Filed 10/29/18 P. v. Cervantes CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GINO CERVANTES, Defendant and Appellant.	B283528 (Los Angeles County Super. Ct. No. LA083959)

APPEAL from a judgment of the Superior Court of Los Angeles County. Thomas Rubinson, Judge. Affirmed in part, and remanded with directions.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Gino Cervantes appeals from a judgment which sentences him to 29 years and four months in state prison for two counts of assault and one count of possession of a firearm by a felon. Cervantes contends his convictions should be reversed owing to juror misconduct and ineffective assistance of counsel. He also argues remand is necessary for the trial court to exercise its newly-granted discretion under Senate Bill No. 620 (SB 620) to strike a firearm enhancement. We remand for the limited purpose of resentencing, but otherwise affirm the judgment.

FACTS

The Javier B. Shooting

On January 15, 2015, Javier B. was outside his apartment building with his younger brother when he was shot in the knee. Javier provided three different accounts of what happened in three different interviews with the police.

At the hospital shortly after the shooting, he told Officer Gitana Gotay that he was shot in the parking lot of a liquor store by masked individuals traveling in a light blue van. Upon further questioning, he told Officer Gotay he was unsure the suspects were masked because the van's windows were tinted and it was raining. When Detective Terrill West arrived at the hospital, Javier told him the suspects in the blue van were African-American and he was walking on the street rather than in the parking lot.

Two days later, Javier spoke with Detective Scott Crowe at the hospital. Javier told Detective Crowe he had just returned from Allan's liquor store and was hanging out with his younger brother in the back of the apartment complex, smoking marijuana. After about 10 to 15 minutes, he saw someone "posted up" in the courtyard area. He recognized the individual

as "Sneeze," someone he used to smoke marijuana with at Birmingham High School. He thought Sneeze wanted to smoke with him, so he asked, "What's up?" Sneeze approached him, asking, "You fucked my lady. You still with that?" Javier immediately replied, "No." Sneeze pulled a revolver out of his sweatshirt pocket, pointed it at Javier's feet, fired twice, and hit him in the kneecap. He then ran back through the courtyard to the street and left in his car. Javier explained he had dated Sneeze's girlfriend and the mother of Sneeze's child while Sneeze was in custody. Javier denied Sneeze wanted to kill him; Javier believed, "he just wanted to make me dance."

Javier refused to further identify or name the person who shot him because he did not want to be a snitch. Javier also refused to look at or identify anyone from a photographic six-pack shown to him the following week. Detective Crowe's investigation revealed that Cervantes's nickname is "Sneezy" and he has a child with Ashley S., whom Javier also dated. At the preliminary hearing, Javier denied he was shot in the knee and had to go to the hospital.

At trial, Javier refused to testify. In a hearing outside the presence of the jury, he denied Cervantes was the shooter and questioned why he had to testify at all. He felt the court was "pushing me to say something when it's not even him." Javier's testimony at the preliminary hearing and at the hearing outside the presence of the jury was read to the jury.

The People admitted into evidence transcripts of calls between Ashley and Cervantes. In them, Cervantes indicated he disapproved of Ashley's friendship with other men because he was afraid she would cheat on him. They also argued over someone named Javier.

Javier's mother testified for the prosecution at trial. She stated she lived in an apartment with her husband and their three sons. On January 10, 2015, she was inside the apartment while Javier and her younger son were outside. Later, she heard a noise that sounded like trash cans falling. Soon after, the police came to the apartment building to investigate a shooting. Javier's mother realized her son had been shot. She next saw Javier at the hospital where he was being treated for the injury to his knee.

Deputy Rodolfo Urrea worked for the Los Angeles County Sheriff's Department and was assigned to main lock-up. On the morning of February 15, 2017, Deputy Urrea was unloading the county inmates at court when he heard a conversation between Javier and Cervantes. One of them told the other to "come up with a good lie so it is believable."

The Jeff K. Shooting

A separate shooting occurred on June 14, 2015, about one mile from Javier's apartment. At approximately 3:00 a.m. that morning, Jeff K. was smoking cigarettes and drinking beer with his friends, Jonathan V. and Jose T. All three lived in the same apartment complex. Jeff had snorted methamphetamine earlier that night. A gold colored sedan pulled up and a woman and two men exited the car. One of the men had a black revolver in his hand. The woman grabbed Jeff, who tried to pull away. The man shot the gun in the air and then pointed the gun at Jeff, telling him to stand still. He then shot Jeff in the arm.

Jeff heard the other man use a taser on Jonathan, who screamed. After he was shot, Jeff managed to get away from the woman. The man with the taser began to chase him and tased him "a little bit," but not enough to stop him from running to his

apartment for help. Jeff's older brother called the police. A neighbor who lived in the same apartment complex heard voices and the gunshots. She called the police as well.

In the 911 recording, Jeff can be heard telling his brother that "Gino" shot him. The officers responding to the call found Jeff laying on the floor of his apartment. Jeff told them "Gino" shot him due to a dispute over a woman they had both dated. The responding officers observed Jeff to be confused and in shock.

Jeff was reluctant to identify his assailants. He testified at trial that some people, including a man known as "Loco," had warned him not to testify. When he was interviewed by the police, Jeff stated it was too dark to see his assailants. However, the responding officer testified he patrolled the area three nights a week and had observed that the alley where the shooting occurred was usually lit all night. Although Jeff identified Cervantes as the shooter from a photographic six-pack, he qualified that identification at trial by stating he was under the influence of morphine at the time.

Jeff testified he and Cervantes had a fistfight a few weeks before the shooting at a bar. On the day before the shooting, a woman named Smiley tried to set up a rematch between the men, but it did not take place. As a result of their prior altercation, Jeff said, people in the neighborhood began to circulate a theory that Cervantes shot Jeff. Jeff testified he was influenced by these rumors.

At the preliminary hearing, Jose testified he left before the assailants got out of the car and did not see them. He also testified he did not speak English so did not understand what was said that night. He told Detective Crowe that he did not want to talk about what happened because he heard someone

was going to get him and he had a family. At trial, Jose was unavailable to testify. His preliminary hearing testimony was read into the record. The police recovered two shell casings from the alley where Jeff was shot.

Cervantes was arrested in a gold Toyota Camry outside Ashley's home. The police found several credit cards in Cervantes's name in a wallet in the Camry along with insurance cards for the car in his name. The car was registered to Ovsana N., who was detained with Cervantes in the car. Cell phone records showed a call was made from Cervantes's phone on June 14, 2015, at 3:16 a.m., in the vicinity where Jeff was shot.

The Trial

Cervantes was charged with the attempted willful, deliberate, and premediated murder of Jeff (count 1; Pen. Code,[1] §§ 664/187, subd. (a)(1)); assault on Jeff with a semiautomatic firearm (count 2; § 245, subd. (b)); assault on Jonathan and Jeff with a stun gun or taser (counts 3 and 6; § 244.5, subd. (b)); possession of a firearm by a felon with priors (count 4; § 29800, subd. (a)(1)); and assault on Javier with a firearm (count 5; § 245, subd. (a)(2)). It was further alleged that Cervantes personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subds. (b)–(d)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and had one prior conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)–(j), 1170.12, subds. (a)–(d)).

At trial, the People presented evidence of the two shootings as described above. The jury found Cervantes guilty on counts 2, 4, and 5, and found true the firearm and great bodily injury

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

enhancement allegations. Cervantes admitted the prior strike conviction.

The court sentenced Cervantes to an aggregate term of 29 years and four months in state prison, calculated as follows: On count 2, 25 years, comprised of the midterm of six years, doubled for the strike prior, plus 10 years for the firearm enhancement and 3 years for the great bodily injury enhancement. On count 4, a concurrent four-year term, comprised of the midterm of 2 years, doubled; the sentence on that count was stayed under section 654. On count 5, the court imposed a consecutive one third the midterm of four years and four months, comprised of one year doubled, plus one year and four months for the firearm enhancement and one year for the great bodily injury enhancement.

Cervantes timely appealed.

DISCUSSION

I. The Juror Misconduct Was Not Prejudicial

Cervantes contends reversal is required due to juror misconduct. At trial, Cervantes questioned whether Juror No. 4 understood English sufficiently to remain on the panel. That was the basis for his request for a hearing, his request to remove Juror No. 4 from the panel, and his motion for new trial. On appeal, Cervantes shifts his focus to whether Juror No. 4 committed prejudicial misconduct by consulting a cell phone translation app for assistance in defining certain words. We address the issue as he has now framed it. Cervantes alternatively claims we must remand the case for a second hearing on the scope of the misconduct. We find the presumption of prejudice resulting from juror misconduct was rebutted, and that remand for a second hearing is not required.

A. Proceedings Below

During trial, which extended several days past the initial time estimate, two jurors advised the trial court they had pre-paid trips planned. It became clear during deliberations that these trips would interfere with the two jurors' participation. Over a defense objection, they were excused and replaced with the alternate jurors. As the trial court advised the jurors of this new development and how they should proceed, it noticed Juror No. 4 using his phone. When the trial court questioned Juror No. 4, he explained he was translating English words that he did not understand. The trial court ordered him to put his phone away and he complied.

After the jury was dismissed for the day, defense counsel stated, "I am concerned that Juror No. 4 does not understand, has not understood the process of what is going on here in terms of the evidence or that he does not understand the jury instructions because of language issues. [¶] So I would ask the court to conduct a hearing with Juror No. 4 and determine whether or not Juror No. 4 is actually capable and competent to sit." The trial court agreed to the hearing. The court indicated it was surprised the issue was not raised by the juror during voir dire because potential jurors often claim to understand only limited English to try to avoid jury service. The court also recalled it had read 45 minutes of instructions and Juror No. 4 did not have his phone out or otherwise indicate to the court he did not understand English. The trial court suggested, "Maybe he was playing Words with Friends," and later asked counsel, "I think he's playing Words with Friends, don't you?"

The court held a hearing about Juror No. 4's phone usage on the next court day. Defense counsel confirmed he had requested the hearing "with regards to Juror No. 4 and the statement that he made about his English language capabilities[.]" Defense counsel also asked the court to "inquire as to whether or not he's using a translator service either in court during trial and/or in deliberations[.]"

Juror No. 4 said he translated words that he did not understand "whenever like in the jury room or outside at school, everywhere." He explained he had been in the United States for six or seven years, and was taking a basic English class at Santa Monica College along with math and computer science classes.

The trial court admonished him not to use his phone: "If there's any words that are not sort of regular non-legal words, I'll define them for you. But I should also add to that that if there's any words that you don't understand, just ask me. Okay? I don't want you using your phone to do the translating because the meaning that we use here in a courtroom might be different." The juror apologized for using his phone in court. When the court noted Juror No. 4 was "conversing just fine in English[,]" Juror No. 4 responded, "I know. That's why I'm just [*sic*] some words that I don't understand. Otherwise I can deal with it."

Upon the court's invitation, defense counsel questioned Juror No. 4 about his English language fluency, including asking about the title of the English class he took in Santa Monica College. Defense counsel also asked whether he used the translator app on his phone while the witnesses were testifying or the judge was talking. Juror No. 4 admitted he did it "sometimes." He also admitted he did it in the jury room "sometimes." Defense counsel asked, "How about the law?

When the judge was reading the law, is that when you needed the translator, also?" Juror No. 4 replied, "No. Just some words like I'm so curious about it, and I just wanted to know." Defense counsel had no further questions. In fact, his questions took up less than two pages of the reporter's transcript. The prosecutor then asked two short questions about where Juror No. 4 first learned English.

After the juror left the courtroom, defense counsel argued, "I disagree that he's speaking English just fine. []There were runs in there I couldn't tell what he was saying. But it sounds like he's taking a basic reading skill class. He called it reading skills, so he must be taking a basic class in reading English. [¶] But the notion that he is using a translator in the jury room for any word or words . . . is an introduction into the deliberative process of information that is not part of this trial and it's misconduct, and I would ask that the court remove Juror No. 4. It is not clear that he has an understanding of this process or what's going on or really what the law is as instructed by the court." The prosecutor disagreed, noting that throughout the two-day voir dire process, Juror No. 4 was able to speak and answer questions in English "to no one's concern."

The trial court denied the request to remove the juror. The court found, "First of all, he is able to converse with me and with counsel here in this hearing without any difficulty. Some of what he was saying was difficult to understand because he spoke with an accent and he spoke quickly and it was sort of run-on sentences, but that doesn't portray a lack of ability to speak English or to understand . . . [¶] . . . [¶] . . . But he's taking three college classes. He's been in the country for six years apparently, from 18 to 24 [years old]. He spoke some English before he got

here. He's spoken more since he's been here. He's conversing with us. [¶] Would it be better if he had not used the translator on his phone to define a couple of words? Of course. But I did think that he was sincere in his pledge to not do that anymore and to ask me if he needs definitions of any words that come up in the case from here on out, and I simply don't think that the couple of times—or handful of times, even—that he used the translator on his phone to define a word here or there during the trial constitutes a sufficient showing of misconduct to remove him from this case."

The court agreed with defense counsel that he should not have been using the translator whether in the courtroom or in the jury room, but found, "I just don't think his actions are of such an egregious nature that they rise to the level of juror misconduct necessitating his removal, especially considering his pledge to not do it anymore. We have a brand-new jury starting with brand-new deliberations that have not even begun yet. They haven't even gone back to the deliberation room as a new jury. So, in a sense, anything that happened the other day while that jury was deliberating is of no moment."

Defense counsel later moved for a new trial on the ground that Juror No. 4 should not have remained on the panel given his inability to comprehend everything at trial because of his limited English. The trial court denied the new trial motion, finding "the juror was understanding the court's questions fine. The juror was responding appropriately."

B. Applicable Law

The right to a fair trial by an impartial jury is guaranteed under the federal and state constitutions. (U.S. Const., 6th and 14th Amends.; Cal. Const., art. I, § 16; *Duncan v. Louisiana*

(1968) 391 U.S. 145, 149; *In re Hitchings* (1993) 6 Cal.4th 97, 110.) An impartial juror disregards extrajudicial influences, and decides cases solely on the evidence presented at trial. (*People v. Nesler* (1997) 16 Cal.4th 561, 581.) A juror who consults an outside source for additional information that is not presented at trial commits misconduct. (*People v. Harper* (1986) 186 Cal.App.3d 1420, 1428 (*Harper*).)

Once juror misconduct is established, a presumption of prejudice arises. The burden is on the People to rebut this presumption or the affected conviction will be reversed. (*People v. Marshall* (1990) 50 Cal.3d 907, 949.) The presumption may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's determination, after an examination of the entire record, that there is no substantial likelihood that one or more jurors was actually biased against the defendant. (*In re Hamilton* (1999) 20 Cal.4th 273, 296; *In re Hitchings, supra,* 6 Cal.4th at p. 119.) The "substantial likelihood" test is an objective standard. (*People v. Marshall, supra,* 50 Cal.3d at p. 951.) In this context, the presumption of prejudice is rebutted if the outside evidence considered by the juror is neutral or irrelevant to defendant's guilt. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 304–305 (*Cabrera*).)

On appeal, we review the trial court's factual findings for substantial evidence, but review de novo the question of whether prejudice arose from juror misconduct. (*People v. Thomas* (2012) 53 Cal.4th 771, 819.)

In *Harper, supra,* 186 Cal.App.3d 1420, a juror read the definition of "murder" from a dictionary to the jury during deliberations. The other jurors immediately warned him that it was improper for him to have done so and that his definition

could not be considered. (*Id.* at p. 1428.) The jury then sent a note to the trial court disclosing the misconduct and asking how to proceed. The trial court brought out the jury, explained generally why dictionary definitions are not applicable in criminal prosecutions, and admonished the jury not to consider the dictionary definition in its deliberations. (*Id.* at p. 1429.)

The Court of Appeal in *Harper* noted: "In this regard, it is crucial, if not determinative, to keep in mind that the misconduct in this case was brought to the attention of the trial court *before* the jury had returned a verdict. Obviously, if such misconduct had been discovered after the verdict was rendered, the seriousness of the misconduct and its prejudicial impact on the jury would be difficult, if not impossible, to assess; thus the prosecution's burden to show such prejudice was rebutted would be almost insurmountable. However, when as in the instant case juror misconduct surfaces during deliberations and the trial court takes the opportunity to do all in its power to correct the error and obviate the prejudice, these efforts by the trial court become part of the record reviewable on appeal." (*Harper, supra,* 186 Cal.App.3d at p. 1427.) The court determined the chance for prejudice was greatly reduced by the trial court's admonishment, and the presumption of prejudice was successfully rebutted. (*Id.* at p. 1430.)

C. Analysis

There is no dispute Juror No. 4's use of his phone to translate words said during trial constituted misconduct. As a result, a presumption of prejudice arose. We find, however, that it has been successfully rebutted because the record demonstrates there is not a substantial likelihood that Cervantes suffered actual harm.

The California Supreme Court has explained that the "[u]se of a dictionary to obtain further understanding of the court's instructions poses a risk that the jury will misunderstand the meaning of terms which have a technical or unique usage in the law." (*People v. Karis* (1988) 46 Cal.3d 612, 642.) That risk does not arise here. Juror No. 4 denied using the translation app on his phone "when the judge was reading the law . . . ." There is no evidence to indicate he did so. The trial court corroborated this by observing Juror No. 4 did not consult his phone while the jury instructions were read. It is likely the words translated by Juror No. 4 were not terms of art or otherwise carried a technical meaning outside of ordinary usage. Because Juror No. 4 did not translate legal terms provided in the jury instructions, his misconduct bore less significance to the issues in the case. (*Cabrera, supra,* 230 Cal.App.3d at p. 305 ["we find the determination of prejudice has turned on the degree of significance the defined word bore to an issue in the case."].)

Looking at the totality of the circumstances, there is not a substantial likelihood that Juror No. 4's misconduct resulted in actual prejudice to Cervantes. The court's and counsel's inquiry revealed that Juror No. 4 only used his phone "sometimes when people were testifying and the judge was talking" as well as "sometimes in the jury room." In fact, the trial court believed Juror No. 4 used his phone to translate words only a "handful" of times. Defense counsel did not challenge this characterization of Juror No. 4's conduct. We believe it is unlikely the trial court and counsel would have all failed to notice if Juror No. 4 had used his phone consistently throughout the trial.

As in *Harper,* it is determinative that the misconduct was brought to the attention of the trial court at a crucial juncture of deliberations before the jury returned a verdict. This allowed the trial court to correct the error and prevent any prejudice. In this case, the trial court discovered the misconduct shortly before the jury began new deliberations with the alternate jurors. The court discussed the misconduct with Juror No. 4 and admonished him not to use his phone for translation from that point forward. Juror No. 4 apologized and promised not to use his phone again. Because deliberations were to begin anew, the slate was effectively wiped clean and any prejudice resulting from Juror No. 4's previous use of his phone in the jury room was overridden.

Moreover, unlike in *Harper,* where the juror looked up the word "murder" and shared it with his fellow panel members, Juror No. 4 confirmed he did not look up any words "when the judge was reading the law. . . ." Nor is there any indication Juror No. 4 shared any translations with his fellow jurors. As part of its standard instructions, the trial court advised the jury at the beginning of trial: "It is unfair to the parties if you receive additional information from any other source because that information may be unreliable or irrelevant and the parties will not have had the opportunity to examine and respond to it." It also instructed the jury to "not use the internet, including email, text messaging, Facebook or twitter, in any way in connection with this case either on your own or as a group. Do not investigate the facts or the law or do any research regarding this case." The jurors were told to keep their cell phones turned off while they were in the courtroom and during deliberations. We presume the other jurors followed these instructions. (*People v. Wilson* (2008) 44 Cal.4th 758, 834.)

We are also not persuaded the trial court's ruling was motivated by the fact that no alternate jurors remained to replace Juror No. 4. Indeed, the trial court specifically stated it would have ruled in the same manner had there been alternates available.

Nor do we find convincing Cervantes's argument that prejudice cannot be assessed without remand to determine exactly which words Juror No. 4 translated. *Cabrera, supra*, 230 Cal.App.3d at pages 306–307, is instructive on this issue. In *Cabrera,* the Court of Appeal found the trial court did not abuse its discretion in failing to conduct an evidentiary hearing regarding the precise words that had been translated by Spanish-speaking jurors during deliberations.

There, a number of Spanish-speaking jurors disagreed with the court interpreter's translation of some Spanish words. In particular, a juror named Leon told the other jurors the interpreter had mistranslated the word "pushed" into "touched." (*Cabrera, supra,* at p. 306.) The investigator for the defense also discovered other Spanish-speaking jurors translated other portions of the testimony for the benefit of the non-Spanish-speaking jurors. However, there was no indication from the evidence which specific words were translated by these other jurors. (*Id.* at p. 302.)

The evidence also suggested that when a conflict existed between the court interpreter's translation and the Spanish-speaking jurors' translations, the jury accepted the translation by the Spanish-speaking jurors. The defense brought the matter to the trial court's attention through declarations and a report from its investigator in a motion for new trial, but did not request an evidentiary hearing. (*Ibid.*) The People submitted no counter-

declarations and the court assumed the truth of the defense's evidence. (*Id*. at p. 306.)

On appeal, the court found Juror Leon's translation to be misconduct, but concluded that it was not prejudicial. (*Cabrera, supra,* at p. 306.)

As to the other Spanish-speaking jurors who retranslated other testimony, the Court of Appeal also found this was misconduct. The court reasoned, "If the only evidence before the trial court was that one or more jurors had retranslated part of the testimony for other jurors, this might be a sufficient showing to require an evidentiary hearing into exactly what words had been retranslated. Without knowing this, the court could not make an informed decision as to whether the presumption of prejudice was rebutted." (*Cabrera, supra,* at p. 306.)

However, the *Cabrera* court determined that other facts supported the trial court's decision not to conduct a evidentiary hearing regarding these other jurors' misconduct. First, the defendant did not request an evidentiary hearing into the translations by the other jurors. The court found counsel was content to rest on the investigator's report and the declarations. Second, the court found it significant that only one of the three Spanish-speaking jurors came forward with any complaints about the accuracy of the translation. Perhaps most significant, the only inaccuracy Juror Leon could remember was the translation of "touch" for "push." The court presumed Juror Leon would remember the most significant translation mistake, which was nevertheless found to be minor and not prejudicial. Thus, the court concluded any other errors must not have been significant enough to mention to the trial court and were not prejudicial. For these reasons, the Court of Appeal determined the trial court

did not abuse its discretion in failing to conduct an evidentiary hearing. (*Cabrera, supra,* at p. 307.)

Here, the trial court conducted an evidentiary hearing. Cervantes contends it was insufficient and demands a second hearing. *Cabrera* tells us a second hearing is unnecessary. Indeed, the *Cabrera* court determined the defendant was not entitled to an evidentiary hearing at all based on similar facts.

Just as in *Cabrera,* Cervantes did not seek an evidentiary hearing on what specific words were translated. Instead, he was content with the questions asked by the trial court and by counsel. Cervantes was provided the opportunity to, and did, question Juror No. 4 about his conduct. The trial court did not limit in any way his examination of Juror No. 4. Cervantes was satisfied once he ascertained that Juror No. 4 did not translate any words during the jury instructions. He did not pursue that line of questioning to ask him specifically which words he translated. He also did not request the trial court to do so.

Moreover, the record in this matter, like in *Cabrera,* shows there was a primary issue and a secondary issue. In *Cabrera,* the primary issue was whether Juror Leon's translation of "touched" into "pushed" was prejudicial misconduct. The secondary issue involved the other jurors' translations. The *Cabrera* court presumed the secondary issue was insignificant compared to the primary issue and thus, even less likely to be prejudicial. That is the case here as well.

It is apparent that the court and counsel were primarily concerned with whether Juror No. 4 was competent to sit on the jury panel based on his ability to speak English. They were only secondarily concerned with whether he committed misconduct by occasionally using a translation app to look up non-legal words

about which he was curious. Indeed, defense counsel only briefly mentioned misconduct in his argument to remove Juror No. 4. As the *Cabrera* court did, we presume the secondary issue was insignificant as compared to the primary issue and even less likely to be prejudicial.

Under the reasoning in *Cabrera*, the trial court did not abuse its discretion in failing to further examine Juror No. 4 regarding the precise words he translated.

II. Cervantes Did Not Receive Ineffective Assistance of Counsel

Cervantes contends he received ineffective assistance of counsel when defense counsel failed to object to Detective Crowe's definition of the term "posted up." He claims it implied Cervantes was a gang member in violation of the trial court's order excluding gang evidence. We disagree.

Before trial, the court granted Cervantes's motion to exclude any evidence that Cervantes was a member of a gang given there were no gang enhancement allegations.[2] During direct examination, Detective Crowe testified Javier told him there was someone "posted up" in the courtyard of his apartment complex. During cross-examination, defense counsel asked Detective Crowe what "posted up" meant. Detective Crow testified, "It's a term used more into the gang culture where a person may be sitting at a location looking for somebody or watching to make sure somebody doesn't come up on them."

To prevail on a claim of ineffective assistance of counsel, a defendant must establish two elements: (1) counsel's representation fell below an objective standard of reasonableness;

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[2] The court ruled, however, that Javier could testify as to Cervantes's nickname or moniker of Sneeze.

and (2) there is a reasonable probability that, but for counsel's errors or omissions, a determination more favorable to the defendant would have resulted. (See *Strickland v. Washington* (1984) 466 U.S. 668, 690, 694 (*Strickland*).) Cervantes can establish neither element.

First, Cervantes misreads Detective Crowe's testimony. Detective Crowe testified the term was used by gang members. He did not testify Cervantes used that term; he testified Javier did. Thus, Detective Crowe's testimony implied Javier was a gang member, not Cervantes. Further, according to the term as described in Detective Crowe's testimony, Javier portrayed Cervantes merely as "a person" who was sitting and looking or watching for someone. Under these facts, no objection could be made because the testimony did not violate the court's order prohibiting evidence of Cervantes's membership in a gang. Accordingly, defense counsel's representation did not fall below an objective standard of reasonableness. This alone is sufficient to overcome an ineffective assistance of counsel argument.

Second, Cervantes has failed to establish there is a reasonable probability that, but for his trial counsel's errors or omissions, he would have received a more favorable outcome. (*Strickland, supra,* 466 U.S. 668 at p. 694.) The evidence that Cervantes shot both Javier and Jeff was strong, despite the witnesses' reluctance to testify.

While Javier refused to identify Cervantes as the shooter and gave the police three different accounts of the shooting for fear of being labeled a "snitch," he told Detective Crowe he was shot by someone he knew from high school as "Sneeze." Javier also disclosed Sneeze shot him because Javier dated his girlfriend while Sneeze was incarcerated. Detective Crowe later discovered

Cervantes's moniker was "Sneezy" and he had a child with April, whom Javier had also dated. In fact, Cervantes argued with April over her friendships with other men, particularly someone named Javier. Additionally, Cervantes and Javier were overheard discussing coming up with a "good lie so it's believable."

Jeff was also reluctant to identify Cervantes as the shooter. However, he can be heard in the background of the 911 call telling his brother that "Gino" shot him. He also told the responding officers that "Gino" shot him and identified Cervantes in a photographic lineup. Cervantes was later arrested in a gold Camry, the same color sedan used in the shooting. Additionally, cell phone records showed a call was made from Cervantes's phone near the time and place of the shooting.

Cervantes's motive for shooting Jeff likewise originated from a dispute over a woman. Jeff testified he and Cervantes had fought a few weeks before the shooting after an argument at a bar. Jeff told the responding officers the fight was over a woman. Another fight was scheduled for the day of the shooting, but it did not take place.

Contrary to Cervantes's assertion that this was a close case, the evidence strongly supported his convictions for assault on Jeff and Javier (counts 2 and 5) and possession of a firearm by a felon (count 4). Given the evidence against him, it is not reasonably probable that Cervantes would have received a more favorable outcome absent the purported error by defense counsel.

III. Remand is Necessary for Resentencing Under SB 620

Cervantes's sentence includes the imposition of two firearm enhancements under section 12022.5, subdivision (a), on counts 2 and 5. He contends this matter should be remanded to allow the

trial court the opportunity to exercise its discretion to strike the enhancements under recently enacted legislation. The Attorney General agrees, as do we.

On January 1, 2018, SB 620 took effect, which amends section 12022.5, subdivision (c), to remove the prohibition against striking the gun use enhancements under this and other statutes. (Stats. 2017, ch. 682, § 1.) The discretion to strike a firearm enhancement under section 12022.5 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Cervantes's case was not final at the time SB 620 came into effect. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it."].) The Attorney General agrees SB 620 applies to Cervantes's sentence. Remand is proper.

On remand, the trial court may strike the firearm enhancements or strike only the punishment for the enhancements. (§ 1385, subd. (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike,

the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the firearm enhancement will remain in the defendant's criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(8) of section 667.5 provides that a violent felony is "[a]ny felony in which the defendant . . . uses a firearm which use has been charged and proved as provided in . . . Section 12022.5 . . . ." As a violent felony, the defendant would be entitled to a maximum of 15 percent conduct credits. (§ 2933.1, subd. (a).)

DISPOSITION

The matter is remanded to allow the trial court to exercise its discretion to strike the firearm enhancements under section 12022.5, subdivision (c). The judgment is otherwise affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.