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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. EFREN PARRA et al., Defendants and Appellants.	2d Crim. No. B282502 (Super. Ct. No. 2013037256) (Ventura County)

A jury convicted appellants Efren Parra and Jose Luis Villalobos of street terrorism (Pen. Code, § 186.22, subd. (a);[1] count 1); second degree robbery (§ 211; count 2), and attempted second degree robbery (§§ 664, 211; count 3). As to counts 2 and 3, the jury found that appellants committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

[1] All statutory references are to the Penal Code unless otherwise stated.

The trial court found that both appellants had suffered a prior serious felony (§ 667, subd. (a)(1)), and a prior serious or violent felony (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It further found that Villalobos had served a prior prison term (§ 667.5, subd. (b).) Appellants were sentenced to terms of 21 years in state prison.

Appellants contend the trial court committed reversible error by denying their motion for mistrial after the prosecution's gang expert disclosed a former co-defendant's guilty plea. They also argue that additional punishment based on the court's finding of prior convictions must be vacated because the court discharged the jury before asking the jury to tender verdicts on the "unbifurcated" prior conviction allegations. In addition, Parra contends the court abused its discretion by denying his motion to sever his trial from that of his co-defendant, Villalobos. He also claims the court erred by refusing to instruct the jury on lesser included offenses. We affirm.

FACTS

At approximately 12:30 a.m. on December 6, 2013, Andrew Padilla and Adrian De Los Reyes left a 7-Eleven in Oxnard. At that time, an Oxnard police officer was speaking to someone in a truck in the store's parking lot.

As Padilla and De Los Reyes were walking away from the store, a vehicle pulled up behind them. According to Padilla, three Hispanic males got out of the vehicle. One of the men asked Padilla and De Los Reyes, "Where are you from?" De Los Reyes replied, "I don't bang."

Acting as if he was concealing a gun, Villalobos told Padilla to empty his pockets or he would "pop" him. Padilla was "scared," but informed the men there was a police officer down the street.

After Villalobos "punched" Padilla in the eye, Padilla ran toward the police officer without surrendering any property.

De Los Reyes testified that four men got out of the vehicle, including appellants. After the men told him to empty his pockets, De Los Reyes threw his cell phone, two lighters and a folding knife on the ground. Villalobos and Parra knocked De Los Reyes to the ground and "started kicking [him] on [his] back and punching [him] and stomping." As the men ran back to their vehicle, one of them yelled, "South Side."

Padilla ran to Oxnard Police Officer Jesus Sedeno, who was still parked at the 7-Eleven. Padilla told the officer that he and De Los Reyes had just been robbed. He pointed toward De Los Reyes, who was on the ground being kicked and punched by three men. Officer Sedeno then saw the taillights from an Acura Integra as it drove away. The officer drove toward the robbery site.

De Los Reyes told Officer Sedeno that he had just been robbed and pointed in the direction of the perpetrators' vehicle. Officer Sedeno pursued the vehicle and pulled it over. When the vehicle stopped, one man opened the front passenger door and ran away. Three men remained in the vehicle while Officer Sedeno waited for backup. When additional officers arrived, Parra, who was driving, got out of the vehicle. Villalobos and Salvador Brandon Avalos also got out of the vehicle.

De Los Reyes identified both appellants at the scene of the traffic stop. Padilla identified only Villalobos. Oxnard Police Officer Andrew Pinkstaff recovered De Los Reyes's cell phone and two lighters from inside the vehicle. De Los Reyes found his knife on the ground. Padilla told police that Parra was the driver of the vehicle and one of the men who assaulted De Los Reyes.

Oxnard Police Officer Jess Aragon was the prosecution's gang expert. He testified that the Southside Chiques criminal street gang, which has approximately 250 members, claims the entire southern portion of Oxnard, and primarily dominates the area around Southwinds Park. To advance in the gang, members must be "active" by "putting in work" to benefit the gang. Such work includes committing crimes to instill fear in the community. A member who fails to do so will not advance or remain in good standing with the gang. The gang's primary activities include stealing vehicles and committing robberies, stabbings, shootings and felony assaults.

The predicate offenses consisted of a 2007 assault with a deadly weapon committed by Villalobos, a 2008 attempted robbery committed by Southside Chiques gang member David Varela, a 2008 first degree residential burglary committed by Parra, a 2010 second degree robbery committed by Southside Chiques gang member Enrique Castellanos, a 2013 second degree robbery committed by Southside Chiques gang member Ruben Correa, and a 2013 unlawful driving or taking a vehicle committed by Southside Chiques gang member Esteban Lopez.

Based on contacts with Villalobos and Parra, their associations with other Southside Chiques gang members, their gang clothing and Villalobos's gang tattoos, Officer Aragon opined that both men are Southside Chiques gang members.

DISCUSSION

Denial of Motion for Mistrial

Officer Aragon testified that former co-defendant Avalos is a member of the Southside Chiques criminal street gang. Officer Aragon based his opinion "on the review of [Avalos's] gang packet, . . . his [field identification (FI)] card, his involved reports,

and his subsequent pleading guilty in this case." Appellants did not object to this testimony at that time. After the parties rested, however, appellants moved for a mistrial. They claimed they were prejudiced by the statement that Avalos had pled guilty in this case.

The trial court denied the motion, opting instead to give a limiting instruction drafted by Parra's counsel: "You have heard evidence that Salvador Brandon Avalos pled guilty before trial. You should not speculate as to the specific charge or charges to which he pled guilty, the sentence he received or was facing, or any aspect of this plea. You may consider that evidence only against him, not against any other defendant."[2]

A motion for mistrial may be granted only when error has occurred that has resulted in incurable prejudice. Appellants contend the limiting instruction did not cure the prejudice caused by the admission of Avalos's guilty plea. We must presume, however, that jurors follow the trial court's instructions. (*People v. Waidla* (2000) 22 Cal.4th 690, 725 ["The presumption is that limiting instructions are followed by the jury"]; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].)

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[2] The trial court also instructed the jury with CALCRIM No. 373: "The evidence shows that other persons may have been involved in the commission of the crimes charged against these defendants. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether those persons have been or will be prosecuted. Your duty is to decide whether the defendants on trial here committed the crimes charged."

Whether it would be impossible for a jury to follow a limiting instruction is determined by the circumstances of each case. (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 599.) Here, the trial court found that the limiting instruction ameliorated any potential damage.

Moreover, "[t]he general rule is that evidence regarding the guilty plea or conviction of a coparticipant in a crime is not admissible to prove *guilt* of a defendant. [Citations.]" (*People v. Neely* (2009) 176 Cal.App.4th 787, 795, italics added.) Officer Aragon did not offer evidence of Avalos's guilty plea to prove appellants' guilt. It was offered to show that Avalos is a Southside Chiques gang member. The trial court's limiting instruction told the jury not to consider the evidence against appellants.

Appellants argue that the admission of Avalos's guilty plea violated their right of confrontation under the *Aranda-Bruton* rule. (*People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).) "'"*Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of [the other] defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" [Citation.]'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 869, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56, 104.)

Appellants did not move for a mistrial based on the *Aranda-Bruton* rule. In the absence of an objection on that basis, appellants forfeited the issue on appeal. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Chaney* (2007) 148 Cal.App.4th

772, 779; see *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 313, fn. 3 [right to confrontation may be waived by failing to object to offending evidence].)

In any event, even if we assume the admission of Avalos's guilty plea violated appellants' confrontation rights, the error was harmless beyond a reasonable doubt because overwhelming evidence established that they committed the charged offenses. (See *People v. Jennings* (2010) 50 Cal.4th 616, 652 [confrontation clause violation not reversible if harmless beyond a reasonable doubt].) Officer Sedeno was in the vicinity of the robbery as it was occurring. After speaking with the two victims, Officer Sedeno immediately followed and apprehended the perpetrators. De Los Reyes identified both appellants as his assailants, and Padilla identified Villalobos as his assailant. In addition, De Los Reyes's cell phone was recovered from the vehicle Parra was driving. The perpetrators' gang affiliation became apparent when one of the men yelled "South Side" as they were leaving the robbery site. Under these circumstances, the trial court did not abuse its discretion when it denied appellants' motion for mistrial.

Denial of Motion to Dismiss Prior Conviction Allegations

After the jury was discharged, the prosecutor raised the issue of the prior convictions. He said, "I think the case was bifurcated. We only allowed [the defendants' prior convictions] in for the limited purpose of [proving] criminal street gang." Parra's counsel was "not entirely certain if we bifurcated," but argued that if there was no bifurcation, the trial court lacked authority to proceed on the prior conviction allegations because the jury had been discharged. Villalobos's counsel could not recall any

discussion regarding bifurcation. Both appellants moved to dismiss the prior conviction allegations.

Upon review of the record, the trial court denied the motion to dismiss. It concluded that while it was not absolutely clear that appellants had requested bifurcation, it was implicit from the record. The court found, based on the conduct of defense counsel, that the prosecutor and the court were justified in believing that appellants wished to bifurcate trial of the prior conviction allegations. It explained that defense counsel (1) approved the jury instructions, which did not present the issue of the priors to the jury, (2) objected to the admission of evidence of appellants' prior convictions as predicate offenses and (3) submitted limiting instructions stating that the admission of the prior-conviction evidence was to be considered for no purpose other than establishing whether the Southside Chiques is a criminal street gang. The court noted that the defense's objections "would be meaningless if the truth of those priors were to be determined by the jury and therefore is, if not an affirmative assertion of a desire to bifurcate, certainly a waiver and estoppel of any prior position."

Appellants contend the trial court erred by denying the motion to dismiss the prior conviction allegations. Although the court violated sections 1025 and 1164 by discharging the jury before the jurors had determined the truth of the alleged prior convictions, appellants' failure to object to the discharge of the jury precludes their obtaining appellate relief on the basis of this statutory error. (*People v. Saunders* (1993) 5 Cal.4th 580, 589 (*Saunders*); *People v. Vera* (1997) 15 Cal.4th 269, 277 (*Vera*).)

Section 1025, subdivision (b) provides that when a defendant has been charged with both a substantive offense and

a prior conviction allegation and does not admit the prior conviction, "the question of whether or not the defendant has suffered the prior conviction shall be tried by the jury that tries the issue upon the plea of not guilty . . . or by the court if a jury is waived." Section 1164, in turn, prohibits the trial court from discharging the jury until it has determined the truth of any alleged prior convictions. This right to have a jury determine the truth of a prior conviction allegation is derived strictly from statute. (*Vera*, *supra*, 15 Cal.4th at p. 277.)

Ordinarily, an appellate court will not consider a claim of error if an objection could have been made in the trial court. (*Saunders*, *supra*, 5 Cal.4th at pp. 589-590.) In *Saunders,* the Supreme Court applied this rule of forfeiture to a violation of sections 1025 and 1164. (*Saunders*, *supra*, 5 Cal.4th at pp. 589-592.) The court noted that "although sections 1025 and 1164 prohibit a trial court from discharging a jury until it has determined the truth of any alleged prior convictions, a defendant may not complain on appeal of a departure from this procedural requirement unless the error has been brought to the attention of the trial court by means of a timely and specific objection." (*Id.* at p. 590.) In so ruling, the court emphasized the strong policy reasons for enforcing the forfeiture rule in this context, explaining that by enacting sections 1025 and 1164 the Legislature did not intend to allow the defense to "create a procedural trap that would enable defense counsel to ambush the trial judge and deprive the People of their statutory right" to prove the truth of the prior conviction allegations. (*Saunders*, at pp. 590-591; accord *Vera*, *supra*, 15 Cal.4th at p. 281.)

It is true that in both *Saunders*, *supra*, 5 Cal.4th 580 and *Vera*, *supra*, 15 Cal.4th 269, it was clear that trial of the prior

conviction allegations had been bifurcated from the jury trial on the substantive offenses. (See *Saunders*, at p. 586; *Vera*, at pp. 272-273.) Where, as here, the trial court was mistaken in its belief that bifurcation had been ordered, we nonetheless conclude that the rationale of *Saunders* and *Vera* applies.

Section 1025, subdivision (b) does not give the defendant an unqualified right to a unitary trial -- that is, a trial at which both the substantive charges and the prior conviction allegations are determined at the same time. The court itself, through the exercise of its general power to control the conduct of a criminal trial under section 1044, may order the determination of the truth of a prior conviction allegation in a separate proceeding after the jury has returned a verdict of guilty on the charged offense. (*People v. Calderon* (1994) 9 Cal.4th 69, 75.) Indeed, even if no prior convictions have been alleged, following a verdict on substantive charges the prosecution may move to amend the information or indictment to allege prior felony convictions, provided the jury has not been discharged. (Compare *People v. Valladoli* (1996) 13 Cal.4th 590, 601 [permitting post verdict, but predischarge, amendment of information to charge prior felony convictions] with *People v. Tindall* (2000) 24 Cal.4th 767, 774-775 [postdischarge amendment improper].) Similarly, the court has broad discretion to reopen a criminal case to permit the introduction of additional evidence (see *People v. Ayala* (2000) 23 Cal.4th 225, 282; *People v. Marshall* (1996) 13 Cal.4th 799, 836), and may even reconvene the jury prior to its discharge to correct an incomplete or irregular verdict. (See *People v. Cain* (1995) 10 Cal.4th 1, 54.) In each such case, even though the defendant has not requested a bifurcated trial, in practical effect that is what occurs.

Nothing in the reasoning of *Saunders* or *Vera* suggests that if, prior to commencement of a subsequent trial on prior conviction allegations, the trial court were to discharge the original jury without objection from the defendant, the defendant would be entitled to appellate relief on the basis of statutory error. As the Supreme Court explained in *Saunders*, the forfeiture rule "does not require the defense to remind the prosecution to present its evidence in a timely manner, but merely requires the defense to object to the discharge of the jury in the event it wishes to assert its statutory right to have the same jury that found defendant guilty also determine the truth of the prior conviction allegations." (*Saunders*, *supra*, 5 Cal.4th at p. 591, fn. 7.)

Denial of Parra's Motion to Sever Trial

Parra contends the trial court abused its discretion by denying his motion to sever his trial from co-defendant Villalobos's trial. We disagree.

"Authorization to hold a joint trial of two or more defendants is provided by section 1098, which states . . . that '[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, *they must be tried jointly, unless the court order separate trials*.' (Italics added.) This law thus establishes a legislative preference for joint trials, subject to a trial court's broad discretion to order severance." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1079.)

"When defendants are charged with having committed 'common crimes involving common events and victims,' as here, the court is presented with a "'classic case"' for a joint trial. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40.) "'Under . . . section 1098, a trial court must order a joint trial

as the "rule" and may order separate trials only as an "exception.'" [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 726, italics omitted.)

Here, both appellants were charged identically, based on common crimes and involving common events and victims. It was therefore a "'classic' case for joint trial." (*People v. Keenan* (1988) 46 Cal.3d 478, 499-500.) As such, "'the difficulty of showing prejudice from denial of severance is so great that the courts almost invariably reject the claim of abuse of discretion.'" (*People v. Matson* (1974) 13 Cal.3d 35, 39.) We conclude Parra has shown neither prejudice nor the "gross unfairness" required for a due process claim. (*People v. Cleveland*, *supra*, 32 Cal.4th at p. 726; *People v. Coffman and Marlow*, *sup*ra, 34 Cal.4th at p. 41.)

Parra contends that Villalobos's counsel elicited testimony that severely undermined his defense that he never left the vehicle. This defense was consistent with Padilla's trial testimony that only three people were directly involved in the robbery. On cross-examination, Villalobos's counsel asked Officer Sedeno a question which caused the officer to testify that, after the robbery, Padilla told him that four men were involved in the robbery. In addition, Parra complains he was prejudiced when Villalobos's counsel asked Padilla if the vehicle's headlights were on. Padilla replied, "No." Parra claims there was no tactical reason for Villalobos's counsel to ask this question, and that the negative answer was particularly harmful to Parra as the driver of the vehicle.

As the People point out, a joint trial is not unfair simply because the codefendants "have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus

helpful to the prosecution. [Citations.]" (*People v. Turner* (1984) 37 Cal.3d 302, 313, overruled on other grounds by *People v. Anderson* (1987) 43 Cal.3d 1104, 1115, 1149-1150.) If the likelihood of antagonistic testimony alone required separate trials, they "would appear to be mandatory in almost every case." (*Id.* at pp. 312-313.)

In this case, however, the testimony elicited by Villalobos's counsel was not particularly damaging given the totality of the evidence. De Los Reyes testified there were four assailants, and Padilla's confirmation of that fact to Officer Sedeno was cumulative and hardly prejudicial to Parra. Moreover, whether there were three or four assailants is irrelevant because De Los Reyes identified Parra as one of the men who robbed and assaulted him.

Villalobos's counsel's question about the vehicle's lights also was not prejudicial. The record reflects that a vehicle approached Padilla and De Los Reyes. Three or four men, including appellants, asked Padilla and De Los Reyes were they were from, demanded that they empty their pockets, and physically attacked the victims before fleeing in the vehicle. Parra was the driver of the vehicle that was stopped shortly thereafter, and officers recovered De Los Reyes's cell phone from the vehicle. De Los Reyes identified Parra as one of his assailants. Because there was sufficient independent evidence of Parra's guilt, the alleged conflict between the two co-defendants did not itself lead to Parra's convictions. (See *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 153.) Consequently, Parra has not demonstrated that severance was necessary because he received a "grossly unfair" trial as a result of Villalobos's counsel's questions to Padilla and Officer Sedeno.

Nor has Parra shown that he received a grossly unfair trial because his counsel was not permitted to ask the gang expert whether Villalobos had been served with a gang injunction. The record confirms that Villalobos was served with a gang injunction some two years after the robbery occurred, and that the trial court excluded the evidence under Evidence Code section 352 because there was "no valid purpose in allowing that in." Parra has not established that this was an abuse of discretion. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 929-930.)

Denial of Instruction on Lesser Included Offenses

Parra contends the trial court erred by failing to instruct the jury on the lesser included offenses of assault and battery. The People respond that neither assault nor battery is a lesser included offense of robbery and attempted robbery, but we need not reach this issue. In the absence of substantial evidence that either appellant committed an assault or a battery but not a robbery or attempted robbery, the court was not required to instruct on assault or battery. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008; see *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [court need not instruct on lesser included offense "'where the evidence establishes if the defendant was guilty at all, he was guilty of the higher offense'"].)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The record establishes that appellants and one or two other men approached Padilla and De Los Reyes just after midnight on a dark street. The men asked the victims where they are from, and then instructed them to empty their pockets. Villalobos acted as if he was holding a gun under his jacket, and

told Padilla he would "pop" him if he did not empty his pockets. When Padilla did not comply, Villalobos punched him in the eye. After Padilla ran off, De Los Reyes emptied his pockets as instructed, and appellants were caught with his cell phone. Appellants' behavior is consistent with the intent to steal by force or fear and does not allow for a finding that they committed only assault or battery. Thus, the trial court was under no obligation to give the jury the lesser included offense instructions. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1008; *People v. Peregrina-Larios*, *supra*, 22 Cal.App.4th at p. 1524.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David R. Worley, Judge
Superior Court County of Ventura

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