, but "it's more than just a stomachache." Given the severity of the juror's illness and her inability to return the following day, the trial court excused the juror for good cause and replaced her with an alternate. (§ 1089 [trial court may discharge juror who becomes ill during trial].)

We review the trial court's ruling for abuse of discretion. (*People v. Williams* (2001) 25 Cal.4th 441, 448.) If the "record supports the juror's disqualification as a demonstrable reality," it will be affirmed on appeal. (*People v. Debose* (2014) 59 Cal.4th

177, 201.) The demonstrable reality test requires that "'the trial court's conclusion is manifestly supported by evidence on which the court actually relied.'" (*Ibid.*, citing *People v. Barnwell* (2007) 41 Cal.4th 1038, 1053.) "In reaching that conclusion, we 'will consider not just the evidence itself, but also the record of reasons the court provides.' (*Ibid.*)" (*Debose*, at p. 201.)

The trial court relied on the juror's statements that she was too ill to participate in the trial for at least two days, possibly longer, that her condition was worsening, and that the earliest appointment with her doctor was not until the next day. Because the juror would be absent for at least two days and her date of return was uncertain, the trial court was justified in finding there was good cause to dismiss her. "The totality of the evidence on which the court relied supports the conclusion that the juror was unable to perform her duties." (*People v. Debose*, *supra*, 59 Cal.4th at p. 201.)

**VII**

Defendant contends the trial court erred in failing to sever counts 4 and 5 from counts 1, 2, 3, 6 and 7. We find no error.

Section 954 provides in relevant part that an accusatory pleading may charge "different offenses of the same class of crimes or offenses, under separate counts." The statute also provides that the court, in the interests of justice and for good cause shown, has discretion to sever the counts for separate trials. (§ 954.)

In reviewing the denial of a severance motion, we bear in mind that the law favors joinder for reasons of efficiency. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) To show prejudice, a defendant is required to make a clear showing that the denial of the severance motion was an abuse of discretion,

which means that the trial court's ruling falls outside the bounds of reason. (*Ibid.*)

In evaluating the trial court's ruling, the factors to be considered are: "(1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges; and (4) whether one of the charges is a capital offense, or the joinder of the charges converts the matter into a capital case." (*People v. Mendoza* (2000) 24 Cal.4th 130, 161.)

Defendant contends that because there were two separate incidents, the evidence of the first incident would not have been cross-admissible in a subsequent trial of the second incident. We conclude, however, that because the same gang allegations were included in each count, the gang evidence was cross-admissible. In addition, defendant's testimony that he ran away in order to avoid being caught with a firearm during the first incident would have been admissible at the trial of the second incident to establish his knowledge of illegal firearm possession and his motive for helping Perez to flee with the gun. (Evid. Code, § 1101, subd. (b).)

We also do not agree that joinder of the counts was likely to inflame the jury against defendant. To the contrary, the jury acquitted him of the greater offense in count 1, was unable to reach a verdict on count 7, and did not find any of the gang enhancement allegations to be true.

Defendant also argues that the charge in count 5 was marginal because there was no evidence that he was "in possession of the gun at his house." He states that by combining

count 5 with the firearm possession counts for the first incident, which he admitted, the jury could only conclude that because he admitted possessing a weapon during the first incident, he must have possessed a weapon during the second.

For the reasons previously discussed, we disagree that the evidence of defendant's constructive possession of the firearm in count 5 was weak. There was substantial circumstantial evidence to support two reasonable inferences—that the weapon belonged to defendant, a convicted felon, who was aided and abetted by Perez in its removal from his home, or that the weapon belonged to Perez, a convicted a felon, who was aided and abetted by defendant in leaving the home with the firearm. Circumstantial evidence is neither inherently stronger nor weaker than direct evidence (*People v. Mendoza*, *supra*, 24 Cal.3d at p. 162), and "'is as sufficient as direct evidence to support a conviction.' [Citation.]" (*People v. Nguyen*, *supra*, 61 Cal.4th at p. 1055.)

**VIII**

Finally, defendant contends that even if the errors in this case were individually harmless, the cumulative effect of the errors requires a reversal because he was deprived of a fair trial and due process. (See *People v. Abel* (2012) 53 Cal.4th 891, 936.) We do not agree. In addition to finding there was no error on the issues reviewed, we conclude that any error was harmless, and that the evidence of defendant's guilt was strong. There is no basis for reversal under either *Watson*, *supra*, 46 Cal.2d at p. 836 or *Chapman v. California* (1967) 386 U.S. 18, 24.

## DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.