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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

REECE MATUI FORMAN,

Defendant and Appellant.

B266113

(Los Angeles County  
Super. Ct. No. BA414792)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, James R. Dabney, Judge. Affirmed.

John L. Staley, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Assistant  
Attorney General, Steven D. Matthews and J. Michael Lehmann,  
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Reece Matui Foreman appeals from the judgment entered after his jury conviction of one count of voluntary manslaughter and one count of possession of marijuana for sale. (Pen. Code, § 192, subd. (a), Health & Saf. Code, § 11359.)<sup>1</sup> He argues the trial court erred in denying his motions for severance, a new trial, and to dismiss his prior strike conviction. We disagree and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

In 2012, defendant was driving at the intersection of West Slauson Avenue and Crenshaw Boulevard in Los Angeles. After he stopped at a light, Marquis Wilson, who had parked at a nearby gas station with Kanashoe Johns and James Jenkins, approached his car. A confrontation ensued between defendant and Wilson in which bullets were fired, and Wilson was shot and eventually died.

The prosecution relied on the testimony of Phillip McElhaney, Milton Adams, and Johns to establish the events of the shooting.

McElhaney was in his car leaving a nearby restaurant and witnessed part of the shooting. He testified he heard three different sets of gunshots. After hearing the first set, he heard the second, which sounded completely different from the first set. Turning towards the sound to see what was transpiring, he saw a pedestrian fire a gun at two cars. He then heard the third set of gunshots, which matched the sound of the first set.

Adams, a close associate of defendant, testified defendant had told him that he had seen someone throw a gang sign.

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

Defendant said he rolled down his window, threw a gang sign, took out his gun, and started shooting. Adams testified that defendant did not say he had shot in self-defense. Adams was impeached with his testimony at the preliminary hearing where he testified it was only after a person at the gas station had reached for a weapon that defendant fired his weapon.

Johns, who had been at the gas station at the time of the shooting, testified he had seen Wilson extend his hand towards defendant before the sound of gunshots. According to Johns, Wilson did not have a gun in his hand as he approached defendant's car.

Defendant testified in his own defense. He said Wilson approached the car from behind, reached the front passenger side window, and pulled out a gun. He believed Wilson intended to kill him, and he fired his gun at Wilson in self-defense. He drove away after the shooting.

In 2013, an officer went to an apartment building to arrest defendant. The officer saw defendant leave the building and drive away. The officer stopped him in his car. Inside the car, the officer found and seized a ten-pound bag of marijuana and another bag containing 468 grams of marijuana. The apartment from which defendant had exited was then searched, and four weapons and marijuana were found. A ballistics expert testified that the bullet recovered from Wilson's body could have been fired by one of the four firearms found in the apartment. A gang expert testified that the fact defendant was able to possess and sell marijuana in Black P Stone gang territory showed that he probably had an affiliation with that gang.<sup>2</sup>

Defendant was charged with murder (§ 187, subd. (a))

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<sup>2</sup>Defendant testified that he was not a gang member.

(count 1), attempted murder (§ 187, subd. (a) & 664) (count 2), four counts of felon in possession of a firearm (§ 29800) (counts 3-6), and possession of marijuana for sale (Health & Saf. Code, § 11359) (count 7). It was alleged that he had committed the crimes for the benefit of a criminal street gang, with the intent to promote, further and assist the gang. (§ 186.22, subd. (b)(1).) It also was alleged that defendant personally used a firearm (§ 12022.53, subd. (b)), personally discharged a firearm (§ 12022.53, subd. (c)), and personally discharged a firearm resulting in death or great bodily injury (§ 12022.53, subd. (d)). It also was alleged that in 2007, he had been convicted of assault with a firearm (§ 245, subd. (a)(2)), which is a serious or violent felony. (§ 667, subd. (d).)

Defendant moved to sever counts 1 and 2 from counts 3 through 7. He argued the charges arose from two separate occasions and that there was no connecting nexus between them. Defendant also argued that admitting the firearm and drug related evidence would be prejudicial and inflammatory to the murder charges. The trial court denied the motion, ruling the ballistic and gang expert testimony evidence was cross-admissible. The trial court ruled that the evidence in counts 3 through 7 was not prejudicial since the jury could parse between the various crimes, and consolidation would not be so inflammatory as to be problematic.

The jury found defendant guilty of voluntary manslaughter (count 1), and found true the allegation that he personally used a firearm within the meaning of section 12022.5, subdivision (a). It also found defendant guilty of possession of marijuana for sale (count 7). It acquitted defendant on counts 2 through 6, and found the gang allegations not true. In a bifurcated trial, the

trial court found the prior conviction allegations to be true.

Defendant filed a motion for a new trial, arguing the trial court erred in denying his motion for severance, and that the subsequent arrest of Johns for murder was an additional basis for granting a new trial since Johns had testified at defendant's trial. The trial court denied the motion because the homicide, narcotics, and firearm counts were connected in that the guns were discovered as a result of a search warrant issued in the homicide case. Further, one of the firearms could not be excluded as the weapon used in counts 1 and 2, and the narcotics were tied to the gang allegations with respect to the murder. As to Johns's testimony, the court reasoned it was clear the jury was aware that he was not an upstanding citizen, but rather that he was a gang member and an uncooperative witness, and that the sequence of events involved in the shooting was established by other witnesses.

At sentencing, defendant moved to dismiss his strike conviction. The court denied the motion, pointing out that the strike was based on a relatively recent conviction (in 2007) for a similar crime (assault with a firearm). The trial court sentenced defendant to an aggregate term of 32 years and four months, consisting of an 11-year term for count 1, doubled to 22 years pursuant to the Three Strikes law. (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court imposed consecutive terms of 16-months for count 7, four-years for the firearm enhancement, and five years for the serious felony enhancement.

## DISCUSSION

### I

We review the trial court's ruling on consolidation for abuse of discretion. (*People v. Ochoa* (1998) 19 Cal.4th 353, 408). A court abuses its discretion when its rulings fall outside the bounds of reason. (*Ibid.*) Pursuant to section 954, "[a]n accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated . . . ." Offenses are deemed to have been connected when there was a "common element of substantial importance in their commission," even if crimes charged do not relate to the same transaction or did not occur at the same place or time. (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.)

Here, the trial court acted within its discretion in denying defendant's motion to sever. The victim was shot with a bullet that could have been fired from one of the seized weapons at the apartment. The large amount of marijuana found at the apartment suggested that defendant had a gang association, which provided a motive for murder. The crimes were connected in that the narcotics and firearm charges in counts 3 through 7 arose out of a search based on the homicide charges in counts 1 and 2. Because there was a common element of substantial importance between all counts, the trial court's ruling denying severance was reasonable.

Where the statutory requirements for joinder are satisfied, the defendant bears the burden of establishing a clear showing of potential prejudice. (*People v. Ochoa, supra*, 19 Cal.4th at

p. 409.) This is determined by four factors: (1) whether evidence on the crimes jointly tried would have been cross-admissible; (2) whether certain charges were unusually likely to inflame the jury against the defendant; (3) whether the prosecution has joined a weak case with a strong case (or another weak case) so that the “spillover” effect from the aggregate evidence on the combined charges might alter the outcome of one of the cases; and (4) whether any of the charges carries the death penalty. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244.)

Here, the evidence was cross-admissible. One of the firearms recovered from the apartment could have fired the fatal shot. Moreover, the marijuana possession was an indication of an association with a gang, which in turn provided a possible motive for murder. If evidence is cross-admissible, prejudice is dispelled. (*People v. Osband* (1996) 13 Cal.4th 622, 667.)

We would reach the same result if the evidence was not cross-admissible, because defendant has not met his burden of showing potential prejudice through the other three factors. The jury acquitted defendant on all firearm charges, found the gang allegations not true, and convicted him only of voluntary manslaughter with respect to his homicide charges. In doing so, the jury rejected the claims that there was a connection between the weapons, drugs, and murder charges. Counts 3 through 7 were not inflammatory to the murder charges, and no spillover effect is indicated. Finally, there was no potential prejudice in the trial court’s denial of defendant’s motion for severance.

## II

Defendant also argues it was error to deny his motion for a new trial. A new trial may be granted “when the court . . . has erred in the decision of any question of law during the course of

the trial.” (§ 1181, subd. (5).) Additionally, a new trial may be granted “[w]hen the verdict or finding is contrary to law or evidence . . . .” (§ 1181, subd. (6).) We review the trial court’s ruling for abuse of discretion. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.)

First, defendant argues that the trial court erred by denying his motion for severance. As we have discussed, the trial court did not act outside the bounds of reason in consolidating defendant’s charges, and there was no showing of resulting prejudice as a result of denying his motion.

Second, defendant argues that the subsequent arrest of Johns for murder is an additional reason his motion should have been granted. He argues that the murder was a basis to impeach Johns’s credibility because it involved moral turpitude. A review of Johns’s testimony indicates that he was uncooperative and not credible as a witness. He was impeached with two felony convictions, and he admitted to being part of a gang that has a culture of not telling the truth when a member is interviewed by law enforcement.

At trial, defendant proceeded on a theory that he acted reasonably in self-defense when he shot Wilson. The testimony of McElhaney and Adams did not support that theory. Johns’s testimony was merely cumulative of theirs.

### III

Defendant also argues the trial court erred in denying his *Romero*<sup>3</sup> motion to dismiss his prior serious or violent felony enhancements. A trial court may dismiss or vacate prior conviction allegations or findings in the furtherance of justice. (§ 1385, subd. (a); *Romero*, 13 Cal.4th at p. 529–530.) In

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<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.



exercising this power, the trial court must consider the defendant's background, his constitutional rights, the nature of the current offense, and the interests of society. (*Id.* at p. 530–531.) The trial court's decision is reviewed for an abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 373–374.)

Here, the trial court acted within its discretion in denying the motion. Defendant's prior strike based on assault was relatively recent and, like the instant case, involved a firearm. Moreover, his current voluntary manslaughter conviction arose because defendant was carrying a firearm, which as a convicted felon, he was prohibited from possessing. The trial court reviewed defendant's case and reasonably determined that his prior serious or violent felony should not be dismissed. There was no abuse of discretion.

#### **DISPOSITION**

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.