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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO JAVIER FLORES, Defendant and Appellant.	B239896 (Los Angeles County Super. Ct. No. BA389446)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick N. Wapner, Judge. Reversed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Francisco Flores appeals from the judgment entered following a jury trial in which he was convicted of second degree murder with a finding he personally and intentionally fired a gun, causing death. Defendant contends the trial court erroneously admitted certain evidence. We agree the trial court erred by concluding it had no discretion to exclude evidence of the facts underlying defendant's prior conviction, and under the circumstances of this case, the error was prejudicial. Accordingly, we reverse.

BACKGROUND

On the night of July 4, 2009, two young women held a house party in Boyle Heights. The invited guests included defendant, his younger brother Julio, Pete Xochipa, and several of Xochipa's friends, including Miguel Rodriguez and Octavio Moran. Xochipa was not a gang member, but police officers testified that Julio and defendant were members of the Opal Street gang and the party location was in the territory of a gang that was a rival to the Opal Street gang, but no rival gang members attended the party.

Rodriguez testified that, sometime in 2008, as he and his friends were about to leave a different party, Julio and two other men approached them and demanded, "'Give us everything.'" Although Rodriguez did not know Julio, someone in Rodriguez's group told Julio's group that they knew them. Someone in Julio's group responded they did not care. Rodriguez's group realized that Julio's group was unarmed, so they commenced a fight that grew into a large "rumble." Rodriguez's group defeated Julio's group. One or more members of Rodriguez's group chased Julio and beat him. Xochipa, who had been inside the house and had not participated in the rumble, approached Rodriguez's group. Suddenly, Julio returned and "pistol whipped" Xochipa, causing cuts on his ear. Julio then ran away, apparently without any action by those who had previously fought, chased, and beaten him. Xochipa subsequently discovered Julio's identity and gang membership on Myspace. Thereafter, Xochipa and Rodriguez repeatedly looked at Julio's Myspace page. Xochipa told Rodriguez that he had heard rumors that Julio and

his friends were looking for Xochipa and his friends. The latter group decided to avoid parties that Julio might be attending.

Xochipa, Rodriguez, Moran and their friends arrived at the July 4, 2009 party before Julio and defendant, who arrived together accompanied by women. Moran testified that defendant was staring at Xochipa. A man who did not know defendant but was assisting the DJ testified that defendant arrived alone and was holding his waistband the entire time. Another party guest who was a friend to both defendant and Xochipa testified that defendant was not holding his waistband, staring at anyone, or acting as if he wanted to create a problem.

Xochipa was "a huge guy," who was 6 feet 2 inches tall and weighed 316 pounds. Defendant and Julio were substantially smaller. In June of 2009, a police officer had noted that defendant was 5 feet 8 inches tall and weighed 135 pounds.

Rodriguez testified that Xochipa said he was going to ask Julio why he was looking for Xochipa. Rodriguez characterized Xochipa's intended conduct as challenging Julio. Rodriguez and Moran followed Xochipa because, as Rodriguez explained at trial, "You never know what could happen." Rodriguez did not hear what Xochipa said to Julio, but Xochipa stood within inches of Julio's face. Julio put his hands up, "palms out up in the air into almost a 90-degree angle on either side of him." Moran testified he tried to calm the two men. Defendant, who was standing next to Julio, pulled a semiautomatic handgun from his waistband and put it against Xochipa's stomach. Moran testified at trial that defendant said "Opal gang" or "Opal," but when interviewed by police in the immediate wake of the shooting he said he did not remember what defendant said but guessed that defendant said a gang name. Xochipa turned to face defendant and asked, "'What are you going to do?'" Xochipa raised his hands, "palms forward out to the side of his body at the level of his upper chest," but did not back down. Rodriguez characterized Xochipa as aggressive and hostile. Defendant and Xochipa argued. Rodriguez testified that defendant looked "mad or scared." Moran told defendant to put the gun away, then reached for the gun and tried to take it from

defendant. Xochipa bumped defendant, who responded by punching Xochipa in the face. The punch pushed Xochipa backward, but he lunged forward and drew back his fist, as if to punch defendant. Defendant raised his gun and fired, fatally shooting Xochipa in the forehead. Rodriguez testified that defendant did not aim the gun at Xochipa's head, but merely lifted it and fired. At trial Moran testified he saw defendant aim and shoot at Xochipa's head, but at the preliminary hearing he testified he did not see defendant aim or fire at Xochipa. Numerous witnesses testified that Xochipa fell to the ground and defendant walked out of the party. Rodriguez testified that the entire incident, from the time Xochipa approached Julio until defendant shot Xochipa, lasted only about 15 or 20 seconds.

The medical examiner testified that stippling indicated the muzzle of the gun was approximately two feet from Xochipa when the shot was fired.

Defendant was arrested four days later at his home. In a phone call from jail a number of months later, defendant told a friend that he was going to let his hair grow out to avoid being recognized by witnesses in court.

A police officer testified regarding the Opal Street gang, which was a small gang in Boyle Heights. In June of 2009 defendant told a police officer that he had been a member of the gang for about six years. Julio was also a member of the Opal Street gang. In response to a hypothetical question based upon the prosecution's evidence, the officer opined that the charged offense would have been committed for the benefit of the Opal Street gang.

In January of 2005, defendant pleaded guilty to making a criminal threat. The trial court allowed the arresting officer to testify to the facts underlying this conviction to establish a predicate offense to support the gang enhancement allegation. In November of 2004, a young man named Ajis reported that Julio had approached him, pointed a gun at him, and said, "You ratta. This is Opal Street." Ajis phoned the police and Julio apparently left, but he returned with defendant before the police arrived. Defendant approached Ajis as he stood with his father and sister, pointed a BB gun at Ajis's father

and said, "'Don't get involved.'" Defendant then pointed the BB gun at Ajis and said, "'This is Opal Street. I'll f-ing blast you.'" Police arrived and detained defendant. The police learned that "one of the witnesses had been throwing rocks at" Julio's car, which led Julio to exchange words with Ajis.

Defendant testified that he grew up in the Opal Street gang neighborhood and his neighborhood friends and Julio ultimately became Opal Street gang members. Defendant was a skateboarder and had been repeatedly beaten, robbed, and shot at. In the third shooting, he was actually wounded in the arm and hand. Because of this, defendant began "claiming" the gang for his own protection, but was never actually jumped in. He did not have any tattoos relating to the Opal Street gang, but had "Boyle Heights," "Player," and "Gangster Mentality" tattoos, along with a tattoo depicting a woman. Defendant moved with his family to Whittier in 2006.

Defendant testified that in the 2004 incident, he actually said to Ajis, "'I don't want to fucking blast you.'" Ajis had thrown rocks at defendant, as well as at Julio's car. Defendant had no other convictions. On cross-examination he admitted he had been charged with committing the criminal threat for the benefit of the gang.

Defendant testified that he had not attended the 2008 party and knew nothing about any incident between Julio and Xochipa until he heard about it in court during proceedings in the present case. Defendant had never even seen Xochipa or his friends before July 4, 2009, and had no problems with them.

Defendant testified that he arrived at the party with Julio and four women. Defendant brought his gun because he carried it with him at all times, everywhere he went. He acquired the gun after he was shot. The location of the party had nothing to do with it. Defendant was not staring at anyone but did look around the party to see if any other friends were there.

Defendant testified that he was talking to some of the women when he turned and saw a group of men approach Julio. Xochipa put his hand inside his waistband and held it there as he approached. Xochipa bumped into Julio, then pushed him. Julio stepped

backward. The two argued. Defendant was concerned for Julio, so he approached and asked if everything was all right. Xochipa turned aggressively toward defendant and asked, "Why the fuck [are you] getting involved?" Xochipa also said it was none of defendant's business. Defendant said, "'That's my brother you're talking to so it is my business.'" Xochipa became angry, moved close to defendant's face, and cursed at him. Xochipa's friends tried, unsuccessfully to calm him down. Defendant was afraid that something was going to happen and did not think he would be able to defend himself with his fists because Xochipa was so large and had several friends with him. Defendant also believed Xochipa had a gun because he still had his hand in his waistband. Xochipa appeared to reach for something. Defendant was fearful. He drew his gun, pointed it at Xochipa's stomach, and told Xochipa to raise his hands. Xochipa complied, and defendant lowered his gun. Xochipa said, "You're fucking up," then said defendant was "going to get it." Defendant understood this as a threat. Xochipa's friends tried to block defendant and Xochipa moved forward. Defendant punched Xochipa with his left hand, but it seemed to have no effect on Xochipa, who continued to advance on defendant. Xochipa quickly lifted one arm. Although defendant did not see a gun, he strongly believed Xochipa was holding a gun in the hand he was lifting and was about to shoot defendant. Defendant took a couple of steps backward, raised his gun, and shot Xochipa without aiming. Defendant denied he said anything about the Opal Street gang. Defendant was scared, shocked, sad, and in disbelief when Xochipa fell. He slowly walked out of the party and drove home. He disposed of the gun in a dumpster in his neighborhood.

Defendant denied that the incident had anything to do with a gang or gang expectations. He got involved only to help defend Julio.

Defendant explained that he made the statement about growing his hair out because his first attorney had advised him that identification would an issue and he should grow his hair out.

Psychology professor Dr. Scott Fraser testified that in the "human alarm reaction," popularly called the fight or flight syndrome, feelings of fear always precede a person's ability to assess fully the strength or legitimacy of a threat. The alarm reaction triggers a physiological response that, among other things, diverts blood from the cerebral cortex to the musculoskeletal system, and thereby reduces a person's ability to process information to evaluate the potential threat that triggered the alarm reaction. This results in a high rate of misperception of objects and actions. Fraser further testified that fighting is a more likely reaction than fleeing if a person is protecting a loved one or feels he or she has the resources to counterattack.

The jury acquitted defendant of first degree murder and found a gang enhancement allegation not true, but convicted him of second degree murder and found he personally and intentionally fired a gun, causing death (Pen. Code, § 12022.53, subd. (d)). The court sentenced defendant to prison for 40 years to life, consisting of 15 years to life for murder plus 25 years to life for the firearm enhancement.

DISCUSSION

1. Admission of prior incident between Julio and Xochipa

Before trial, the prosecutor sought a ruling on the admissibility of the evidence that Julio had "pistol whipped" Xochipa in 2008. The prosecutor argued that, although defendant was not involved in the prior incident, the evidence was essential to her case because it demonstrated how the parties knew each other, explained why Xochipa approached Julio in the interaction that led to the charged shooting, and showed that Xochipa "was simply standing his ground in light of the fact that he had been pistol whipped" by Julio. Defendant argued the evidence was irrelevant because Xochipa's state of mind was not in issue; the prosecutor was speculating that the prior incident, not the "rumors" Xochipa cited to Michael Rodriguez, motivated Xochipa to approach Julio; and introduction of the evidence would violate defendant's confrontation rights because Xochipa could not be cross-examined. Defendant also objected that the evidence was

unduly prejudicial because the prosecutor was trying to impute wrongdoing in the prior incident to him.

The trial court permitted the prosecutor to introduce the evidence, saying, "It's admissible. It would be admissible if the victim had survived this attack. And other than not being able to ask him directly what was in [his] head, it's not prejudicial to [defendant]; or to use a 352 analogy, or analysis, excuse me, it's not so unduly prejudicial that it outweighs—substantially outweighs the probative value. [¶] . . . [I]t explains to the jury the context in which this all took place. And I think . . . that it's the jury, ultimately, that needs to be able to evaluate that and decide what happened. Whether, in fact, it proves . . . that he was standing up to bullies, that's up to the jury to decide. [¶] And what [defendant] knew about the prior incident, if anything, is also up to the jury to decide in terms of the actions that he took that night. But the jury should be allowed to at least understand the case in its complete context. And I don't see how doing that is prejudicial to [defendant]."

Defendant contends that the trial court erred by admitting evidence of the prior incident between Julio and Xochipa because it was irrelevant and he was unable to cross-examine Xochipa. He argues that admission of this evidence violated due process and his confrontation rights.

We review any ruling on the admissibility of evidence for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) This standard of review applies to both a trial court's determination of the relevance of evidence and its determination under Evidence Code section 352 (undesignated statutory references pertain to the Evidence Code) of whether the evidence's probative value is substantially outweighed by its prejudicial effect. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of an action." (§ 210.)

We review the propriety of the trial court's ruling, not its reasoning. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14.)

Defendant's testimony was that Xochipa acted aggressively toward both Julio and defendant and defendant displayed and fired his gun in self-defense. The trial court instructed upon self-defense, defense of others, heat of passion, and provocation. Accordingly, Xochipa's conduct on the night he was murdered was extremely relevant to prove or disprove these defenses. Although Xochipa's motive for acting as he did is far less relevant, whether it was "rumors" or the prior incident or both, we cannot say his motive was completely irrelevant in light of these defense theories. The prior incident provided a potential explanation for why Xochipa acted aggressively toward Julio and defendant, and thus tended to support theories of self-defense, defense of others, heat of passion, and provocation. Notably, defense counsel argued to the jury that if the prior incident occurred as Rodriguez testified, "[I]t does give us context [*sic*] into Pete Xochipa's mindset when he sees Julio for the first time since the [prior] party. [¶] It also illustrates that [Xochipa] and [Rodriguez] were in no way trying to avoid a potential conflict or potential run-in with Julio Flores. In fact, it was the exact opposite. They're looking for him online, and when they finally see him a year later, their approaching him is evidence of the fact that they weren't trying to avoid a confrontation. They were looking for a confrontation." Counsel continued, "This was a night when [Xochipa] saw Julio. It was time for revenge. They spot Julio and [defendant] when they enter the party; and within a very short period of time . . . [Xochipa] tells [Rodriguez] he's going to go over and confront Julio."

Accordingly, the trial court did not abuse its discretion by admitting the evidence. Even if we were to conclude that the trial court erred, we would not find admission of the evidence prejudicial to defendant, nor would we conclude that its admission rendered his trial so fundamentally unfair as to violate due process because it was abundantly clear that defendant was not involved in the prior incident, defendant testified he did not even know about it until after he shot Xochipa, and, most important, the evidence tended to

strengthen the defense. Indeed, even if the jury inferred that defendant knew about the prior incident before he shot Xochipa, the evidence supported an inference that defendant actually believed Xochipa posed a danger of death or great bodily injury to Julio or defendant because Xochipa was intent on revenge for the prior incident.

Defendant's confrontation claim has no merit because the evidence in issue was a description of events by Rodriguez, whom defendant cross-examined fully and effectively.

Defendant appears to argue that the trial court further erred by failing to instruct the jury to consider evidence of the prior incident "solely on the issue of Mr. Xochipa's state of mind," not for "the truth of the matter asserted." The evidence of the prior incident was not hearsay and could be considered for its truth, even though it was relevant solely to Xochipa's state of mind. Such an instruction would have been inappropriate.

2. Admission of testimony regarding rumors that Julio was looking for Xochipa

Defendant also objected to admitting evidence that Xochipa had told Rodriguez he had heard "rumors" that Julio was looking for him on the ground it was "unreliable hearsay," irrelevant, and unduly prejudicial. The trial court overruled the objections and admitted the evidence, but gave the following limiting instruction: "So with regard to the statement about the rumors and what he heard, you may not consider that statement for its truth that, in fact, those rumors were true or that he heard them. Only—you may only consider it as it affects your decision about what Mr. Xochipa might have been thinking that night. [¶] What he was thinking, what he wasn't thinking is based—is up to you to decide based on this information; but you can't consider the statement 'they were looking for me' for the truth of it."

Defendant contends that the trial court erred by admitting evidence of the prior incident between Julio and Xochipa because it was hearsay and irrelevant and he was unable to cross-examine Xochipa. He argues that admission of this evidence violated due process and his confrontation rights.

Because the evidence was not admitted for a hearsay purpose and the trial court so instructed the jury, we reject defendant's hearsay contention. We reject his relevance contention for essentially the same reasons we stated in regard to the evidence of the prior incident: the "rumors" provided a potential explanation for Xochipa's aggressive conduct toward Julio and defendant, and thus tended to support theories of self-defense, defense of others, heat of passion, and provocation. We reject defendant's confrontation claim because the confrontation clause does not restrict the introduction of out-of-court statements for nonhearsay purposes. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 [124 S.Ct. 1354]; *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6.) Because the trial court did not err by admitting the "rumors" evidence and that evidence tended to support, not harm, the defense, we cannot conclude its admission rendered defendant's trial fundamentally unfair in violation of the Due Process Clause.

3. Admission of facts underlying defendant's prior conviction

Before trial, the prosecutor sought to admit evidence of defendant's 2005 criminal threat conviction to show intent, motive, and modus operandi pursuant to section 1101, subdivision (b). The trial court denied the request, saying the prior conviction did not reflect an intent to kill because the conduct underlying the prior conviction was a spoken threat and defendant was armed with a BB gun and thus did not have the ability to kill anyone. Citing *People v. Tran* (2011) 51 Cal.4th 1040 (*Tran*), the prosecutor argued the prior conviction should be admitted as a predicate offense for proof of the gang enhancement. The court agreed, stating, "[T]hey are telling us, no uncertain terms, if this has—the evidence has relevance to prove a predicate, then it doesn't stay out under 352 because the only reason that 352 keeps it out is . . . if it . . . poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. [¶] And they suggest that it's basically if it has probative value, and it's not so unfair as to change the outcome, that it comes in."

Defendant asked the court to admit only the existence of the conviction, not its underlying facts, and the court deferred ruling on his request until after it had had an

opportunity to reread *Tran*. After rereading *Tran*, the court stated, "I find this *Tran* decision very suspect because the whole notion of 352 is to balance prejudice versus probative value. And in all kinds of cases, we've always evaluated it in connection with all of the evidence that's available. So this decision doesn't really make any sense to me. [¶] . . . [¶] In the facts of the *Tran* case, the facts of his prior offense were admitted by the trial court, and the Supreme Court validated that and said it was okay even though he was also convicted of extortion based on those very same facts. So the fact that the Supreme Court basically says it's the commission and not necessarily the conviction of the offense, and that in a case where the defendant was both—both committed and was convicted of the conduct, and they let in the conduct and Supreme Court didn't say it had to stay out; for those reasons, the conduct, assuming it can be properly proved, can come in."

In keeping with its prior ruling that the evidence was not admissible to show defendant's intent, motive, or modus operandi, when the prosecutor introduced evidence of the facts underlying defendant's prior conviction, the court *orally instructed the jury* it could consider the evidence only with respect to "the gang allegation and the basis of the expert's eventual opinion about the gang allegation. [¶] You cannot consider it for its truth. And you cannot consider it as evidence that the defendant has a propensity to commit crimes or as evidence of the defendant's character." Yet the court's *written jury instructions* also told the jury that that "evidence of gang activity" could be considered with respect to the gang enhancement, witnesses' credibility, defendant's motive to commit the charged crime, and whether defendant actually believed in the need to defend himself or acted in the heat of passion.

In her closing argument the prosecutor argued, without objection, that defendant's conduct in the prior offense demonstrated that he was not acting from fear when he shot Xochipa.

Defendant contends that the trial court erroneously concluded that *Tran* required that it admit evidence of the conduct underlying the prior conviction, and that it had no

discretion to exclude evidence of that conduct pursuant to section 352. We agree. The remarks of the trial court indicate it believed it had no discretion to exclude evidence of the facts underlying defendant's prior conviction.

In *Tran, supra*, 51 Cal.4th 1040, the California Supreme Court held that "a predicate offense may be established by evidence of an offense the defendant committed on a separate occasion." (*Id.* at p. 1044.) The trial court in *Tran* admitted evidence of both Tran's prior conviction and the facts underlying that conviction. Although the Supreme Court affirmed the judgment, it neither addressed the extent of what evidence regarding a defendant's prior offense should be admitted nor held that the facts underlying a prior conviction are necessarily introduced when a prosecutor utilizes such a prior offense as part of his or her proof of a gang enhancement. The Supreme Court also made it abundantly clear in *Tran* that trial courts must continue to conduct a section 352 analysis and exercise their discretion when admitting a prior offense as part of the prosecution's proof of a gang enhancement. For example, it stated, "That evidence of a defendant's separate offense may be admissible to prove a predicate offense does not mean trial courts must in all cases admit such evidence when offered by the prosecution. Considerations such as those described in *People v. Ewoldt* [(1994) 7 Cal.4th 380,] 404–405, will still inform the trial court's discretion and in an individual case may require exclusion of the evidence. Further, although the court need not limit the prosecution's evidence to one or two separate offenses lest the jury find a failure of proof as to at least one of them, the probative value of the evidence inevitably decreases with each additional offense, while its prejudicial effect increases, tilting the balance towards exclusion. *And the trial court of course retains discretion to exclude details of offenses or related conduct that might tend to inflame without furthering the purpose for admitting the evidence.*" (*Tran*, *supra*, 51 Cal.4th at p. 1049, italics added.) The Supreme Court then stated it found "the admission of evidence of defendant's conviction of extortion and related activities in 1993 and 1994 to have been a proper exercise of the trial court's discretion under Evidence Code section 352." (*Tran*, at p. 1050.)

Accordingly, the trial court erroneously interpreted *Tran* as requiring it to accede to the prosecutor's desire to introduce the *facts* underlying defendant's prior offense. *Tran* neither established such a requirement nor deprived the trial court of its discretion to limit or exclude those facts pursuant to section 352, which provides that the trial court may, in its discretion, exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will either be unduly time consuming or create a substantial danger of undue prejudice, confusion of the issues, or misleading the jury.

We further conclude that the admission of the *facts* underlying defendant's prior offense was error. Evidence of other offenses or misconduct is inadmissible to prove criminal propensity, but may be admitted to prove matters such as motive, intent, identity, or a common design or plan. (§ 1101, subds. (a), (b).) Because evidence of an uncharged offense is highly prejudicial, it must have substantial probative value, and the trial court must carefully analyze the evidence under section 352 to determine if its probative value outweighs its inherent prejudicial effect. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404 (*Ewoldt*).) Factors relevant to this analysis are (1) the strength of the probative value, including similarities and dissimilarities between the charged and uncharged offenses, (2) whether the source of evidence about the uncharged offense is independent of, and unaffected by, information about the charged offense, (3) whether the defendant was punished for the prior misconduct, so as to minimize the danger the jury will want to hold him accountable for that conduct as well, (4) whether the evidence of the uncharged offense is stronger or more inflammatory than the evidence of the charged offense, and (5) the time lapse between the offenses. (*Id.* at pp. 404–405.) Dissimilarities between the charged and uncharged offenses decrease the probative value. (*People v. Balcom* (1994) 7 Cal.4th 414, 427.)

"In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance."'" (*Ewoldt, supra*, 7 Cal.4th at p. 402, quoting *People v.*

Robbins (1988) 45 Cal.3d 867, 879.) Nonetheless, admission to show intent requires a lower degree of similarity than admission for other purposes because the "'recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish . . . the presence of the normal, i.e., criminal, intent accompanying such an act . . . .'" (*Ewoldt*, at p. 402.)

"To be admissible to demonstrate a distinctive modus operandi, the evidence must disclose common marks or identifiers, that, considered singly or in combination, support a strong inference that the defendant committed both crimes." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1316.)

"Other crimes evidence is admissible to establish two different types or categories of motive evidence. In the first category, 'the uncharged act supplies the motive for the charged crime; the uncharged act is cause, the charged crime is effect.' [Citation.] 'In the second category, the uncharged act evidences the existence of a motive, but the act does not supply the motive. . . . [T]he motive is the cause, and both the charged and uncharged acts are effects. Both crimes are explainable as a result of the same motive.' [Citation.]" (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1381, italics omitted.)

We conclude that the trial court properly denied the prosecutor's request to introduce the *facts* underlying defendant's prior conviction to show intent, motive, or modus operandi under section 1101, subdivision (b), but later erred by admitting those same very facts when allowing the prosecutor to use defendant's prior conviction as a predicate offense to support the gang enhancement allegation. The prior offense involved an oral threat—apparently intended to prevent Ajis from reporting Julio's conduct to the police—"backed up" with a BB gun, whereas the present offense was a fatal shooting with a real gun under circumstances that supported several plausible defenses, including self-defense and provocation. The offenses involved different intents, different results, and different victims, and were dissimilar in the manner in

which they were committed. Thus, the *facts* of the prior offense had no probative value with respect to intent, motive, or modus operandi.

The *facts* underlying defendant's prior conviction arguably demonstrated that it was gang-related, but a predicate offense need not be shown to have been committed for the benefit of, at the direction of, or in association with the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 621.) Thus, the *facts* of the prior offense had little or no probative value with respect to the sole purpose for which the trial court permitted the prosecutor to introduce the offense, which was to establish a predicate offense as part of proof of the gang enhancement allegation.

"Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' [Citations.] 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have *substantial* probative value.'" (*Ewoldt, supra*, 7 Cal.4th at p. 404.) Accordingly, the trial court is required to carefully analyze the evidence under section 352. (*Ibid.*) We necessarily conclude that the nonexistent or negligible probative value of the *facts* of the prior offense was substantially outweighed by the substantial prejudicial effect inherent in introducing those facts. Although the nature of defendant's prior offense was relatively mild in comparison with the present offense and his conviction of that offense reduced the danger the jury would feel a need to punish him for it in the present case, the *facts* of the prior case tended to suggest that defendant and Julio were hot-tempered bullies who threatened and intimidated others while invoking the name of their gang.

Although the trial court gave an oral limiting instruction, it effectively negated that limiting instruction by giving a written instruction that permitted the jury also to consider the prior conviction and the facts underlying it with respect to defendant's motive to commit the charged crime and whether defendant actually believed in the need to defend himself or acted in the heat of passion. The trial court thus effectively negated its ruling on the prosecutor's section 1101, subdivision (b) motion and deprived the limiting

instruction of the value it might otherwise have held by permitting the jury to consider the *facts* of the prior offense with respect to motive and defendant's mental state.

These errors were exacerbated by the prosecutor's argument that the *facts* of the prior offense demonstrated that defendant did not act from fear when he shot Xochipa.

The pertinent standard of prejudice is *People v. Watson* (1956) 46 Cal.2d 818, 836, that is, reversal is required if it is reasonably probable defendant would have obtained a more favorable result absent the error. (§ 353, subd. (b); *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Malone* (1988) 47 Cal.3d 1, 22.) Defendant had a plausible self-defense or unreasonable self-defense claim. The jury's second degree murder verdict strongly suggests that the jury at least partially believed defendant's testimony regarding Xochipa's conduct, which was corroborated to some degree by Rodriguez's testimony. Accordingly, we conclude it is reasonably probable that defendant would have obtained a more favorable verdict, such as voluntary manslaughter based on unreasonable self-defense, if the jury had not heard the facts of the prior offense, had not been told it could consider those facts with respect to defendant's motive and whether defendant acted in self-defense or heat of passion, and had not heard argument by the prosecutor that the facts of the prior offense proved that defendant did not display and fire his gun in fear, as defendant testified.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.