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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ALEXANDER, Defendant and Appellant.	B267271 (Los Angeles County Super. Ct. No. TA134242)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed as Modified.

Ava R. Stralla, 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, Mary Sanchez and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Charles Alexander of attempted murder (Pen. Code, §§ 664/187; count 1) with a finding that he personally discharged a firearm (§ 12022.53, subd. (c)), assault with a deadly weapon (§ 245, subd. (a); count 2) with a finding that he personally used a deadly and dangerous weapon (a car) (§ 12022, subd. (b)(1)), carrying a loaded unregistered handgun (§ 25850, subd. (a); count 3), and having a concealed firearm in a vehicle (§ 25400, subd. (a)(1); count 4).[1] The trial court sentenced him to a term of 29 years in prison.

On appeal, appellant contends that the trial court erred in instructing on the kill zone theory of attempted murder and in admitting evidence relating to gang membership. We disagree with these contentions. Appellant also contends that the abstract of judgment must be corrected to reflect an enhancement on count 2 under section 12022, subdivision (b)(1), rather than section 12022.53, subdivision (b)(1). We order the abstract so modified and otherwise affirm the judgment.

BACKGROUND

Appellant's Prior Relationship With Yolanda Conner and Her Family

Prior to July 2014, appellant dated Stephanie Conner ("Stephanie"), the adopted sister of Yolanda Conner ("Conner").

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[1] In count 1, the jury found that the attempted murder was not premeditated, and in count 2, the jury found defendant not guilty of attempted murder, but guilty of assault with a deadly weapon as a lesser included offense. All unspecified statutory references are to the Penal Code.

Appellant lived with them at Conner's home on East 103rd Street in Los Angeles. Also living there were, among others, a young man from the neighborhood, Reggie Holmes ("Holmes"), Conner's boyfriend Santiago Gutierrez ("Gutierrez"), and Conner's son Brian King ("King"). King and Holmes were members of the Front Street gang. Appellant, known as "Chapo," was a member of the Avalon Crips gang, which associated and did business with Front Street. Appellant and King were friends, and Conner referred to appellant as her son.

According to Conner, during their relationship, Stephanie and appellant broke up and got back together several times. Appellant was still dating another woman, Daisy Ramirez, during that time, and Stephanie was also seeing another man. The last breakup between Stephanie and appellant occurred sometime before July 2014 after Stephanie and Daisy had a fight. When appellant came to Conner's home to get his clothes, Stephanie tried to stop him, and appellant struck her. Conner intervened, threatened to call the police, and told appellant to go back to Daisy. Appellant called Conner a "Fat B," and told her to stay out of his business. About a month after the breakup, Stephanie began dating another man, Luis Solomon.

Incidents on July 19 and 20, 2014

Following Conner's intervention when appellant struck Stephanie, appellant's anger seemed to escalate. On July 19, 2014, King and some friends were walking on East 103rd Street when appellant drove his black BMW next to them, revving the engine. King heard the brakes,

and appellant yelled, "You can't stop Chapo!" King and the others fled, fearing that appellant might shoot.

The following day, July 20, 2014, appellant drove to Conner's residence with Holmes and another male who belonged to Front Street. Conner felt threatened, but stepped outside. According to Gutierrez, appellant said to him, "You want to play? We'll be back." Based on appellant's demeanor, Gutierrez felt it was a threat.

Assault with a Deadly Weapon on Conner on July 21, 2014

On July 21, 2014, the day after appellant threatened Gutierrez, Conner was getting into the driver's seat of her car in front of her neighbor's residence on East 103rd Street, when she heard the revving of a car engine. Gutierrez was getting in the passenger side, and Stephanie was outside the car. Conner turned and saw appellant driving his black BMW fast toward her, perhaps 40 to 45 miles an hour. They made eye contact and appellant had a serious look on his face. Conner had one leg in the car and one leg out. Appellant swerved toward her, and Stephanie called, "Watch out." Conner had to shut the car door as far as possible with half her body still outside to prevent appellant's car from striking her before it swerved away. According to Conner, the car passed within a foot of her, close enough for Conner to feel her car shake. Conner believed that if she had not moved, appellant's car would have hit her.

Gutierrez saw appellant swerve toward Conner and then drive off erratically, running a stop sign. He believed appellant tried to hit Conner.

Attempted Murder of Gutierrez

At trial, Gutierrez admitted that he was reluctant and scared to testify. At the preliminary hearing, he tried to refuse to testify by invoking his Fifth Amendment privilege, not fully understanding what it meant. After an attorney was appointed to represent him and explained the privilege, Gutierrez told the attorney that the incidents he told the police about actually occurred. After the attorney explained that his statements to the police were not under oath, Gutierrez resumed the stand and answered almost every question at the preliminary hearing with "I don't remember" rather than testify to the facts. He did so because he was afraid of retaliation, and threats had already been made against him and his family. He was aware of the gang rule that "snitches get stitches." However, at trial, he decided to tell the truth, because the threats had not ceased and he decided he "might as well . . . come to court."

Concerning the facts supporting the attempted murder charge of which he was the alleged victim, Gutierrez testified that around 12:00 a.m. on July 24, 2014, he returned in his SUV to Conner's home after an errand, backed into the driveway, and parked. Although Gutierrez turned off the engine, the car lights were still on. While King, Martinez, and Holmes were sitting in the vehicle smoking marijuana, Gutierrez popped open the hood from inside the SUV, intending to disconnect the battery cables. A friend, "Leo," was at the front of the vehicle, helping unlatch the hood. Gutierrez got out of the vehicle and approached the front, but never got fully in front of the SUV. While

they were both trying to get the hood up (Gutierrez could not remember if they succeeded), Gutierrez heard someone say something like, "Here comes Charles," or "There goes Charles." Gutierrez looked up and observed appellant's black BMW pull up and stop in "right in front" of Gutierrez and the vehicle. Gutierrez estimated that appellant was about 15 feet away from him. Appellant rolled down the window, and Gutierrez saw he had a gun. As Gutierrez ran for cover to the house, he heard about six shots. Bullets struck the radiator of Gutierrez' vehicle and the back passenger window. Bullets also struck the house.

King was in the back passenger seat of the SUV and observed appellant's black BMW approach with its headlights off. He saw the driver's window roll down and a gun protrude; he did not see appellant's face. When the first shot was fired, King opened the rear passenger door of the SUV to get out, and a bullet struck the window. He ran into house. In all, he heard about six or seven shots in rapid succession. He believed that when the shooting started, Gutierrez was on the porch. However, Gutierrez testified that he was never on the porch, and that it was another shooting when he was on the porch.

Martinez was in the front passenger seat and heard "just a few" shots, perhaps three or four, and saw a car drive past. He was the last person to flee from the SUV to the house.

When the shooting occurred, Conner was in a bedroom with Stephanie and Stephanie's friend. She heard six gunshots.

Officer Craig Garcia arrived at the Conner residence around 12:25 a.m., after the shooting. He observed bullet holes in the front bay window of the house, an interior sliding glass door, and an interior wall.

The bullet hole in the bay window was near where Gutierrez had been standing when the shooting occurred. He also observed a bullet hole in the SUV in the driveway, but did not find any bullets or casings at the scene.

Subsequent Investigation

In his trial testimony, King denied telling a District Attorney Investigator after the shooting that appellant's girlfriend Daisy Ramirez was driving past Conner's house. He was impeached by the testimony of District Attorney Investigator ("DAI") Mark Felix. On May 8, 2015 DAI Felix contacted King at Conner's residence. King did not want to be interviewed because he feared he would be labeled a snitch. King said he was afraid because appellant's girlfriend, Daisy Ramirez, had driven by the house several times since the shooting and King believed Daisy was connected to the Mexican Mafia or a drug cartel.

Counts 3 and 4—Possession of a Loaded Firearm and Having a Concealed Firearm in a Vehicle

Around 4:00 p.m. on July 17, 2014, Los Angeles County Sheriff's Deputy Anthony Roman was assisting in a search of a residence in the 700 block of East 101st Street in Los Angeles when a black BMW sped away from the residence and ran through a stop sign. Deputy Roman and his partner followed the car to the end of street, where the driver parked in a red zone and left all four windows down. Appellant, who had been driving, got out with Daisy, who was the registered owner of the car, and they hurried into a residence. Deputy Roman observed the

handle of a revolver sticking out underneath the steering column. He seized the gun. It was a .38 caliber revolver loaded with four rounds and an expended shell casing. A certified CLETS report for the revolver, serial number N029409, reflected that the registered owner was Leuam Sithongsouk.

B. *Defense Evidence*

Stephanie and Daisy testified on appellant's behalf.

According to Stephanie, it was not unusual for appellant to swerve or drive in a zig-zag pattern. When appellant swerved his car toward Conner, Stephanie was there but Gutierrez was not. Appellant did not cross into the lane next to Conner.

On the date of the shooting, Stephanie was in a bedroom at Conner's residence with a friend and Conner when she heard two gunshots. They ran out to the hallway, and Stephanie saw Gutierrez running out of the house. King, Martinez, Holmes, and Leo were running into the house. There had been two other shootings at Conner's residence. One occurred in December 2013, and resulted in a bullet hole inside the house, in the top of the wall in the entryway.

Stephanie admitted that on July 11, 2014, appellant approached her and her boyfriend Solomon in front of Conner's residence. She admitted that appellant saw her get out of Solomon's car, that Solomon drove away, and appellant chased Solomon. Stephanie denied telling DAI Felix that appellant confronted her and they had an argument before he chased Solomon. Stephanie admitted that, on February 22,

2015, she wrote a post on Facebook saying that "at the end of the day [she] want[ed] to free Chapo."

According to Daisy Ramirez, she was appellant's girlfriend from October 10, 2008, through the time of trial, with the exception of a period of time beginning in January 2012. During the time when they were not dating, appellant dated Stephanie. Daisy and Stephanie did not like each other.

In July 2014, appellant lived with Daisy on East 101st Street in Los Angeles, a couple blocks away from Conner's residence. On July 17, 2014, police searched a home five residences away from Daisy's residence. Daisy and appellant got into her black BMW, which was parked in front of her residence, and left with appellant driving just as police began approaching the house to be searched. Appellant stopped at the stop sign at 101st Street and McKinley, then continued the two blocks to their friend's home. Appellant parked, but Daisy was not certain whether he parked in a red zone. She did not see appellant with a gun in her car that day or at any other time.

On the date of the shooting, July 24, 2014, appellant returned home from work around 3:00 or 4:00 p.m. He left and returned sometime around 8:00 or 9:00 p.m. Appellant did not appear to be angry or agitated, and he did not have weapons with him. Daisy admitted she loved appellant and did not want to see anything bad happen to him. She denied having family members who were in a gang or that she had been harassing the Conner family.

C. *Rebuttal Evidence*

DAI Felix had a conversation with defense counsel and Stephanie on April 29, 2015. She was very upset and cried throughout most of the interview. Stephanie seemed to "still be very much in love" or still have "affection for" appellant. She told DAI Felix that, in July 2014, appellant confronted her when Solomon dropped her off at her home. After the altercation, appellant left. Stephanie also told DAI Felix that, on July 21, 2014, appellant drove fast past Conner "like he usually did," but he did not swerve toward her. She also said that, when the July 24 shooting occurred, Gutierrez had been outside in the front yard.

DISCUSSION

I. *Kill Zone Instruction*

With respect to the charge of attempted murder of Gutierrez, over defense objection, the trial court's instruction included the so-called "kill zone" paragraph of CALCRIM No. 600: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Santiago Gutierrez, the People must prove that the defendant not only intended to kill the people in front of 807 E. 103rd Street [the Conner residence] but also either intended to kill Santiago Gutierrez, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Santiago Gutierrez, or intended to kill the people in front of 807 E. 103rd Street by killing everyone in the kill zone, then

you must find the defendant not guilty of the attempted murder of Santiago Gutierrez."

Appellant contends that the kill zone instruction misled the jury on the intent element of attempted murder because no evidence supported the inference that he intended to kill a specific alleged target (Gutierrez) by killing everyone within a limited geographic area in front of the Conner residence. Appellant relies primarily on *People v. McCloud* (2012) 211 Cal.App.4th 788 (*McCloud*). There, the court observed: "The kill zone theory . . . does *not* apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual. Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area. In effect, the defendant reasons that he cannot miss his intended target if he kills *everyone* in the area in which the target is located. [¶] The kill zone theory consequently does not operate as an exception to the mental state requirement for attempted murder or as a means of somehow bypassing that requirement. In a kill zone case, the defendant does not

merely subject everyone in the kill zone to lethal risk. Rather, the defendant *specifically intends* that *everyone* in the kill zone die. If some of those individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder." (*Id*. at p. 798.)

Whether *McCloud's* analysis of the kill zone theory is correct is an issue currently pending before the California Supreme Court.[2] Regardless, *McCloud* does not suggest that the trial court in the present case erred in instructing on the kill zone theory.

Appellant parses the evidence in an attempt to show that the evidence was insufficient to support the kill zone instruction. He argues that he fired four or five shots from a revolver rather than a spray of bullets from a high-powered automatic weapon; no bullets were recovered; the evidence was conflicting where Gutierrez was during the shooting (Gutierrez testified he was near the vehicle, King testified he was on the porch, Stephanie testified he was absent); and there was no evidence the persons in the SUV were visible. Appellant's argument misunderstands the appropriate standard. The question is whether "substantial evidence" supported the instruction, meaning evidence in the record (setting aside issues of credibility and regardless of conflicts)

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[2] The Supreme Court granted review in *People v. Canizales* (S221958, formerly 229 Cal.App.4th 820), in which the court of appeal criticized *McCloud's* analysis and held that the trial court properly instructed on the kill zone theory. The court has since granted review and deferred briefing in at least three other decisions on the same issue.

which, if believed by the jury, would support the inference discussed in the kill zone instruction, i.e., that "the defendant not only intended to kill the people in front of [the Conner residence] but also either intended to kill Santiago Gutierrez or intended to kill everyone within a kill zone." (See *People v. Alexander* (2010) 49 Cal.4th 846, 920-921; *People v. Breverman* (1998) 19 Cal.4th 142, 162-163.) Here, there is no question that inference was supported.

The prosecution presented evidence that following Conner's intervention when appellant struck Stephanie, appellant demonstrated strong enmity toward Conner and her household. On July 19, 2014, as King, who lived with Conner, and some friends were walking on East 103rd Street, appellant drove his black BMW next to them, revving the engine, and yelling "You can't stop Chapo!" King and the others fled, fearing that appellant might shoot. The next day, July 20, 2014, appellant drove to Conner's residence and threatened Gutierrez, Conner's boyfriend who also lived with her, saying, "You want to play? We'll be back." The day after that, July 21, 2014, appellant nearly struck Conner with his car, resulting in his conviction of assault with a deadly weapon. Thus, the jury could infer that appellant had a violent animus toward Conner and her household, including King and Gutierrez.

The attempted murder of Gutierrez occurred in the early morning of July 24, 2014, three days after appellant assaulted Conner with his vehicle. From the evidence, the jury could conclude that there were at least five people in front of Conner's residence at the time: King, Martinez, and Holmes were sitting in Gutierrez' SUV parked in the

driveway facing the street, and Gutierrez and his friend, Leo, were outside the vehicle. According to Gutierrez, Leo was in front of the vehicle, and Gutierrez was approaching that area when appellant pulled up in his black BMW and stopped in front of Gutierrez and the SUV, about 15 feet away from where Gutierrez was standing. He rolled down the window, and opened fire with a pistol (presumably a revolver since no shell casings were found), firing as many as six or seven times.[3] During the shooting, Gutierrez fled for cover, and the three occupants of the SUV got out and fled as well. One bullet struck the window of the rear passenger door of the SUV just as King opened that door. Another struck the radiator of the Gutierrez' vehicle. The jury could reasonably infer that appellant observed the occupants flee from the vehicle and fired at them, striking the radiator and the vehicle window. Further, the array of other bullet holes after the shooting — in the front bay window of the house, an interior sliding glass door, and an interior wall — suggested that appellant shot at as many targets as he could find as they fled.

On this evidence, the jury could reasonably infer that defendant intended to kill Gutierrez. He had threatened Gutierrez four days earlier on July 20, 2014 ("You want to play? We'll be back"), and when he began shooting, he was only about 15 feet away from Gutierrez. Further, appellant had demonstrated a violent animus toward Conner

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[3] Gutierrez heard about six shots. King heard about six or seven. Martinez heard perhaps three or four. Conner, who was inside, heard six gunshots.

and her household because she had intervened when he struck Stephanie. The jury could thus reasonably infer that to avenge the disrespect Conner had shown him, and as part of his pattern of hostility toward her and her household, appellant fired as many as seven shots, intending to kill everyone outside Conner's house in order to kill Gutierrez. To the extent defendant contends that the evidence and instruction failed to define a specific geographic space sufficient to constitute a kill zone, he is mistaken. It was defined by the space occupied by the persons at whom he shot, all of whom were either in Gutierrez' SUV outside Conner's residence (King, Holmes, and Martinez), standing in front of the vehicle (Leo), or standing near the front of the vehicle (Gutierrez). In short, in the words of *McCloud*, the evidence supported the inference that appellant "tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*." (211 Cal.App.4th at p. 798.) We find no error in the trial court's giving the kill zone instruction.

II. *Gang Evidence*

Appellant challenges the admission of testimony relating to gangs given by King, Conner, Gutierrez, and DAI Felix on the ground it was more prejudicial than probative under Evidence Code section 352. We disagree. Defense counsel elicited some of the evidence, and failed to lodge a proper objection under Evidence Code section 352 to the evidence he did not elicit, thus forfeiting the claim. In any event, all of the testimony was admissible because it related to the source of King's,

Conner's, and Gutierrez' fear of testifying. Finally, even if the trial court erred, the error was not prejudicial.

A. *Initial Discussion of Gang Evidence*

Appellant contends that before trial, the court ruled gang evidence admissible, thus rendering any objection by defense counsel futile. Appellant misconstrues the record.

Before trial, outside the jury's presence, the prosecutor represented that she did not intend to present evidence of appellant's gang affiliation. The court instructed the prosecutor to address the issue at sidebar if her plan changed. The court observed, "just kind of thinking out loud, we don't know what the witnesses are going to say, and if for some reason the witness attributes the defendant's alleged gang membership [as a reason for] them being frightened or not testifying, or whatnot, then potentially it could become relevant. But I'd like to address that outside the presence of the jury before we get to that point." Defense counsel asked for a ruling precluding the prosecutor from eliciting any testimony that a witness might be afraid to testify because of gang-related threats. The court declined to make such a blanket ruling, and explained: "That's relevant . . . because it goes to the state of mind of the witness and their attitude toward testifying. . . . I don't know what these witnesses are going to say. . . . [A]t this point it's not coming in, but it could very well be . . . witnesses change their stories or . . . have been reluctant. . . . I just want to be as clear as I can with regard to both of those situations."

Contrary to appellant's interpretation, the court's comments did not constitute a blanket ruling that gang evidence was admissible. The court simply explained that gang evidence might become relevant if a witness was reluctant or afraid to testify because of defendant's gang membership. That is an accurate statement of the law. (*People v. Merriman* (2014) 60 Cal.4th 1, 85-86 (*Merriman*) [evidence that witness fears retaliation for testifying, even if the absence of hesitation to answer questions, relevant to witness' credibility]; *People v. Valdez* (2012) 55 Cal.4th 82, 135 (*Valdez*) [witness' fear of testifying, and explanation of the basis for that fear, is relevant to credibility and trial court has discretion to admit such evidence]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368 (*Olguin*) [evidence of gang-related threat made by third party to witness admissible as relevant to witness' state of mind].) The court also contemplated a hearing at side bar before such evidence was admitted. Thus, nothing the court said obviated the necessity of an objection by defense counsel to testimony concerning gangs in general or defendant's gang membership in particular.[4]

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[4] In his reply brief, appellant contends that trial counsel objected on relevance grounds to the specific gang evidence challenged on appeal, and that, given the potential prejudice from such evidence, such an objection should have alerted the court to evaluate the evidence under Evidence Code section 352. However, as we show in our summary of the record in our discussion of the challenged testimony, *infra,* no such objection on the ground of relevance occurred. Indeed, none of the pages of the reporter's transcript cited by appellant in support of his argument reveals any relevance objection to the testimony he is challenging on appeal. The only objection by defense counsel on the ground of relevance that appears in appellant's citations occurred when Conner was asked why Reggie Holmes was no longer living with her. The court sustained the objection. Thus, even assuming that an

B. *King's Testimony*

On direct examination, the prosecutor asked King if someone had come to Conner's house the previous day and threatened him about testifying. He denied both that such an incident occurred and that he told Conner about it. He then testified that he had told Conner "something similar," in the course of which he volunteered that he had belonged to a gang. He explained: "I was walking down the street, and *I'm from a gang over there*, and . . . they just told me like, 'You can't be doing shit like that.'" (Italics added.) "They" tried to dissuade him from testifying and threatened punishment. He "felt like [his] life was in danger."

Defense counsel did not object to King's reference to his gang membership. On cross-examination, he asked King what gang he was affiliated with. The prosecutor objected on the ground of relevance. The court overruled the objection, and added that the prosecutor could "follow up with whatever questions you need to." Under resumed cross-examination by defense counsel, King then testified that he belonged to the Front Street gang for about a year, that the gang claimed McKinley and East 103rd Street, that Front Street's only enemy gang was Back

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objection on relevance grounds would have preserved a claim under Evidence Codes section 352 [but see *People v. Williams* (1997) 16 Cal.4th 153, 209 (*Williams*) [evidence on relevance grounds insufficient to preserve Evidence Code § 352 objection on the ground of prejudice]], no such objection was made to the evidence at issue. Appellant's contention to the contrary is based on a misstatement of the record.

Street, that King had friends in other gangs but not Back Street, and that "you could expect anything from Back Street."

After a break in defense counsel's cross-examination, outside the jury's presence, the court said to the prosecutor, "I'm assuming . . . you're going to be asking about the defendant's gang affiliation [on redirect examination]?" The prosecutor said she would. Defense counsel stated, "No objection . . . but I would ask for discovery" regarding defendant's gang affiliation. The court explained: "Well, it goes to the state of mind of this witness, what he believes the defendant to be and the effect of other gang members telling him not to testify. And you [defense counsel] brought up the fact that he's a gang member or associate. That makes it even more of a rule. So you're the one that mentioned the gang stuff first. So I think at this point it's fair game."

When defense counsel then resumed his cross-examination, he elicited testimony from King that appellant had not jumped him into King's gang, that appellant was not a member of King's gang, that appellant was an active gang member but King did not know "where he is from," and that King and appellant grew up together so it would not matter if appellant belonged to a rival gang. Defense counsel also elicited testimony that the threat King had received was made by members of King's own gang.

On redirect examination, the prosecutor elicited testimony that King joined Front Street after the shooting, because most of his friends belonged. King knew that appellant called himself "Chapo."

Thus, as the record shows, in describing a threat he received about testifying, King volunteered that he was a gang member.

Defense counsel did not object. Indeed, on cross-examination, over the prosecutor's objection, defense counsel elicited the name of King's gang, and then asked, among other things, about the gang's territory and enemies. By the time of the break in his cross-examination, defense counsel's questioning of King regarding his gang membership raised a legitimate issue concerning appellant's gang membership and whether his gang was behind the threats to King. It also raised the issue whether appellant's gang affiliation supplied a motive for the incident of July 19, 2014, when appellant drove his black BMW next to King and his friends, and yelled, "You can't stop Chapo!" It further raised the issue whether appellant might have had a gang-related motive when he shot at Gutierrez, King and others.

Thus, during the break in defense counsel's examination, the court quite properly confirmed whether on redirect examination the prosecutor was "going to be asking about the defendant's gang affiliation." Defense counsel expressly stated that he had "[n]o objection," but asked for discovery. The court commented that given defense counsel's cross-examination, evidence of defendant's gang membership was "fair game."

When defense counsel then resumed his cross-examination, he again delved into the subject of gang membership, eliciting testimony from King that, among other things, appellant was an active gang member but King did not know "where he is from," and that the threat King had received was made by members of King's own gang. On redirect examination, the prosecutor elicited testimony that King knew that appellant called himself "Chapo," which was the name appellant

called out when he accosted King on the street and called out, "You can't stop Chapo!"

Given the manner in which King's off-hand reference to his gang membership was exploited by defense counsel, and given his express failure to object to evidence concerning appellant's gang membership, appellant cannot complain on appeal about any of the references to gangs in King's testimony. In any event, evidence that King was threatened by members of his own gang, Front Street, was admissible to his credibility (*Olguin, supra,* 31 Cal.App.4th at p. 1368),[5] and his testimony exonerating appellant of participating in the threat mitigated any potential prejudice that might have flowed from his testimony that appellant was an active gang member.

C. *Conner's Testimony*

After appellant attempted to run Conner over with his car on July 21, 2014, Conner called 911. A recording of the call was played for the jury. In the call, Conner said that "yesterday he [appellant] came with his friends threatening us. And I did call the Detective. He supposed to

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[5] We note that Conner testified that King had told her that gang members had threatened to kill him if he testified. The court gave a limiting instruction during Conner's testimony concerning threats made to King: "Ladies and gentlemen, with regard to any kind of perceived threat or the effect that it had on Mr. King, you can use this evidence only as it has relevance, if any, as to the witness' state of mind; his attitude; his actions; his bias; his prejudice, lack or presence thereof. So it actually goes to the witness' state of mind and the effect that it had on him. It's not really offered for the truth; it's offered as to how — the effect on the listener, Mr. King." In his briefing on appeal, appellant does not mention this testimony as a basis for his claim that the trial court erred in admitting gang evidence.

be helping us move; however in the meantime he keeps harassing us." The prosecutor asked what Conner meant by those comments. She responded that "he [appellant] had brought the Front Streets over to our house." Defense counsel objected on the ground of speculation.

After the objection, the court allowed the prosecutor to lay a foundation. Conner then testified that she knew appellant to be a member of the Avalon Crips. Defense counsel did not object.

Next, Conner testified that she thought Front Street and the Avalon Crips did business together. Defense counsel objected on the ground of speculation. The court allowed the prosecutor to clarify, and Conner testified that she "personally observed it" because appellant used to come to her house with marijuana that he took from "Snoop," whom she did know to be a member of a gang. Defense counsel did not object.

Conner then testified that in the threatening incident she referred to in her 911 call, she felt threatened because appellant appeared at her house with Front Street gang members, one of whom was Reggie Holmes, who lived with her and whom she knew to be a Front Street gang member. Although defense counsel objected on the ground of speculation when Conner testified that defendant "brought all of those guys" (the court did not rule), he did not object on any other ground.

During a sidebar conference, the court cautioned the prosecutor about asking questions that called on Conner to speculate. Defense counsel observed that if Front Street members came to Conner's house, "I don't think that's a correlation [with] my client." He did not pose a specific objection.

The prosecutor then elicited testimony from Conner that appellant appeared at her house with Reggie Holmes and another man. They arrived in two carloads. Conner stepped outside, but Gutierrez was also outside and he "dealt with it." Defense counsel posed no objection.

Based on our review of the record, appellant's claim on appeal that the trial court erred under Evidence Code section 352 in admitting Conner's testimony discussing gangs fails. First, defense counsel failed to object to much of the evidence, and when he did object, he did not do so on the ground that admission would violate Evidence Code section 352. Thus, appellant's claim that admission of Conner's testimony discussing gangs was inadmissible under Evidence Code section 352 is forfeited. (*Williams, supra,* 16 Cal.4th at p. 206 [failure to make timely and specific objection under Evid. Code, § 352 forfeits the claim on appeal].) Second, in any event, all of the testimony was admissible. As our Supreme Court has made clear, "'[e]vidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness . . . [as is an] explanation of the basis for the witness's fear . . . .' [Citations.] 'A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony. . . . [¶] Regardless of [the source of the threat], the jury would be entitled to evaluate the witness's testimony knowing it was given under such circumstances.' [Citation.]" (*Merriman, supra,* 60 Cal.4th at p. 86.) In short, the substance of Conner's testimony was that she felt threatened because appellant, a member of the Avalon Crips, appeared at her house with members of Front Street, a gang that associated with the Avalon Crips. That

testimony was undoubtedly admissible as to Conner's credibility. It was also admissible as to appellant's consciousness of guilt. (*People v. Valdez, supra,* 55 Cal.4th at p. 135, fn. 32: "Evidence of efforts to intimidate a witness is also admissible to show a defendant's consciousness of guilt if there is evidence the defendant authorized or acquiesced in the efforts"]; see also *People v. Hannon* (1977) 19 Cal.3d 588, 598–600, overruled on another ground by *People v. Martinez* (2000) 22 Cal.4th 750, 762.)

D. *Gutierrez' Testimony*

On direct examination, Gutierrez admitted that he was reluctant to testify at trial. He also admitted that he appeared at the preliminary hearing because the police said they would arrest him if he did not. At the preliminary hearing, he answered "I don't remember" to almost every question. He did so because he was afraid of retaliation, and threats had already been made against him and his family.

Although defense counsel objected at times on the ground that Gutierrez' testimony was becoming a narrative, and that it was non-responsive, he did not object on the ground of Evidence Code section 352. In his cross-examination of Gutierrez, defense counsel explored Gutierrez' testimony at the preliminary hearing and his fear of testifying.

On redirect examination, Gutierrez testified that "it's an unwritten rule. . . . You just don't come to court." He testified that he was referring to the gang rule that "snitches get stitches." Defense counsel did not object to this testimony.

On this record, any objection to these portions of Gutierrez' testimony on the ground of Evidence Code section 352 was forfeited by failure to make specific, timely objection. (*Williams, supra,* 16 Cal.4th at p. 206.) In any event, the testimony was admissible as relevant to Gutierrez' credibility. (*Merriman, supra,* 60 Cal.4th at pp. 85-86; *Valdez, supra,* 55 Cal.4th at p. 135; *Olguin, supra,* 31 Cal.App.4th at p. 1368.)

E. *DAI Felix's Testimony*

In his testimony, King denied that after the shooting, he told DAI Felix that Daisy Ramirez had been driving past Conner's house. The prosecutor called DAI Felix to impeach King. DAI Felix testified that at the end of his interview of King, King said that he was afraid because appellant's girlfriend Daisy had been driving in front of the house several times. Defense counsel did not object. DAI Felix then testified that King told him he was concerned because he believed that "Daisy was somehow mixed in with either the Mexican Mafia or a drug cartel." Defense counsel objected to this testimony on the ground of hearsay and speculation. He did not object on the ground of Evidence Code section 352. The trial court overruled the objection and immediately gave a limiting instruction: "Ladies and gentlemen, that testimony is not offered for the truth of what he just stated. It's only offered to the effect on Mr. King and his state of mind. Same as the admonition I had given you before. It's not offered for the truth. It's just for the effect of how Mr. King might have believed it and his attitude towards testifying, et cetera, if it has any relevance. It's all up to you to decide."

Because defense counsel failed to make a specific, timely objection under Evidence Code section 352 to this testimony, that claim is forfeited on appeal. (*Williams, supra,* 16 Cal.4th at p. 206.) In any event, the testimony was admissible as a prior inconsistent statement of King, and as evidence of his state of mind relevant to his credibility as a witness. (*Merriman, supra,* 60 Cal.4th at pp. 85-86; *Valdez, supra,* 55 Cal.4th at p. 135; *Olguin, supra,* 31 Cal.App.4th at p. 1368.)

DAI Felix also testified that when he transported King to court to testify, King was "extremely nervous, almost agitated . . . very concerned for his safety, very concerned that someone would see him being picked up in a police car." He also testified that when King got into the car, he was wearing a hoodie to conceal his face. Defense counsel objected to this testimony as hearsay and cumulative. He did not object on the ground of Evidence Code section 352.

After this testimony, the prosecutor ceased cross-examination. The first question defense counsel asked DAI Felix on cross-examination was whether King had told him he was a member of Front Street. He had not.

On this record, appellant has forfeited any claim that DAI Felix's testimony concerning the extent of and reason for King's fear was inadmissible under Evidence Code section 352 by failing to make a specific, timely objection on that ground. (*Williams, supra,* 16 Cal.4th at p. 206.) Regardless, the court did not abuse its discretion in allowing DAI Felix to testify to these matters. (*Valdez, supra,* 55 Cal.4th at p. 135.)

F. *Prejudice*

Even if the trial court erroneously admitted any of the testimony containing gang references, it is not reasonably probable that a different result would have been reached. (See *People v. Mendoza* (2011) 52 Cal.4th 1056, 1093 [applying *Watson* to erroneous admission of evidence].) The references to appellant's gang affiliation were very limited. King testified only that appellant was an active gang member, and Conner stated that she believed appellant was in the Avalon Crips. There was no testimony concerning violent crimes committed by gangs or any unrelated gang activity by appellant. Moreover, that appellant was in a gang was not particularly inflammatory, given that one of the key witnesses in the case, King, was also a gang member. We note as well that the trial court gave limiting instructions concerning threats King may have received, including after DAI Felix's testimony that King was afraid because he believed Daisy had ties to the Mexican Mafia or a drug cartel. Finally, on count 2, the jury acquitted appellant of the charged attempted murder of Conner, finding him guilty instead of the lesser offense of assault with a deadly weapon. On count 2, although the jury convicted appellant of the attempted murder of Gutierrez, it found not true the allegation that the crime was deliberate and premeditated. Thus, the verdicts suggest that the jury carefully evaluated the evidence, and was not swayed in that evaluation by references to gangs. We conclude that even if all of the evidence challenged by appellant was inadmissible, the error was not prejudicial. (*Ibid.*)

III. *Abstract of Judgment*

As to count 2, assault with a deadly weapon on Conner, the clerk's minute order of the sentencing and the abstract of judgment erroneously reflect a true finding on a firearm enhancement under section 12022.53, subdivision (b). Appellant contends the minute order and abstract of judgment should be corrected to reflect that the enhancement found true as to count 2 was for a violation of section 12022, subdivision (b)(1), personal use of a deadly weapon, i.e., the black BMW. Respondent agrees, as do we.

Thus, the clerk's minute order regarding the sentence and the abstract of judgment must be corrected to reflect on count 2 a true finding on the section 12022, subdivision (b)(1) enhancement. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186 [appellate court may order correction of clerical errors in abstract of judgment at any time].) Despite the errors in the minute order and abstract of judgment in referring to section 12022.53, subdivision (b) in count 2 rather than section 12022, subdivision (b), the trial court imposed sentence in accordance with section 12022, subdivision (b)(1). The error is solely in recording the oral sentence pronounced. Thus, there will be no change in the sentence.

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DISPOSITION

The clerk of the superior court is ordered to prepare an amended minute order of sentencing and amended abstract of judgment that reflects on count 2 a true finding under section 12022, subdivision (b)(1), rather than section 12022.53, subdivision (b). The clerk shall forward the amended abstract to the Department of Corrections and Rehabilitation. There is no change in the sentence. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.