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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. KEVIN ALEXANDER VENTURA et al., Defendants and Appellants.	B270540 (Los Angeles County Super. Ct. No. BA431426)

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas W. Sortino, Judge. Affirmed.

Michele A. Douglass, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Alexander Ventura.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant Maynor Diaz.

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.

INTRODUCTION

Defendants Kevin Alexander Ventura and Maynor Diaz were convicted by jury of several counts of armed robbery and attempted armed robbery. They contend that the court erred in denying a motion to bifurcate the trial to have the gang enhancements tried separately, and in denying a motion for mistrial after a police officer witness revealed that Ventura stated that he and Diaz lived in the same residence. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Procedural background

The Los Angeles County District Attorney (the People) filed an information on January 13, 2015, charging Ventura, Diaz, and codefendant Eric Luis as follows: Count 1, attempted second degree robbery against Daniel P.[1] (Pen. Code, §§ 664, 211[2]); count 2, second degree robbery against Alexandra R. (§ 211); count 3, second degree robbery against Sergio V. (§ 211); count 4, attempted second degree robbery against Justin M. (§§ 664, 211); count 5, second degree robbery against Sabrina V. (§ 211); count 6, second degree robbery against Yoosun C. (§ 211); count 7, second degree robbery against Tamar Y. (§ 211); count 8, attempted second degree robbery against Shan L. (§§ 664, 211). The People alleged that Diaz personally used a firearm in count 1, and that Ventura personally used a firearm in counts 2, 3, 4, 5, 6, 7, and 8. (§ 12022.53, subd. (b).) For each of the counts, the People also alleged that a principal in the offenses was armed

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[1] We refer to the victims and witnesses by their initials or first names to protect their privacy. (See Cal. Rules of Court, rule 8.90(b)(4).)

[2] All further statutory references are to the Penal Code unless otherwise indicated.

with a firearm (§ 12022, subd. (a)(1)) and that the offenses were committed in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The case proceeded to trial against Ventura, Diaz, and Luis. The defendants were tried together, but Luis had a separate jury that heard some evidence relating to Luis only.

B. Prosecution evidence

1. *Victims' testimony*

Count 7: Tamar Y. testified that on the afternoon of October 31, 2014, she was at an apartment in the vicinity of First Street and Gramercy Place in Los Angeles. She walked outside and was talking on her cell phone and smoking a cigarette. She went to her car, got her purse out of the trunk, and sat down on the curb with her purse next to her. A man approached her; he was wearing red shorts and a black shirt. The man lifted his shirt, and pulled a silver semiautomatic gun from his waistband. The man racked the gun's slide,[3] pointed the gun at Tamar's head, and told her to give him her belongings. The man took Tamar's phone and purse. The man ran away, and Tamar ran the other way; as she looked back over her shoulder she saw a white car speeding away. After she reported the incident to police, Tamar tentatively identified Ventura from a photographic lineup as the man who pointed the gun at her. Tamar also identified Ventura in court, but said she was not certain it was the same person.

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[3] Throughout trial, the witnesses used varying terminology when describing the perpetrator racking the gun's slide, and each witness who testified about it demonstrated to the court the action he or she witnessed. Discrepancies in the witnesses' terminology or demonstrated actions are not at issue on appeal, so we state herein that the perpetrator racked the gun's slide.

Count 1: Daniel P. testified that on the afternoon of November 4, 2014, he was in the area of Fifth Street near Normandie Avenue in Los Angeles. He was leaving work and answering emails on his phone. He noticed a white Nissan vehicle parked in a red zone, with two men in it listening to music. Still photos from video surveillance in the area showed a car that looked like the car Daniel saw. Daniel heard footsteps approach him from behind. A man put his arm around Daniel's neck, pointed a gun at his head, and said, "Give me your fucking phone or I'm going to shoot you." The gun was silver with gold trim on the grip. Daniel dropped his phone and grabbed for the gun. The man broke free from Daniel's grip, stood in front of him, racked the gun's slide, pointed the gun at Daniel, and said again, "Give me your fucking phone or else I will shoot you."

Then the white Nissan pulled up; Daniel saw that two men were in the car, one in the driver's seat and one in the back seat. (On cross examination, defense counsel read Daniel's testimony from the preliminary transcript in which he said only the driver was in the white car, and no one else. The man with the gun punched Daniel in the face and got in the car; the car drove away. Daniel got a partial license plate number. He signaled to a passing police officer and reported the incident. Daniel identified Diaz as the man with the gun in a photo array and in court. The surveillance video showing Daniel walking and the white car was played for the jury.

Count 2: Alexandra R. testified that on the afternoon of November 6, 2014, she was waiting for a bus near the corner of James M. Wood Boulevard and Kingsley Drive. She was looking at her phone, and had music playing through earbuds in her ears. A man approached her, racked the slide on a silver gun, and

pointed it at her; Alexandra took the earbuds out of her ears. He said, "Give me your phone." Alexandra handed him the phone. Alexandra went home and called 911. Alexandra identified Ventura as the man who pointed the gun at her from a photo array and in court.

Count 8: Shan L. testified that on the afternoon of November 6, 2014, she was walking near Eighth Street and Wilton Place with her mother-in-law. Shan had her infant daughter in a front-pack baby carrier, and her phone in her hand. A man got out of the front passenger door of a white car, racked the slide of a silver gun, pointed the gun at Shan's abdomen, and said, "Give me your phone." Shan tossed her phone in the air. The man said, "Fuck," and got back into the car. In court, Shan identified Ventura as the man with the gun; when police presented a photo array shortly after the incident, Shan was unable to identify Ventura.

Count 4: Justin M. testified that shortly after midnight on November 7, 2014 he was walking near the intersection of Vermont and Beverly, wearing earbuds and playing music on his phone. A silver or white four-door car pulled up next to him and two men got out, one from the front passenger seat and one from the back seat. The two men stood on either side of Justin; the man on his left had a gun. Justin testified that the gun was black, and "almost looked like a standard police issued like you see in a movie." However, Justin also agreed that he described the gun to police as stainless steel.

In court, Justin identified Ventura as the man holding the gun and Diaz as the man without the gun. Diaz said, "Give me your shit," and reached for Justin's phone. Ventura reached for the bag Justin was carrying over his shoulder, and Justin pushed

Ventura's hand away. Ventura said he was going to shoot Justin, and Justin responded, "No, you're not." Diaz punched Justin in the face twice. One of the men saw police nearby and said, "Oh, shit, the cops." The men got into the car and drove away. Justin called 911.

Count 3: Sergio V. testified that about 20 minutes after midnight on November 7, 2014, he was near the intersection of Fifth Street and Serrano. He was carrying a gym bag and talking on the phone through an earbud headset. He noticed a white, four-door sedan with very shiny, after-market rims drive past him, and then return from the opposite direction. The car returned for a third time, pulled into a driveway, and stopped. A man stepped out of the rear door holding a shiny gun; he racked the slide, pointed it at Sergio, and asked Sergio where he was from. Sergio assumed the man was asking if he was from a gang, so he said, "No" or "Nowhere." Sergio identified Ventura as the man with the gun. Sergio identified him as Diaz, and said he did not have a gun.

Ventura said, "Give me your phone," and Diaz took Sergio's phone. Ventura also told Sergio to give him his wallet, but Sergio told them he was coming from the gym and was not carrying his wallet.

Ventura shouted "Westside" two or three times. As they went back to the car, Sergio heard one man say, "Why didn't you do it? Why didn't you shoot him?" Both men got into the car, and they drove away. Sergio borrowed a phone and called 911. On cross-examination, Sergio agreed that he initially reported that the car was a Toyota Yaris, because it looked like a coworker's Yaris.

Count 5: Sabrina V. testified that she was with her 16-year-old daughter in the area of Second Street and Hobart at about 7:45 p.m. on November 10, 2014. She had a cell phone in her hand. A man with a gun approached her, pointed the gun at her, and said, "Give me your phone." Sabrina gave him her phone, and he left. She did not see anyone else during the incident. Sabrina called 911 from another phone to report the incident. She said that the man who took her phone was wearing a black shirt and red pants. Police later took Sabrina to view a suspect in person; she identified Ventura, dressed in the same clothing she had seen earlier, as the perpetrator. Sabrina testified that police later found her phone and returned it to her.

Sabrina's daughter, Marisa V. also testified. Marisa noticed a white car in the area at the time of the incident. She testified that the man approached them, racked the slide on a gun, and pointed the gun at Sabrina's neck. After Sabrina handed him her phone, the man ran away. Marisa did not know whether he went to the white car. In court, Marisa identified Ventura as the man with the gun.

Count 6: Yoosun C. testified that on November 10, 2014, at about 7:50 p.m., she was near the intersection of Fourth Street and Catalina Street. She was walking, texting on her phone, and listening to music through earphones. A man approached from the front and grabbed her; she stepped back and another man was behind her. The man in front grabbed the phone from Yoosun. The man behind Yoosun put a silver gun against her back. One of the men—Yoosun was not sure which—pulled on the purse that was on her shoulder. Yoosun screamed. The men went toward a white Nissan Sentra, and were racking a round in the gun. The man with the gun got into the back seat of the car,

and then pointed the gun at Yoosun. The other man got into the front passenger seat. Someone who heard Yoosun scream came to help her, and called 911. Yoosun was unable to identify her attackers in court or in person following the attack. The police later returned Yoosun's phone to her, but the SIM card was missing.

Witness Joseph W. testified that on the evening of November 10, 2014, he was walking on Catalina Street towards Fourth Street when he heard a scream. He walked up to the intersection and looked toward the scream on Fourth Street, and saw a woman screaming while two men were walking away from her toward a white Nissan Sentra parked nearby. The men got into the car and it sped off. Joseph approached Yoosun to see if she was all right. Yoosun was "screaming, crying hysterically, saying that they just stole her phone." Joseph called 911.

2. *Investigation*

Los Angeles Police Department robbery detective Anthony Kong testified that he received several reports of cell phone robberies with similar facts: a white car and a suspect that would rack the gun. After Daniel P. reported a description of the car and the first four digits of a license plate, Kong checked a license plate reader database, found cars with similar license plates, and was able to locate a white Nissan that matched the partial license plate Daniel P. reported and had been seen in the area of the robberies. Kong checked the registered owner of the car and people associated with the car, which included anyone who had received a ticket in the car. Codefendant Luis had received a ticket in the car. Kong put Luis's picture in a photographic six-pack and showed it to Daniel P.; Daniel was unable to identify a suspect.

Upon further investigation, Kong and his partner noted similarities in Sergio V.'s description of the car's rims, the surveillance video taken near the incident involving Daniel P., and a Google Maps street photo of the address where the car was registered, which showed a parked white car. Kong alerted officers in the area of the residence to look for the car.

LAPD sergeant Hector Urena testified that he had responded to the call regarding the incident involving Yoosun C., and she had described the suspects' car as a white Nissan Altima or Sentra. Urena also received Kong's alert about the Nissan Sentra involved in similar armed robberies nearby. Urena, his partner, and LAPD Detective Sandefur went to the address where the car was registered, and found the car in an alley behind the address. Codefendant Luis was in the vehicle.

A search of the car revealed a stainless steel Colt .45 handgun, and an identification card for defendant Diaz. The pistol was loaded but there was no round in the chamber. Sandefur showed the jury the pistol and magazine, and with the magazine removed, demonstrated how to rack the slide. Officers also searched Luis's bedroom inside the residence, and recovered ammunition for the handgun. They also recovered a pellet or BB gun, which had no slide.

While officers were at Luis's residence, Ventura and Diaz arrived together. Ventura was wearing a black t-shirt and red shorts, matching the clothing Sabrina V. had described.[4] They were arrested. Kong spoke with Ventura and learned that Ventura and Diaz shared a residence. Officers searched Ventura

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[4] On cross-examination, Urena agreed that Yoosun C., whose attack occurred the same day, reported that her attackers were wearing jeans and different colored shirts.

and Diaz's residence and found a Samsung phone, two SIM cards, and two memory cards. Yoosun C. later identified the phone as hers. Kong also testified that he took another phone recovered during the investigation to Sabrina V.'s residence.

On cross-examination, Kong agreed that he showed photographic six-packs to Justin M., Sergio V., and Shan L., and none of these victims identified Diaz.

3. *Gang evidence*

LAPD officer Rafael Espinoza testified that he worked with the LAPD Gang Enforcement Detail. He was assigned to the Westside Drifters gang, and he was familiar with many of the "main players" of that gang. The Westside Drifters' activities included murders, attempted murders, narcotics sales, grand theft auto, and stealing things to collect money for the gang. Espinoza testified that another LAPD officer made contact with Diaz multiple times while he was with an admitted Drifters member; the officer suspected that Diaz was a Drifters associate.

Kong testified that he did an Internet search on Diaz, and found a Facebook account with several photographs. Information on the account matched Diaz's date of birth, place of birth, and area of residence. In one photograph shown to the jury, one person depicted is making the Drifters hand sign, and another is making a sign showing disrespect to a rival gang. Espinoza testified that generally, only gang members have permission to make gang hand signs. In closing arguments, the prosecutor stated that the person in the photograph making the Drifters sign was Diaz.

Espinoza testified that when a gang member asks, "Where are you from?" The question is a challenge intended to determine whether someone is from rival gang territory. Espinoza also

testified that gang associates who want to become gang members "put in work" for the gang, meaning that they follow other gang members' instructions and commit crimes in rival territory to earn street credit with the gang. Espinoza testified that none of the crimes committed in this case were in Westside Drifters' territory; they occurred in various rivals' territory.

Espinoza was asked whether a series of crimes such as the ones here, including one crime against a Hispanic male (Sergio V.) where the perpetrators yelled "Westside!" two or three times, would have been committed for the benefit of a criminal street gang. Espinoza said yes. He also opined that the gang name was likely only shouted in the one crime involving a Hispanic male in his early 20s in a rival gang area because the perpetrators probably thought they were addressing a rival gang member. Espinoza opined that even though no explicit gang affiliation was expressed in the commission of the other crimes, those crimes might have been intended to benefit the gang because a cut of the proceeds generally would be given to the gang. Also, the mere fact of committing crimes in rival territory would elevate the perpetrator's stature within the gang.

On cross-examination, Espinoza said he did not know who in the Westside Drifters may have ordered these crimes, and he did not speak with rival gang members to determine whether they were responsible for the crimes. He did not interview community members to see if the crimes struck fear in community members, nor did he find out whether anyone's status was raised within the gang as a result of the crimes. He also said that a gang may commit crimes either within or outside of its own territory.

C. Defense evidence

LAPD officer Joseph Oyama testified that Daniel P. flagged him down after the attempted robbery of his phone. Oyama said that Daniel described the gun used in the attempted robbery as being dark blue. On cross-examination, Oyama said that if a witness described a gun as being black, he would write "blue steel"[5] in the report.

LAPD officer Tsao Chun Lin testified that he responded to the call regarding Sergio V. Lin said Sergio described the perpetrators' car as a 2006 Toyota Yaris. Lin also said that Sergio did not report that the perpetrator did anything with the gun, other than point it at him.

LAPD officer Walter Casasola testified that he responded to the robbery reported by Shan L. He said Shan reported that the gun was a "blue steel semiautomatic handgun." On cross-examination, Casasola said Shan did not use the term "blue steel."

D. Partial deadlock and verdict

The jury found Diaz guilty on counts 1, 3, 4, and 6, and not guilty on counts 5, 7, and 8. For count 1, the jury found the personal-use firearm allegation true. (§ 12022.53, subd. (b).) For counts 3, 4, and 6, the jury found true the allegation that a principal in the offense was armed with a firearm. (§12022, subd. (a)(1).)

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[5] Oyama explained that a "blue steel" gun "is a general term for a handgun that's . . . all steel, including the grip, and it's generally very dark in color. It kind of resembles . . . black in color, but it's really dark blue." With the court's permission, Oyama showed the jury his LAPD service weapon as an example, a .40 caliber Glock, which had a blue steel barrel.

The jury found Ventura guilty on counts 2, 3, 4, 5, 6, and 8, and it found the personal-use and principal firearm allegations to be true on each count. (§§ 12022, subd. (a)(1), 12022.53, subd. (b).) The jury found Ventura not guilty on counts 1 and 7.

For both defendants, the jury deadlocked on the gang enhancements, and the court declared a mistrial as to those enhancements. The People later dismissed the gang allegations.

The court sentenced Diaz to a total of 15 years and eight months in prison, calculated as follows. On count 1 as the base term, the court imposed the midterm sentence of two years, plus 10 years for the section 12022.53, subd. (b) firearm enhancement. On counts 3 and 6, the court imposed consecutive terms of 16 months. On count 4, the court imposed a consecutive one-year term. On all counts, the court imposed and stayed a one year term for the section 12022, subd. (a)(1) enhancements. The court also ordered Diaz to pay various fines and fees.

The court sentenced Ventura to a total of 21 years, eight months in prison, calculated as follows. On count 2 as the base term, the court imposed the midterm sentence of three years, plus 10 years for the section 12022.53, subd. (b) firearm enhancement. On counts 3 and 5, the court imposed terms of one year, plus three years and four months for the 12022.53, subd. (b) firearm enhancements, for a total of four years and four months on each count, to be served consecutively. On counts 4, 6, and 8, the court imposed concurrent terms of 13 years. The court also ordered Ventura to pay various fines and fees.

Ventura and Diaz timely appealed.

DISCUSSION

A. Denial of request to bifurcate

Ventura contends that the trial court erred by denying his motion to bifurcate the trial on the gang enhancement allegations from the remainder of the trial.[6]

1. *Background*

Before jury voir dire, Ventura moved to bifurcate the gang allegations, and Diaz joined the motion. Ventura argued that only count 3 included evidence of gang affiliation associated with the alleged offense. There was some evidence that Diaz was associated with a gang, including the Facebook picture in which Diaz and others displayed gang hand signs, and a field identification card associating Diaz with gang members. Ventura argued that "the prejudicial nature of the gang evidence has too high of a possibility of spilling over into the other counts," thus increasing the likelihood that the jury would find the gang allegations true for the other counts.

The prosecutor opposed the motion, asserting that he intended to present evidence that all counts were gang-related. He said it was not surprising that defendants made overt references to a gang in count 3, because victim Sergio V. was a Hispanic male in his early 20s. The other victims were females or people of Asian descent, making it less likely for those victims to have any gang affiliation. The prosecutor also argued that the defendants were "putting in work" for the gang so they could be inducted as members of the gang or gain respect within the gang. He added that the evidence of gang affiliation was limited, and it likely would not cause the jury to convict defendants on any crimes.

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[6] Diaz joined Ventura's appellate arguments.

The court denied the motion, noting that bifurcation is discretionary and "the probative value substantially outweighs any possible prejudicial effect." The court reasoned that because the prosecution was planning to argue that all the counts were motivated by gang-related issues, "gang evidence would be relevant to the substantive charges regardless of enhancement." Therefore, "to try the enhancement together with the underlying crimes is judicially efficient."

As discussed above, gang expert Espinoza testified that all of the robberies and attempted robberies could have been for the benefit of a gang, even though there was only overt gang evidence in one count. As part of the jury instructions, the court said, "You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose and knowledge that are required to prove the gang-related enhancements charged. You may also consider the evidence to evaluate the facts and information relied on by the expert witness in reaching his or her opinion and on the issue of motive to commit any of the charged crimes. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or he has a disposition to commit crime." The jury deadlocked on the gang enhancements, and the allegations were eventually dismissed.

2. *Standard of Review*

A trial court has discretion to bifurcate a trial so that gang enhancement allegations are tried separately. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*); § 1044; *People v. Calderon* (1994) 9 Cal.4th 69, 75 [§ 1044 "vests the trial court with broad discretion to control the conduct of a criminal

trial," including ordering portions of the trial to be bifurcated].) "Bifurcation of gang allegations is appropriate where the gang evidence is 'so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt.'" (*People v. Franklin* (2016) 248 Cal.App.4th 938, 952.) "On appeal, we review the trial court's ruling for an abuse of discretion, based on a review of the record that was before the trial court at the time of the ruling." (*People v. Burch* (2007) 148 Cal.App.4th 862, 867.)

3. *Discussion*

Ventura contends that the gang evidence was more prejudicial than probative. He argues that under Evidence Code section 352, the evidence should have been excluded. However, a determination that certain evidence might be more prejudicial than probative under Evidence Code section 352 does not compel bifurcation. "Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself—for example, if some of it might be excluded under Evidence Code section 352 as unduly prejudicial when no gang enhancement is charged—a court may still deny bifurcation." (*Hernandez, supra*, 33 Cal.4th at p. 1050.)

Here, the prosecution's theory was that the defendants' rash of similar robberies in territories of Westside Drifters rivals' was motivated by defendants' gang involvement. In addition, victim Sergio V. testified that Ventura asked where he was from and then yelled "Westside!" two or three times. "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of

applying force or fear, or other issues pertinent to guilt of the charged crime." (*Hernandez, supra*, 33 Cal.4th at p. 1049.) Here, the evidence was admissible to show issues pertinent to guilt, such as a motive for a group of young men to repeatedly steal cell phones from people at gunpoint within a certain area. The court did not abuse its discretion in declining to bifurcate the gang evidence from the remainder of the trial.

Assuming *arguendo* that the court's denial of Ventura's bifurcation request was error, it was harmless. Ventura argues that even if the jury had a reasonable doubt as to the substantive charges, it "would still be inclined to convict appellant based on the prejudicial evidence of gang association." However, the court gave CALCRIM 303 and a version of CALCRIM 1403, instructing the jury that the gang evidence was admitted only for the limited purpose of considering the gang enhancement, and it could not be used as evidence of bad character or a propensity to commit crime. Absent a showing to the contrary, we presume the jury followed these instructions and considered the evidence only for a limited purpose. (*People v. Simon* (2016) 1 Cal.5th 98, 130.) Ventura has not pointed to anything in the record suggesting that the jury failed to follow these instructions.

Ventura also contends that the introduction of the gang evidence was prejudicial because this was a close case. He supports his argument by pointing to the fact that the jury acquitted him on counts 1 and 7, and deadlocked on the gang allegations. There was ample evidence of guilt, however. Victims and witnesses in seven of the eight counts positively identified one or both of the defendants. Two of the stolen phones were recovered during the investigation, including the phone recovered at defendants' residence. There were significant similarities in

the crimes, including the car used, the gun, the perpetrator racking the gun's slide, and the property taken from the victims. The relatively minor discrepancies to which Ventura points, such as witnesses' differing descriptions of the perpetrators' heights, do not suggest that the case was particularly close or that the jury improperly relied on gang evidence to render a verdict. Furthermore, the fact that the jury deadlocked on the gang enhancement allegations on each of the counts demonstrates that the jury was not so influenced by the gang evidence that it failed to evaluate the evidence. Any purported error was harmless under either the *Chapman* or *Watson* standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable outcome].)

B. Denial of motion for mistrial

Diaz argues that the court erred in denying his motion for mistrial following part of Detective Kong's testimony.

1. *Background*

After defendants were arrested, when Ventura was asked where he lived, he responded, "I live with Diaz" or "I stay with Diaz." During trial outside the presence of the jury, the prosecutor said he intended to establish through Kong's testimony that Ventura and Diaz lived at the same residence, but he wanted to avoid any *Aranda/Bruton*[7] issues. The prosecutor

[7] Under the *Aranda/Bruton* rule, "a nontestifying codefendant's extrajudicial statement that incriminates the other defendant is inadmissible as a violation of the latter's rights to confrontation and cross-examination." (*People v. Capistrano* (2014) 59 Cal.4th 830, 868 (*Capistrano*); see also *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).)

suggested establishing that each defendant lived at the same address, without any explicit references to the other defendant. Diaz's attorney agreed with this approach because the evidence of Diaz's residence was admissible, and "having [the information] come in in a sanitized fashion probably will benefit Mr. Diaz." Ventura's counsel did not object. The court said that evidence of each defendant's residence, without reference to the other defendant, would not present an *Aranda/Bruton* issue.

During Kong's testimony, the following exchange ensued:

"Q. [prosecutor] Okay. Did you speak with defendant Ventura sometime that evening?

"A. [Kong] Yes.

"Q. And did he tell you a residence he was staying at?

"A. Yes.

"Q. And what residence was that?"

"A. He was staying at the same residence as Mr. Diaz., at Mr. Diaz's residence.

"Q. Okay. And did you respond to that residence?

"A. Yes."

After some brief additional testimony, the court called counsel into chambers. The judge said, "I think Detective Kong just kind of stepped in the issue we were trying to avoid." Ventura's and Diaz's counsel moved for a mistrial. The prosecutor argued that Kong's statement was not problematic, because "all that he has said at this point is that he stays at the same residence. Staying at [a] residence in no way implicates anyone in any kind of crime. . . ." The court denied the motions for mistrial, and said that the statement was "not a central issue to guilt or innocence but a peripheral circumstantial issue they can draw a circumstantial inference from." The court noted that

the parties knew residence information would be admitted anyway, and added, "I do not believe it is prejudicial to the extent it requires a mistrial."

The judge offered to strike Kong's answer and give the jury a curative instruction. Counsel for all three defendants said they were making a tactical decision to forgo any curative instruction to avoid highlighting the issue.

During jury instructions, the court instructed, "You have heard evidence that defendant Ventura and defendant Diaz made statements about their residence after their arrest. You may consider each defendant's statement only against the defendant who made it, not against any other defendant."

2. *Standard of Review*

"A motion for mistrial is directed to the sound discretion of the trial court. '[A] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction.'" (*People v. Jenkins* (2000) 22 Cal.4th 900, 985-986 (*Jenkins*).) "[W]e review a ruling on a motion for mistrial for an abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 283.)

3. *Discussion*

Diaz argues that the trial court erred in denying his motion for mistrial, because he "suffered irreparable harm by the admission of inculpatory statements by Ventura rendering Diaz guilty by association with Ventura." Diaz argues that he was not afforded any opportunity to cross-examine Ventura, and as a result Kong's statement ran afoul of the Confrontation Clause. "The confrontation clause of the Sixth Amendment to the federal

Constitution, made applicable to the states through the Fourteenth Amendment, provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The right of confrontation includes the right of cross-examination." (*People v. Fletcher* (1996) 13 Cal.4th 451, 455.) Therefore, "a nontestifying codefendant's extrajudicial statement that incriminates the other defendant is inadmissible as a violation of the latter's rights to confrontation and cross-examination." (*Capistrano, supra*, 59 Cal.4th at p. 868.)

Diaz argues that Ventura's statement that he lived with Diaz was "powerfully incriminating" because it "implicat[ed] him as the second participant in the commission of the charged offenses. Without this evidence, there was no evidence Diaz and Ventura knew one another or had, previous to [the day they were arrested], ever associated with one another." This is not an accurate characterization of the evidence. Sergio V. and Justin M. identified both Ventura and Diaz as participants in the crimes against them. Diaz's identification was found in the car identified by several witnesses, suggesting that Diaz had been in the car with Ventura and Luis. Defendants arrived together at Luis's residence on the day they were arrested, allowing the jury to conclude that they knew each other and were traveling together. Kong's statement was therefore not the only evidence associating Ventura and Diaz.

Furthermore, all parties agreed that evidence of the defendants' address would be admitted at trial. Had police identified the shared residence with an address, rather than stating that Ventura said he lived with Diaz, the jury would have been provided the same information. In other words, the jury

would have received evidence that defendants lived at the same residence, even without Kong's testimony that Ventura said he lived with Diaz.

Kong's statement was therefore not incurably prejudicial, and the trial court did not err by denying Diaz's motion for a mistrial. "'Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.'" (*Jenkins, supra*, 22 Cal.4th at p. 986.) Because the jury would have received the same information even without Kong's testimony about Ventura's statement, the trial court did not err in finding that Kong's statement was not incurably prejudicial.

Even if the court had erred, however, any such error was harmless. (See *People v. Sanchez* (2016) 63 Cal.4th 665, 698 [confrontation error is analyzed under the standard of harmless beyond a reasonable doubt].) Where there is compelling evidence of guilt, the erroneous denial of a motion for mistrial may be harmless error. (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1581; *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1100.) Of the four counts for which Diaz was found guilty, three of the victims identified him as the perpetrator. The fourth, Yoosun C., testified that two men attacked her, and her phone was found in Ventura and Diaz's residence. The jury did not find defendants guilty of all the same counts, suggesting that it did not automatically assume that just because Ventura and Diaz lived together, they must have committed each crime together. Diaz's identification was in the car that was identified as the one in which the perpetrators had been traveling, suggesting that Diaz had been in that car. A gun matching the description from the victims and witnesses was also found in the car. The evidence of

guilt was compelling, and any error in admitting Kong's testimony regarding Ventura's statement was harmless.

DISPOSITION

Affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.