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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL FLORES, Defendant and Appellant.	B256104 (Los Angeles County Super. Ct. No. TA126733)

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

Maureen L. Fox, 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, Senior Assistant Deputy Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Kimberley J. Baker-Guillemet, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Manuel Flores appeals from his convictions for carjacking and possession of a firearm by a felon. He contends the convictions must be reversed because the trial court abused its discretion in permitting expert testimony regarding racist views of his gang and its offensive acts against African-American males, and erred in permitting unduly prejudicial evidence of other bad acts. He also raises claims of prosecutorial misconduct, and ineffective assistance of counsel. We affirm.

PROCEDURAL BACKGROUND

Flores was charged by information with one count each of carjacking (Pen. Code, § 215, subd. (a);[1] count 1) and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 2). As to count 1 it was alleged that Flores personally used a firearm within the meaning of sections 186.22, subdivision (b)(4) and 12022.53, subdivision (b). As to both counts it was alleged that Flores committed the crimes for the benefit of, at the direction of, and in association with a criminal street gang pursuant to section 186.22, subdivision (b)(1)(C). The information also alleged that Flores had two prior convictions pursuant to section 667.5, subdivision (b).

Flores pleaded not guilty and denied all allegations. After trial, a jury found Flores guilty as to both counts, but found the gang and firearm allegations not true.[2] Flores waived his right to trial and admitted the previously denied allegations as to his prior convictions. The court sentenced Flores to a total sentence of 11 years in state prison, ordered him to pay various fees and fines, and awarded presentence credits. This timely appeal followed.

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

[2] Although the jury found true the allegation that a principal used a firearm in the commission of the offense within the meaning of section 12022.53, subd. (b), the court struck the allegation because, as a matter of law, it could not be found true in the absence of a true finding on the gang allegation.

FACTUAL BACKGROUND

The prosecution's case

At 2:30 a.m. on January 22, 2013, Jojuan White, a male who is apparently African-American, was sitting in a white Lexus parked in the driveway of his home in Compton listening to the radio. He was approached by two male Hispanics. One of the men, who wore a dark colored hooded sweatshirt, tapped on the window with a black object that White thought may have been a gun, and ordered White to get out of the car and down on the ground. White did not see the first man's face or hair. The second man stood behind the first and wore dark clothing, including a jacket, and something on his head which was possibly a baseball cap. White's view of the second man was partially obscured by the man with the gun, and White was unable to see his face. After White—who was afraid—got out of the car, the man with the gun got into the driver's seat and drove off with the other man in the passenger seat. White called 911 and reported a carjacking. Neither man claimed membership in a gang nor made any gang references during the incident.

Los Angeles County Sheriff's Department (LASD) Deputy Angel Banuelos was on patrol in Lynwood at 3:00 a.m. on January 22, 2013, when he received a call about a nearby carjacking of a white Lexus being driven by two Hispanic men. Shortly thereafter, Banuelos saw a car matching that description driving on Imperial Highway. Banuelos pulled next to the Lexus and shined his flashlight into that car's interior, and saw two Hispanic men. Banuelos called for backup and followed the Lexus, which turned into a parking lot. The Lexus drove over a traffic island, through the lot (from which there was no exit), and sped up and drove into a fence in which it became lodged.

Two men (one of whom was Flores) exited the car through the driver's side door and ran. Banuelos heard a gunshot and took cover, believing the men were shooting at him. Helicopter and backup units arrived to establish a containment area. The helicopter unit reported that a heat source had been located in the bushes. LASD Deputy John Davoren, a member of the SWAT team K-9 unit, and his police dog were at the scene.

Davoren called for the person hiding to surrender or be bitten by the dog. Flores emerged from the bushes and was arrested. He wore a black shirt and jeans. A black jacket was later recovered from the area in which Flores had hidden.

Other members of the SWAT team's K-9 unit searched the area north of a nearby freeway, where a dog alerted to the side of a Ford Expedition parked in a driveway. As the deputies approached they noticed movement under a blanket in the cargo space in the back of the vehicle. Believing this was one of the carjacking suspects, the deputies ordered the person to come out; no one did. LASD Deputy John McDonald found an unlocked door. As he opened the vehicle's door and reached inside, he heard a gunshot. The officers took cover. Later, they opened the hatchback where they found the body of a deceased male Hispanic under a blanket. The man, later identified as Ernesto Ortega, the second carjacking suspect, had a semi-automatic handgun and a gunshot wound to the head. Ortega's death was caused by a single, self-inflicted shot to the head.

LASD Deputy Clinton Kelly brought White to a field show-up. As he arrived at the scene where Flores (by then handcuffed) was being detained by several officers, Kelly heard White immediately identify Flores as the person who "carjacked" him wielding a weapon stating, "that's the guy that had the gun." Kelly also testified that when asked earlier, White had been unable to provide information about the suspects' facial features, height or tattoos. Other officers at the show-up only heard White identify Flores as "one of the suspects." At trial, White testified that he had identified Flores as one of the two suspects at the field show-up because of his clothing and the fact that he stood near White's car. White also testified that he never identified Flores as the man with the gun. A dark beanie was later recovered from the passenger side of the stolen Lexus. Banuelos was called to the scene of the show-up and identified Flores as one of two men he saw emerge from the crashed Lexus. He later identified Ortega as the other suspect who had run from the car with Flores.

LASD Detective Leslie Rodriguez interviewed White on the day of the crime. White told Rodriguez he had been parked in the driveway of his home, smoking a

cigarette. He saw two Hispanic males walk past his house. About five minutes later, the men returned and approached the car. One man, wearing a black or dark hooded sweatshirt, later identified as Ortega, approached the driver's side door holding a gun, tapped the window and ordered White out of the car. The second suspect, later identified as Flores, had worn a hoodless black "bomber" jacket and had stood behind Ortega as Ortega wielded the gun. White told Rodriguez he had not seen the gunman's face clearly, but did see that he had a slim face. He had been unable to see the man behind the gunman.

White told Rodriguez he became afraid for his life when he saw the gun, a black, semiautomatic pistol. After he got out of the car, White was ordered to lie face down on the driveway. Ortega jumped into the driver's seat, Flores walked around and got in on the passenger's side, and the two men drove off. Rodriguez later showed White a photographic six-pack containing a photo of Ortega. White did not identify Ortega but did identify another person, unrelated to this case. White was not shown a six-pack containing a photo of Flores. Flores's right hand is heavily tattooed. White did not see tattoos on the hand of the person who tapped on the window. No prints matching Flores were obtained from the stolen Lexus.

According to Rodriguez, White was reluctant to testify at both the preliminary hearing and at trial, and had to be arrested and brought in to testify. In Rodriguez's experience, witnesses in gang-related crimes have often been fearful and reluctant to cooperate with law enforcement. White never said he thought the carjacking was gang-related or that Flores was a gang member.

After Flores was detained, Rodriguez noticed a gunshot wound on his leg. An LASD criminalist examined Flores's jeans for bullet damage and to determine the trajectory of any holes. Based on the damage to Flores's skin and jeans, the criminalist determined the bullet would have entered through the thigh and come out through the calf as Flores crouched or sat with his legs bent. The gun would have been held at a very low angle to the leg. Because a gun had been found with Ortega's body, Rodriguez thought

there might be a second gun. Several officers and a K-9 unit searched the area where Flores was found; no second gun was found. Flores told Rodriguez that he had fallen asleep in the bushes.

Deputy Joseph Sumner of the LASD Gang Division testified as the prosecution's gang expert. Sumner knew Flores as a member of the Compton Varrio Setenta (CV-70) gang, which he described as one of the two most racist gangs in the city. One of several tattoos Flores has on one hand says "N-K," which Sumner testified stood for "Nigga Killer." Ortega was a member of KAK, a tagging group aligned with the Tortilla Flats gang, one of CV-70's rivals. Sumner had no evidence that CV-70 was courting anyone from KAK. Nevertheless, he opined that the present crime may have been a means by which Ortega could prove his worth to the CV-70's as a prospective gang member. Sumner acknowledged that committing suicide once caught is inconsistent with a goal of becoming a gang member.

After the preliminary hearing, Rodriguez intercepted a call Flores made to his brother from jail during which Flores said White had not "snitch[ed]" at the preliminary hearing or implicated him in the crime, and discussed his own role in the carjacking. He told his brother that he and Ortega had been at the home of a mutual friend (Endo) on the evening of January 22. Flores was tired and told the friend and Ortega that he wanted to go home. After Ortega teased him about leaving so early, Flores told Ortega, "I'll show you how to get active nigga." At some point Ortega said to Flores, "let's get a G-ride." Flores agreed and the two men unsuccessfully searched for a car to steal. As they were returning to the friend's house, Ortega asked Flores if he planned to "leave him hanging;" Flores said he would not. Shortly thereafter, to Flores's surprise, Ortega ran up to White who was sitting in a car and said, "Nigga . . . get out the car." Although Flores had been surprised by Ortega's actions, his brother told Flores he should have known Ortega was "on some other shit" (i.e., high on drugs), and said he and Ortega should never have left the friend's house.

At trial, Sumner explained these and other statements made by Flores and his brother during their phone call. "G-ride" is a term used by gang members and car thieves to refer to a vehicle that has been stolen, but not necessarily carjacked. "Getting active" has meaning both in and out of the gang context. When Flores told Ortega he was "'gonna to show him how to get active,'" he meant he would show Ortega how to "'gangbang, how to be a gangster'" by committing crimes. Outside the gang context, "getting" or "being active" could mean "to do something," often times crime-related. Flores's statement that he and Ortega looked for some "niggas[']house" meant they were looking for a specific target. When Ortega asked if Flores planned to "leave [him] hanging," he was asking whether Flores planned to "leave [Ortega] alone to do [the crime] by himself," or if he would be "there . . . to back [Ortega] up." The brother's statement to Flores that they "'already knew [Ortega] was gonna to do some shit. He had already told [them], but you know, I told you, too,'" meant Flores should have known Ortega planned to go out and commit a crime. Based on his knowledge of Flores, the conversation between the brothers and Flores's statement that he would show Ortega "how to get active, Sumner believed Flores was an "active" and "well-known" member of CV-70 gang. In Sumner's opinion, based on available information and the facts of the case, the crime was committed for the benefit of a criminal street gang.

Defense case

Flores testified in his own defense. He has been a member of the CV-70 gang since age 13. KAK is a tagging crew affiliated with the CV-70's rival gang, Tortilla Flats. Flores's brother is a member of KAK. No member of KAK would be recruited by the CV-70's.

On the evening of the crime, Flores had been socializing at a friend's house and smoking marijuana. Ortega—who was a member of KAK and a friend of Flores's brother's—was also at the friend's house. Ortega was "all cranked out" on methamphetamine and acting "weird," i.e., moving and talking a lot and giving

nonsensical answers to questions.[3] After smoking a "blunt" Flores wanted to go home but Ortega gave him a hard time, wanting him to stay. At some point, Ortega asked Flores if he wanted to "'get a G-ride'" (steal a car); Flores said he did not. Eventually, after Ortega pressured him, Flores agreed to go with him to steal a car. The two men walked around for a while, but could not find a car to steal. Flores decided to go home and convinced Ortega to head back to their friend's house.

Just before they arrived back at their friend's house, Ortega asked Flores if he was "gonna leave [Ortega] hanging?" Flores understood Ortega to be asking whether Flores planned to leave Ortega outside alone. Flores responded, "Nah, fool [nigga], why . . . would I leave you hanging?"[4] By this time, Flores thought the idea of stealing a car had been abandoned. To his surprise, however, Ortega "ran up to [White's] car" and ordered him out at gunpoint, as Flores stood about four feet away. Flores felt there was "nothing that [he] could do" because Ortega had already ordered White out of the car. Flores felt he had no choice but to go along with Ortega and got in the passenger side of the car and they drove away. Flores had not known Ortega had a gun until he saw him pull it out. Flores never had the gun in his possession. The carjacking took about 30 to 45 seconds. At some point, Ortega tried unsuccessfully to drive the car through a fence into which the car became stuck. Flores exited from the driver's door because the passenger door would not open. Ortega got out on the same side and they ran in a different directions to hide.

Flores testified that Ortega had begun using increasing amounts of drugs before the crime. On at least one prior occasion, Flores knew that Ortega had gotten "tweaked out on meth and [had] gone out and [tried] to cause trouble, [and] commit[ted] some

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[3] The toxicology report from Ortega's autopsy revealed the presence of amphetamine and methamphetamine in his blood stream.

[4] An interlineation in the written transcription of the call replaced "fool" with "nigga."

crime." Flores had been reluctant to leave Ortega alone on the street that night in the condition he was in because he "was acting so weird. Like he was dumb." He was worried that Ortega "was a little bit too high." During the conversation with his brother, Flores had not used the term "active" to refer to becoming or being active in a gang. He had only heard law enforcement use that term in relation to gang activity. Flores had intended to help Ortega steal a car, but never intended to participate in a carjacking and did not believe Ortega would do something so crazy. By the time White was approached, Flores had abandoned the intent to steal a car.

Flores recalled speaking with Rodriguez, but not telling her that he had fallen asleep in the bushes. Flores has five prior convictions for carrying a firearm.

Flores's gang expert, Martin Flores, opined that Flores is a member of CV-70, a criminal street gang. KAK, also known as "Baby Flats," is a tagging crew principally associated with the Tortilla Flats gang, CV-70's rival. Martin Flores is not aware of any case in which CV-70 had recruited someone from KAK. He also testified that in the gang context, to be "active" may have various meanings, including participating in gang-related offenses or criminal activity. In the opinion of Martin Flores, the crime here was a spontaneous act committed by two people from different "hoods," with ties to different gangs or crews, and their joint commission of the carjacking was done in a "personal capacity" and was not gang-related.

DISCUSSION

1. Trial court's admission of testimony regarding the racist views of Flores's gang

At trial, the prosecution asked its gang expert to explain the meaning of four tattoos on Flores's hand that read: "P-K," "C-K," "2-K" and "N-K." Sumner testified that P-K means "Piru Killer," C-K means "Crip Killer," and 2-K means "Segundos Killer." The Piru Bloods and Crips are each African-American gangs and rivals of CV-70. The Segundos gang is another rival of Flores's gang. The following exchange occurred when Sumner was asked to explain what "N-K" meant:

"[Sumner]: Sorry, but the 'N-K' is for Nigga Killer. They are one of the most racist gangs within the city; one of the two.

"[Prosecutor]: When you say that, what do you mean?

"[Sumner]: CV-70's primary targets are the Pirus. . . . [I]n 2005 and 2006, they made a major offensive against a Piru gang and they were shooting at any black male they could catch on the street.

"[Defense counsel]: Your Honor, I will object as to relevance as [Evidence Code section] 352, the facts of this case.

"The Court: Well, the answer may remain. It is an explanation as to what the expert believes the 'N-K' tattoos mean."

a. No forfeiture

The Attorney General argues that Flores failed to object to Sumner's statement that CV-70 is "one of the most racist gangs within the city," and therefore forfeited any claim of error. (Evid. Code, § 353, subd. (a); *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63.) This contention lacks merit.

The excerpt above shows Sumner's initial response when asked to explain the meaning of the N-K tattoo was vague as to the "they" to whom or which he had referred as being among the most racist gangs in the city. In a follow-up question, the prosecutor sought clarification of Sumner's answer. When Sumner explained that "they" referred to the CV-70 gang, which had a history of targeting a particular black gang and random black males, Flores's counsel objected immediately, asserting that information was not relevant to the case at bar.

A claim of the erroneous admission of evidence is preserved for appeal if the timely objection to admission of the evidence alerted the trial court to the nature of the evidence and the basis on which exclusion was sought and afforded the opposing party an opportunity to establish its admissibility. (*People v. Holt* (1997) 15 Cal.4th 619, 666–667.) It is clear from its statement that Sumner was merely providing an "explanation as to what [he] believe[d] the 'N-K' tattoos mean," that the court understood defense

counsel's objection to apply both to Sumner's view regarding the extreme racism of the CV-70 gang and his explanation of the bases for that opinion. No forfeiture occurred.

b. No violation of Evidence Code section 352

Flores contends that Sumner's testimony regarding the extreme racism of and arbitrary shootings of black males by his gang was not relevant because no interracial violence was involved here. Thus it was unnecessary for Sumner to elaborate or do anything other than explain the meaning of the N-K tattoo or the fact that Flores's gang was a rival of certain black gangs.

The Attorney General argues that Sumner's statements were relevant "to support the prosecution's theory that carjacking an African-American man at gunpoint in rival territory would bolster, support or further the gang's reputation in the community as a force to be feared by rival African-American gangs, as well as bolster the individual actors' personal reputations as 'gangsters' because they 'put in work' for the gang." Evidence of a racist attitude is a potentially inflammatory topic, but may nonetheless be admissible if it has probative value. (*People v. Quartermain* (1997) 16 Cal.4th 600, 629 (*Quartermain*); see *Dawson v. Delaware* (1992) 503 U.S. 159, 165 [112 S.Ct. 1093, 117 L.Ed.2d 309] [evidence of racial intolerance is admissible if relevant to issue being tried].) The Attorney General argues Sumner's comment must be considered in the context of Flores's racist reference to White during the conversation with his brother, and his gang's past indiscriminate targeting of African-American males.

"The People are entitled to 'introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.) "[E]ven where gang membership is relevant," however, "because it may have a highly inflammatory impact on the jury trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) On the other hand, "'[b]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.'" (*Gonzalez,*

at p. 1550.) On appeal, we review for abuse of discretion a trial court's ruling on whether evidence is relevant, not unduly prejudicial, and thus admissible. (*Williams*, at p. 197.)

Sumner's explanation of the racist meaning of Flores's tattoo was probative of his gang membership, and to provide context as to the nature of that gang affiliation. The evidence was properly admitted as it provided context to the prosecution's attempt to establish Flores's motive for and intent in committing or overseeing the carjacking as a means to recruit Ortega into the CV-70 fold. (Cf. *People v. McKinnon* (2011) 52 Cal.4th 610, 655 [in attempting to establish defendant's motive for simply walking up to victim and shooting him, prosecution was entitled to give context to defendant's statement that, just before killing victim, "This is for Scotty"].) Sumner's testimony was therefore relevant to the prosecution's theory at trial that Flores was supervising Ortega as he "put[] in work" in order to become a member of the CV-70 gang.

It is beyond question that in contemporary society, evidence that a person subscribes to racist beliefs will expose him or her to opprobrium. Where evidence of such racist beliefs has little probative value, it may be unduly prejudicial. (Cf. *People v. Williams*, *supra*, 16 Cal.4th at p. 193.) """[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence."" (*People v. McKinnon*, *supra*, 52 Cal.4th at p. 655.) While we agree the expert's statement was relevant to the theory that Flores was recruiting Ortega, we reject the Attorney General's contention that Sumner's explanation was relevant to show the carjacking was motivated by racism.

First, the record contains no evidence that the prosecution relied on the theory of racial animus at trial. The prosecution did not refer again to Sumner's comment regarding the racism of the CV-70 gang after it was made, and did not argue in either his opening statement or in closing argument that Flores's motive for the crime was race-

related.[5] Our review of the cold record has disclosed no evidence of racial animus as the motivating factor. The record does not indicate that the carjacking took place in an area claimed by an African-American gang (only that it was committed outside of CV-70's territory). Nor does the record expressly reflect that the victim was African-American or a member of an African-American gang. However, the contention in the respondent's brief that White is African-American has not been challenged by Flores. Also, neither Sumner's comment nor any other evidence in the record revealed that Flores personally harbored racial animus against African–Americans beyond his membership in CV-70. Although Flores referred to the stolen Lexus as "that nigga's car" in his conversation with his brother, he also repeatedly used the term "nigga" to refer himself, to Ortega and to their friend Endo, none of whom (presumably) is African-American. Nothing in the record suggests that when Flores and Ortega went looking for a car to steal, they did so motivated by racial animus. Indeed, had Flores and Ortega accomplished their shared goal and stolen an unoccupied car, they could not have known the race of the car's owner. Although racism remains endemic in our society, the average juror likely knows that not all people who have racist attitudes act on them in criminal ways. (See *People v. Lindberg* (2008) 45 Cal.4th 1, 46 [analogizing evidence concerning white supremacy to evidence of gang activity].) Even if Flores shares his gang's racist beliefs, there is no evidence those beliefs motivated his actions here.

Further, evidence of the racist beliefs of members of the CV-70 gang, though prejudicial, is not inadmissible. There is no question that evidence of racism is potentially inflammatory. However, it may be relevant and admissible if it has probative value. (See, e.g., *Quartermain, supra,* 16 Cal.4th at p. 629.) The fact that the evidence cast Flores in a bad light does not alone render it inadmissible. (*People v. Lindberg*,

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[5] During opening statement, the prosecutor quoted from the call Flores made to his brother, indicating that the jury would hear testimony regarding the gang-related crime, during which Flores said, "that nigga, he didn't snitch . . . ."

supra, 45 Cal.4th at p. 50 ["Evidence is not unduly prejudicial 'merely because it strongly implicates a defendant and casts him or her in a bad light'"].) If that were the case, all prosecution evidence showing a defendant committed the charged crime would be inadmissible. Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §§ 210, 350.) Relevant evidence may be excluded only "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

Under Evidence Code section 352, prejudicial is not the same as damaging. (*People v. Karis* (1988) 46 Cal.3d 612, 638; *People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) "Evidence is prejudicial within the meaning of Evidence Code section 352 if it encourages the jury to prejudge defendant's case based upon extraneous or irrelevant considerations." (*People v. Rogers* (2006) 39 Cal.4th 826, 863; *People v. Lopez* (2013) 56 Cal.4th 1028, 1059 [unduly prejudicial evidence is that which uniquely tends to evoke an emotional bias against the defendant as an individual and has very little effect on the issues].) The "undue prejudice" with which Evidence Code section 352 is concerned is "evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis." (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate a point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. Here, although there is no evidence the carjacking was motivated by racist beliefs against an African-American victim, the court could reasonably conclude that the nature of the gang's collective ideology, while likely to cast Flores in a bad light, nevertheless bears relevance to the theory that he was putting in work on the gang's behalf to recruit Ortega.

Flores's reliance on *People v. Ortiz* (1979) 95 Cal.App.3d 926 (*Ortiz*) is misplaced. In *Ortiz*, the court held that the trial court committed prejudicial error in allowing the prosecutor to elicit and comment upon testimony describing in detail animal sacrifices made by the defendant in connection with his membership in a religious cult. In reversing the defendant's conviction, the *Ortiz* court found the evidence regarding defendant's religious practice both irrelevant and highly inflammatory to the issues in the case. (*Id*. at pp. 933–936.) The prosecutor's repeated references to animal sacrifices posed a substantial danger of undue prejudice by "creating a negative image of defendant in the minds of the jury." (*Id*. at p. 934.) Here, unlike *Ortiz*, evidence of the racism of Flores's gang was mentioned only once as part of a fuller explanation of the gang's tenets and the relation of those beliefs to the meaning of tattoos on the hand of one of its members. The disputed evidence did not unduly prejudice Flores and his concern that it evoked significant emotional bias that led to guilt by association is unfounded. The evidence of Flores's association with a gang that holds racist beliefs did not have an inflammatory impact on the jury, which acquitted him of the gang allegation.

On this record, we conclude that Sumner's reference to the nature of the CV-70 gang was probative of the prosecution's theory that Flores's intent in committing a carjacking was as a means of recruiting Ortega. The probative value of this evidence was not substantially outweighed by the probability that its admission would confuse the issues or mislead the jury. The expert's reference to CV-70's racism was fleeting and the court made clear that it was offered only to explain Flores's tattoo. The court acted within its discretion to admit this single relevant statement under Evidence Code section 352.[6]

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[6] Because we conclude that Sumner's testimony was not inadmissible under Evidence Code section 352, we also conclude that the admission of this testimony did not deprive Flores of due process and a fair trial under the federal Constitution.

c. Any error was harmless

In the interest of complete review, we note that even if we were to assume evidentiary error, any error would be harmless, whether assessed under the federal constitutional (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] [reversal is required under the federal Constitution unless the error was harmless beyond a reasonable doubt]), or state (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [state law error requires reversal only if it is reasonably probable that the error had an effect on the verdict]) standard of review. The evidence that Flores was guilty of carjacking is overwhelming. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.)

Flores admitted that he and Ortega went out looking for a car to steal, that he assured Ortega he would not "leave him hanging," that he stood behind Ortega when Ortega ordered White out of his car at gunpoint, and that he voluntarily got into the car and drove off with Ortega. Regardless of why he committed the crime, Flores is undoubtedly guilty. Accordingly, even if the trial court erred in admitting Sumner's disputed testimony, that error was harmless. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

2. Sumner's statement that Flores had "done a lot of things"

a. Relevant proceedings

At trial, Sumner explained that "putting in work" is "committing some type of crime that will benefit the gang," and that gang members bolster their reputations and earn respect by committing crimes for the gang's benefit. When asked to explain what he meant by saying that gang members bolster their reputation by committing crimes, the gang expert said, "Respect is everything. . . . The more respect that is earned, they'll place you up on a pedestal. They'll think of you differently." Referring to Flores by his gang moniker, Sumner said, "Smokey is well respected. He's done a lot of things." Flores's counsel objected on foundational grounds and requested a sidebar at which the following exchange took place:[7]

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[7] Flores's counsel apparently did not move to strike Sumner's comments.

"[The Court]: We're at sidebar, outside of the presence of the jurors.

"Is he going to go into the things—

"[Prosecutor]: I didn't know he was going to say this part, so I have no problem—you want me to pull him aside to say it? I don't know if the court wants to admonish him not to mention anything about any other activities that could—however, as soon as he said it, I was like—

"[Defense counsel]: Yeah.

"[Prosecutor]: I didn't even know that he was going to get into it, so I never talked to him about that.

"[Defense counsel]: And I don't have any discovery on any arrests—

[¶] . . . [¶]

"[Prosecutor]: I don't. . . . I completely agree. I will just—how do you want me to handle it as far as not mentioning it?

"[The Court]: I can say, "'Go to your next question,'" and I could tell him we're not going to go into any other cases or crime or—I can admonish him in front of the jurors. Some attorneys like me to do that. Some think it brings more attention to the issue than what it's worth.

"[Defense counsel]: Yeah. I agree with that. I don't think that it's necessary to admonish him. Maybe if you could write down a note for him or something and approach him, 'We're not going to go into anything about any other crimes.' Does that seem to make sense?

"[The Court]: Okay.

"[Defense counsel]: Write down a little note, 'We're not testifying about other crimes.' I don't know if you need to talk to him.

"[Prosecutor]: No. No, that's fine.

[¶] . . . [¶]

"[The Court]: I can tell him. You want me to tell him?

"[Prosecutor]: Yeah. Yeah, about any other crimes.

"[Defense counsel]: But we are not going to say it on the record.

"[The Court]: No. No, I will tell him to the side.

"[Defense counsel]: Got it."

b. Forfeiture

Flores contends that Sumner's statement that he has "done a lot of things" was improperly admitted evidence of "other crimes" or "bad acts" because it was nonresponsive, irrelevant and prejudicial. (See Evid. Code, § 1101, subd. (a) [evidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or specific instances of his conduct) is inadmissible to prove his conduct on a specific occasion].) Flores's claim fails because his counsel rejected the court's offer to admonish the jury regarding the statement. If defense counsel declined a trial court's offer to instruct or admonish the jury as to a particular issue, a defendant may not complain about the absence of such an instruction or admonition on appeal. (*People v. Thomas* (2012) 53 Cal.4th 771, 810 (*Thomas*).)

Here, Flores's attorney was offered the opportunity to have the court admonish Sumner in front of the jury not to mention prior bad acts. Defense counsel explicitly rejected that offer as unnecessary, agreeing with the court that such an admonition could bring "more attention to the issue than what it's worth." It was then agreed by all that Sumner would be discretely admonished not to testify about other crimes.

Thomas, supra, 53 Cal.4th 771, is instructive. In *Thomas,* the defendant complained that testimonial evidence should have been admitted with a limiting instruction. However, defendant's trial counsel rejected the court's offer to give such an instruction because counsel believed it would only serve to highlight the matter. (*Id.* at p. 810.) So too here. Flores's counsel made a tactical decision to decline an admonition that would have addressed the risk of prejudice about which Flores now complains. Flores has forfeited his right to complain on appeal about the admission of the evidence. (*Ibid.*)

c. No ineffective assistance of counsel

Flores also contends that his attorney's failure to request that the court admonish the jury to disregard Sumner's testimony constituted ineffective assistance of counsel. If such an admonition could have cured the harm caused by Sumner's testimony, Flores maintains that his defense attorney's performance was necessarily deficient for declining the court's offer to provide the admonition.

To prevail on an ineffective assistance of counsel claim, Flores must show both that his attorney's performance was deficient, and that her deficient performance prejudiced him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674] (*Strickland*).) Flores's claim of ineffective assistance fails under the first prong because he has not shown that his trial attorney's decision not to seek an admonition was deficient. "A reviewing court will not second-guess trial counsel's reasonable tactical decisions." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) Flores's counsel made a tactical decision not to have the court admonish the jury because she did not want to bring additional attention to bear on Sumner's inappropriate statement. Instead, she chose to have Sumner discreetly admonished, thus assuring he would not make the same mistake again without alerting the jury. Counsel's tactical decisions were the product of a reasonable and sound trial strategy. Flores's belated attempt to second-guess those tactical decisions is improper. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8 [124 S.Ct. 1, 157 L.Ed.2d 1].) Flores's ineffective assistance of counsel claim fails under the first prong, so we need not analyze whether he can show prejudice.

3. The claim of prosecutorial misconduct was forfeited and Flores did not suffer ineffective assistance of counsel

During closing argument, the prosecutor argued to the jury that:

"In order to prove a defendant guilty of a crime, I have to prove elements to you. Every crime has certain elements, and I have to prove each element to you beyond a reasonable

doubt. [¶] . . . [¶] I don't need to eliminate all possible doubt. I don't need to eliminate all imaginary doubt. What reasonable doubt means is if you have a doubt, it has to be reasonable using your common sense, and it has to be based on something that you heard. It cannot be just something made up. We are not trying to come up with some science fiction scenario where this could have possibly happened."

Flores maintains that by telling the jury that reasonable doubt "has to be based on something that you heard," the prosecutor excluded the possibility that reasonable doubt could be based on the absence of requisite proof by the prosecution. Flores's attorney did not object to the prosecutor's statement, nor seek an admonition. Thus, Flores has forfeited the claim.

"In order to preserve any claim of prosecutorial misconduct, there must be a timely objection and request for admonition. [Citation.] '"[O]therwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct."'" (*People v. Dykes* (2009) 46 Cal.4th 731, 786; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146.) Flores claims his failure to object is excused because any objection would have been futile and would only have highlighted the prosecutor's misconduct and accorded it greater prominence in the jurors' minds. However, even if we assume the prosecution's statement was improper, Flores makes no argument or showing that an admonition would not have avoided any possible prejudice. (*People v. Price* (1991) 1 Cal.4th 324, 461–462.)

Flores's claim also fails on the merits. We reject Flores's characterization that the prosecutor distorted the concept of reasonable doubt by effectively telling the jury there had to be "'affirmative evidence demonstrating reasonable doubt.'" The prosecutor simply told jurors their decision had to be based on evidence adduced at trial, and they were not free to conjure reasonable doubt from on an imagined possibility. Further, the statement with which Flores takes issue followed on the heels of the prosecutor's explicit acknowledgement that it was his obligation "to prove elements to [the jury]. Every crime

has certain elements, and *I have to prove each element to* [*the jury*] *beyond a reasonable doubt*." (Italics added.) No improper comments were made.

We also reject the assertion that Flores's attorney's failure to object to the prosecutor's statement constituted ineffective assistance of counsel. First, the prosecutor did not mischaracterize its burden of proof, so no objection was necessary or in order. Further, because the record does not reveal why Flores's counsel did not object, this claim rests on facts outside of the record, and may not be raised here. (See *People v. Seaton* (2001) 26 Cal.4th 598, 643 [where record did not reveal why trial counsel failed to object to certain testimony, claim rested on facts outside the appellate record, and could only be raised on habeas corpus].) In any event, Flores has not shown his attorney's performance was deficient, or that he was prejudiced by any deficient performance on the part of counsel. (*Strickland, supra*, 466 U.S. at p. 687.) The court gave the appropriate instructions regarding the presumption of innocence and the prosecution's burden of proof. The trial court also instructed the jury that it was required to follow the court's instructions as to the law and, to the extent any attorney's comments or argument conflicted with the court's instructions, the instructions must prevail. Absent evidence to the contrary, we presume that the jury followed those instructions. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

MOOR, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.