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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LESTER PALMER et al., Defendants and Appellants.	B232546 (Los Angeles County Super. Ct. No. TA111683)

APPEAL from a judgments of the Superior Court of Los Angeles County. Kelvin D. Flier, Judge. Affirmed in part, vacated in part and remanded.

Shafer & Associates, Mark A. Shafer and Nicholas B. Grossman for Defendant and Appellant Lester Palmer.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Donald Hubbard.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Lester Palmer and Donald Hubbard appeal from their respective convictions for attempted murder. First, they argue that the trial court committed prejudicial error by not trying each defendant separately because the case against Palmer was weaker than the case against Hubbard. Second, they argue that the trial court committed prejudicial error in admitting the gun that was found in the vehicle in which they were apprehended because the gun was not the same caliber gun as the one used in the commission of the attempted murders. Third, they argue that the field show-up in which a witness identified Hubbard as the shooter was improperly admitted by the trial court. Fourth, they assert, Detective Arias' testimony regarding a witness' identification of Hubbard and Palmer was improperly admitted at trial because the prosecution did not provide this information to appellants in advance of trial. In addition, Hubbard separately appeals the trial court's denial of his request to dismiss one of his prior three strikes and the trial court's ruling on his sentencing based on a misinterpretation of Penal Code section 667, subdivisions (c)(6)-(7).[1] As we shall explain fully below, only Hubbard's claim with respect section 667, subdivisions (c)(6)-(7) requires remand.

FACTUAL AND PROCEDURAL BACKGROUND

Testimony Regarding the Shooting

On April 7, 2010, around 4:30 p.m., Robert Leflore and Johnny Smith stood outside of their grandmother's house located on Caress Avenue near Pauline Street. Sheila Barrows testified that she was driving on Caress Avenue between Pauline and Marcelle at the time. Barrows was driving north on Caress when she heard the gunshots behind her, and through her rearview mirror she saw Smith and Leflore running away from the shooting. When Barrows saw this, she made a U-turn. She also saw two vehicles, a BMW and a Cadillac Escalade parked side-by-side. She saw the shooter, a man, about 5 feet, 5 inches tall. She was about 15 to 18 feet away from the shooter when she first saw him. Barrows stated the shooter wore royal blue shirt and jeans. She saw the shooter put a gun into the Escalade and get into the BMW which drove away. She

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1 All references to statute hereinafter are to the Penal Code.

also testified that she got a good look at the shooter's face. In court, Barrows identified Hubbard as the shooter.

When the BMW drove away, Barrows followed the BMW until she saw the car disappear down a driveway. Shortly thereafter, she saw a law enforcement vehicle and stopped to speak with the officer.[2] About five minutes later Detective Anacona escorted Barrows and her passenger to an area near Greenleaf and Long Beach. At that location, Barrows identified the BMW that she had earlier observed flee from the shooting. Hubbard stood nearby; he wore a white t-shirt and red sweat pants.

At trial, Barrows described her identification of Hubbard as:

> Q. So when you went over to Long Beach and Greenleaf, did you understand that you didn't have to pick anybody out if they weren't involved?
>
> A. No, I just picked him out.
>
> Q. But my question is: were you just picking that person because he was with the police there?
>
> A. Oh, no.
>
> Q. Did you understand that you're not just to pick whoever is there?
>
> A. No.
>
> Q. Just if you recognized the person?
>
> A. Yes.
>
> Q. When you saw him out there were you absolutely sure that was him?
>
> A. Yes.

Detective Leonarda Anacona stated that Barrows's identification of Hubbard occurred about eight minutes after the shooting. She also stated that when Barrows identified Hubbard, he was wearing different clothes than from earlier that day.

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[2] She had already called 9-1-1 to report the shooting.

According to Detective Anacona, Barrows did not identify Palmer. Detective Anacona collected twelve 9-millimeter casings from the area where the shooting occurred. She also stated the firearm that was recovered from the vehicle had live rounds in it.

Robert Leflore, one of the victims, also testified at trial. Leflore stated that he wore glasses but he was not wearing glasses that day. Leflore described the shooter as a tall person about 6 feet, 5 inches or 6 feet, 6 inches tall wearing a royal blue shirt with dark skin. Leflore testified that he did not see appellants at the Compton station and that he did not recall identifying Hubbard as the shooter on the day of the shooting. Leflore conceded he would not disclose the identity of the shooter even if he got a good look at the shooter. The other victim, Robert Smith, also testified at trial. He, similar to Barrows and Leflore, testified that the shooter was wearing a royal blue shirt.

Detective Arias also testified about his conversations with Leflore. On the day of the shooting, Leflore was arrested based on an unrelated warrant and was taken to the same facility where Palmer and Hubbard were transported. Upon arrival, as appellants were being removed from a Sheriff's vehicle, Leflore saw them and stated "Those are the guys from Neighborhood, those are the guys that shot at us." The following day Leflore was interviewed, and the interview was recorded. A copy of the interview was provided to all attorneys. In the interview, when asked about the shooting Leflore stated "It was the guys who were at the jail with me, those were the two guys that shot at me." He also stated that he recognized them from school.

At this point in the trial, appellants' attorneys requested the court grant a mistrial because they claimed Leflore's jailhouse identification had not been disclosed in the police report. The court denied the motion for mistrial because the recordings containing the identification had been provided to all counsel. The court also stated that the matter could be dealt with jury instructions and was willing to provide defendants a continuance if necessary.

Detective Arias also testified as to appellants' gang affiliation. He stated that both appellants were a part of the Neighborhood Crips. Hubbard had tattoos associating him to the Neighborhood Crips. He based Palmer's gang membership on Palmer's own

admission, based on contact with Palmer when he was with other members of the Neighborhood Crips, field identification cards and the current case.

Detective Eric Gomez testified regarding appellants' arrest. He stated that he instructed Palmer to put his hands up several times but that Palmer hesitated. He then saw a handgun in the car. The firearm was loaded with .40-caliber ammunition.

The owner of the BMW, Lovely Daniels, also testified and admitted that the BMW used to flee the shooting belonged to her. She stated that she loaned it to Donald Hubbard. Hubbard told Ms. Daniels that he was going to go see Lester Palmer. She also testified that when she got the car back there were jeans in the car, but claimed that she had placed the jeans in the car.

Conviction and Sentencing

The jury found Hubbard to be guilty of the crime of attempted murders of Robert Lefore and Johnny Smith (counts 1 and 2) in violation of section 664/187, subdivision (a) and that he personally used a firearm (a handgun) in the commission of the crime. The jury also found the gang enhancement allegation to be true as per section 186.22, subdivision (b)(1)(c). Hubbard requested the court to exercise its discretion to dismiss a prior but the court denied the motion stating: "I do not think that the prior is remote or old for these purposes. I think his prior performance both while on probation on the matters as well as being on parole is unsatisfactory, and we really didn't have a period of inactivity where he has not been involved in some sort of criminal conduct. So I just don't think this is the type of case which would warrant striking the strikes, so with that understanding, I'm going to deny that request and deny the motion to exercise the court's discretion." Hubbard was sentenced to 70 years to life for count 1 and 65 years to life for count 2. The court stated that under section 667, subdivisions (c)(6)-(7), the sentences were to run consecutively.

The jury also found Palmer guilty of the crime of attempted murders of Robert Lefore and Johnny Smith (counts 1 and 2) in violation of section 664/187, subdivision (a) and that the principal used a firearm (a handgun) in the commission of the crime. The

jury also found the gang enhancement allegation to be true. Palmer was sentenced to 27 years to life for count 1 and 27 years to life for count 2. This appeal followed.

DISCUSSION

I. Appellate Claims Brought by Hubbard and Palmer Jointly

A. Separate Trials

1. Standard of Review

The standard for reviewing an order denying a motion to sever a joint trial is abuse of discretion. (*People v. Price* (1991) 1 Cal.4th 324, 388, superseded by statute on other grounds as stated in *People v. Hinks* (1997) 58 Cal.App.4th 1157, 1161-1165.) Moreover, to establish an abuse of discretion, the "defendant must make a clear showing of prejudice." (*People v. Price, supra,* 1 Cal.4th at p. 388.) Our review of an order denying a severance request is confined to the record before the trial court at the time it rules upon the motion. (*Ibid*.)

2. Motion for Separate Trials

Appellants argue they should have been tried separately. The statute governing joint trials provides as follows:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order a number of the defendants to be tried at one trial, and any number of others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial. (§ 1098.)

When defendants are charged with the same offense, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.' [Citation.]" (*People v. Conerly* (2009) 176 Cal.App.4th 240, 249 citing *People v. Alvarez* (1996) 14 Cal.4th 155, 190; original italics.) One occasion when severance of a joint trial is appropriate is when one codefendant may provide exonerating testimony for another

codefendant. (*People v. Conerly, supra,* 176 Cal.App.4th at p. 250.) The court in *People v. Isenor* (1971) 17 Cal.App.3d 324, 332 set forth the following factors for such a case: "(1) Does the movant desire the testimony of the codefendant; (2) will the testimony be exculpatory; (3) how significant is the testimony; (4) is the court satisfied that the testimony is bona fide; (5) on the basis of the showing at the time of the motion, how strong is the likelihood that, if the motion were granted, the codefendant will testify; and (6) what is the effect of granting in terms of judicial administration and economy? [Citation.]"

Other circumstances where a separate trial may be appropriate include "prejudicial association with codefendant[], likely confusion resulting from evidence on multiple counts, [and] conflicting defenses." (*People v. Massie* (1967) 66 Cal.2d 899, 916-917, fns. omitted; *People v. Letner* (2010) 50 Cal.4th 99, 149-150.) Thus, as a rule, joint defendants must be tried together unless a circumstance arises where severance of the trial is appropriate; however, if a defendant fails to object to the joint trial then the issue may not be first heard on appeal. (*People v. Cornejo* (1979) 92 Cal.App.3d 637, 659; *People v. Kipnis* (1970) 5 Cal.App.3d 980, 987.)

Here, both appellants argue that the trial court committed prejudicial error when it failed to try them separately. Appellants rely on *People v. Marshall* (1997) 15 Cal.4th 1, 27-28 for their argument. In that case the Supreme Court set out a criteria to determine issues of joinder of charges as follows: "(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses; and (4) is any one of the charges a death penalty offense, or does joinder of the charges convert the matter into a capital case." Relying mostly on the third factor, appellants assert that the trial should have ordered separate trials because the case against Palmer was weaker than the case against Hubbard. Appellants cite Palmer's lack of participation in the actual shooting and his lesser role as a getaway

driver, Palmer's lack of gang related tattoos, and introduction of Hubbard's gang related tattoos.

Appellants' argument fails for two reasons. First, they failed to bring a proper motion to sever trial below. Palmer brought a motion to sever the gang enhancement allegation not a motion to sever the case from Hubbard. Separate trials for offenses is governed by section 954, while trials for multiple defendants charged with the same counts is governed by section 1098. By failing to bring a motion to sever the trial below, appellants waived any complaint as to their joint trial for the purposes of this appeal. (See *People v. Maury* (2003) 30 Cal.4th 342, 392 [holding that trial courts have "no sua sponte duty" to sever actions and defendant's failure to request a severance waives the matter on appeal"].)

Second, even if appellants had not waived the argument concerning separate trials, appellants failed to establish this was the type of case where the trial court should have deviated from the general rule of joining defendants charged with the same offense. Appellants rely on *Marshall*; however, that case does not deal with severance of trials for multiple defendants charged with the same charge but with severance of trials for separate offenses. Although considerations for determining whether separate trials for offenses is appropriate are similar to the considerations for separate trials for multiple defendants, they are not identical. As discussed above, the general rule regarding joint trials for multiple defendants is that the defendants should be tried together. Here, by relying on a case related to section 954, appellants failed to even assert the appropriate argument before this court. In any event, appellants failed to show that separate trials were appropriate here because neither appellant provided exonerating testimony for the other. Likewise appellants have not shown they would suffer prejudice by association since both appellants were members of the same gang. Thus, even if this issue was properly before this court, appellants would not succeed in their argument.

B. Hubbard's Field Show-up

Appellants' next argument is that the trial court committed prejudicial error when it admitted Sheila Barrows' testimony regarding Hubbard's identification during a field

show-up. Appellants bear the burden to show that the identification procedure was unreliable. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

A field show-up is "an informal confrontation involving only the police, the victim and the suspect." (*People v. Rodriguez* (1987) 196 Cal.App.3d 1041, 1049.) It is different from a lineup which "is a relatively formalized procedure wherein a suspect, who is generally already in custody, is placed among a group of other persons whose general appearance resembles the suspect." (*Ibid*.) "The result [of a lineup] is essentially a test of the reliability of the victim's identification." (*Ibid*.) On the other hand, the principal function of a field show-up is "prompt determination of whether the correct person has been apprehended. [Citation.] Such knowledge is of overriding importance to law enforcement, the public and criminal suspect himself. [Citation.] An in-the-field show up is not the equivalent of a lineup. The two procedures serve different, though, related, functions, and involve different considerations for all concerned." (*Ibid.* citing *People v. Dampier* (1984) 159 Cal.App. 3d 709, 712-713.)

A single person show-up is not inherently unfair. (*Stovall v. Denno* (1967) 388 U.S. 293, 302; *People v. Bisogni* (1971) 4 Cal.3d 582; *People v. Bauer* (1969) 1 Cal.3d 368, 374, (cert. den., 400 U.S. 927); *People v. Burns* (1969) 270 Cal.App.2d 238, 246.) However, a field show-up is not without constraints. "Due process require(s) the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable." (*People v. Yeoman* (2003) 31 Cal.4th 93, 123; see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114.) If a pretrial identification procedure suggests the identity of the person to be identified in advance, then the procedure is unfair. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) "'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at

the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.) The defendant bears the burden of demonstrating the identification procedure was unreliable. (*Ibid.*) Unfairness must be proved as a "demonstrable reality," not just speculation. (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.)

While there are due process constraints on field show-ups, the failure to object to such errors at trial "relieves the reviewing court of the obligation to consider those errors on appeal" even if violation of constitutional rights is at stake. (*In re Seaton* (2004) 34 Cal.4th 193, 198; see also *People Cunningham* (2001) 25 Cal.4th 926, 989.)

Here, appellants argue that the field show-up was not proper because Ms. Barrows saw both appellants in handcuffs immediately preceding her identification of Hubbard. Appellants' attempt to bolster their argument by emphasizing the fact that even at a distance of 10 feet away, Ms. Barrows did not see the tattoo on Hubbard's neck and she stated that Hubbard was wearing blue jeans and a royal blue shirt at the time of the shooting, but when Hubbard was apprehended, he was wearing sweat pants and a red shirt.

There are two main issues here. The first issue is whether this matter is properly before this court. While Hubbard had a right to challenge the field show-up, he waived this right when he failed to object to the identification at trial. As to Palmer, since Ms. Barrows identified Hubbard during the field show-up and not Palmer, Palmer lacks standing to challenge the field identification of Hubbard.

In any event, if Hubbard had objected to the field show-up at the trial below, he would not prevail on appeal. *United States v. Pickar* (8th Cir. 2010) 616 F.3d 821 sheds some light here. In that case, the court upheld the trial court's decision to deny the defendant's motion to suppress his field show-up that occurred 45 minutes after a bank robbery when the defendant was handcuffed, standing in front of a marked police vehicle, with a police officer shining a flashlight on the defendant's face and the victim stood 20 to 30 feet away inside the bank that was the subject of the defendant's robbery. (*Id.* at p.

828.) The court stated such a show-up was not unduly suggestive. The facts in this case are not as suggestive as those in *Pickar*. Here, both appellants stood outside a police car and were handcuffed; however, unlike *Pickar*, no police officer was shining a light in Hubbard's face. Moreover, unlike *Pickar* the police presented more than one suspect to Ms. Barrows, and Ms. Barrows identified only Mr. Hubbard. Thus, the field show-up was not unduly suggestive.

Finally Hubbard has not convinced us that the identification was unreliable. Ms. Barrows had an opportunity to observe Hubbard's appearance during the shooting; she was about 10 feet away from Hubbard when she observed him. Thus, appellants have not shown the identification was outside constitutional bounds.

C. Admission of Detective Arias' Testimony

1. Standard of review

The trial court's ruling on the motion for a mistrial is reviewed for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) However, on the issue of whether appellants established a *Brady* violation, we review the matter de novo. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.)

2. The Prosecution did not Violate Section 1054.1 nor did It Commit a Brady Violation.

Appellants argue that Detective Arias' testimony regarding Robert Leflore's statements identifying appellants as the individuals who shot at him should not have been admitted because the prosecution did not disclose this information to the defense.

The prosecutor's duty regarding disclosure of materials and information is set forth in section 1054.1. That section states:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. (§ 1054.1.)

If a prosecutor suppresses evidence, then the suppression may culminate into a "*Brady* violation." A "*Brady* violation" refers to the breach of the duty to disclose exculpatory evidence; however, a "real *Brady* violation" occurs when the suppression of the exculpatory evidence is so serious that there is a reasonable probability that it would result in a different verdict at trial. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042-1043.) When determining whether a suppression is actually a *Brady* violation, the following must exist: "'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' [Citation.] Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt or innocence.' [Citations.] Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible [citation], that the absence of the suppressed evidence made conviction 'more likely' [citation], or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' [citation]. A defendant instead 'must show a "reasonable probability of a different result."'" (*Ibid*.) Thus, to show material is subject to *Brady*, it

"'must be favorable to the accused, either because it is exculpatory, or because it is impeaching[.]'" (*Ibid*; see *People v. Ashraf* (2007) 151 Cal.App.4th 1205, 1214.)

Appellants assert that the prosecution suppressed information regarding Robert Leflore's identification of appellants on the day of the shooting. On the day of the shooting, Robert Leflore was arrested and taken to the same jail as appellants. Leflore saw appellants in the parking lot of the jail and identified them as the shooters. The next day Leflore reiterated his identification in a recorded interview with Detective Arias. Appellants state that the prosecution neglected to share this information with them and thus appellants were not able to "investigate and properly strategize for trial" which in turn deprived appellants of their constitutional right to a fair trial.

The Attorney General argues that the trial court did not abuse its discretion in admitting Detective Arias' testimony because while there was no report regarding the interview, a copy of the recorded interview was provided to appellants. Moreover, in denying appellants' motion for mistrial, the trial court observed that any prejudice from Detective Arias' testimony could be dealt with through jury instructions or request for a continuance.

While a prosecutor has a duty to disclose certain material to opposing counsel, a prosecutor does not have a duty to conduct the defendant's investigation for him. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1134, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390.) The prosecution did not violate section 1054.1 as it did not fail to disclose information that it had in its possession. There was no police report regarding Leflore's interview, and the recording of the interview was provided to opposing counsel. Appellants had access to the same information as the prosecution did in this case. Apparently, however, appellants' counsel failed to review the information already provided to them and also failed to avail themselves of either a continuance or appropriate jury instructions that the court offered to appellants as a remedy.

Moreover, this is not a case of suppression that would amount to a *Brady* violation. Robert Leflore's testimony was neither exculpatory nor did the appellants show it was impeaching. We therefore find it difficult to side with appellants' argument

that the prosecution suppressed any information regarding Leflore's interview. We affirm the trial court's ruling on the matter.

D. Admission of Gun Evidence

Appellants argue that the trial court committed prejudicial error when it allowed the .40 caliber gun found in the BMW in which appellants were apprehended to be admitted at trial. This gun was found on the center console of the BMW next to Palmer. Appellants base their argument on the facts that the gun was not the one used in the commission of the attempted murders and neither appellant was charged with possession of the gun. They further argue that the gun was highly prejudicial to Palmer because jurors equate guns with gangs. In making the motion in the lower court, defense counsel asked "any reference to [the handgun] be excluded. It's unduly prejudicial to [Palmer] under 352." The prosecutor responded that the evidence showed that Palmer had aided and abetted in the crimes: the gun was "paramount to proving aiding and abetting. Not only did he pull over, let Mr. Hubbard get out and shoot, get rid of the weapon, and get back in the car, but he was doing all that presumably with a loaded firearm at his control. So the aiding and abetting factor is paramount."

In admitting the gun the court implicitly found it was relevant and further explained "[a]nd again, based on what the proffered evidence is, I don't think it's unduly prejudicial. So I'll deny the motion to exclude that evidence."

All relevant evidence is admissible unless excluded under the federal or California Constitutions or by statute. (Evid. Code, § 351.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Moreover, evidence of another crime is admissible when it is relevant to prove identity, preparation, plan, or knowledge even if the crime is uncharged. (Evid. Code, § 1101, subd. (b); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) In the matter of proving identity, the uncharged crime must be highly similar to the charged offenses. (*Ibid.*) For evidence of an uncharged crime to be relevant to common design or plan the uncharged crime must be "'such a concurrence of

common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*People v. Ewoldt* (1998) 7 Cal.4th 380, 402.)

Evidence Code Section 352 provides: "the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create as substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) Evidence Code section 352 applies to prevent *undue* prejudice, that is "'evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues' not the prejudice 'that naturally flows from relevant, highly probative evidence'" (*People v. Padilla* (1995) 11 Cal.4th 891, 925.) Moreover, the undue prejudice must *substantially outweigh* its relevance. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.)

Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.]." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We review for abuse of discretion a court's ruling on relevance and admission or exclusion of evidence under Evidence Code section 352. (*People v. Cole* (2004) 33 Cal.4th 1158, 1195.) "We will not overturn or disturb a trial court's exercise of its discretion under [Evidence Code] section 352 in the absence of manifest abuse, upon a finding that its decision was palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.) Review of a court's exercise of discretion under Evidence Code section 352 is based on the harmless error test set forth *in People v. Watson* (1956) 46 Cal.2d 818, 836. (*See People v. Alcala* (1992) 4 Cal.4th 742, 790-791.) The trial court's judgment may be overturned only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*People v. Watson, supra*, 46 Cal.2d at p. 836.)

In our view the relevance of the gun found in the BMW to the charged crimes is dubious. The gun was not the same caliber gun as the one used in the attempted murders. While the presence of the gun in the vehicle may be evidence of another uncharged crime (possession of a firearm) neither appellant was charged with possession of the .40 caliber gun. We are not convinced that this gun found in the vehicle subsequent to the commission of the attempted murders is relevant to prove identity, common plan or to indicate that either of the appellants committed the attempted murders charged in this case. The gun does not have the "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The prosecutor failed connected the gun to Palmer, and thus its relevance under an aiding and abetting is, at its best, weak. We are not convinced that the gun was relevant and thus should have been admitted into evidence, in the first instance.

In addition, even were we to assume it had minimal probative value, the undue prejudice of this evidence outweighed its materiality. We agree with appellants that in the case, gun evidence, relating to a gun that had not been used in the shooting, is highly prejudicial giving rise to an inference of guilt and possible gang membership.

Our conclusion notwithstanding, appellants have not demonstrated that the admission of this evidence resulted in prejudice under *Watson*--that it is reasonably probable that they would have obtained a better verdict in absence of this evidence. "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13; see *People v. Watson, supra,* 46 Cal.2d at p. 836.)

We are not of the opinion that the admittance of the .40 caliber gun resulted in prejudice. The other evidence against appellants was strong. As to Hubbard, two eyewitnesses identified him as the shooter: Sheila Barrows and Robert Leflore. Sheila Barrows identified Hubbard at a field show-up about 10 minutes after the shooting. She

subsequently identified Hubbard as the shooter at a preliminary hearing and at trial. Barrows also identified the BMW—which Palmer was driving—as the vehicle that Hubbard got into after the shooting. As to both appellants, Robert Leflore identified them as the "guys who shot at us" on the day of the shooting. The next day Robert Leflore again indicated that appellants were the individuals responsible for the commission of the attempted murders in a recorded interview with Detective Arias. Moreover, both appellants were apprehended in the getaway car, a white BMW that Sheila Barrows identified as the shooter's getaway vehicle.

In sum, given the other evidence presented to the jury implicating appellants in the crimes, it is not likely that appellants would have received a more favorable result at trial had this evidence been excluded.

II. Issues on Appeal Asserted by Hubbard

A. Request to Dismiss Prior Strikes

1. Standard of Review

A trial court's decision refusing to dismiss or strike a prior serious and/or violent felony conviction allegation under section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, '"[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.] Second, a '"decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge."'" [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting

People v. Superior Court (Du) (1992) 5 Cal.App.4th 822, 831, and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573.)

The California Supreme Court explained, "[i]n light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]." (*People v. Carmony, supra,* 33 Cal.4th at p. 378.) Discretion is also abused when the trial court's decision to strike or not to strike a prior is not in conformity with the "spirit" of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

But "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony, supra,* 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

2. The Trial Court Did Not Abuse Its Discretion in Refusing to Dismiss Any of Hubbard's Prior Felony Strike Convictions

A court has authority under section 1385 to order an action dismissed in the furtherance of justice. (§ 1385.) *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 further elaborates on the dismissal of action in relation to the "Three Strikes Law." A court should consider the following before dismissing a prior strike action: (1) the nature and circumstances of the defendant's present felony; (2) prior serious and/or

violent felonies; and (3) the defendant's background and character. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 997-998; *People v. Williams* (1998)17 Cal.4th 148, 161.)

Even though the court has the power to dismiss an action sua sponte, the Three Strikes law and legislative act is designed to restrict a court's discretion in sentencing a repeat offender. (*Romero, supra,* 13 Cal.4th at p. 528.) To that extent, a court dismissing an action must set forth the reasons and not just the motivation for such dismissal "so that all may know why this great power was exercised." (*Id.* at p. 531.) Thus, a court may not dismiss an action without careful consideration and detailing the reasoning.

a. Number of Prior Strikes Subject to Hubbard's Motion

Preliminarily, before we reach the merits of the court's decision on the section 1385 motion, we address the issue of the number of strikes that were properly subject to the motion below.

In a supplemental appellate brief [3] Hubbard attempts to clarify the *Romero* motion that he brought before the trial court. Hubbard requests that this court construe the motion below such that Hubbard asked that two of his three prior strikes be dismissed instead of only one. Hubbard argues that while defense counsel asked for Hubbard's 2005 juvenile adjudication for robbery to be dismissed, the trial court seemed to address the subject of the dismissal in plurality as did the prosecutor. Based on this, Hubbard asserts that it is not clear how many strikes defense counsel asked the court to dismiss. Since dismissal of only one prior will still lead to Hubbard being sentenced as a third striker, Hubbard requests that this court infer from the record below that the *Romero* motion was for the court to strike two of his strike priors.

Regardless of whether the trial court or the prosecutor referred to the strike(s) in question as singular or plural, it is clear from the record that Hubbard's defense counsel only asked for the strike of one prior, the 2005 sustained juvenile adjudication, and dismissal thereof. Moreover, in making its final determination, the trial court referred to

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[3] Pursuant to this court's order dated March 23, 2012, Hubbard's request for leave to file a supplemental brief was granted. Moreover, the Attorney General was provided the opportunity to file a response thereafter.

the strike subject to dismissal as a singular. Thus, only one strike was subject of the *Romero* motion below.

We turn to Hubbard's second argument. Hubbard argues that if this court determines that defense counsel only asked for the strike of one prior and the dismissal thereof, then defense counsel provided ineffective counsel. In order to establish that counsel provided ineffective assistance, a defendant must not only show that counsel was not a reasonably competent counsel, but also that the deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

To show that counsel was not a reasonably competent counsel, "defendant must show that counsel's representation fell below an objective standard of reasonableness." (*Strickland v. Washington, supra,* 466 U.S. at p. 688.) In determining whether counsel's assistance was indeed ineffective the court must be highly deferential, and make an effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (*Id.* at p. 689.) However, the reviewing court does not need to determine "whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*In re Fields* (1990) 51 Cal.3d 1063, 1079.)

Hubbard's counsel did not provide ineffective assistance because Hubbard was not prejudiced by his counsel's unreasonable conduct. To show that the defense was prejudiced, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Strickland, supra,* 466 U.S. at p. 687). As discussed in more detail below, the trial court declined to dismiss the strike subject to Hubbard's *Romero* motion. The court's decision to deny the motion was not related to the number of strikes subject to the *Romero* motion. Instead, the court denied the motion because all of the strike priors were not remote in time and there was no period of inactivity where Hubbard was not involved in some sort of criminal activity.

Because Hubbard suffered no prejudice due to his counsel's conduct, he did not receive ineffective assistance from his counsel.

b. Trial Court's Decision Denying the Motion to Dismiss Priors

The trial court declined to dismiss Hubbard's prior juvenile adjudication for robbery. It stated, "I do not think that the prior is remote or old for these purposes. I think his prior performance both while on probation on the matters as well as being on parole is unsatisfactory, and we really didn't have a period of inactivity where he has not been involved in some sort of criminal conduct. So I just don't think this is the type of case which would warrant striking the strikes, so with that understanding, I'm going to deny that request and deny the motion to exercise the court's discretion."

Hubbard conceded "that prior juvenile adjudications may be used to increase a defendant's sentence under the Three Strikes Law," but argues that the trial court should have dismissed that count. Hubbard cites *People v. Garcia* (1999) 20 Cal.4th 490 in support of his argument. In that case, the Supreme Court upheld the lower court's decision to strike defendant's five separate convictions because they all "arose from a single period of aberrant behavior for which he served a single term," the crimes were related to his drug addiction and the defendant cooperated with the police. (*Id.* at p. 494.) In *Garcia,* the five convictions were from 1991 while the case concerned robberies that occurred in 1996. There were no other convictions between 1991 and 1996. Thus, they were remote in time.

Here, however, unlike *Garcia*, the convictions were not remote in time. Hubbard was convicted of his first strike prior for violation of section 422 (terrorist threats), on February 8, 2005. Hubbard suffered a sustained juvenile adjudication as his second strike prior for violation of section 211 (robbery), on June 8, 2005. His conviction for his third strike prior for violation of section 136.1 (dissuading or threatening a witness from testifying) took place on September 12, 2007. Unlike *Garcia* where the defendant had a period of inactivity of five years, there was no such inactivity in this case. On the contrary, the three prior strikes all took place within five years of the current conviction. This distinction makes the case at hand markedly different from *Garcia*. Moreover, as

the trial judge explained, Hubbard was on parole at the time of his prior conviction. This coupled with the fact that Hubbard's criminal behavior was without a period of inactivity convinces us that the trial court did not abuse its discretion when it refused to dismiss a strike.

B. The Trial Court Misinterpreted Sections 667, subdivisions (c)(6)-(7)

Hubbard's last argument is that the trial court erred when it imposed consecutive sentences for count 1 and count 2, 70 years and 65 years respectively, because it misinterpreted section 667, subdivision (c)(7). Section 667, subdivision (c)(6) states, "[i]f there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." Section 667, subdivision (c)(7) states, "If there is a current conviction for more than one serious or violent felony as described in paragraph (6), the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law." As the beginning of each of these sections indicates, they refer and apply in situations where there is a "current conviction." (*People v. Deloza* (1998) 18 Cal.4th 585.) Section 667, subdivision (c)(6) limits the mandate only to the situation where the "current conviction" does not arise "from the same set of operative facts" and "not committed on the same occasion."

The Supreme Court explained in *People v. Hendrix* (1997) 16 Cal.4th 508, 512-513 that the plain language of section 667, subdivision (c) mandating consecutive sentences for felony convictions not arising from the same facts and occasion implies that consecutive sentences are not mandatory "if the multiple current felony convictions are 'committed on the same occasion' or 'aris[e] from the same set of operative facts.'" Concerning section 667, subdivision (c)(7) the court noted that this section also did not mandate consecutive sentences for convictions that did not arise out of the same facts or were committed on the same occasion. (*Id.* at p. 514.) The court then concluded that

consecutive sentences were not mandatory under the three strikes law. (*Id.* at p. 515.) The Supreme Court reaffirmed these interpretations and conclusion in *Deloza*.

Hubbard argues, and the Attorney General concedes, that the court misinterpreted section 667, subdivisions (c)(6)-(7) when it imposed consecutive sentences stating "[t]he time in count 02 *must* run consecutive to the time in count 01." Hubbard asserts that section 667, subdivisions (c)(6)-(7) do not mandate consecutive terms in this case because the two counts arose from the same operative facts and were committed on the same occasion. Hubbard asked that the matter for his sentencing be remanded.

The two counts for attempted murder while separate offenses occurred at the same exact occasion and arise out of the same sets of operative facts. This is not the type of scenario where section 667, subdivisions (c)(6)-(7) must apply. While the trial court has discretion to impose consecutive sentences for each count, the trial court was not mandated to impose consecutive sentences. Thus, we order this matter to be remanded to the trial court for resentencing.

DISPOSITION

The sentences imposed on counts 1 and 2 as to Hubbard are vacated and remanded to the trial court for resentencing for the court to exercise its discretion to impose consecutive or concurrent sentences pursuant to section 667, subdivisions (c)(6), (c)(7); § 1170.12, subdivisions (a)(6), (a)(7), and California Rules of Court, rule 4.425. In all other respects, the judgments are affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **JACKSON, J.**