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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. GUILLERMO MIRANDA, Defendant and Appellant.	B229274 (Los Angeles County Super. Ct. No. BA365489)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis Landin, Judge. Affirmed.

The Kavinoky Law Firm and Mark McBride for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, James William Bilderback II and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Guillermo Miranda guilty of assault with a semi-automatic firearm of Miguel Navarro (Pen. Code, § 245, subd. (b)),[1] making a criminal threat to Navarro (§ 422), and carrying a loaded and unregistered firearm (§ 12031, subd. (a)(1)). The jury also found all three crimes were committed for the benefit of a criminal street gang, and defendant personally used a firearm as to the assault and criminal threats charges (§ 12022.5). Defendant was sentenced to 16 years in state prison.[2]

In this timely appeal, defendant contends the trial court made reversible evidentiary errors. Respondent contends defendant forfeited the claims of error by failing to object to the evidence in the trial court, and the contentions are frivolous. (Evid. Code, § 353.) We affirm. The contentions were forfeited, and in any event, admission of the evidence was not an abuse of discretion.

STATEMENT OF FACTS

Prosecution Case

On December 5, 2009, at 10:30 p.m., Navarro was drinking beer, but was not intoxicated, on the porch outside the home where he had lived for many years. A dozen of his relatives, including children, were with him. Eastside Trece, a criminal street gang, claimed the neighborhood and maintained extensive gang graffiti around Navarro's home. Defendant, a self-admitted member of the Eastside Trece gang, walked by with a woman. He yelled out, "Who is whistling at my girl?" When Navarro answered that no

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[1] Hereinafter, all statutory references will be to the Penal Code, unless otherwise indicated.

[2] Defendant was sentenced to the three-year low term as to assault with a semi-automatic firearm, plus ten years for the gang enhancement, and three years for the firearm enhancement. Sentence as to criminal threats was imposed concurrently, and sentence as to carrying a loaded firearm was stayed.

one was, defendant became enraged. Defendant threatened, "This is Eastside Trece, bitch. I am going to get a green light on you,"[3] and quickly walked away. Navarro was terrified of Eastside Trece and the harm he believed defendant would do to him and his family, because he knew Eastside Trece to be a violent street gang that claimed the area around his neighborhood. Fifteen minutes later, defendant returned with a loaded semi-automatic handgun, another man, and two women. Defendant told Navarro, "Eastside Trece, I got the green light to fuck you guys up." Defendant pointed the gun toward Navarro and Navarro's family. While Navarro tried to calm defendant, the police arrived, and defendant briskly walked away. Navarro pointed at defendant to identify him to the police. The police apprehended defendant and recovered the gun.

Defense Case

Defendant did not belong to a gang and was not the person who threatened Navarro. He was an innocent bystander, who was walking home from a party with his aunt when the police detained him. The young woman whom a police officer identified as having been with defendant when he was arrested was at home with her mother all evening. Two witnesses—a gang intervention specialist and a former member of Eastside Trece—both testified defendant was not a member of Eastside Trece. Navarro did not really see the perpetrator and was drunk.

DISCUSSION

The Contentions Were Forfeited

Defendant contends admission of statements he made to Officer Joseph Fransen describing the incident, identifying defendant as the perpetrator, and expressing fear of

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[3] "Get a green light" means "get authority to do violence upon someone else."

Eastside Trece was reversible error, in that his statements were inadmissible hearsay. "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]"' (*People v. Seijas* [(2005)] 36 Cal.4th [291,] 301; see *People v. Partida* (2005) 37 Cal.4th 428, 434–435.)" (*People v. Williams* (2008) 43 Cal.4th 584, 620; see also Evid. Code, § 353.[4]) Defendant did not object to the statements at trial. His failure to object forfeits the issue on appeal.[5]

In Any Event, Navarro's Statements to Officer Fransen Were Properly Admitted

Defendant contends Navarro's statements to Officer Fransen did not fall within the exception to the hearsay rule in Evidence Code section 1235 [prior inconsistent statements]. If this contention were before us, it would fail on the merits.

We review the trial court's rulings concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2002) 22 Cal.4th 690, 717.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*Id*. at p. 714.)

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[4] "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

[5] To the extent defendant contends his right to confront and cross-examine Navarro was violated, his failure to interpose a timely and specific constitutional objection on that ground in the trial court resulted in a forfeiture of this claim. (E.g., *People v. Burgener* (2003) 29 Cal.4th 833, 869 [a claim based on a purported violation of the confrontation clause must be timely asserted at trial or it is waived on appeal]; *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19 [same].)

Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code s]ection 770." Evidence Code section 770 provides in pertinent part: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement[.]"

"'Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. (*People v. Green* (1971) 3 Cal.3d 981, 988.) However, . . . [w]hen a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. (*Id*. at pp. 988–989.) As long as there is a reasonable basis in the record for concluding that the witness's "I don't remember" statements are evasive and untruthful, admission of his or her prior statements is proper. (*People v. O'Quinn* (1980) 109 Cal.App.3d 219, 225.)' (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) The requisite finding is implied from the trial court's ruling. (Evid. Code, § 402, subd. (c).)" (*People v. Ledesma* (2006) 39 Cal.4th 641, 711-712.)

At trial, Navarro testified he did not remember the crimes, never saw defendant before, and did not know or fear Eastside Trece. When asked at trial about statements he made at the scene describing the crimes to the police, identifying defendant as the perpetrator, and expressing fear of Eastside Trece, Navarro testified he did not remember what he told the police. Navarro explained he identified someone as the perpetrator only because of what his relatives told him.

Without objection, Officer Fransen related Navarro's statements describing the details of the crimes to him, identifying defendant as the perpetrator, and expressing his fear of Eastside Trece.

Navarro's statements to Officer Fransen identifying defendant as the perpetrator and indicating fear of Eastside Trece were admissible as prior inconsistent statements

(Evid Code, § 1235), because they were inconsistent with Navarro's testimony at trial that he had never seen defendant before and knew nothing about Eastside Trece. Navarro's statements were admissible as prior inconsistent statements, because the record contains "'a reasonable basis . . . for concluding that the witness's "I don't remember" statements [were] evasive and untruthful . . . . [Citation.]' [Citation.]" (*People v. Ledesma, supra,* 39 Cal.4th at pp. 711-712.) Navarro claimed he did not remember what happened that night or what he told the police at the scene, but he insisted he remembered that defendant was not the perpetrator. He refused to provide the prosecutor with the names of his relatives who were with him but did not know why he refused. Despite the presence of Eastside Trece graffiti all around his house and living in a neighborhood claimed by Eastside Trece, he denied knowledge of Eastside Trece, knowing what a gang is, and being nervous testifying in court. He stated he did not know what he thought would happen if he divulged his relatives' names. He claimed he wanted to come in to testify and that his memory of the events on December 5 was clearer at trial than it was on December 5. The trial court found Navarro was not cooperating with the prosecutor's examination. The trial court did not err in admitting Navarro's statements to Officer Fransen as prior inconsistent statements.[6]

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[6] As the statements were admissible as prior inconsistent statements, we need not discuss defendant's contention that they were not admissible as a prior identification under Evidence Code section 1238.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.