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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MIKE DONIS, Defendant and Appellant.	B257944 (Los Angeles County Super. Ct. No. BA410345)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed in part, reversed in part and remanded with directions.

Wayne C. Tobin, 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 Attorney General, Margaret E. Maxwell, and Nathan Guttman, Deputy Attorneys General, for Plaintiff and Respondent.

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Mike Donis was convicted by a jury of two counts of robbery with true findings on related criminal street gang enhancements. On appeal Donis contends his counsel was constitutionally ineffective in failing to request a limiting instruction immediately after the trial court admitted evidence that a fellow gang member had threatened a prosecution witness—an instruction that was given prior to jury deliberations. He also contends the court abandoned its role as neutral arbiter and improperly assisted the prosecutor in proving the criminal street gang enhancement allegations. We agree with Donis's second argument, reverse the gang enhancements and remand for resentencing. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Donis was charged in an information with two counts of robbery. (Pen. Code, § 211.)[1] It was specially alleged that Donis had committed each offense for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).)[2] In addition, it was specially alleged that Donis had suffered two prior serious or violent felony convictions within the meaning of both section 667, subdivision (a), and the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and had served three separate prison terms for prior felony convictions (§ 667.5, subd. (b)). Donis pleaded not guilty and denied the special allegations.

2. *The Trial*

According to the evidence at trial Luis Ramirez and Hector Arvizo sold tacos from a food cart near the intersection of Adams Boulevard and Redondo Beach Boulevard in Los Angeles, an area claimed by the 18th Street criminal street gang. On April 18, 2013,

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1 Statutory references are to this code unless otherwise indicated.

2 For simplicity on occasion this opinion uses the phrase "to benefit a criminal street gang" to refer to crimes that, in the statutory language, are 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." (§ 186.22, subd. (b); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

while working at their cart, they were approached by two men. One of the men, dressed in a grey hooded sweatshirt, said, "Give me your money motherfucker" and hit Ramirez in the eye and Arvizo in the head. The other man remained silent and acted as a look-out. Ramirez gave the man in the sweatshirt $15; Arvizo gave him $20 or $30. Then, after Arvizo's assailant ordered him to empty the contents of his pockets, Arvizo handed over an additional $300. The man in the sweatshirt took the money, and he and his confederate fled.

Ericka Gonzalez operated her own food truck a block away from the site of the robbery. She could not see the taco cart from her location and did not see the robbery. However, about the time of the robbery, Gonzalez saw two men, whom she knew to be Donis and Jonathan Garcia Alavez,[3] run from the direction of the taco cart toward her truck. Donis was wearing a grey hooded sweatshirt. Gonzalez reported to police Donis was "out of control" when he arrived at her taco truck. He physically attacked her customers and hit her when she tried to intervene. When police arrived at the scene, Donis and Alavez fled. Police chased them and were able to apprehend Alavez but not Donis. An unidentified bystander reported Alavez had "just robbed the guy at the taco truck." During a field identification a few minutes later, Arvizo and Ramirez separately identified Alavez as one of the robbers. Donis was arrested a few days later.[4]

Neither Ramirez nor Arvizo was able to identify Donis in a photographic lineup, although Ramirez stated Donis's photograph "looked familiar." At the preliminary hearing Arvizo identified Donis as the robber in the grey sweatshirt; at trial, however, he stated he could not identify Donis and did not see his attacker in the courtroom.

Donis and Alavez are both members of the Alsace Street clique of the 18th Street criminal street gang. On April 21, 2013 (the day Donis was arrested) an 18th Street gang

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3 Alavez is also called Olevarez and Garcia at different places in the record. For clarity, we refer to him as Jonathan Garcia Alavez as he is identified in the information.

4 Donis and Alavez, both charged with two counts of robbery, were tried separately. It appears neither man was charged with any crime relating to his conduct toward Gonzalez or her customers.

member known as "Chubbs" visited Gonzalez at her home and warned her not to testify in this case or "something might happen to her." In addition, Gonzalez told police that Donis had telephoned her directly on April 24, 2013 and tried to persuade her not to testify. Soon after that, she was visited at her place of business by another 18th Street gang member known as "Demon," who demanded she pay "taxes" to the gang. On each of these occasions, she told police, she was scared. At trial, however, Gonzalez denied feeling intimidated by the 18th Street gang or its members' visits; she intended to testify and tell the truth. She testified, inconsistently with her reports to police, that Donis had been the victim in the altercation at her taco truck, not the aggressor. She also testified Donis had not threatened her when he called her. To the contrary, he simply apologized for causing trouble. He explained he had been "out of his senses" and under the influence of drugs and alcohol.

Officer Adaniz Cook of the Los Angeles Police Department testified as a gang expert. Given a hypothetical based on the facts of the case, Cook opined the robberies of Ramirez and Arvizo in 18th Street territory were committed for the benefit a criminal street gang.

Donis did not testify. The defense theory of the case was mistaken identification. Kathy Pezdek, a professor of psychology at Claremont Graduate University, was called as an expert witness by the defense to opine on the unreliability of eyewitness identification.

3. *The Verdict and Sentence*

The jury convicted Donis of both robbery offenses and found true the special allegations the crimes had been committed for the benefit of a criminal street gang. After a bifurcated court trial the court found true one of the prior conviction allegations within the meaning of section 667, subdivision (a)(1),[5] and one prior felony prison term

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5 The trial court found the second alleged prior conviction was actually a juvenile adjudication and did not qualify as a prior serious felony conviction within the meaning of section 667, subdivision (a)(1). (See *People v. Garcia* (1999) 21 Cal.4th 1, 24

allegation (§ 667.5); the court dismissed both qualifying strike convictions in furtherance of justice (§ 1385). Donis was sentenced to an aggregate state prison term of 21 years.[6]

DISCUSSION

1. *Donis's Counsel Was Not Constitutionally Ineffective*

a. *Relevant proceedings*

Over defense counsel's Evidence Code section 352 objection, the trial court admitted evidence that Gonzalez reported to police Chubbs's threat if she testified against Donis. The court found the evidence highly probative as to whether Gonzalez, whose testimony was inconsistent with her statements to police, was afraid to testify truthfully. Citing *People v. Olguin* (1994) 31 Cal.App.4th 1355, the court told defense counsel she could "get a limiting instruction, if you request it, that the jury should consider these third party approaches only for her state of mind." After the evidence was admitted, defense counsel did not request, and the court did not then give, a limiting instruction. At the close of evidence, however, the court instructed the jury, pursuant to CALCRIM No. 303, that "during trial certain evidence was admitted for a limited purpose. This instruction applies to statements made before trial by . . . Chubbs, also known as Jaime Moreno, to Ericka Gonzalez. If you find these statements were made, you may consider them only for the purpose of evaluating the state of mind of Ericka Gonzalez as she was testifying. You may consider that evidence only for that purpose and no other."

b. *Governing law*

The right to counsel guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution "'includes, and indeed

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[recognizing juvenile adjudication is not a conviction for purposes of section 667, subd. (a)(1), enhancement].)

6 Donis was sentenced on count 1 to the upper term of five years, plus 10 years for the criminal street gang enhancement, plus five years for the prior conviction enhancement (§ 667, subd. (a)(1)) and one year for the prior prison term enhancement (§ 667.5, subd. (b)). The court imposed a similar sentence on count 2, to run concurrently with the sentence on count 1.

presumes, the right to effective counsel. . . .'" (*People v. Blair* (2005) 36 Cal.4th 686, 732.) "'To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant.'" (*In re Roberts* (2003) 29 Cal.4th 726, 744-745; accord, *In re Crew* (2011) 52 Cal.4th 126, 150; see *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656; accord, *People v. Vines* (2011) 51 Cal.4th 830, 875.)

There is a presumption the challenged action or inaction "'might be considered sound trial strategy'" under the circumstances. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 689, 694; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Carter* (2003) 30 Cal.4th 1166, 1211.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*Gamache*, at p. 391; *People v. Anderson* (2001) 25 Cal.4th 543, 569; *People v. Lucas* (1995) 12 Cal.4th 415, 442.)

c. *Donis has failed to demonstrate prejudice*

Donis acknowledges that the limiting instruction was given prior to deliberations. Nonetheless, he contends the failure to give the instruction immediately after the evidence of Chubbs's threat was introduced allowed the jury time to consider the evidence for a variety of more incriminating purposes than simply Gonzalez's state of mind, including that Donis had authorized Chubbs's threat. We need not determine whether counsel's performance was deficient because Donis has failed to demonstrate he suffered any prejudice. (See *In re Fields* (1990) 51 Cal.3d 1063, 1069 [in considering a claim of ineffective assistance of counsel, it is not necessary to determine """whether

counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed"""]; *People v. Upsher* (2007) 155 Cal.App.4th 1311, 1325 [same]; see also *In re Champion* (2014) 58 Cal.4th 965, 1007 [to establish prejudice, the defendant must demonstrate a "reasonable probability" that absent the errors the result would have been different]; *People v. Williams* (1997) 16 Cal.4th 153, [same].)

Here, the jury was instructed just after jury selection and again on the day Gomez testified about the threat to refrain from reaching an opinion "until you've heard all the proof." The court also gave the limiting instruction prior to deliberations. We presume the jury understood and followed these instructions. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670 [jurors are presumed to understand and follow the court's instructions]; *People v. Holt* (1997) 15 Cal.4th 619, 662 [same].) Moreover, Donis's argument that the delay in giving the instruction permitted an improper inference that he authorized the threat ignores other, more damaging evidence, not subject to a limiting instruction: Donis had telephoned Gonzalez himself to persuade her not to testify. Thus, the negative inference he posits from the delay in giving the instruction—that Donis was responsible for threatening Gonzalez—was entirely cumulative. On this record, the failure to request the limiting instruction immediately, even if error, was harmless.

2. *The Court Improperly Assisted the Prosecutor in Proving the Gang Enhancement*

a. *Relevant proceedings*

Officer Cook testified during the People's case-in-chief as a gang expert. After Cook testified to the 18th Street gang's primary activities, the prosecutor had marked for identification two orders holding 18th Street gang members Josh Perez and Kehende Moeneik Lang, Jr. to answer on felony charges (holding orders). That evidence was introduced to prove members of the 18th Street gang had engaged in a pattern of criminal activity qualifying the gang as a criminal street gang under section 186.22,

subdivision (b). (See § 186.22, subd. (e) [requiring proof of qualifying predicate offenses as element of enhancement].) Officer Cook testified he knew both men to be 18th Street gang members. He did not testify that he had any personal knowledge they had, in fact, committed any prior felonies.

Later, during a break in Officer Cook's testimony and outside the presence of the jury, the court expressed its concern whether holding orders alone would be sufficient to establish the necessary predicate offenses: "One of the things I do up here is to try to—try to anticipate problems and get assistance from counsel before they actually become problems. If you're going to rely upon proof that somebody was held to answer as proof of a predicate, I want you to find me some authority for doing that. Maybe there is. But when you're proving up the predicates, there's three things the court has to be aware of. Number 1, whether the predicate is one of the enumerated crimes in the statute. Number 2, whether there's sufficient evidence to prove up the predicate, and number 3, . . . whether certain of the predicates should be excluded under [Evidence Code] section 352. The latter problem doesn't present itself because there [are] only two predicates being identified so far. But I'm familiar with the case law on this and I'm very familiar with a predicate being proved up by convictions. I've never seen it being proved up this way. It might be able—you might be able to proceed that way, maybe, if that's what you choose to do. But if you're not going to proceed by convictions, there are instructional problems that we need to address, because [CALCRIM No. 1401], which talks about the proof of the so-called gang enhancement if you're not relying on convictions, requires us, the way I read it, to instruct the jury on the elements of the unconvicted predicates that you're trying to prove up so they can determine whether the proof establishes it or not. Do you follow me? I've been accused laughingly, of attempting to help the prosecution earlier in this trial[7] and I'm a little reluctant to bring it up, frankly, because that's not my role to help you. But it is my role to make sure that the

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7 The court's reference was to a joke made by defense counsel. It was not a serious accusation, nor would the record have supported it if it had been.

decisions I reach on whatever proof you choose to introduce are sound and correct. And if you're going to proceed this way, it's—in my experience, it's unusual. I don't have anything more to say about it." The next day, prior to resting its case in chief, the prosecutor, without objection, introduced certified records of conviction to prove the predicate offenses.

b. *Governing law on the court's role as neutral arbiter*

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. [Citation.] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. [Citation.] At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' [citation] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." (*Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242 [100 S.Ct. 1610, 64 L.Ed.2d 182].)

"The trial court has a statutory duty to control trial proceedings, including the introduction and exclusion of evidence. [Citation.] As provided by section 1044, it is 'the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' However, 'a judge should be careful not to throw the weight of his [or her] judicial position into a case, either for or against the defendant.'" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; accord, *People v. Harris* (2005) 37 Cal.4th 310, 346-347.)

In reviewing a claim of judicial error in this regard, our role is to determine whether the court's actions, whether or not undertaken in bad faith, denied the defendant

a fair trial. (*People v. Cook* (2006) 39 Cal.4th 566, 598; see *People v. Snow* (2003) 30 Cal.4th 43, 78 [role of reviewing court "'. . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid, [but] . . . whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial'"].)

c. *The trial court improperly assisted the prosecutor and unfairly prejudiced the defense*

Section 186.22, subdivision (e), provides that a pattern of criminal gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more of the" offenses enumerated in that subdivision. Thus, the People need not prove the predicate offenses resulted in convictions if they can establish two or more of the listed felonies were committed by gang members within the section's time constraints. (*People v. Garcia* (2014) 224 Cal.App.4th 519, 524; *In re Leland D.* (1990) 223 Cal.App.3d 251, 258.)

Donis contends, and the Attorney General acknowledges, that holding orders—determinations following a preliminary examination that probable cause exists to believe the defendant has committed a felony (see § 866, subd. (b))—are insufficient to establish predicate offenses were committed under section 186.22. (See *In re Leland D.*, *supra*, 223 Cal.App.3d at p. 258 [arrest records, without more, are insufficient to establish predicate offense was "committed" under § 186.22]; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462 [same].)[8] Donis argues the trial court abandoned its role as neutral arbiter when it strongly suggested to the prosecution, before it had rested its case-in-chief, that the evidence introduced to support the gang enhancement was insufficient, thereby

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8 Although not cited by either Donis or the Attorney General, *In re I.M.* (2005) 125 Cal.App.4th 1195, 1207-1208 held evidence a gang member was "being prosecuted" for an offense provided sufficient evidence of the "commission" of the predicate offense to establish a pattern of criminal gang activity: "That Monstro was being 'prosecuted' permits the conclusion that there was significant evidence that he had in fact committed the offense." No authority was cited for this rather startling proposition, and we strongly disagree with it.

alerting the prosecutor to an evidentiary deficiency at a time when she could cure it and, in the process, depriving the defense of the opportunity to obtain a dismissal of the enhancement allegation for insufficient evidence (see § 1118.1).

i. *Donis's failure to object did not forfeit his claim*

At the threshold the Attorney General insists Donis has forfeited the issue by failing to object to the trial court's action. (See *People v. Cook, supra,* 39 Cal.4th at p. 598 [failure to object at trial generally forfeits claim on appeal that court was biased or abandoned its role as neutral arbiter]; *People v. Harris, supra,* 37 Cal.4th at p. 350.) However, the general purpose of the forfeiture doctrine—to provide the trial court an opportunity to cure the error and ensure a fair trial (see *People v. Simon* (2001) 25 Cal.4th 1082, 1103)—is not furthered when any objection would have been futile. (*People v. Sturm, supra,* 37 Cal.4th at p. 1237.) Here, having alerted the prosecutor to the deficiency in her proof, there was nothing the court could have done to ameliorate the harm already inflicted to the defendant's case. Accordingly, we decline to apply forfeiture.

ii. *The court overstepped its proper role in commenting on the strength of the prosecution's evidence*

Fundamental to the proper role of the trial judge is remaining neutral and controlling the course of the proceedings without becoming an advocate for either party. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 739, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2; *People v. Rigney* (1961) 55 Cal.2d 236, 241.) By effectively advising the prosecutor to produce additional evidence in support of the criminal street gang enhancement, the trial judge here, albeit apparently in good faith, crossed that line.

We acknowledge, as do both Donis and the Attorney General, this is not a case that fits neatly into general descriptions of judicial misconduct, which typically involve some manifestation of bias or expression of opinion on the strength of evidence in front of the jury, none of which occurred here. (See, e.g., *People v. Sturm, supra,* 37 Cal.4th at p. 1244 [bias questioning of witness]; *People v. Santana* (2000) 80 Cal.App.4th 1194,

1206-1207 [court committed prejudicial misconduct when it suggested to jury that it found People's case against defendant to be strong and defendant's evidence to be questionable].) What the record does reveal is a good faith attempt by the trial court to, in its words, address and resolve problems "before they become issues." In its zeal to do the right thing, however, this trial court firmly placed its "thumb . . . on the scales of justice, tilting the balance in the state's favor . . . ." (*People v. Gammage* (1992) 2 Cal.4th 693, 705 (conc. opn. Mosk, J.). Under those circumstances, the true finding on the gang enhancements, made possible only because of the court's inadvertent partiality, cannot stand.

iii. *The court's conduct cannot be justified under section 1044 as merely controlling the proceedings*

The Attorney General contends the court's actions were authorized as an effort to control the proceedings. (See § 1044.) In particular, she observes, the court had given the parties proposed jury instructions prior to Officer Cook's testimony. Those instructions included CALCRIM No. 1401, which presents different language relating to proof of "a pattern of criminal gang activity" depending on whether the prosecutor has presented evidence of convictions of the predicate offenses or other forms of proof that the offenses were committed, for example, testimony from a percipient witness.[9] According to the Attorney General, in highlighting the holding orders during a break in

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9 CALCRIM No. 1401 defines the elements required for a true finding on a criminal street gang enhancement allegation, including that the members of the organization, "whether acting alone or together, engage in or have engaged in a pattern of criminal gang activity." The instruction then explains, in language tracking the statute itself, that "a pattern of criminal gang activity" means the commission, attempted commission, or conspiracy to commit or solicit to commit or conviction of two or more crimes that meet certain definitional requirements. An additional paragraph is included in CALCRIM No. 1401, which the trial court is advised to give "only when the conduct that establishes the pattern of criminal gang activity, i.e., predicate offenses, has not resulted in a conviction or sustained juvenile petition." That paragraph provides, "To decide whether a member of the gang [or the defendant] committed _____ <*insert felony or felonies from Pen. Code, § 186.22(e)(1)-(33)*> please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]."

the testimony, the court merely sought to clarify the proof the People intended to introduce for purposes of formulating proper jury instructions to be given later in the case.

The Attorney General's justification for the court's action is unpersuasive. CALCRIM No. 1401 gives the trial judge a binary choice: Either evidence of convictions has been introduced, in which case one form of the instruction is to be used, or it has not, in which case an additional paragraph must be included in CALCRIM No. 1401. The nature of the nonconviction evidence to prove the predicate offenses were committed has no impact on the instructions to be given.

Even if the Attorney General's explanation is credited, however, the court could, and should, have inquired at the close of evidence and in a neutral matter whether there was any additional evidence to be introduced. Instead, the court opined on the sufficiency of the evidence, thereby alerting the prosecution to the evidentiary deficiency and preempting a defense motion to dismiss.[10]

iv. *The judicial error deprived Donis of the opportunity to obtain a dismissal or a reversal on appeal for insufficient evidence*

The Attorney General argues, even if the court exceeded its judicial role and assisted the prosecutor, there was no real prejudice and certainly no deprivation of Donis's right to a fair trial. After all, she surmises, the prosecutor would have been alerted to the problem at the close of evidence, either when jury instructions were discussed or a motion to dismiss was made; and the court would have allowed the People to reopen their case to introduce the judgments of conviction, which were readily available. (See *People v. Riley* (2010) 185 Cal.App.4th 754, 756 [trial court did not abuse its discretion under § 1094 in permitting the prosecution to reopen its case to prove prior convictions notwithstanding the defense's filing of an acquittal motion when the prosecutor's failure to prove priors during the People's case-in-chief resulted from

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10 Because Donis had not challenged the admissibility of the holding orders, this is not a case where the court's evaluation of the evidence was rooted in admissibility determinations. (See generally Evid. Code, § 402.)

mistake rather than an attempt to gain a tactical advantage].)[11] To suggest that the error is harmless based on mere speculation the prosecution could have reopened its case-in-chief after being alerted to the error by a section 1118.1 motion ignores the equally plausible scenario that defense counsel understood the deficiency and would have saved her evidentiary argument for the jury (and for appeal) rather than giving the People the opportunity to ask to reopen. Accordingly, when, as here, the error deprived the defendant of the benefits of obtaining a not-true finding on the gang enhancement and thereby denied him a fair trial, prejudice is established. (See generally *People v. Avila* (2009) 46 Cal.4th 680, 696 [to obtain reversal, defendant must show judicial misconduct that was "'so prejudicial that it deprived defendant of "'a fair, as opposed to a perfect, trial'"'"]; *People v. Sturm, supra,* 37 Cal.4th at p. 1244 [same].

The question remains whether Donis is subject to retrial on the enhancement or whether retrial is prohibited under the federal double jeopardy clause.[12] Ordinarily, reversal due to prosecutorial or judicial misconduct that results in a denial of a fair trial

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11 We have some concern, notwithstanding the decision in *People v. Riley, supra,* 185 Cal.App.4th at page 756, whether it is an appropriate use of the discretion afforded the court under section 1094 to permit the reopening of the People's case in a jury trial after the defense has made an acquittal motion based on insufficient evidence. (See § 1118.1 [on motion of defendant in a case tried before a jury, the trial court "shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal"].) The *Riley* court properly characterized the issue before it as one of first impression, at least in a jury trial (cf. *People v. Goss* (1992) 7 Cal.App.4th 702, 708 [court has discretion in bench trial under section 1094 to allow People to reopen case following section 1118 motion so long as court is convinced failure to present evidence was result of inadvertence or mistake and not an effort to gain tactical advantage]); and no court has cited *Riley* for this proposition in any published case. Nonetheless, we need not address that question because, as we explain, even if that option were available to the People, it does not negate the court's error or render it harmless to the defense.

12 The double jeopardy clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that no person shall "'be subject for the same offense to be twice put in jeopardy.'" (*Lockhart v. Nelson* (1988) 488 U.S. 33, 38 [109 S.Ct. 285, 102 L.Ed.2d 265].)

does not implicate federal double jeopardy principles. (*People v. Hill* (1998) 17 Cal.4th 800, 847; cf. *People v. Batts* (2003) 30 Cal.4th 660, 682 [recognizing prosecutorial or judicial misconduct, if motivated by bad faith, may implicate double jeopardy prohibition following declaration of mistrial].) Here, however, the court's conduct effectively deprived Donis of a not true finding on the enhancement at trial pursuant to section 1118.1 or a reversal of the enhancement on appeal for insufficient evidence; in either circumstance, retrial would have been prohibited. (See *People v. Seel* (2004) 34 Cal.4th 535, 549-550 [a finding of insufficient evidence on a nonrecidivist enhancement is akin to an acquittal, barring retrial on double jeopardy grounds]; see *United States v. DiFrancesco* (1980) 449 U.S. 117, 130-131 [101 S.Ct. 426, 66 L.Ed.2d 328] [federal double jeopardy clause bars retrial for evidentiary insufficiency]; *Burks v. United States* (1978) 437 U.S. 1, 11 [98 S.Ct. 2141, 57 L.Ed.2d 1] [same].)

Under these rather novel circumstances, the same policy barring retrial after a reversal on appeal for insufficient evidence (see *Burks v. United States*, *supra*, 437 U.S. at pp. 16-17 [double jeopardy is implicated on a finding of insufficient evidence because the jury was required as a matter of law to acquit the defendant on the state of the evidence before it]; *Lockhart v. Nelson* (1988) 488 U.S. 33, 38 [109 S.Ct. 285, 102 L.Ed.2d 265] [same]) applies here. Absent the court's intervention, a not true finding on the criminal street gang enhancement would have been required as a matter of law. On this record, it would offend federal prohibitions of double jeopardy to permit retrial of the enhancement.

DISPOSITION

The gang enhancement findings are reversed, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

BECKLOFF, J.*

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