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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. OSCAR JESUS SALAIS, Defendant and Appellant.	B252520 (Los Angeles County Super. Ct. No. KA101379)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oscar Jesus Salais was convicted by a jury of three counts of attempted murder (counts 1-3), three counts of attempted second degree robbery (counts 4-6), and possession of a short-barreled rifle or shotgun (count 7). (Pen. Code, §§ 664, 187, subd. (a), 211, 33215.)[1] Firearm and criminal street gang allegations were also found to be true. (§§ 12022.53, subds. (b), (c) [counts 1-6], 186.22, subd. (b)(1)(C) [counts 1-7].) Defendant received a sentence of 105 years to life. In this appeal from the judgment, he raises issues of insufficient evidence, prosecutorial misconduct (*Brady*[2] violation), and ineffective assistance of counsel. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

During the early morning hours of February 9, 2013, Marco Valladarez, Carlos Cisneros, and Jonathan Cabrera were walking to a convenience store. They were confronted by a man with a shotgun who said, "Where you fools from? This is Bassett." Cisneros replied that they "were not from anywhere" and "were just going to the store." The man pointed the shotgun at them and said, "Give me the shit. Give me your shit. . . . [¶] Empty your pockets. Don't fuck with me."

The man struck Valladarez in the face with the shotgun, causing a "fairly deep" injury that bled. When the man pulled the trigger, the weapon made a clicking sound but did not fire. Cisneros pushed the barrel away and told his friends to run. As they were running, the man fired a shot and yelled "Bassett." Valladarez, Cisneros, and Cabrera reported the crime to Los Angeles County Sheriff's deputies, who recovered a live shotgun round from the street.

About two weeks later, on February 21, 2013, Deputy Joseph Rivera stopped a vehicle in which defendant was a passenger. Rivera observed that defendant's seat was tilted all the way back, his legs were "straight out," and there was a "big bulge in his

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

[2] *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

waistband." Rivera patted defendant's waistband, felt the handle of a firearm, and removed a sawed off shotgun from defendant's pants. Defendant was arrested on a weapons charge, and the shotgun was booked into evidence.

The shotgun contained three shells—16-gauge, 6-shot shells made by Federal—that matched the live round from the February 9 incident. After being told that he was a suspect in that crime, defendant failed to appear at the preliminary hearing on the weapons charge. A bench warrant was issued, and he was arrested while hiding under a bed in his girlfriend's trailer. He admitted possession of a stolen shotgun found in the trailer.

Valladarez, Cisneros, and Cabrera identified defendant through photographic lineups. They also identified a photograph of the sawed off shotgun that was recovered during the traffic stop on February 21.

As to the February 9 incident, defendant was charged with attempted murder (count 1 [Valladarez], count 2 [Cisneros], and count 3 [Cabrera]), and attempted robbery (count 4 [Valladarez], count 5 [Cisneros], and count 6 [Cabrera]), with a firearm and gang allegations. As to the weapon recovered on February 21, defendant was charged with possession of a sawed off shotgun (count 7). He was also charged with receiving stolen property, the firearm found in the trailer (count 8).

A. Prosecution's Evidence at Trial

Valladarez. Valladarez identified defendant in court. He testified that defendant pulled a sawed off shotgun from his shorts and said, "Give me the shit. Give me your shit." When Cisneros told defendant that "[w]e weren't from anywhere," defendant replied, "I don't give a fuck. This is Bassett." After they did not respond, defendant hit Valladarez in the face with the shotgun and repeated his demand, "Give up the shit." Defendant then pulled the trigger while pointing the weapon at Valladarez's face, but it "jammed up" and made a clicking sound. Cisneros pushed the barrel away and said to run. As they were running, defendant fired a round from the middle of the street. At that point, they were about 33 feet and 9 inches away (based on courtroom measurements), or 75 feet away (according to Valladarez's testimony at the preliminary hearing). When

they reached the store, they reported the crime to sheriff's deputies. Valladarez told the officers that the shotgun had jammed and made a clicking sound. The officers did not believe them at first, but when they went to the scene, they found a shotgun round on the street.

Cisneros. Cisneros also identified defendant in court. He testified that defendant "pulled out a shotgun, and . . . said, 'Where you fools from? This is Bassett.'" Cisneros told him "that we were not from anywhere." Defendant demanded, "'Empty your pockets. Don't fuck with me,'" and hit Valladarez in the face with the shotgun. Cisneros grabbed the shotgun, but defendant yanked it back and pulled the trigger while pointing the weapon at Cisneros and Valladarez, who were next to each other. Cisneros heard a "click," but "it didn't go off." While defendant was manipulating the shotgun (Cisneros made a "sliding-action motion"), Cisneros told the others to run. As they were running, defendant fired a shot and yelled "Bassett." Cisneros heard a bullet hitting a house. They were about 9 feet, 5 inches away when the shot was fired (based on courtroom measurements). They flagged a patrol car and reported the crime. Cisneros told officers about the man pulling the trigger while pointing the weapon at his face. Officers recovered a shotgun round from the street.

Cabrera. Cabrera also identified defendant in court. He testified that after defendant pulled a shotgun from his shorts, he asked where they were from and said, "This is Bassett gang." "Give me your shit." Cabrera was about 8 feet, 3 inches away (based on courtroom measurements) when Valladarez was hit in the face with the shotgun. Defendant was waving the shotgun back and forth, and "tried to . . . fire off a round, but the gun ended up getting stuck." Cabrera heard a clicking sound while the shotgun was pointed at Cisneros, who pushed the barrel away and said to run. As defendant was "messing" with the shotgun "to get it unstuck" (Cabrera made motions "consistent with activating a slide action"), Cabrera started to run. Cabrera was across the street and about 30 feet away (based on courtroom measurements) or 65 to 70 feet away (based on his preliminary hearing testimony) when the shot was fired. Valladarez

and Cisneros were running behind him. The suspect "wasn't clean-shaven," and Cabrera could not recall saying that he was clean-shaven.

Deputy Garcia. Deputy Mayra Garcia testified that she and her partner were flagged down by Valladarez, Cisneros, and Cabrera at about 2 a.m. on February 9, 2013. Valladarez was bleeding from a laceration on his cheek. The three men appeared to be frightened, and reported an attempted robbery and shooting. When backup officers arrived, they searched the location with flashlights. Garcia recovered a live shotgun round from the street, which was booked into evidence.[3]

On cross-examination, Garcia denied being told by the victims about the trigger being pulled and the gun making a clicking sound while the weapon was pointed at their faces. Based on her recollection of their statements, "the only time they heard any kind of clicking or gunfire . . . was as they ran away down the street."

Ballistics Evidence. Manuel Munoz, the prosecution's criminalist, testified that when a shotgun misfires, the unfired round can be ejected by pumping the slide backwards. As the unfired round is cycled through the weapon, it is imprinted with tool markings that can be used for identification purposes. By examining the shotgun found on February 21 and the shell found on February 9, Munoz matched the tool markings on the shell to this particular shotgun.

Munoz explained that a 6-shot shell contains 350 to 400 pellets of lead or "birdshot." He testified that when a 6-shot shell is fired at someone 3 feet away, probably all of the pellets would cluster and strike the intended target. But when the target is 100 feet away, the pellets would spread out and decelerate before reaching the target. When fired from that distance, the few pellets that hit the victim "might break skin," but would not be lethal.

Munoz testified that a shotgun is a "very effective long range weapon" depending on the type of ammunition used. A lead slug, for example, is "very effective long range."

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[3] The only physical evidence recovered at the scene was the live round that was ejected from the shotgun that was later found in defendant's possession.

It is possible to load a shotgun with an assortment of shells, such as a 6-shot shell, followed by a slug, followed by a 6-shot, and so on.

When asked whether a shotgun makes a clicking sound when it misfires, Munoz replied that he "didn't try that on this particular shotgun," but "normally, no. A trigger disconnects on some of these shotguns that prevents that from happening."

Gang Evidence. Based on a hypothetical that tracked the facts of the February 9 incident, the prosecution's gang expert—Sergeant Robert Chism—testified that in his opinion, the crime was committed for the benefit of a criminal street gang. He also offered his opinion that defendant belongs to the Bassett Grande gang, which operates in that area, but the victims are not gang members. He testified that members of a gang often pass around and share firearms.

Defense Case. The defense questioned Detective Carlos Gutierrez, the investigating officer, about the victims' statements, if any, concerning an attempted shooting at close range while the weapon was pointed at their faces. Gutierrez testified that according to their interview statements, Cisneros was 8 feet away when he saw defendant pull the trigger and heard a clicking sound; Valladarez saw defendant's finger on the trigger, but did not mention a clicking sound; and Cabrera heard "the racking of a shotgun" and "sometime after that, he heard a shot."

Prosecution's Theories of Attempted Murder. The prosecutor argued the act of pointing a weapon at someone's face and pulling the trigger constitutes attempted murder, as does firing a weapon at someone within the zone of danger. The prosecutor asked the jury to consider the evidence in light of the instructions on both theories: "So when you read that instruction, if you find the kill zone applies and attaches liability for the defendant to any one victim, that's fine. But you also have the separate non-kill zone theory, the pointing at and pulling the trigger directly in someone's face."[4]

Defense Theories. The defense theories included mistaken identity and, alternatively, lack of intent to kill. As to mistaken identity, defense counsel pointed out

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[4] There is no claim of instructional error.

that defendant's features (including facial hair and tattoos) did not match the physical description of the assailant. Counsel also sought to explain defendant's possession of the shotgun used in the February 9 incident by reminding the jury of Chism's expert testimony that weapons are often passed around among gang members.

As to lack of intent to kill, defense counsel focused on inconsistencies in the victims' statements, especially as to the clicking sound. Counsel argued that according to their statements on the night of the crime, the clicking sound occurred as they were running away, and not when the weapon was pointed at their faces. Counsel also stated, "even if you're pointing right at them and you fire it, it can't even kill them. They are too far away. Those little teeny, tiny shots spraying out don't have the force and velocity to hit them with any kind of force that's going to cause them death."

Prosecution's Rebuttal. In rebuttal, the prosecutor argued that a sawed off shotgun is a lethal weapon, because "at 3 feet your face would be gone. You would have 350 to 400 pellets blow your face off." The prosecutor told the jury that "as far as the kill zone and the level of dangerousness, again, it depends on the distance that you are whether or not it's going to be a lethal or non-lethal shot . . . ." "[T]wo of the witnesses said that they were much, much closer than the elevators, however far the elevators are. Much closer than that."

The prosecutor argued there was substantial evidence of intent to kill: "My point was, when you take a loaded shotgun and you point it at a person and you pull the trigger, what other intent can you have other than the intent to kill? I'm not saying every time you roll with it in your pants you're going to kill somebody . . . . My whole point is, when you take a loaded shotgun, you stick it in somebody's face, and you try to pull the trigger, what other possible intent could you have other than to kill somebody? Zero. None."

Jury Verdict. The jury found defendant guilty of attempted murder (counts 1-3), attempted second degree robbery (counts 4-6), and possession of a short-barreled rifle or shotgun (count 7). (§§ 664, 187, subd. (a), 211, 33215.) It also found true the allegations that he personally used a firearm (§ 12022.53, subd. (b)), personally and intentionally

discharged a firearm (§ 12022.53, subd. (c)), and committed the crime for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). Defendant was acquitted of count 8, receiving stolen property.

Pursuant to a defense motion, the sentencing hearing was continued to allow the filing of a new trial motion based on an alleged *Brady* violation. After the motion was argued and denied, the court imposed a sentence of 105 years to life. Defendant appealed.

DISCUSSION

I

Defendant seeks reversal of the attempted murder convictions (counts 1-3) based on insufficient evidence of intent to kill. He alternatively argues the prosecution proved at most only one count of attempted murder. We disagree.

In deciding a claim of insufficient evidence, the appellate court reviews the record in the light most favorable to the judgment. (*People v. Mejia* (2012) 211 Cal.App.4th 586, 602.) "[T]he appellate court does not reevaluate witness credibility or resolve conflicts in the evidence. Such matters are exclusively issues for the jury. [Citation.] Further, the reviewing court must accept logical inferences that the jury might have drawn from any circumstantial evidence. [Citation.] While it is the jury's duty to acquit where circumstantial evidence is subject to two reasonable interpretations, one which points to guilt and one which points to innocence, it is the jury, not the appellate court, that must be convinced beyond a reasonable doubt. [Citation.] Where circumstances reasonably justify a jury's findings of fact, a reviewing court's conclusion that such circumstances might also reasonably be reconciled with contrary findings does not justify reversal. [Citation.]" (*Ibid.*)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (. . . § 21a; *People v. Lee* (2003) 31 Cal.4th 613, 623.)" (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7 (*Decker*).) "For an attempt, the overt act must go beyond mere preparation and show

that the killer is putting his or her plan into action; it need not be the last proximate or ultimate step toward commission of the crime or crimes [citation], nor need it satisfy any element of the crime. [Citation.] However, as we have explained, '[b]etween preparation for the attempt and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made.' (*People v. Murray* (1859) 14 Cal. 159; see also *People v. Anderson* (1934) 1 Cal.2d 687, 689–690.) '"[I]t is sufficient if it is the first or some subsequent act directed towards that end after the preparations are made."' (*People v. Memro* (1985) 38 Cal.3d 658, 698.)" (*Decker*, *supra*, 41 Cal.4th at p. 8.)

Defendant contends the victims' testimony—that the shotgun misfired and made a clicking sound—was refuted by Munoz's testimony that "if there was an attempt to unsuccessfully fire that shotgun, [the victims] would not have heard any clicking sound." That is not an accurate description of his testimony. Munoz stated that *some* weapons do not make a clicking sound because the trigger disconnects when the weapon misfires. He also stated that he did not know whether this particular weapon makes a clicking sound when it misfires. Accordingly, he did not discredit the victims' testimony about the clicking sound.

The victims' testimony is not inherently improbable. To the extent, if any, their statements changed over time, it is not our function to resolve discrepancies in the evidence. Because an appellate court does not "reevaluate witness credibility or resolve conflicts in the evidence," we defer to the jury's logical inferences and credibility findings. (*People v. Mejia*, *supra*, 211 Cal.App.4th at p. 602.) "'"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. [Citations.] Conflicts and even testimony which is subject to justifiable

suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends."' (*People v. Thornton* (1974) 11 Cal.3d 738, 754.)" (*People v. Maciel* (2013) 57 Cal.4th 482, 519.)

Defendant's alternative contention—that the prosecution proved at most only one count of attempted murder—is not supported by the record. As previously discussed, attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (*Decker*, *supra*, 41 Cal.4th at p. 7.) All three victims testified there was an attempted shooting at close range, and an actual shooting as they were running away. The jury found true the allegation that defendant personally discharged a firearm, indicating it believed the victims' testimony regarding the firing of a single round. The testimony regarding the shot fired, coupled with the testimony of the attempted shooting of Valladarez and Cisneros at close range, established defendant's guilt of three counts of attempted murder.

II

Defendant argues the prosecution committed a *Brady* violation. As we discuss below, this contention involves the alleged delay in providing a police report concerning a prosecution witness—Valladarez—who was arrested for an incident that occurred after he testified in this case. We conclude the prosecutor, who disclosed Valladarez's arrest at the earliest opportunity, did not violate *Brady*.

A. Relevant Facts

Valladarez completed his testimony on Friday, August 23, 2013. He was arrested later that night after engaging in violent behavior on a bus.

When defendant's trial resumed on Monday, August 26, 2013, the prosecutor immediately informed defense counsel and the trial court of Valladarez's arrest. The prosecutor explained that Valladarez allegedly "got drunk, got on a bus, got in some kind of fight, pulled out a pocketknife. That's the extent of what I know." "He's currently in custody. I ran him. He's got an immigration hold as well with a court date, actually, of tomorrow in El Monte. I think at this point it's basically irrelevant. He's already

testified, and I have no idea what's going to happen with the case. ¶ I have personally not gotten involved whatsoever with the law enforcement agency or the D.A.'s office over there. I've instructed Detective Gutierrez to do the same. Basically, let it run its course, whatever happens. We're not going to get involved with it whatsoever. ¶ Again, I just wanted to bring that to the court's attention. So the defense knows, but I don't think it's really relevant at this point since he has already testified."

Defense counsel argued that because the arrest involved moral turpitude, it was admissible for purposes of impeachment. The prosecutor disagreed, and questioned whether an incident occurring after the witness had finished testifying could be used for impeachment.

The trial court declined to rule on the admissibility of the arrest, stating: "I need to know a little bit more about it before we make it of any significance in this case. We still don't know. I think we are all speculating as to what exactly transpired. We're going off very little to no information at all. If there was an arrest, he's in custody. He should be due out probably tomorrow, I would think, for some type of court intervention. [¶] Maybe we can re-inquire perhaps later in the day and find out what, if anything, is planned for tomorrow with that case through law enforcement, maybe El Monte P.D., then maybe we can get a little more information as to what may have transpired. [¶] At this point, whether or not it's going to be of any significance in this case is certainly unknown until we receive more information. But let's not dwell on that issue at this point. We need to finish the prosecution's case, and then we can perhaps readdress this issue later in the day."

Later that same day, both sides rested and, after jury instructions and closing arguments were given, the jury began deliberating. The jury reached a verdict the following day, August 27, 2013, and was dismissed. No further mention was made of Valladarez's arrest until the sentencing hearing on September 12, 2013.

At that hearing, defendant requested a continuance in order to bring a motion for new trial based on *Brady* error. Defense counsel stated that she had just received Valladarez's arrest report, which contained new information: "[Valladarez] went onto a

bus and he became verbally assaultive to a bus driver. He made threats to her, criminal threats, saying he was going to kill her. He then took off his shirt and went up and down the bus. He punched a 57-year-old man in the face, pulled a knife on him. So it wasn't really minor conduct by this witness. Then it was also said by the witnesses that he was saying gang statements, gang slurs and he pulled off his shirt and he had an SGV tattooed across his stomach. So based on the information that we didn't have during the trial, I would request a continuance so that I could file a motion for a new trial with that knowledge that I did not have previously."

The trial court granted a continuance, and defendant filed a motion for new trial. At the hearing on that motion, defendant argued the arrest report was subject to disclosure under *Brady* because it contained impeachment evidence, including Valladarez's alleged use of a knife and gangster type slang, the officer's description of Valladarez as a "gang member/associated," and photographs of the "SGV" tattoo (commonly used by gang members in the San Gabriel Valley) on Valladarez's torso. Counsel argued the suppression of this information was prejudicial because its timely disclosure would have allowed the defense to take "a completely different approach in its case in chief."

The trial court noted the relative strength of the prosecution's evidence: "There were a few discrepancies, but they were minor at best, indicating that the incident did, in fact, take place the way Mr. Valladarez described. The fact that [defendant] fired the single round, the fact that [the victims] fled to a nearby convenience store, met police, reported it instantaneously. [Defendant] was subsequently detained in possession of a shotgun that remarkably matched the description of the same weapon used. How would the destruction of Mr. Valladarez's credibility lend anything to help [defendant] in this case?"

Defense counsel responded that although she could not disclose her client's confidential communications, the new information, coupled with a prior incident (Valladarez had a prior arrest for possession of a knife that was disclosed before trial), would have allowed her to argue that he "is a person who has a pattern and practice of

carrying around a knife." "[E]ssentially it's three on one and he has a proclivity of carrying around a knife. I think that would change entirely" the course of the trial.

The prosecutor argued that self defense was not an issue in this case and there was no evidence that the victims were armed. On the other hand, the forensic evidence identified the sawed off shotgun found on defendant's person as the weapon used in this case. The prosecutor argued there was no *Brady* violation,[5] all of Valladarez's prior arrests were disclosed, there were no prior convictions, and there were no prior indications of gang membership. The prosecutor contended the newly discovered "SGV" tattoo was not sufficient to prove gang membership, and because Valladarez was not asked about his gang affiliation at trial, he did not say anything that is subject to impeachment.

Defense counsel agreed that Valladarez was not asked about his gang affiliation, but argued that by recounting Cisneros's statement—"we are not from anywhere"—he implicitly denied any gang affiliation. Counsel argued that evidence of his possible gang affiliation was relevant to show that he is not just a "poor innocent boy who was just walking to the Arco to get some chips," and that the incident possibly "started as a mutual combat."

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[5] The prosecutor stated: "The sequence of events was that [Valladarez] testified on a Friday. The conduct [leading to his arrest on the bus] happened early Saturday morning, so basically within 24 hours . . . I found out about [Valladarez's arrest], and the first thing . . . Monday morning, I brought it to Ms. Higgins's [defense counsel's] attention and the Court's attention. The Court basically said, well, we don't have all the information. Let's finish the People's case and we can readdress it. That's where the transcript ends. I called Detective Chism that morning. Then I called my last civilian witness, I think it was Mr. Cisneros. I rested that morning. I'm sure the court minutes will bear it out. [¶] Ms. Higgins I believe called Detective Gutierrez as her own witness briefly. And that was the end of the case. She never brought it up again, whether it was by tactical choice or whatever, never sought a continuance for the afternoon for us to be able to get a report, a continuance to further discuss it, nothing. I can only assume that was some type of tactical decision and even if, for example—again, I don't see the *Brady* violation. I brought it to everyone's attention first thing in the morning on Monday. [¶] In addition to that, I think it's highly questionable whether that conduct is even admissible, when the conduct occurs after the person testifies."

The trial court stated there was no evidence that the victims—who immediately reported the crime to police—were the aggressors. The court said that on this record, it was "not plausible that [defendant] was the unsuspecting victim in the case. It was the other way around. And I'm confident that the evidence showed that and supported that." The court denied the motion for new trial, concluding the new information about Valladarez would have had little to no impact on the jury's verdict.

B. Brady

In *Brady*, the United States Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady*, *supra*, 373 U.S. at p. 87.) The duty to disclose such evidence has since been extended to situations in which no request was made by the accused (*United States v. Agurs* (1976) 427 U.S. 97, 107), to impeachment evidence (*United States v. Bagley* (1985) 473 U.S. 667, 676), and to evidence known only to police investigators and not to the prosecutor (*Kyles v. Whitley* (1995) 514 U.S. 419, 438).

"Such evidence is material '"if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."' ([*Kyles v. Whitley*, *supra*, 514 U.S]. at p. 433.) In order to comply with *Brady*, therefore, 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' (*Kyles* [*v. Whitley*], *supra*, 514 U.S. at p. 437; accord, *In re Brown* (1998) 17 Cal.4th 873, 879.)" (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).)

"'[T]he term "*Brady* violation" is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence—that is, to any suppression of so-called "*Brady* material"—although, strictly speaking, there is never a real "*Brady* violation" unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must

have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282, fn. omitted.) Prejudice, in this context, focuses on 'the materiality of the evidence to the issue of guilt and innocence.' (*United States v. Agurs*, *supra*, 427 U.S. at p. 112, fn. 20; accord, *U.S. v. Fallon* (7th Cir. 2003) 348 F.3d 248, 252.) Materiality, in turn, requires more than a showing that the suppressed evidence would have been admissible (cf. *Wood v. Bartholomew* (1995) 516 U.S. 1, 2), that the absence of the suppressed evidence made conviction 'more likely' (*Strickler*, *supra*, 527 U.S. at p. 289), or that using the suppressed evidence to discredit a witness's testimony 'might have changed the outcome of the trial' (*ibid.*). A defendant instead 'must show a "reasonable probability of a different result."' (*Banks v. Dretke* (2004) 540 U.S. 668, 699.)" (*Salazar*, *supra*, 35 Cal.4th at p. 1042.)

C. Analysis

A *Brady* claim involves both conclusions of law and mixed questions of law and fact. (*Salazar*, *supra*, 35 Cal.4th at p. 1042.) On appeal, the trial court's determinations are "subject to independent review. [Citation.] Because the [trial court] can observe the demeanor of the witnesses and their manner of testifying, findings of fact, though not binding, are entitled to great weight when supported by substantial evidence. [Citation.]" (*Ibid.*)

Defendant contends that because the trial court requested a copy of the arrest report, the prosecution's noncompliance constituted a willful suppression of evidence, which violated his right to due process under state and federal law. The record, however, does not indicate a request was made by the court. After stating that "*maybe*" or "*perhaps*" the issue could be revisited later, the court directed the parties not to dwell on the matter, but to "*finish the prosecution's case*." (Italics added.)

Because there was no violation of a court order or request to produce the report, the assertion of a willful suppression of evidence fails.

In support of the motion for new trial, defendant argued that Valladarez's prior arrest for possession of a knife, coupled with his latest arrest involving the use of a knife,

indicated he "has a pattern and practice of carrying around a knife" and "essentially it's three on one." In his opening brief on appeal, defendant argues the prompt disclosure of Valladarez's most recent arrest report would have allowed him to argue that "*this incident was the product of self-defense in that* [*defendant*] *only pulled out the shotgun in response to some aggressive action by a rival gang member or members*, and only ejected the live round to scare the three men away." (Italics added.) In response to plaintiff's suggestion that "evidence of gang affiliation would have likely worked against [defendant] because the jury could have inferred an additional gang related motive for the incident," defendant backed away from the rival gang theory in his reply brief: "The issue here relates to witness credibility. Quite simply, as discussed more fully . . . , [defendant] *would not have suggested this was a gang confrontation.* Instead, [the gang evidence] would have buttressed [defense counsel's] argument that [the victims] were not credible witnesses. . . ." (Italics added.)

Defendant's contention, as we understand it, is that the new arrest report would have been used to attack Valladarez's credibility, without raising a gang confrontation theory. If the gang confrontation theory is eliminated, the new arrest report contains little information of substance that was not already provided to the defense. The record shows that the prosecutor promptly informed defense counsel and the court of Valladarez's arrest and his alleged conduct on the bus. There was no request, then or later, that the new arrest report be obtained before close of the prosecutor's case in chief.

Defendant argues that without the new arrest report, he was unable to challenge Detective Chism's testimony that the victims were not gang members. He points out that Chism's expert opinion was buttressed by the victims' testimony concerning Cisneros's statement—that we're not from anywhere—which constitutes an implicit denial of gang membership, and the prosecutor's argument that the victims were "normal, everyday young men. No gang ties. Nothing like that." He contends that because the prosecution's case rested on the testimony of victims who "told three vastly different accounts of what transpired," their credibility was at issue. He argues there is a

reasonable probability the new information contained in the arrest report would have impeached Valladarez's credibility and changed the outcome of the trial.

It is not reasonably likely the impeachment of Valladarez's credibility would have affected the outcome of the trial. Since no gang membership questions were asked of the victims, there were no responses to impeach on that subject. The argument that Valladarez implicitly denied gang membership by recounting Cisneros's statement—we're not from anywhere—is unavailing. If defendant is equating the recounting of the statement with silence in the face of an accusatory statement, we conclude that a disavowal of gang membership is not an accusatory statement and therefore Valladarez's recounting of the statement is not an adoptive admission.

Defendant's primary difficulty is the strength of the prosecution's case apart from Valladarez's testimony. Defendant was not only identified by two other eyewitnesses, he was implicated through forensic evidence tying the sawed off shotgun found in his possession to the shotgun round found at the scene of the crime. His membership in the Bassett gang further implicated him, given the assailant's statement, "Where you fools from? This is Bassett." Because of the independent evidence of defendant's guilt, this is not a situation in which the prosecution's case rested on a single witness whose credibility was later called into question. On this record, there is no reasonable probability that the impeachment of Valladarez's credibility—through a subsequent incident and his possible gang affiliation—would have affected the jury's verdict. In order for a nondisclosure of the arrest report to constitute *Brady* error, there must be a showing of a reasonable probability of a different result. (*Salazar*, *supra*, 35 Cal.4th at p. 1042.) That showing has not been made.

III

Defendant alternatively contends his trial counsel was ineffective in failing to request a copy of Valladarez's arrest report immediately upon learning of the arrest.

"To prevail on this claim, [defendant] must establish his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been

different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686–687 (*Strickland*); *People v. Williams* (1997) 16 Cal.4th 153, 215.)" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different. (*People v. Williams*, *supra*, 16 Cal.4th at p. 215 . . . .)" (*People v. Mesa*, *supra*, 144 Cal.App.4th at p. 1008.)

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."' (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, *supra*, 466 U.S. at p. 697.)

In order to establish prejudice, defendant argues the same factors mentioned above. For the reasons previously discussed, we conclude there is no reasonable probability the new evidence would have changed the outcome of this case. We therefore reject the claim of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

MANELLA, J. COLLINS, J.