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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. MANUEL FRANCISCO FELIPE, Defendant and Appellant.	B229845 (Los Angeles County Super. Ct. No. BA371418)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Scott A. Taryle and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Manuel Francisco Felipe appeals from a judgment entered after a jury convicted him of premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a)).[1] The jury found true the special circumstance allegations that appellant personally used a deadly weapon, a knife (§ 12022, subd. (b)(1)) and inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). The jury also found true that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). Appellant was sentenced to state prison for a term of 19 years to life, consisting of 15 years to life for the attempted murder, plus three years for the bodily injury enhancement, and one year for the dangerous weapon enhancement.

Appellant challenges the sufficiency of the evidence supporting the gang allegation. He also contends that the trial court abused its discretion by admitting evidence that four years earlier in the same area of downtown Los Angeles appellant possessed a knife similar to the one used to stab the victim in this case. Finding no error, we affirm the trial court's ruling.

FACTS

Prosecution Evidence

Sometime after 3:00 p.m. on May 8, 2010, Justin Carter was walking on Los Angeles Street in downtown Los Angeles when he saw a large group of young Hispanic males converging near the corner of 6th Street. As he got closer he saw that one individual (later identified as Amadeo Gomez Gutierrez) was being kicked and beaten by a number of others. When Gutierrez fell to the ground, all of the assailants disbursed except one who stood over him and stabbed him five to seven times in the stomach. Carter saw the attacker use a small pocket knife with a blade approximately four inches long. After the attack concluded, Carter saw a police officer on 5th Street and reported what he had seen. On May 13, 2010, Carter was shown a six-pack photo lineup and

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

selected appellant's photograph as the one who looked the most like the person he had seen stabbing Gutierrez.

Gutierrez was transported to the hospital where he underwent multiple surgeries for his life threatening abdominal injuries. He was still hospitalized at the time of trial, approximately six months after the attack, and unable to testify. The treating physician testified that Gutierrez had not eaten since the attack and may never be able to eat. It was unclear if he could resume a "meaningful life" in the future.

A few minutes after Gutierrez was stabbed, R.J. and his family were driving in downtown Los Angeles. R.J. turned onto 6th Street from a parking lot towards Los Angeles Street when he saw two young males running towards him. Both young men were "kind of dressed like in gang-related" clothing, and were constantly looking around as they ran. Appellant had a T-shirt wrapped around his hand. R.J. observed as both men approached a trash can, threw something into it, and then continued running. Shortly afterwards, R.J. discovered that someone had been assaulted and called 9-1-1 and reported the location of the trash can. On May 26, 2010, R.J. was shown a number of photo lineups and asked if he could identify the individuals he saw running on May 8, 2010. He selected one individual who was identified as Francisco Falcon. In court, he identified appellant as the other young man he saw running towards his car on May 8, 2010.

A.J. was in the vehicle driven by her father, R.J., and saw appellant and Falcon looking around as they were running. She saw that appellant's hand appeared to be bloody. She saw both men run towards a trash can and watched as they threw something into it. On May 26, 2010, A.J. selected appellant's photo from a six-pack photo lineup as the person she saw with the bloody hand, and selected Falcon's photo from another six-pack as appellant's companion. She also identified appellant in court as the individual with the bloody hand that she saw running on 6th Street on May 8, 2010.

A 9-1-1 call made shortly after the attack on Gutierrez was played for the jurors. When the caller was asked if he could describe the assailants he told the operator they "ran off" and described them as "a group of, of lazy gang bangers," and "little cholos."

Officer Eduardo Alvarez of the Los Angeles Police Department (LAPD) investigated the crime scene. A shirt and a folding knife were retrieved from a trash can on 6th Street. Officer Alvarez canvassed the area near the crime scene and escape route and obtained a number of surveillance videos from the businesses in the area. The videos depicted various scenes including one showing two individuals running away from the crime scene on Los Angeles Street at 3:23 p.m. on the date of the stabbing. Another video depicted appellant wiping his bloody left hand with his shirt. Officer Alvarez identified appellant from the surveillance videos because he had previously seen him in the general location on a number of occasions and had spoken to him. Officer Alvarez recognized Falcon from the videos because he had previously arrested him and had approximately 30 contacts with him prior to the May 8, 2010 incident. Both R.J. and A.J. authenticated a surveillance video from the date of the crime and identified appellant on the video. Officer Alvarez arrested appellant on May 14, 2010. Appellant had a one-inch cut on the inside of his left thumb which appeared to be healing.

Gang Expert Testimony

Officer Alvarez testified as the prosecution's gang expert. Officer Alvarez had been an officer with the LAPD for over eight years and investigated gangs in the downtown area. In the past, he testified as an expert on both the 18th Street, and 5th and Hill gangs. The area where the assault on Gutierrez occurred was within the territory controlled by the 5th and Hill gang. He spoke with gang members on a daily basis and sometimes used them as informants. He testified that the 5th and Hill gang had approximately 250 documented members. Their primary activities included narcotic sales, extortion, robbery, and assaults on other gang members to protect their territory. The 5th and Hill gang collected extortion money from the illegal street vendors who sold items ranging from DVD's to hot dogs. Assaults by gang members in public places in broad daylight was not unusual. A vendor who refused to pay extortion money to the gang would be "beaten up to set an example for everybody else." Fifth and Hill gang members were reported to have shot and stabbed people in public displays of their capacity for violence and to show the consequences of crossing the gang.

Officer Alvarez had investigated a number of violent crimes committed by 5th and Hill gang members. The gang members were sometimes armed with guns but predominantly carried knives. Multiple gang members acting together assaulted individuals to administer severe beatings and it was common during a gang beating for the violence to escalate from an assault to a homicide involving a gun or knife. Gang members also assisted each other in getting away from crime scenes. They split up or ran in smaller groups and helped by discarding weapons and hiding gang members in their homes.

Appellant had a number of tattoos including the letter "h" on each shoulder, the number "5" on his right shoulder, and "5th and Hill" tattooed on his right bicep. Falcon told Officer Alvarez that he was a member of the 5th and Hill gang and used the moniker "Diablo." He had 5th and Hill gang tattoos on his neck and on the back of his head.

When asked a hypothetical question based on the facts of the case, Officer Alvarez opined that such an assault promoted and furthered the interest of the 5th and Hill gang because it created fear in the community. When people in the neighborhood saw the violence the gang was capable of, they would be fearful for their safety and reluctant to testify openly or acknowledge they witnessed crimes. Furthermore, the gang member who committed the stabbing gained status within the gang because it evidenced that member's capacity to commit violent acts to promote the 5th and Hill gang.

Prior Knife Possession Incident

Jason Deleo provided security services for businesses in the downtown Los Angeles area. He testified that in June 2006 he saw appellant in the same general area where Gutierrez was assaulted. Appellant was carrying a switchblade or flip-open-type knife with a blade three to four inches in length. The knife appeared similar to the knife used to stab Gutierrez.

Defense Evidence

The principal defense witness was Dr. Robert Shomer, an experimental psychologist specializing in eyewitness identifications. He testified about various factors impacting the accuracy and reliability of a witness's identification of a suspect. He

explained that an accurate identification in this case would be affected by a number of factors including stress, movement, and whether the number of individuals involved diverted the attention and focus of the witnesses.

LAPD Lieutenant Paul Vernon interviewed Justin Carter on the day Gutierrez was attacked. Carter told Lieutenant Vernon that he didn't think he could identify the individual that stabbed Gutierrez. Carter also wasn't sure the assailants were gang members and thought the attack seemed personal.

Appellant's sister, Izabel Felipe, testified that on the morning of May 8, 2010, appellant cut his hand on a sharp metal awning pole. Appellant was at her home the entire day. She left to do laundry between 1:00 p.m. and 3:30 p.m. and when she returned he was at her home.

Rebuttal Evidence

Officer Alvarez testified that during a postarrest interrogation, appellant told him that he had been at the movies on the day of the attack on Gutierrez. Appellant also told Officer Alvarez that he cut his hand when a television fell on it.

DISCUSSION

I. Sufficiency of the Evidence in Support of the Gang Enhancement

A. Contention

Appellant contends that there was insufficient evidence to support the gang enhancement in connection with the charged offense of premeditated attempted murder. Specifically he contends that the evidence failed to support the gang expert's opinion.

B. Standard of Review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the

evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless "'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) It also applies when determining whether the evidence is sufficient to sustain a jury finding on a gang enhancement. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321–322.) The testimony of one witness, if believed, may be sufficient to prove any fact. (Evid. Code, § 411.)

C. Gang-related Offense

Section 186.22, subdivision (b)(1) provides an enhanced sentence to a person convicted of a felony committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616–617.) It applies to "gang-related" crimes. (*People v. Castaneda* (2000) 23 Cal.4th 743, 745.) The crime must have "some connection with the activities of a gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 761 [discussing § 186.30].)

Expert testimony may be used to prove the elements of a gang enhancement allegation. (*People v. Williams* (2009) 170 Cal.App.4th 587, 621.) "Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22(b)(1). [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 63.)

D. Substantial Evidence Supported the Gang Enhancement

Officer Alvarez rendered his opinion in response to a hypothetical "rooted in facts shown by the evidence." (*People v. Gardeley, supra,* 14 Cal.4th at p. 618.) Officer Alvarez opined that the Gutierrez stabbing promoted and furthered the criminal interests of the 5th and Hill gang by creating fear in the community because fear leads to reluctance on the part of residents to testify. Extortion of local street vendors was a primary activity of the 5th and Hill gang and an attack such as this in broad daylight sent

a message to the neighborhood that the gang was capable of extreme violence. Testimony regarding the viciousness of the attack which was committed within the confines of 5th and Hill gang territory constituted substantial evidence. (*People v. Albillar, supra,* 51 Cal.4th at p. 63.)

Appellant argues that there is no evidence to support the expert's opinion that the crime was gang related or committed by gang members. We disagree. While "it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang" the facts here are otherwise and supported the gang association. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) The victim was in a neighborhood controlled by 5th and Hill, a gang with a history of violence, when he was attacked by a group of individuals, one of whom stabbed him as he lay on the ground. In making their escape, gang members generally split up into smaller groups. Within minutes of the incident appellant was identified by eyewitnesses and on surveillance videotapes running from the scene of the crime in the company of another known 5th and Hill gang member, Francisco Falcon. Gang members also assist each other in discarding weapons and both Falcon and appellant were seen throwing something in a trash can from which a shirt and knife were later retrieved.

Appellant points to the absence of testimony regarding the use of gang signs, language, or colors associated with the attack to support his contention that there was no evidence to support Officer Alvarez's opinion that the crime was committed to intimidate local residents. Appellant relies on *People v. Ochoa* (2009) 179 Cal.App.4th 650, (*Ochoa*). In *Ochoa*, a gang enhancement finding was reversed on appeal when the defendant did not wear gang clothing, display gang signs or call out a gang name while committing a crime. There was no testimony that the crime was committed in gang territory, and the defendant was not in the company of any fellow gang members. (*Id.* at p. 662.) The court found no evidentiary support for the gang expert's testimony that the crime might benefit the defendant's gang. (*Ibid.*)

Here, unlike *Ochoa*, there were facts to support Officer Alvarez's testimony. Extortion of local street vendors and by definition enforcement through intimidation was

a signature crime of the 5th and Hill gang. There were at least 250 documented members of the gang and the attack took place in broad daylight within 5th and Hill territory. Furthermore, the attackers were recognized as gang members by R.J. who described appellant and Falcon's clothing as "gang-related," and the 9-1-1 caller who described them as "gang bangers" and "little cholos." Appellant had numerous 5th and Hill gang tattoos.

The other cases appellant relies on are factually distinguishable. In *People v. Ramon* (2009) 175 Cal.App.4th 843, two gang members were arrested driving a stolen vehicle in gang territory. (*Id.* at p. 848.) A gang expert testified that possession of a stolen truck and an unregistered firearm benefitted the gang by placing the defendant in a position to spread fear and intimidation. The court found the testimony to be speculative because there were no facts from which the expert could discern whether they were acting on their own behalf or on behalf of their gang. (*Id.* at p. 851.) In *In re Frank S.* (2006) 141 Cal.App.4th 1192, a minor was found to be in possession of a knife, a small amount of methamphetamine and a red bandana. (*Id.* at p. 1195.) The court found that evidence insufficient to warrant the conclusion the minor had the specific intent to promote, further, or assist in criminal conduct by gang members. (*Ibid.*) The prosecution failed to provide any evidence that the minor was in gang territory, had gang members with him, or had any reason to use the knife in a gang-related offense. (*Id.* at p. 1199.)

Here, there were underlying facts to support the opinions Officer Alvarez expressed. The evidence showed that appellant participated in a group beating in which he stabbed the victim. The attack took place within gang territory and had all the hallmarks of a 5th and Hill act of intimidation. Appellant ran from the scene with a fellow 5th and Hill gang member and together they disposed of the weapon used in the attack.

Appellant contends that there are other possible scenarios that have nothing to do with 5th and Hill gang activities. But we need not address appellant's alternative theories regarding the inferences that could have been drawn from the evidence. "'[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed

simply because the circumstances might also reasonably be reconciled with a contrary finding.'" (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162, quoting *People v. Farnam* (2002) 28 Cal.4th 107, 143.)

II. Evidence of Possession of Knife

A. Contention

Appellant asserts that the trial court erred in admitting evidence that he possessed a knife in 2006 which resembled the one used to stab Gutierrez. He claims the evidence was more prejudicial than probative under Evidence Code section 352 and that, but for the admission of the prior possession evidence, it is reasonably probable a result more favorable to appellant would have been reached. He also asserts that admission of the prior possession evidence violated his right to due process of law and a fair trial.

B. Procedural Background

The prosecutor moved in limine to introduce evidence that in 2006, four years before Gutierrez was assaulted and stabbed, appellant had been seen in the same general location with a knife resembling the one used to stab Gutierrez. The court conducted an Evidence Code section 402 hearing. According to the prosecutor, the evidence would show that in an incident that occurred in June 2006 in the area of 6th and Spring Streets in Los Angeles, approximately one block from where Gutierrez was stabbed, appellant when approached by a security guard named Jason Deleo, pulled out a knife. Using it in an "outward pointing gesture" he said, "these fools want to get shanked." The prosecutor sought to introduce the evidence on the issue of identity because the defense was misidentification and alibi. The prosecutor also argued the evidence was relevant to show motive in a gang case. Defense counsel argued that the four-year gap in time between the incidents made the probative value of the evidence "extremely weak" and highly prejudicial.

The court stated that if the knife used by appellant in 2006 closely resembled the knife used to stab Gutierrez it would be relevant to "a major issue in this case" namely, placing the knife in appellant's possession. The court also stated that a description of

appellant's earlier actions would be highly prejudicial under Evidence Code section 352 and therefore would limit testimony to the fact of possession only.

Deleo testified during the 402 hearing. He identified appellant in court who he knew as "Youngster" as being in possession of "some sort of a switch blade type knife" in June 2006. Deleo was then shown a photograph of the knife recovered from the trash can on the day Gutierrez was stabbed. Deleo testified that the knife he saw in appellant's possession in 2006 was similar to the one used to stab Gutierrez. The blades were approximately the same size and the color and handles were also similar.

The trial court informed Deleo that he would not be allowed to describe appellant's threatening conduct, or that appellant pointed the knife in his direction, or that Deleo recognized appellant as "Little Youngster."[2] The court instructed Deleo that he could only testify that he saw appellant in 2006 with a similar switchblade-type knife with a similar color and blade size to the knife used to stab Gutierrez.

Deleo testified in accordance with the trial court's instructions. The trial court declined the prosecutor's request to give the jurors a modified version of CALJIC No.2.50 which with respect to evidence of the knife possession would have instructed them to consider the "other crimes" evidence only for a limited purpose. The court explained that Deleo's testimony had been sanitized to the extent that the evidence did not "rise to the level of another crime" and therefore the instruction would be inappropriate. In concluding his closing argument, the prosecutor asked the jury to consider if it was a mere coincidence that appellant was seen in the same area in 2006 holding a similar knife.

C. Relevant Authority

The admissibility of evidence of prior misconduct, as with other types of circumstantial evidence, depends upon "(1) the *materiality* of the fact sought to be proved or disproved; (2) the *tendency* of the uncharged crime to prove or disprove the material

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[2] The court apparently misspoke as the witness referred to appellant as "Youngster" rather than "Little Youngster."

fact; and (3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence. [Citations.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 315 (*Thompson*), overruled on other grounds by *People v. Rowland* (1992) 4 Cal.4th 238, 260.) "To be material, the evidence need only tend to prove or disprove some fact in issue." (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1246.) "In order to satisfy the requirement of *materiality*, the fact sought to be proved may be either an ultimate fact" in dispute "or an intermediate fact 'from which such ultimate fact[] may be presumed or inferred.'" (*Thompson, supra*, at p. 315.) To determine whether the evidence "has a *tendency* to prove the material fact," the trial court examines "whether or not the uncharged offense serves '"logically, naturally, and by reasonable inference'" to establish that fact." (*Id.* at p. 316.)

Evidence Code section 352 states, "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 substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." A trial court enjoys broad discretion under Evidence Code section 352, in assessing whether probative value outweighs undue prejudice, confusion, or consumption of time. (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1337.)

One of the policy considerations inherent in the determination of whether other crimes evidence is admissible is found in Evidence Code section 1101. Subdivision (a) provides: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Evidence Code section 1101, subdivision (b) provides an exception to this rule as follows: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

However, "[t]here is no fixed category of mutually exclusive exceptions; i.e., intent, common plan, identity, etc., are merely illustrative of the types of relevant facts in proof of which other crimes may be shown as circumstantial evidence." (1 Witkin, Cal. Evidence (4th ed. 2000) Circumstantial Evidence, § 75, p. 411.)

"[A]n appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including, . . . one that turns on the relevance of the evidence in question." (*People v. Waidla* (2000) 22 Cal.4th 690, 723.)

D. Analysis

The trial court did not abuse its discretion because the evidence of appellant's prior possession of a similar knife was a material fact relevant to the issue of identity. (*Thompson*, *supra*, 27 Cal.3d at p. 315.) Appellant's defense consisted of casting doubt on his identity as the perpetrator. Appellant's sister testified as an alibi witness and defense counsel vigorously cross-examined the prosecution's eyewitnesses and presented an expert that questioned the validity and accuracy of eyewitness identifications.

Contrary to appellant's contention the probative value of the evidence was not "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404, quoting Evid. Code, § 352.) The court listened to argument from the prosecutor and defense counsel and found the evidence was admissible but with a cautionary instruction to the witness, thus indicating that it had weighed the probative value against the potential for prejudice. The evidence was sanitized so that the jury did not hear that appellant brandished the weapon in a threatening manner or that Deleo knew appellant as "Youngster," an apparent gang moniker. The probative value of the evidence was high but it did not have a tendency to evoke an emotional bias against appellant as the fact that appellant possessed a knife in 2006 was not nearly as inflammatory as the evidence of the charged offense.

Evidence that appellant possessed a knife four years prior to the Gutierrez stabbing, coupled with the evidence that the perpetrator of the Gutierrez stabbing used a similar switchblade-type knife with a similar color and blade size tended to establish that

appellant was the perpetrator. "Standing alone the inference may have been weak, but that does not make the evidence irrelevant." (*People v. Freeman* (1994) 8 Cal.4th 450, 491 [rejecting argument that evidence of a garbage bag found in the defendant's car shortly after the subject robbery was irrelevant because no one identified it as the bag used to hold the robbery victims' property, and an "'infinite'" number of people '"must possess such common, unremarkable articles as plastic bags"' in their cars].) Appellant contends that the evidence was inadmissible because the knives in question were both common place switchblades and there was nothing particularly distinctive about them. But, "[t]he fact that many persons may similarly have possessed such [knives] may diminish the strength of the evidence, but it does not make it irrelevant." (*Ibid.*)

In *People v. De La Plane* (1979) 88 Cal.App.3d 223, the trial court admitted evidence of a sawed-off axe handle found in the house in which the defendant was arrested. There, the only evidence that connected the axe handle to the murder victim was expert testimony concluding that the handle "*could* have caused" the victim's wounds. (*Id.* at p. 239.) The appellate court reasoned in that case, "If a victim's wound *could* have been caused by a specific type of weapon or instrument, such a weapon or instrument found in defendant's possession is admissible in evidence. Such a weapon or instrument is considered relevant on the theory that a trier of fact may reasonably draw an inference from defendant's possession of the weapon or instrument to the fact that he used the weapon or instrument to commit the offense—a disputed fact of consequence in the action." (*Ibid.*; see also *People v. Alcala* (1992) 4 Cal.4th 742, 796–797 [evidence of Kane Kut knives seized from defendant's residence properly admitted to show that defendant had access to, or familiarity with, the same brand of carving knife found near the murder victim's remains]; *People v. Clark* (1992) 3 Cal.4th 41, 129 [evidence of two knives belonging to the defendant properly admitted at trial, even though neither knife was directly or conclusively connected to the offenses].)

While the least degree of similarity (between the uncharged act and the charged offense) is required to prove intent, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity.

(*People v. Soper* (2009) 45 Cal.4th 759, 776, explaining *People v. Ewoldt, supra*, 7 Cal.4th 380.)

Appellant argues that the only relevance of his knife possession in 2006 was as character evidence to unduly prejudice appellant in the eyes of the jury and that sufficient similarities justifying admission do not exist between the two incidents. But that limited view distorts the import of the evidence. The fact that appellant possessed a knife in 2006 might reflect poorly on his character but the significance of the fact is that the knife he possessed then matched the description of the knife used to stab Gutierrez, and his possession of the knife in 2006 occurred in gang territory within approximately one block of the Gutierrez stabbing in May 2010. The acts were sufficiently distinctive to support the inference that the same person committed both acts. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.)

E. Any Error Harmless

Even were we to agree with appellant and find that the trial court erred in allowing the jury to hear the sanitized evidence regarding appellant's possession of a knife in 2006, we nonetheless would conclude that any error was harmless. Contrary to appellant's assertions, the circumstantial evidence against appellant was overwhelming. Appellant and his companion Falcon were known to Officer Alvarez as members of the 5th and Hill gang. A.J. identified appellant as the person she saw with a bloody hand running on 6th Street on May 8, 2010. Video surveillance evidence showed appellant running from the scene of the crime while wiping blood from his hand. Both R.J. and A.J. saw appellant stop and throw something into a trash can. A knife was later retrieved from the same trash can. When appellant was arrested six days after the stabbing he had a one-inch cut on the inside of his left thumb. There were inconsistencies with appellant's alibi. Appellant's sister said he cut his thumb on a metal awning but appellant told the investigating officer that a television fell on it. Appellant's sister said he was at home all day on May 8, 2010, but appellant told the investigating officer that he had been at the movies that day.

We do not believe the jury would have returned a verdict more favorable to appellant absent the prior knife possession evidence, and any error in admitting the evidence was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24 [standard of harmless beyond a reasonable doubt employed for federal constitutional error]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonable probability of a more favorable result is standard for assessing state law error].)

F. Forfeiture

The general forfeiture rule set forth in Evidence Code section 353 provides, as relevant, "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion . . . ."

Because appellant did not object to the evidence on due process grounds below, his claim on appeal is limited to the "very narrow due process argument" that the alleged error in admitting evidence regarding the prior possession of a knife over his objection under Evidence Code section 352 "had the additional legal consequence of violating due process." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Appellant must show the error asserted "render[ed] the trial fundamentally unfair." (*Id*. at p. 432.)

In view of our analysis here, appellant's constitutional claims fail.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
DOI TODD

We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST