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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 ACEITUNO, Defendant and Appellant.	B265134 (Los Angeles County Super. Ct. No. VA137400)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas McKnew, Jr., Judge. Reversed and remanded.

Theresa Osterman Stevenson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Angel Aceituno was tried by a jury on charges of, among others, assault on peace officers with a gun. At his trial, evidence of an uncharged offense was admitted. Because we conclude that the trial court abused its discretion by admitting evidence about that uncharged offense, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The People's case*

1. October 17, 2012: Zimmerman Park shooting (uncharged incident)

On October 17, 2012, at 9:00 p.m., Simon Arellano was at Zimmerman Park in Norwalk drinking beer with friends. They encountered a couple of men, one of whom was Aceituno, with guns drawn. Aceituno asked Arellano where he was from. Arellano said he wasn't from anywhere and didn't bang. When Aceituno asked for a beer, Arellano gave him one. Saying " 'fuck that,' " Aceituno demanded all of the beer. When Arellano refused to give it to him, Aceituno shot Arellano in the face. Arellano was shot more than once, but survived. As a result of his injuries, Arellano uses a colostomy bag.

Two 9-millimeter and one 25-millimeter casings but no gun were recovered.

2. October 20, 2012: Hermosillo Park shooting (charged incident)

On October 20, 2012, three days after Arellano was shot, sheriff's deputies shot Aceituno. On that day, Hermosillo Park in Norwalk was hosting a Halloween parade. The Barrio Norwalk gang claims Hermosillo Park as part of its territory. Members of a rival gang, Carmelas, were taking part in the parade. Having

been briefed about a potential conflict between Barrio Norwalk and Carmelas, deputy sheriffs were at the park.

At approximately 3:00 p.m., Deputy Sheriff David Jimenez and his partner Michael McMorrow saw approximately 15 Barrio Norwalk gang members congregating near the park's restrooms. When the deputies walked in the group's direction, approximately six people separated from the group and walked toward the rear of the park. Jimenez and McMorrow returned to their patrol car, intending to meet the six men at the park's east end. As the deputies drove in the group's direction, two men separated from the group of six. The two men then separated, with one, Aceituno, heading northeast.

The deputies followed Aceituno, who broke into a run. As Aceituno ran, "he started bending over at the waist and holding" his waist, leading the deputies to think Aceituno was armed. McMorrow shouted, " 'Gun,' " and Aceituno, holding a gun, turned toward the police car. Believing that Aceituno was going to fire his gun, McMorrow accelerated and struck Aceituno with the car, causing him to fall. The deputies exited their car with weapons drawn. Aceituno, still holding a gun, got up and ran. Jimenez and McMorrow ordered Aceituno to " 'stop running. Drop the gun.' " Instead, Aceituno "manipulate[d]" his gun in a way that made the deputies think he was chambering a round. When Aceituno raised his gun to chest level and turned toward McMorrow, Jimenez shot Aceituno, firing his weapon approximately seven times. McMorrow also fired his gun eight to 10 times. Shot, Aceituno fell, tossing the gun to his right, about five feet away.[1] At trial, Jimenez testified he didn't believe that Aceituno fired at the deputies.

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[1] Aceituno was shot two or three times.

Others witnessed these events. Sergeant Grady Miles saw Aceituno running with a gun. Joseph Legaspi and Luis Mencos, who were working at the park, also saw Aceituno with a gun. Legaspi testified that two gang members separated from a larger group and ran, with deputies in pursuit. Aceituno pulled a weapon from his waistband and pointed it at the deputies. A police car hit Aceituno, who fell but got up, still holding the gun. The deputies were getting out of the car when Aceituno got "maybe one shot off," two at most, before deputies returned fire. Mencos also saw Aceituno run from the deputies. Aceituno had a black gun, which was pointing straight up. Mencos heard a single "pop" and then a large number of gunshots. Mencos did not hear anyone yell, "Gun, gun, gun."

A Smith & Wesson gun containing nine live rounds in the magazine was recovered. A live cartridge, which had been cycled through the gun, was within a couple of feet of the gun. The casings found at Zimmerman Park were fired from the Smith & Wesson gun recovered from Hermosillo Park.

At the time of the Hermosillo Park shooting, Aceituno was a previously convicted felon.

3. Gang evidence

Detective Sergio Reyes has been assigned to a gang unit since 2007. While at the Academy, he had a "40-hour block of just gangs and some culture classes." After the Academy, he worked at Central Jail on the floor housing gang members, which allowed him to speak to "hundreds, if not thousands, of gang members." After leaving Central Jail, he interviewed "numerous" gang members while on patrol.

Gangs claim a specific turf, by, for example, writing graffiti on walls and committing crimes. Committing crimes also

enhances a gang's status: "It shows for the gang – basically, what it does is a gang member's going to do something on behalf of the gang for themselves. Within the gang, it brings them up in status as somebody who is willing to put in work. Crazy – with crazy guys, they will do whatever they need to do to represent the 'hood." Committing crimes enhances the individual gang member's status as well. A "guy who's willing to put in work" on the gang's behalf "is somebody that can be trusted, somebody that eventually might be in charge of the gang when someone gets locked up and they're next, there'll be no doubt that this guy can continue representing their neighborhood."

It was unsurprising to Reyes that someone as young as 18 commits crimes for a gang. Younger guys commit "the most craziest crimes," because, as juveniles, they might face less jail time. In the hierarchy of crimes, there is nothing "crazier or farther out" than confronting police officers with a firearm.[2]

The Varrio (or Barrio) Norwalk gang claims Rosecrans to the north, Bloomfield to the east, 160th to the south, and Pioneer to the west. Aceituno, whose moniker is G-Boy, is a member of that gang and its clique, Locotes. Five photographs of Aceituno throwing gang signs were shown to the jury.

Given a hypothetical modeled on the facts of what occurred in Hermosillo Park, Officer Reyes said that the shooter's status would be elevated "pretty high" "just simply because he is crazy enough to point a weapon at a" deputy. "He's basically showing that he doesn't really care. He is willing to do whatever it takes because he believes being a gang member he can do whatever he wants."

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[2] At the time of these events, Aceituno was 18.

B. *Defense case*

Omar Cardenas was at Hermosillo Park playing with his son when he heard gun shots. Cardenas saw two deputies, guns drawn, shooting at a young man running from them. The young man was holding his pants. When the young man was shot, he was running with his back to the deputies. Cardenas did not see Aceituno turn and point a gun at the deputies, and he did not hear anybody say anything. After Aceituno fell, one of the deputies kicked him in the face.

Melissa Sandoval was also at the park. She saw a police car following two running teenagers. One boy was holding up his baggy pants. Sandoval didn't see anything, including a weapon, in the boy's hand, and he had his back to the police car. The car struck the boy, and he fell but got up and ran. Sandoval did not see him reach into his waistband and pull out a gun and turn and face the officers, see him extend his hand as if he had something in it or hear the deputies give commands. The boy was shot while he was still running. After the boy was shot, an officer kicked him.

Kyle Pettigrew was in the parade that terminated at the park. He saw the police car hit two men; both fell but got up. The deputies fired their guns and one man fell. Pettigrew did not see Aceituno with a gun, reach for anything or turn around. Aceituno had his back to the deputies at all times. Pettigrew also did not see any kicking. Only after Aceituno was on the ground did Pettigrew hear deputies tell him to " 'stay down.' " Pettigrew didn't hear the officers tell Aceituno to stop running before shooting him.

Fourteen shots were fired.

II. Procedural background

Aceituno was charged separately with crimes arising out of the Zimmerman Park and the Hermosillo Park shootings. The trial court handling the Zimmerman Park case denied a motion to consolidate the cases.[3] Aceituno went to trial first on the Hermosillo Park charges, which did not include either a substantive gang offense or a gang allegation. After a trial on those charges, a jury, on May 6, 2015, found Aceituno guilty of: counts 1 (McMorrow) and 2 (Jimenez), assault on a peace officer with a semiautomatic firearm (Pen. Code, § 245, subd. (d)(2))[4] and found true gun use allegations (§§ 12022.53, subd. (b), 12022.5, subds. (a), (d)); count 3, carrying a loaded firearm by a convicted felon (§ 25850, subd. (a)) and found true that he was previously convicted of a felony (§ 25850, subd. (c)(1)); and count 4, possession of a firearm by a convicted felon (§ 29800, subd. (a)(1)).

On June 24, 2015, the trial court sentenced Aceituno, on count 1, to the base term of nine years plus 10 years for the gun use enhancement (§ 12022.53, subd. (b)) and, on count 2, to a consecutive 2 years 4 months plus 3 years 4 months for the gun use enhancement (*ibid.*), for a total sentence of 24 years eight months. The court imposed concurrent sentences on counts 3 and 4.

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[3] The reason for that denial is unclear. According to defense counsel, it was denied because of "the prejudicial aspects to the co-defendant" in the Zimmerman Park case.

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

DISCUSSION

Aceituno contends that the trial court abused its discretion, under Evidence Code sections 352 and 1101, subdivision (b), and violated his federal due process right to a fair trial by admitting evidence about the Zimmerman Park shooting.

A. *Additional background*

Before trial, the defense moved to exclude evidence about the Zimmerman Park shooting because "the issue in this case is not whether [Aceituno] used the same weapon, but the issue is whether [Aceituno] used the weapon in this case, period." Witnesses were "not saying that he did not have a gun. They're just saying that they didn't see a gun in his hand just before [Aceituno] got shot." Therefore, evidence of the Zimmerman Park shooting should be excluded because it was irrelevant and more prejudicial than probative.

The prosecutor responded that the evidence was relevant to show Aceituno's "connection" to the gun found at Hermosillo Park three days later. The trial court suggested that the parties stipulate Aceituno had a gun on his person when deputies were chasing him. The prosecutor agreed to stipulate, but the defense would not stipulate, in light of the pending other case.

The trial court found that the evidence was relevant, and its relevance outweighed any prejudicial effect. But the court agreed to give a limiting instruction when the prosecutor's witness testified: "It would be limited, however, for the purpose of only connecting the weapon with your client, and it is not relevant to whether or not he is guilty or not guilty in the other case that is pending, and it is not relevant to the fact that he pointed that weapon in this case at the alleged victims in this case before the court."

Thereafter, the prosecutor, during his opening statement, told the jury that Arellano would testify that, three days before the shooting in Hermosillo Park, he was at Zimmerman Park, where Aceituno confronted him, demanded beer, and issued a gang challenge. After announcing his gang affiliation, " 'This is Norwalk,' " Aceituno "shoots [Arellano] in the face and in the body."

Defense counsel, during his opening statement, alluded to the pending trial on charges arising out of the Zimmerman Park shooting, prompting the trial court to admonish the jury, "No evidence will come in regarding another trial that is either being pursued or will take place. The only reason that I am allowing evidence in concerning the Zimmerman Park shooting is for the purposes of the gun identification. That is not an issue as to whether or not the defendant did or did not fire the weapon and shoot a third individual. [¶] You may hear evidence to that effect but that is not what this case is about. This case is only about what occurred in" Hermosillo Park. "This case is not about any other crime, and you should not in any way involve yourself in discussing whether the defendant did or did not commit that crime. [¶] It is hard to separate the two, I know, because the purpose of the evidence is for one reason and one reason only and that is to connect the defendant to a gun that was identified and purportedly used on October the 20th, 2012, in [Hermosillo] Park."

Arellano was the prosecution's first witness, and he testified as described above. Specifically, at the time of these events he was 19 and working for UPS. Defendant approached him at Zimmerman Park with a gun drawn and asked Arellano where he was from. Arellano replied he didn't bang. The

prosecutor asked Arellano what he meant when he told Aceituno he didn't "bang," and the defense objected that this "line of questioning [is] not relevant to this case." The court agreed that "it seems to be getting rather far afield from the case. There was a limited reason why this testimony is coming in. I don't need and I don't believe we need to hear all the background of what occurred beyond what we have heard thus far. Insofar as that [ ] question that you just asked, you certainly can ask other questions about what occurred there."

Arellano continued to testify that defendant demanded a beer, which Arellano gave him. Defense counsel objected again that "[w]e don't need those kind of details . . . . All we want to know is what happened." The court overruled the objection but added that "[w]e need to have some of this background information. It's not evidence that you'll consider . . . as to the crimes that have been charged at another park on another day. This is only background information for a limited purpose for the identification of the defendant with this gun. That is why this testimony is being offered and for that reason only."

Arellano continued to testify that defendant said, " 'Fuck that. Give me all your beer.' " When Arellano refused, defendant shot him in the face, and he was shot more than once. When Aceituno was asked to describe his injuries, defense counsel reiterated that "we're going into too much detail." The court sustained the objection and said, "I believe we are going too far with respect to an account of everything that happened. The defendant – the testimony is shot this witness in the face and may have shot him more than one time." Notwithstanding the court's ruling, the prosecutor asked if Arellano was hospitalized and "[w]hat happened as a result of that?" Arellano replied he

needed a "colostomy bag which is, basically, I have bowel movements through my stomach." The court interjected that, again, "we're going beyond the purpose of this testimony."

On cross-examination, Arellano confirmed he couldn't identify the bullet or casing in the gun.

In closing, the prosecutor discussed Arellano's testimony, first reminding the jury that it was admitted for "a limited purpose and that is not to show that the defendant is a bad guy or he's prone to acts of violence but, rather, that he, in fact, was in possession of that particular firearm . . . ." He then repeated the details of the Zimmerman Park shooting, at which point defense counsel objected that the prosecutor was "going into details of a case that's pending and does not really concern this case in details." The court sustained the objection "in part" because the "only purpose of that testimony regarding what occurred three days before the incident, which resulted in the four counts in this case, was to show that the defendant had the pistol that looked like the one that has been identified in this case. That's the main purpose. And it was only offered for a limited, limited basis." The court told the prosecutor not to talk about Zimmerman Park and "go on to the case in chief."

The prosecutor, however, continued: "As I was saying, [Arellano] identified the defendant when he was shown a series of Varrio Norwalk photos saying, 'I will never forget this piece of shit.' He tried to kill me for a beer." The defense objected again, and the trial court said, "No. I said go on. Please go on." "Beyond what occurred with Mr. Arellano who was a victim and was injured, we have that evidence. You have alluded to it, and that's fine. And it was offered for a limited purpose. Just go on, please." Apparently unwilling to move on, the prosecutor said he

was just "arguing the evidence that came out before this jury." After the court asked the jury if it understood its ruling, the prosecutor explained that the evidence was for the limited purpose of showing that Aceituno possessed the firearm at Hermosillo Park.

Defense counsel argued in closing that the jury could believe or not that Aceituno had the gun. But the "question is did he pull the gun out and point it at the police officers and assault them?"

After the close of evidence, the jury was instructed with CALJIC No. 2.09: "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

B. *The trial court abused its discretion by admitting extraneous details about the Zimmerman Park shooting.*

Evidence a defendant committed misconduct other than that currently charged is generally inadmissible to prove he or she has a propensity to commit the charged crime. (Evid. Code, § 1101, subd. (a); *People v. Kelly* (2007) 42 Cal.4th 763, 782; *People v. Rogers* (2009) 46 Cal.4th 1136, 1165.) But such evidence is admissible if it is relevant to prove, for example, intent, motive or identity. (Evid. Code, § 1101, subd. (b); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Edwards* (2013) 57 Cal.4th 658, 711.) When reviewing the admission of evidence of other offenses, a court must consider the materiality of the fact to be proved or disproved and the probative value of the other crimes evidence to prove or disprove the fact. (*People v.*

Fuiava (2012) 53 Cal.4th 622, 667; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372-1373.)

Even if other crimes evidence is admissible under Evidence Code section 1101, subdivision (b), it should be excluded under Evidence Code section 352 if its probative value is substantially outweighed by undue prejudice. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491.) Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) But " ' " '[p]rejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent." ' " (*Scott*, at p. 490.) Rather, evidence is prejudicial under Evidence Code section 352 if it uniquely tends to evoke an emotional bias against a party as an individual or would cause the jury to prejudge a person on the basis of extraneous factors, and has little effect on the issues. (*Scott*, at p. 491.)

We review the trial court's rulings under Evidence Code sections 352 and 1101 for abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 930; *People v. Fuiava*, *supra*, 53 Cal.4th at pp. 667-668.)

Here, the Zimmerman Park shooting was admissible to connect Aceituno to the gun found at Hermosillo Park. Although the main issue was, as Aceituno asserts on appeal, whether he was openly wielding a gun and *not* whether he had a gun at all, to the extent Aceituno tried to distance himself from the gun found at Hermosillo Park, the prosecution was entitled to link him to it using the Zimmerman Park evidence. Indeed, there was

evidence that Aceituno did not have a gun at all. During opening statement, defense counsel said witnesses would testify they did not see Aceituno with a gun. Cardenas, Sandoval and Pettigrew then testified they did not see Aceituno with a gun. Based on their testimony, the jury could have believed either that Aceituno had no gun at all or had one but was not holding it in his hand during the chase. To the extent the defense thereby raised an inference Aceituno had *no* connection to the gun found at Hermosillo Park, evidence he used that gun three days earlier at Zimmerman Park to shoot Arellano was admissible to dispel that inference.

As the trial court repeatedly said, however, the evidence was admissible for a very limited purpose. To establish that purpose, all the prosecutor needed to elicit from Arellano was that defendant was at Zimmerman Park on October 17, 2012 in possession of a gun. The firearms expert would then testify that the casings from the Zimmerman Park gun matched the gun found next to defendant at Hermosillo Park three days later. Everything else Arellano testified about—that defendant issued a gang challenge; that defendant demanded a beer; that when Arellano refused to give him all of the beer, defendant shot Arellano in the face; that Arellano was shot more than once; and that he uses a colostomy bag as a result of the shooting—was irrelevant. The trial court therefore abused its discretion in admitting those details.

Admission of evidence prohibited by Evidence Code sections 352 and 1101 is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 835. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 652, 656, 659.) Under *Watson*, we examine the entire cause, including the evidence, and reverse

only if we are of the opinion that it is reasonably probable a result more favorable to appellant would have been reached in the absence of the error. (*Watson*, at p. 835.)[5]

It is reasonably probable the jury would have reached a result more favorable to Aceituno. Not only were the details about the shooting of Arellano irrelevant, they were unduly prejudicial. Undue prejudice comes from evidence "that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden (*1994) 9 Cal.4th 83, 134, impliedly overruled on another ground by *People v. Yeoman* (2003) 31 Cal.4th 93.) As we have said, the extraneous details of the shooting had no probative value yet would tend to evoke an emotional bias against Aceituno—a person who shot someone in the face over a beer. (Compare *People v. Lindberg* (2008) 45 Cal.4th 1, 49-50; *People v. Doolin* (2009) 45 Cal.4th 390, 435-439 [evidence relevant for impeachment]; *People v. Padilla* (1995) 11 Cal.4th 891, 925 [evidence relevant to motive], overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 823.)[6]

The potential for prejudice, moreover, is increased where, as here, the uncharged offense is more inflammatory than evidence of the charged offense. (See *People v. Tran* (2011)

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[5] We would reach the same result if the error were reviewed under *Chapman v. California* (1967) 386 U.S. 18.

[6] In closing, the prosecutor argued that the evidence was relevant to motive, i.e., Aceituno ran from deputies at Hermosillo Park because he had the gun used to shoot Arellano. That, however, was not a purpose for which the evidence was admitted. In any event, the extraneous details of the Zimmerman Park shooting were irrelevant to the motive theory.

51 Cal.4th 1040, 1047 [potential for prejudice is decreased when testimony describing the uncharged act is no stronger or more inflammatory than testimony concerning the charged offense]; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) Although we do not wish to understate the seriousness of assaulting police officers, the details of the Zimmerman Park shooting were uniquely inflammatory, more so than those concerning the assault. As defense counsel argued, the question for the jury was whether Aceituno assaulted the officers, i.e., pulled the gun out. Therefore, even if the jury believed he had a gun on his person they could still acquit him of assault if he didn't have it in his hand.[7] But admitting the details of the prior shooting made it more likely that the jury would believe Aceituno assaulted the officers as opposed to believing he simply had the gun on his person. After all, if Aceituno shot someone in the face over beer, would he have any compunction about assaulting officers with a gun?

Nor can we find that the trial court's limiting instructions cured the error and its prejudicial impact. (See, e.g., *People v. Dellinger* (1984) 163 Cal.App.3d 284, 299-300 ["Because of the inherently prejudicial nature of other crimes evidence, the courts have recognized that limiting instructions are frequently inadequate to protect the accused."].) The trial court clearly agreed that the extraneous details were irrelevant and prejudicial, and that is why the court gave repeated limiting instructions. Yet, the court failed, at the outset, to limit the prior

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[7] Defense counsel argued that you "can believe that [Aceituno] had the gun if you want to. But the question is did he pull the gun out and point it at the police officers and assault them?"

incident evidence to the bare fact that defendant had a gun at Zimmerman Park and instead allowed the extraneous details to be repeated in front of the jury. We therefore conclude that the error in admitting extraneous details about the Zimmerman Park shooting was not harmless.

Because we reverse the judgment on this ground, we need not reach Aceituno's other contentions about the admissibility of gang evidence and sentencing error.

DISPOSITION

The judgment is reversed and remanded for proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.