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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CARLOS CHAVEZ, Defendant and Appellant.	2d Crim. No.B279979 (Super. Ct. No. NA100709) (Los Angeles County)

The victims in this case are brothers Brian and Adrian Barajas. They were attacked by appellant Carlos Chavez and his fellow gang members, who instigated a fist fight at a house party. Appellant hid a knife in his fist and stabbed the victims, wounding Adrian and killing Brian, who was trying to protect his younger brother from appellant. Eyewitnesses saw appellant with a knife in his hand during the attack. The victims were unarmed.

Moments before attacking the Barajas brothers, appellant bragged of his gang membership; his cohorts in the attack are part of the same gang. Appellant was charged with murder and

attempted murder, with allegations that he personally used a deadly weapon and committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang, to promote, further and assist in the gang's criminal conduct. (Pen. Code, §§ 187, subd. (a), 664/187, subd. (a), 12022, subd. (b)(1), 186.22, subd. (b)(1)(C).)[1]

A jury convicted appellant as charged. He was sentenced for first degree murder to 25 years to life in prison, plus one year for using a deadly weapon. For premeditated attempted murder, he was sentenced to a consecutive term of 15 years to life, plus one year. The trial court set the minimum parole period at 15 years, based on the gang enhancement.

We reject appellant's claims of error. The jury's findings on the gang enhancement are supported by the record, and the trial court correctly denied appellant's motion for mistrial after striking part of a police officer's testimony and admonishing the jury to disregard it. The evidence supports the convictions. We affirm.

FACTS

On July 27, 2013, the Barajas brothers went to a backyard party in Wilmington to hear music. They were accompanied by their friends Tania Garcia, Melody Flores, Luis Montellano and Joseph Martinez. Montellano, Garcia and Flores grew up in Wilmington and are aware of the local gangs, though no one in their circle of friends belongs to a gang.

At the party, a group consisting of appellant and 10 to 12 men approached Adrian. Appellant asked Adrian where he was from. Garcia explained that this is a way to find out if a person

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[1] Unlabeled statutory references are to the Penal Code.

belongs to a gang.[2] She described appellant as looking "mad for some reason. He was angry." Flores also described appellant as "angry." Appellant yelled repeatedly "East Side Wilmas" and "East Side Ghost Town." Adrian replied that he does not "gang bang," is not from a rival clique, and did not care where appellant is from. In the gang world, it is disrespectful to say that you do not care if someone claims membership in a particular gang.

Adrian had never before met or spoken to appellant. He had seen appellant around and knew that appellant's moniker is Tazer. Adrian also knew that appellant's aggressive approach and reference to East Side Wilmas was gang-related behavior, so Adrian told appellant, "I'm not from nowhere." Adrian is not a gang member; however, appellant seemed to think that Adrian was from a rival group. To deflect appellant, Adrian said that he is in D.O.A. (Drunk on Arrival), which Adrian described as a "street art group," not a gang. This disclosure did not help, as appellant continued to look angry.

Garcia and Flores testified that Adrian did not say anything to appellant before the encounter to provoke a confrontation. Flores stated that East Side Wilmas is a gang, and that appellant and his cohorts at the party are members of that gang. She was frightened when appellant and his friends approached, because gangs kill people.

Montellano and Flores saw appellant throw the first punch, hitting Adrian's face. This incited appellant's friends to join in. Flores asked appellant why he was attacking her boyfriend, Adrian. Appellant replied, "I'm going to kill your lame ass boyfriend." Flores was hit in the head by appellant's companions.

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[2] The police gang expert confirmed that "Where you from?" is a way of asking for gang affiliation.

Garcia saw "a bunch of fists . . . flying everywhere trying to hit Adrian" and "a bunch of guys" with appellant attacking and striking Adrian. Garcia was startled by the unexpected attack, and was struck in the melee. Garcia saw Brian try to grab Adrian and pull him away from the attackers. Brian did not hit anyone: he was trying to separate people from his younger brother. Garcia described Brian as someone who is not violent.

The homeowners, where the party was taking place, stopped the fight and ejected appellant and his friends. Adrian was upset, and Brian tried to calm him. In Garcia's view, Adrian is someone who defends himself, whereas Brian is a peacemaker. Flores described Brian as someone who "was always like a little kid," liked cartoons, and was not a fighter. Adrian agreed that Brian was "definitely not a fighter." Montellano has known the Barajas siblings since he was seven, and described Brian as "a very peaceful, passive . . . very kind, easy going person."

The Barajases and their friends left the party. Appellant and his associates were waiting for them outside. He was still angry and wanted to fight Adrian "one-on-one." Garcia and Flores saw appellant's friends in the street, the same group that had attacked them moments earlier at the party. Garcia described them as "a bunch of guys, mad, ready to beat us up." They were dressed like "gangsters" in baggy clothing. Appellant wore a hat emblazoned with the letter "W" for "Wilmas." Garcia was scared, because there was "just a little bit of us and a lot of them." Appellant and his friends stripped to "wife beater" tank tops and were jumping up and down, to show that they were ready to fight.

Appellant and Adrian began to fight. Adrian knocked appellant down twice. At first, appellant's cohorts stood back, but once appellant was knocked down, they jumped on Adrian.

Brian was next to Adrian, being struck, but hid his face in his hands and did not hit anyone. Garcia was one foot away from appellant. She saw him pull out a small knife and hold it in his right fist. Garcia could see only the blade, not the handle.

Garcia heard appellant say to Adrian, "I'm going to kill you and your fucking brother." Garcia stated that appellant "attacked Adrian, and all of his friends started to jump Adrian as well." Garcia saw appellant punch Adrian with the hand that held the knife. Adrian was stabbed and bleeding. Brian was in the middle, trying make peace and stop the fight. He protected Adrian by stepping in front of appellant. Flores witnessed appellant hit Brian in the face and torso. Meanwhile, appellant's associates knocked Adrian to the ground.

As Garcia moved to assist Adrian, Brian grabbed her. Brian was breathing heavily and his eyes were wide. Garcia pushed Brian away and felt something wet on her hands. She saw it was blood.

Montellano was standing two feet away from appellant and Adrian during the fight. He saw in appellant's fist a blade no more than four inches long, with a tape-wrapped handle. Montellano saw appellant swing the knife twice at Adrian, who reacted as if he were badly hurt and began bleeding. As appellant pulled his arm back to take a third swing at Adrian with the knife, Montellano knocked appellant to the ground.

Montellano's hand was lacerated as he pinned appellant to the ground and tried to remove the knife from appellant. Garcia helped by stomping on appellant's arm. Appellant would not let go of the knife. He threatened to shoot Garcia and Montellano. Frightened, they abandoned their efforts to subdue appellant, grabbed Adrian, and ran down the street.

When the fighting stopped, Flores saw appellant holding a knife in his right hand; she described it as a homemade device, a kitchen knife with the handle wrapped in tape. Adrian never saw a knife in appellant's hand.

A passing motorist saw the fight and witnessed Brian get knocked to the ground, hitting his head hard on the ground. The motorist described "gangsters" kicking and punching Brian, who was unconscious. The driver ran at the attackers, yelling and scattering them.

Garcia was unaware whether Brian escaped with the group, but she could see that Adrian was bleeding heavily. Garcia and Flores went to retrieve Adrian's car. They saw Brian sprawled with his legs on the sidewalk and his torso in the street. Appellant and his group were near Brian, and were walking away from him. Brian was moaning, asking for water, and saying, "I can't breathe." Flores did not realize that Brian had been stabbed so she did not wait for an ambulance.

The two women placed Brian in the car, drove to collect the rest of their friends, then continued on to Martinez's house. On arrival, they saw that Brian had chest and facial injuries. They did not realize how serious the chest injury was, because it was a small wound and not spurting blood.

Brian was taken to a hospital, where he died. An autopsy showed facial injuries possibly caused by being punched or kicked; the cause of death was a stab wound in the mid-chest that penetrated Brian's heart, causing internal bleeding. Adrian sustained bruises and abrasions, and was stabbed in four places.

When Garcia spoke to police about the stabbings, she referred to appellant as "Tazer," which is his moniker or nickname. She was apprehensive about cooperating with police, because she had seen what appellant did to the Barajas brothers

and knew that his gang could exact revenge. Nevertheless, she picked appellant's photograph out of a line-up, identifying him as the person who stabbed Adrian, and threatened to kill her, Brian and Montellano. She is positive that appellant was the assailant.

Flores initially lied to the police and said that she did not know what happened on the night of the stabbings. She was scared. A year later, she spoke to the detective and identified appellant as the assailant in a photographic lineup. She is positive that appellant is the person who was armed with a knife. Montellano testified that he feared retaliation for cooperating in the police investigation. He identified appellant in a photographic lineup as the person who attacked Adrian with a deadly weapon. He is positive of his identification.

Adrian testified that he did not want to fight appellant, whom he described as a gangster accompanied by "a bunch of his friends . . . so something bad can happen." Once appellant attacked him at the party, Adrian wanted to leave quickly before appellant retrieved a gun. Adrian initially lied to the police, telling them that he did not know who attacked him. He explained, "I know the consequences of talking, so you could say there was some fear involved in it." When Adrian was a child, his uncle testified against a gang member, and "he was killed."

After giving thought to Brian's death, Adrian decided to identify appellant because "I didn't want to let my brother pass away in vain." Adrian is positive that appellant is the person he fought with. He is unsure what will happen to him owing to his testimony in this case.

Juan Terrazas is in the gang enforcement unit at the Los Angeles Police Department, and is an expert on gangs. He described how gangs operate by making money from criminal activity, and by instilling fear in their rivals and in the

community at large, using intimidation and threats of retaliation. Gangs gain "respect" by engaging in violence. Losing a fight would result in an unacceptable loss of respect for the gang.

Terrazas was assigned to the East Side Wilmas, which has 400 active members. Members may wear a hat with a red "W" to show their affiliation. Ghost Town is a clique within the East Side Wilmas. Terrazas is familiar with appellant, who is tattooed with the letter "W" to signify membership in Wilmas, wears a cap with a "W," and hangs out with members of that gang. Terrazas served appellant with a gang injunction in 2012. Appellant "was trying to make a name for himself" in his gang.

Appellant's sister Ana Lucia testified in his defense. She saw wounds on appellant's head and cheek and swelling on his right fist on July 28, 2013. Appellant told her he had been in a fight the night of July 27. Appellant's nickname is Tazer. Ana Lucia does not know whether he is in a gang; however, their older brother, aka "Suspect," is an East Side Wilmas gang member serving a life sentence in prison. After appellant's arrest, Ana Lucia posted on Facebook, "Fuck all snitches and everybody running their mouth about them. Not guilty." She acknowledged that many of her Facebook "friends" are East Side Wilmas gangsters.

Appellant's friend Victor Mendez attended the party on July 27, 2013. Mendez blamed Adrian and his group of friends for causing violence in the street outside the party and jumping on and injuring appellant. Mendez testified that appellant is innocent, but he did not call the police after appellant's arrest to tell them that appellant did not stab the victims.

DISCUSSION

1. Gang Enhancement Evidence and Instruction

Appellant does not contest that he is in East Side Wilmas. Instead, he contends that the prosecution failed to offer sufficient evidence of a pattern of criminal gang activity. The prosecutor listed two incidents to prove a pattern of gang criminality. Both were convictions for assault with a firearm by Wilmas members: one conviction was obtained in 2012—before the murder in this case—and the second conviction was obtained in December 2013, for a crime committed in November 2012.

A gang enhancement may be imposed against "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang . . . ." (§ 186.22, subd. (a).) A "pattern" means the commission (or attempted commission) of two or more offenses on separate occasions, including assault with a deadly weapon and homicide. (*Id.*, subd. (e)(1), (3).)

Appellant argues that both "pattern" offenses must be committed before the charged offense. He is mistaken. The prosecution can meet the "pattern" requirement by showing one prior offense *and* the defendant's commission of the charged offense. (*People v. Loeun* (1997) 17 Cal.4th 1, 10, 14; *People v. Gardeley* (1996) 14 Cal.4th 605, 624 (disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13) ["The prosecution proved the second requisite predicate offense through evidence in this case of the attack on [the victim] by defendants Gardeley and Thompson . . . members of the Family Crip gang"].) The Legislature's use of the present and past tense in section 186.22—that gang members "'engage in or have

engaged in'" criminal activity—means that "instances of current criminal conduct can satisfy the statutory requirement for a 'pattern of criminal gang activity.'" (*Loeun*, at pp. 10-11, italics omitted.) In short, to find a gang pattern, "a predicate offense may be established by evidence of the charged offense." (*People v. Tran* (2011) 51 Cal.4th 1040, 1046.)

Here, the jury was instructed that "pattern of activity" means the convictions of appellant's fellow gang members for assault with a firearm (2012) and assault with a semiautomatic firearm four months after the murder in this case, in 2013. The jury was not instructed that a pattern could be proved by the crimes charged in this case.

The Attorney General maintains that the predicate gang activity offense may include a conviction obtained after the crime for which the defendant is being tried, and argues that "another gang member's subsequent offense sufficiently satisfied the requirement of predicate pattern offenses." Respondent cites as authority *People v. Loeun*, *supra*, 17 Cal.4th 1. However, the offense described in *Loeun* occurred "on the same occasion" as the defendant's offense, only "seconds later," amounting to the "contemporaneous commission of a second predicate offense." (*Id.* at pp. 5, 10, 14.) *Loeun* does not stand for the proposition that a gang crime conviction arising four months after the charged offense qualifies as a predicate offense.

Assuming arguendo that the prosecution could not use the December 2013 assault with a firearm conviction as a "predicate" offense, the outcome is unaffected. As we shall explain, though the jury was not instructed that *appellant's charged offenses* are "pattern of activity" crimes, his conviction of the charged offenses can nevertheless sustain the jury's findings.

An incorrect instruction regarding which offenses qualify as predicate offenses under section 186.22 is reviewed under a harmless error standard. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1400-1401 [jury was incorrectly instructed that the crime of "'battery with serious bodily injury'" was a predicate gang offense under section 186.22].) In this case, appellant received two consecutive indeterminate life sentences for the murder of Brian and the attempted murder of Adrian. The gang finding did not alter appellant's term of imprisonment; rather, it prescribed the minimum period he must serve before becoming eligible for parole, i.e., 15 years. Consequently, because the gang finding did not lengthen appellant's sentence, instructional error on an element of the gang enhancement does not violate the federal Constitution, and is subject to a harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 327-328.)

As noted, the jury was not informed that the current offenses could serve as predicate offenses. Yet "the charged offenses themselves, standing alone, could have provided all of the requisite predicate crimes," and lead inexorably to the conclusion that "this was an ongoing criminal enterprise." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 388-389.)

Appellant does not contest the first predicate offense, a 2012 assault with a firearm conviction. At trial, the jury found appellant guilty of murder and attempted murder of the Barajas brothers. Thus, "the jury necessarily found a second predicate offense, the commission of these attempted murders, true beyond a reasonable doubt by virtue of the jury's conviction of defendant for those underlying crimes. We are able to hold therefore that the trial court's instructional error was harmless beyond a reasonable doubt. [¶] It is of no moment that the prosecutor did

not choose to argue that the second predicate crime could be established by a conviction of the crimes alleged in this information." (*People v. Bragg*, *supra*, 161 Cal.App.4th at pp. 1401-1402.)

Because any error in describing the second predicate offense was harmless, in light of the two convictions in this case, there is no merit to appellant's second argument that the "pattern of activity" language in the gang enhancement instruction affected the verdict.

2. Existence of East Side Wilmas as a Gang

Appellant asserts a due process violation arising from the introduction of gang evidence. He contends that no substantial evidence establishes that East Side Wilmas is a gang.

Appellant's claim is deficient for several reasons. First, he forfeited it by failing to object at trial that East Side Wilmas does not exist as a gang. (*People v. Seijas* (2005) 36 Cal.4th 291, 302.) Second, appellant's brief does not spell out in any fashion why the evidence is insufficient. The police gang expert testified that the gang exists as a criminal enterprise, and his testimony was unrebutted. The record contains substantial evidence that East Side Wilmas is a gang in Wilmington.

3. Motion For a Mistrial

The trial court denied appellant's motion for a mistrial. The motion was made after police gang expert Juan Terrazas testified that he encountered appellant in 2012 while on patrol; appellant threw a gang sign and reached for his waistband, causing Terrazas to reach for his own weapon. The trial court promptly struck the answer and instructed the jury to disregard Terrazas's statement.

Appellant argued that Terrazas's testimony violated a ruling in which the trial court found that the relevance of

Terrazas's encounter with appellant was outweighed by possible undue prejudice because in that incident, Terrazas saw appellant throw a gun to the ground. The prosecution agreed to tell Terrazas "not to bring up the gun" while testifying. The trial court found that although he "came pretty close" to violating the ruling, Terrazas "did not say the defendant had a gun." The court was satisfied that striking the testimony and admonishing the jury cured the problem.

A mistrial is warranted only in exceptional cases if testimony is incurably prejudicial. (*People v. Avila* (2006) 38 Cal.4th 491, 573.) An admonishment may be sufficient to cure any prejudice. The trial court exercises discretion in determining whether the error can be cured by admonition or instruction. (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) A discretionary ruling will not be reversed on appeal absent a showing that discretion was exercised "in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

For example, a mistrial motion may be denied after a witness testifies that the defendant "had recently gotten out of prison, was crazy, and would kill him" if he said anything about defendant's crimes. Despite the obvious prejudice posed by the defendant being called "crazy," recently incarcerated, and willing to kill, the Supreme Court concluded that the court did not abuse its discretion by denying a mistrial and admonishing the jury. (*People v. Avila*, *supra*, 38 Cal.4th at pp. 571-574.)

Here, no incurable prejudice arose from Terrazas's testimony that "I felt that, in my opinion, [appellant] was reaching for his waistband, arming himself." He did not state that appellant actually had a gun or other weapon. Rather, he expressed a feeling or "opinion," for whatever such speculation

was worth in the eyes of the jury. Terrazas's vague testimony about appellant reaching for his waistband, where he might have had a weapon, was far less damning than the witness statements in *People v. Avila*, *supra*, 38 Cal.4th 491.

The trial court did not abuse its discretion by denying appellant's motion for a mistrial. It promptly admonished the jury to disregard Terrazas's testimony. "We presume the jury followed the court's instructions." (*People v. Avila*, *supra*, 38 Cal.4th at p. 574.)

4. Harmless Error

We have not found instructional or evidentiary errors, cumulative or otherwise. (*People v. Phillips* (2000) 22 Cal.4th 226, 244 [there was "no error to cumulate"].) That said, we observe that the evidence against appellant from percipient witnesses was so overwhelming that his claimed errors are rendered harmless.

Defense witnesses confirmed that appellant participated in a fight on July 27, 2013, including one of appellant's friends who was with him at the time. Appellant told his sister that he had injuries on his head and fists as a result of the fight.

Appellant was positively identified as the assailant by four witnesses who had close physical contact with him during the first fight at the house and the second fight in the street. At the beginning of the fatal encounter, the witnesses heard appellant identify himself as a gang member, repeatedly yelling his gang affiliation. Appellant asked Adrian where he was from, a gang challenge. Appellant was accompanied by 10 to 12 fellow gang members, who joined in appellant's attack on the Barajas brothers. The witnesses told the jury that they were reluctant to testify against appellant, expressing fear of retaliation.

Two of the witnesses saw appellant with a knife in his fist, stabbing at Adrian. They saw Brian plant himself between appellant and Adrian, not fighting, but trying to stop the attack. The witnesses pinned appellant to the ground and attempted to wrest the knife away from him. During the scuffle over the knife, appellant threatened to get a gun and shoot the witnesses.

Under the circumstances, a statement about appellant reaching for his waistband, from an officer who was not at the scene of the crime, which was promptly stricken from the record, did not result in a miscarriage of justice. Nor did the gang instruction alter the outcome of this case. Any error that may have occurred at trial was harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

James D. Otto, Judge

Superior Court County of Los Angeles

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