Filed 3/29/17 P. v. Ballesteros CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALEJANDRO BALLESTEROS et al., Defendants and Appellants.	B262260 (Los Angeles County Super. Ct. No. NA094149)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed in part; reversed in part and remanded with directions.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant Alejandro Ballesteros.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant Oswaldo Ballesteros.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Elaine F. Tumonis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendants and appellants Alejandro and Oswaldo Ballesteros[1] guilty of assault with a semiautomatic firearm and found true gang allegations. To prove the gang allegations, a gang expert testified that in forming his opinion defendants are gang members he relied on field identification cards ("FI cards"). At least some of those FI cards were displayed to the jury, even though details in them were not admissible. On appeal, defendants raise numerous contentions about the FI card evidence. We conclude that the trial court erred in allowing the cards to be shown to the jury and that the error was prejudicial. We therefore reverse the true findings on the gang enhancement allegations, although we reject or need not address defendants' remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background

A. *The assaults with a semiautomic weapon*

Sometime between 3:00 a.m. and 4:00 a.m. on November 18, 2012, Paris Woodfin and Shayla Paster were in Woodfin's parked car, across the street from the Right Step, a transitional hotel in Wilmington where Paster lived. Woodfin had a gun on the floor behind the driver's seat. Woodfin and Paster were looking for Woodfin's insulin kit in the car's backseat. Two Hispanic men, who Paster identified as Alejandro and Oswaldo, went into the hotel. About seven minutes later, they exited the hotel with Enrique Navarrete, who Paster identified at trial as "Bones."

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[1] We refer to defendants, who are brothers, by their first names to avoid confusion.

According to Woodfin, Alejandro raised his shirt to reveal an automatic gun. According to Paster, the three men stood "there like corralling," and Alejandro raised a gun and cocked it.

Oswaldo asked Woodfin what city or "set" he was from, which Woodfin assumed was "gang related." Paster told the men Woodfin " 'doesn't gangbang and he is also a diabetic.' " When she said she didn't gang bang, Alejandro or Oswaldo said, " 'Well, we do.' " The men came toward Woodfin and Paster "aggressively," and Paster told them, " '[W]e are Christians and we don't do those type of things.' " At this point, Woodfin was still in the backseat of the car, but Paster was outside at the driver's side of the car. Paster hugged Alejandro and begged, " 'Please don't do this. We are Christians,' " not gang members.

One man was so close to Woodfin that Woodfin would have been "hindered" had he tried to get out of the car. Alejandro took the gun out of his pocket, chambered a round, and put the gun back in his pocket. Oswaldo told Woodfin and Paster it looked " 'like you have something that we want.' " Paster pleaded with the man not to shoot Woodfin. Oswaldo asked Woodfin if he had a weapon, but Woodfin denied it.

Woodfin grabbed his gun, got out of the car, and "pushed the individual out of the way." Oswaldo approached Woodfin but backed up when Woodfin pointed his gun at him. Woodfin raised his gun and "then the shooting started." He couldn't say if he or the shooter was the first to fire; "[i]t was pretty close." The "firing started simultaneously." Paster, however, testified that Alejandro fired first, and Woodfin returned fire.[2]

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[2] Part of the incident was captured by video surveillance. It shows Alejandro, Oswaldo, and Navarrete in the Right Step and

Woodfin was shot in the hip. Paster called 911.

B. *Gang evidence*

Officer Mark Maldonado testified as a gang expert. During his "tours" in the Los Angeles Police Department's Harbor Division from 2009 to 2011, the Eastside Wilmas gang was one of his primary responsibilities. He therefore has had personal contact with members of and investigated crimes committed by the gang. The gang has approximately 450 members, and E.S.W. is one of its signs or symbols. The gang's territory borders Avalon to the west, Alameda to the north, Harry Bridge to the south, and Alameda to the east. The Right Step hotel is inside the gang's territory. The gang refers to the hotel as "the Watson," and it's a known location for the gang. The gang's primary activities include homicide, attempted homicide, robbery, narcotic sales and use, and grand theft auto.

The officer testified about three predicate crimes involving Eastside Wilmas gang members. Anthony Galvan, who Officer Maldonado personally contacted and who admitted his gang membership to the officer, was convicted of a robbery occurring in 2010. The officer also had contact with Anthony Ricco, an Eastside Wilmas who was convicted of being a felon in possession of a firearm in 2011. Jeanette Arana was convicted of assault with a firearm, and she admitted her membership in Eastside Wilmas to Officer Maldonado.

Officer Maldonado offered an opinion that Alejandro and Oswaldo, as well as Navarrete, are Eastside Wilmas gang members. This opinion was based in part on FI cards, which we

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exiting it. There is a brief shot of Alejandro in the street with his arm raised.

discuss below. But it was also based on the officer having known Alejandro since 2003 and the officer's "numerous" contacts with him, during which Alejandro admitted his gang membership. Based on the officer's contacts with Alejandro, "where I stopped him and who I have stopped him with [other gang members]," and Alejandro's tattoos (Alejandro has an Eastside Wilmas tattoo on his chest), the officer opined that Alejandro is an Eastside Wilmas gang member. Based on the officer's prior contacts with Oswaldo, Oswaldo's tattoos (Eastside Wilmas is tattooed across his chest, on his arms and on the top of his head) and associations, the officer offered the same opinion of Oswaldo. The officer, however, last saw defendants "maybe six to eight" years ago.

Based on a hypothetical modeled on the facts of the case, Officer Maldonado opined that such a crime would benefit and be in association with a criminal street gang.

II. Procedural background

Defendants were jointly tried by a jury.[3] On November 3, 2014, the jury found defendants guilty of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b))[4] and found true a gang allegation (§ 186.22, subd. (b)(1)(B)). As to Alejandro, the jury found true personal gun use (§ 12022.5, subd. (a)), principal armed with a gun (§ 12022, subd. (a)(1)), and personal infliction of great bodily injury (§ 12022.7, subd. (a)) allegations.

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[3] Navarrete was separately tried and convicted of assault with a semiautomatic firearm. We affirmed his conviction in (*People v. Navarrete* (May 4, 2015, B253517) [nonpub. opn.].)

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

As to Oswaldo, the jury found that a principal was armed with a gun (§ 12022, subd. (a)(1)).

After denying defendants' motion for a new trial, they were sentenced on February 3, 2015. The court sentenced Oswaldo to the midterm of six years plus five years for the gang enhancement (§ 186.22, subd. (b)(1)(B)) plus one year for the weapon enhancement (§ 12022, subd. (a)(1)), for a total of 12 years in prison. The court sentenced Alejandro to the high term of nine years plus 10 years for the gun enhancement (§ 12022.5, subd. (a)) plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(B)) plus three years for the great bodily injury enhancement (§ 12022.7, subd. (a)) plus one year (§ 667.5, subd. (b)) for a total of 33 years in prison.

DISCUSSION[5]

I. Defendants' right to an impartial jury was not violated.

Defendants contend they were deprived of their right to an impartial jury, because the trial court improperly denied a challenge for cause to Juror No. 17. We disagree.

A. *Additional background*

During voir dire, Juror No. 17 said he had no significant others, was a "wellness coach, business distributor, distributor for health science company," and he lived in Long Beach. Eight to 10 years ago, a cousin was robbed and shot three times, but this would "not necessarily" have a "carry-over effect," although the juror was "not a big fan with certain associations" and "would have to really be persuaded [beyond a reasonable doubt], pretty much."

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[5] Each defendant joins any argument that may benefit him.

"The Court: Okay. So what you are saying is, you will be able to follow [the] law because you are going to ask [the prosecutor] to present evidence and persuade you beyond a reasonable doubt that the charge is true?

"[Juror No. 17]: Yeah.

"The Court: At this point as you sit, do you feel that you are leaning toward one party or the other, prosecution or defense?

"[Juror No. 17]: Not necessarily.

"The Court: I don't like the word 'not necessarily.' That means you are.

"[Juror No. 17]: No. Well, like I said, I am not a fan of certain associations. Not saying that they are, but because that hasn't been shown to me so far, it is hard for me not to have that go through my head because that is a pretty dramatic thing that happened to a close family member of mine.

"The Court: When you say 'association,' what do you mean?

"[Juror No. 17]: A gang association.

"The Court: Would it be safe for me to state that you have a problem with gang members?

"[Juror No. 17]: Well, yeah. That's pretty true, yes.

"The Court: As I indicated to Juror 12, most people would be saying the same thing.

"[Juror No. 17]: Exactly.

"The Court: But being a gang member is not a crime by itself.

"[Juror No. 17]: Totally agree.

"The Court: So if [the prosecutor] is able to prove that either Mr. Alejandro or Mr. Oswaldo Ballesteros is [a] gang member, you still have to basically evaluate all the evidence and decide whether or not [the prosecutor] has proven her case to you

beyond a reasonable doubt that there was, in fact, assault with a firearm.

"[Juror No. 17]: Right.

"The Court: Are you going to hold her to that?

"[Juror No. 17]: Yes. I mean, yeah.

"The Court: Any other yes answers?

"[Juror No. 17]: I believe that's my only biggest one.

"The Court: Any reason why you could not serve as a juror in this case?

"[Juror No. 17]: No.

"The Court: Any reason why you couldn't be fair to both parties in this case?

"[Juror No. 17]: No. I could be fair."

Defense counsel then said: "I appreciate what you are saying about particular associations, but, you know, I am the world's most impolitically-correct person. I don't do that. You heard gang, I ain't cool with it. In my mind bad things if you associate with them. I am going to assume – well, I am not going to assume you are guilty. I am going to assume that you are not innocent. [¶] Is that fair to say?

"[Juror No. 17]: Yeah.

"[Defense counsel]: Is there anything that we could say or do that could cause you to change that opinion?

"[Juror No. 17]: No.

"[Defense Counsel]: Okay. And would you agree then that it is probably not fair that you sit on this particular trial? [¶] Understanding that anyone sitting there has to have 12 jurors who are sitting there going, to me, those two people are wrongfully accused, they are presumed innocent. And in the Constitution it doesn't say kind of innocent, right?

"[Juror No. 17]: Yep.

"[Defense counsel]: So as we are sitting here, they are not going to get the trial that the framers of the Constitution intended from you. [¶] Is that fair [or accurate] to say?

"[Juror No. 17]: Yeah."

When it was the prosecutor's turn to voir dire, she asked the juror about the "allegation of gang membership. And the judge said, nobody likes gangs."

"[Prosecutor]: . . . [¶] . . . If I were to prove to you absolutely that the defendants are members of a gang, keeping in mind what the judge said is you only get to that if you find that they are guilty of the charged crime, but I do not prove to you that they are guilty of the charged crime. You think, you know what? Absolutely they run with this gang, I have no doubt about it, but I am not convinced they even did this crime. Would you vote not guilty?

"[Defense Counsel]: Object. Vague. Not hypothetical, to these two.

"The Court: Objection is noted, overruled.

"[Prosecutor]: Would you vote not guilty if I didn't prove the charge to you?

"[Juror No. 17]: Yes.

"[Prosecutor]: Even if you are convinced that they are gang members?

"[Juror No. 17]: Yeah.

"[Prosecutor]: Okay. So you would follow the law and base your decision first on whether or not they are guilty of the charged crime, notwithstanding gang membership?

"[Juror No. 17]: Yep."

The defense challenged Juror No. 17 for cause because the juror talked about "gang association. He said they wouldn't be able to give[ ] them a fair trial as envisioned. That was going to presumption of innocence," and therefore the juror was biased against defendants from the outset. The prosecutor responded that the juror said he would follow the law and find defendants not guilty if the prosecutor failed to prove their guilt—even if the juror was convinced they were gang members.

The trial court found: "It is one thing to say I don't like gang members, but another thing to say I can't follow the law. What he said, if people cannot prove the underlying charge, assault with firearm, but if they prove that he is a gang member, [he] is not going to penalize him, therefore say, since you are [a] gang member, I am going to find you guilty anyway." The court therefore rejected the for-cause challenge.

Defense counsel thereafter accepted the panel with Juror No. 17, who became Juror No. 4, even though the defense had 13 remaining peremptory challenges.

After defendants were found guilty, they moved for a new trial, which argued that the for-cause challenge to Juror No. 17 was improperly denied.

B. *The record fails to show the juror was biased.*

To help ensure a criminal defendant's constitutional right to trial by an unbiased, impartial jury (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16), a juror may be challenged for cause for implied or actual bias. (Code Civ. Proc., § 225, subd. (b)(1); *People v. Black* (2014) 58 Cal.4th 912, 916.) Implied bias is "when the existence of the facts as ascertained, in judgment of law disqualifies the juror." (Code Civ. Proc., § 225, subd. (b)(1)(B); see also *Black*, at p. 916.) " ' "Actual bias" [is] "the

existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." [Citations.]' " (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; see also Code Civ. Proc., § 225, subd. (b)(1)(C).)

" ' "Assessing the qualifications of jurors challenged for cause is a matter falling within the broad discretion of the trial court. [Citation.] The trial court must determine whether the prospective juror will be 'unable to faithfully and impartially apply the law in the case.' [Citation.] A juror will often give conflicting or confusing answers regarding his or her impartiality or capacity to serve, and the trial court must weigh the juror's responses in deciding whether to remove the juror for cause. The trial court's resolution of these factual matters is binding on the appellate court if supported by substantial evidence. [Citation.]" ' " (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1285; see also *People v. Weaver* (2001) 26 Cal.4th 876, 910; *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 428.)

When a court erroneously denies a challenge for cause, the defendant must show that the error affected his or her right to a fair trial and impartial jury. (*People v. Black*, *supra*, 58 Cal.4th at p. 920.) "When a defendant uses peremptory challenges to excuse prospective jurors who should have been removed for cause, a defendant's right to an impartial jury is affected only when he exhausts his peremptory challenges and an incompetent juror, meaning a juror who should have been removed for cause, sits on the jury that decides the case." (*Ibid.*, citing with approval *People v. Yeoman* (2003) 31 Cal.4th 93, 114; see also *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1000-1001.)

Therefore, "a defendant challenging on appeal the denial of a challenge for cause must fulfill a trio of procedural requirements: (1) the defense must exercise a peremptory challenge to remove the juror in question; (2) the defense must exhaust all available peremptory challenges; and (3) the defense must express dissatisfaction with the jury as finally constituted." (*People v. Weaver*, *supra*, 26 Cal.4th at pp. 910-911.)

Defendants here did not meet these requirements. After the trial court denied the for-cause challenge to Juror No. 17, the defense did not thereafter use a peremptory challenge to remove the juror, even though the defense had challenges left. Counsel also did not express dissatisfaction with the jury. The claim of error is therefore forfeited. (*People v. Mickel* (2016) 2 Cal.5th 181, 216.)

Even if the claim is not forfeited, we would find no error or ineffective assistance of counsel for failing to use a peremptory challenge to remove the juror. True, the juror gave conflicting answers about whether his feelings about gangs would impact his impartiality, telling the trial court and prosecutor he would hold the prosecution to the reasonable doubt standard but implying to defense counsel that defendants would not get a fair trial from him. Nonetheless, the court was in the best position to evaluate these responses. (*People v. Gonzales*, *supra*, 54 Cal.4th at p. 1285; *People v. Hillhouse* (2002) 27 Cal.4th 469, 488-489.) On this record, the court could conclude that although the juror had reservations about gangs—a common reservation in the population—the juror also would put them aside and hold the prosecution to the reasonable doubt standard. Indeed, such a juror, "who candidly states his preconceptions and expresses concerns about them, but also indicates a determination to be

impartial, may be preferable to one who categorically denies any prejudgment but may be disingenuous in doing so." (*Hillhouse*, at p. 488.) The court therefore did not abuse its discretion by denying the for-cause challenge.

For the same reason, trial counsel did not provide ineffective assistance by failing to use a peremptory challenge to remove the juror. The use of peremptory challenges is inherently subjective and intuitive, therefore the appellate record will rarely disclose reversible incompetence in this process. (*People v. Montiel* (1993) 5 Cal.4th 877, 911, disapproved on another ground by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).) On this record, counsel could have had a tactical reason for keeping Juror No. 17 on the panel. Moreover, the record shows that the juror was not incompetent. Therefore, no prejudice accrued to defendants as a result of the juror's service. (See generally *Strickland v. Washington* (1984) 466 U.S. 668 [a defendant claiming ineffective assistance of counsel must establish both error and prejudice].)

Nor do we agree that statements counsel made at the new trial motion hearing demonstrate his incompetence. When the prosecutor pointed out that counsel could have used a peremptory challenge to remove the juror, counsel said, "my job isn't to do cause challenges. It's the court's obligation to ensure that . . . no partial jurors sit on this case." It appears counsel was referring to for-cause challenges rather than peremptory challenges. In any event, nothing in this record shows that counsel misunderstood he could use a peremptory challenge to remove the juror, given that he used a peremptory challenge to remove Juror No. 2, to whom a challenge for cause was also denied.

We therefore conclude that reversal of the judgments is not warranted.

II. Admissibility of the FI cards

Defendants' multifaceted attack on the use of FI cards at trial includes claims based on the confrontation clause and prosecutorial misconduct. We, however, focus on Evidence Code sections 352 and 1101 and conclude, under those sections, that the trial court prejudicially erred in admitting evidence about the FI cards.

A. *Additional background*

During his testimony, Officer Maldonado relied on FI cards about defendants. Those cards, People's exhibits 20 and 26, were marked, over defense counsel's objection, for identification. Exhibit 20 consists of four pages containing the front and back sides of seven FI cards. The first page contains the front side of the first 4 FI cards, and Officer Maldonado prepared card No. 1. Exhibit 26 consists of two pages containing the front and back of two FI cards; Officer Maldonado didn't prepare either card.

The officer explained a FI card "is a card where we take information, basic information either on suspects, witnesses, or anybody during an investigation, has the basic information, last name, first name, height, weight, birth date, address, and has occupation, has tattoos of any kind again or identifying marks, has phone numbers, social security, and gang affiliation or club affiliation . . . ." FI cards are used "by all officers, for all different reasons, for witnesses of any – or suspects of any kind, but as far as gang officers, they will use them to keep . . . track of how many times they stopped an individual or and keep the information updated on those individuals."

When Officer Maldonado testified that he "and other officers" filled out Alejandro's FI cards, defense counsel objected, citing hearsay and his clients' confrontation and cross-examination rights. The trial court overruled the objection and told the jury that this "witness has been called as an expert. An expert can rely on documents and it is not offered for the truth of the matter." The prosecutor then put exhibit 20 or part of it (it is unclear) on the projector and went over it with the officer. The officer went over the first card, which he filled out. The front of the FI card showed Alejandro's basic information, including that he has a scar on his nose, his moniker is Little Sparky, and he belongs to the Mahar Locos clique. Counsel objected again under Evidence Code sections 352 and 1101. The objection was overruled. The officer continued, adding that Alejandro is "Little Sparky," because his older brother, Miguel, was also an Eastside Wilmas known as "Sparky."

When the prosecutor began to review the back of Alejandro's FI card, defense counsel asked for a sidebar, at which he said it was improper for the prosecutor to "put up what my client was alleged[ly] stopped for in the past."[6] Counsel reasserted that the card was not admissible and that it referred to a prior bad act, but the trial court overruled the objection. Counsel also objected to the prosecutor eliciting evidence about Alejandro's older brother, Miguel, about whom no discovery had been turned over. The court told the prosecutor to turn over Miguel's FI card.

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[6] Although defense counsel had, before trial, apparently declined to get a copy of the FI cards, he asked for them before Officer Maldonado testified but he didn't get them.

In front of the jury, the prosecutor displayed the back of the FI card, although it is unclear whether the projection included other cards. One of those other cards stated, "ARR 459 PC Burg" (card No. 4), and another stated, "Gang member on injunction list" (card No. 2). Officer Maldonado testified that the back of the card he prepared showed that Alejandro was stopped with Antonio Hernandez, an Eastside Wilmas gang member known as Little Listo. When defense counsel's hearsay objection was sustained, the trial court told the prosecutor to lay a foundation. The officer then testified, "[t]hat's my F.I." and he had contacted Hernandez on multiple occasions and arrested him. The officer said that the "narrative is basically what happened during the stop. In this particular day, we detained the both of them for a violation of gang injunction."[7] Defense counsel asked for another sidebar, at which he objected that was a prior bad act having no relevance. Counsel pointed out that the FI card was created in 2006, making it eight years old. The court then instructed the jury that "there was testimony about certain individuals being in violation of gang injunction. That is not the issue in this case. It is irrelevant to this case. Therefore, any testimony relating to that particular subject is stricken."

The prosecutor then asked if the FI cards the officer did not fill out factored into his opinion Alejandro was an Eastside Wilmas, and the officer answered, "Yes."

Two FI cards about Oswaldo were then marked as People's exhibit 26, and although the officer did not fill them out, he said

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[7] The narrative stated, "Detained For 166 PC viol w/ ESW Gangmember [¶] Warned For violation [¶] Associating w/ Gangmember"

they were kept in the department's regular course of business. Counsel's hearsay objection was overruled. Focusing on one card, which was projected to the jury, the officer explained that the front page reflected basic information about Oswaldo, i.e., his name, address, what he was wearing when stopped, "personal oddities, says tattoo says Eastside Wilmas on chest," and his moniker (Lazy or Waldo), and his gang.

When the prosecutor began to go over the back of the card, defense counsel asked for another sidebar. The trial court told the prosecutor to "turn that around" and "[b]ring it to the sidebar." At sidebar, defense counsel argued, "She just put up an F.I. card with battery and 273.5 on it . . . now juror knows he has been convicted of battery and 273.5. Just nothing to do with this case. And I warned and I asked you not to and she did it anyway. If you can't get in the gang injunction crap, how can you get in violations of that?" After the court agreed that the FI card could not be shown to the jury, the defense moved for a mistrial: "We now told [the jury] he has been violated for gang injunctions, now battery, now 273.5 . . . ." The court denied the motion but instructed the jury: "[T]his detective officer is talking to you about field investigation identification card. It is an out-of-court statement offered for the truth of the matter. It is a hearsay. However, it is only being allowed by this witness to be used to render his opinion as whether or not these defendants are gang member or not. So you are to give weight as to only that issue and that issue only. Everything else that is in the field card is hearsay. Therefore, it will be stricken, other than officer's testimony using the field cards."

Back in front of the jury, Officer Maldonado testified that the FI card's narrative "states, suspect is self-admitted gang member, gang, dressed with gang tattoos."

The People rested when Officer Maldonado concluded his testimony. The defense then objected to admitting the FI cards. The court didn't rule at that time and told the parties to go over the exhibits during the break. When the parties returned, they didn't raise the exhibit issue. The next morning, the defense began, without raising the exhibit issue. By the time the parties began their closing arguments, the court had yet to rule clearly on the admissibility of the FI cards. During his closing, defense counsel impugned the FI cards as dated, because they were six to eight years old.

In rebuttal, the prosecutor told the jury they would get copies of the cards, just "to point out to you the dates on them with regard to Alejandro . . . . [¶] There are a number of cards. There is one dated 2006. Another 2011. May 2012 and there is another card dated November of '07. Another one April of '11. Another one of June of '12. [¶] So don['t] be misled by him that these cards are all eight years old. They are not. There are cards for Alejandro . . . that are very recent. [¶] In fact within the year 2012; and if you look on the backside so, in essence, page 2 and page 4 of the cards related to Alejandro Ballesteros. [¶] If you look at them there are dates on there. It says date, time and those are the dates these cards were filled out by the officers. [¶] With regards to Oswaldo . . . , there are two cards. The dates of those one of them is March of 2010 and the other is July of 2011 and not eight years old like [defense counsel] wants you to believe. [¶] The one that I put up on the screen to discuss with Officer Maldonado just to explain to you what these cards are

perhaps was an older one and that was just explained what the information is on the card. By no means are all the cards that old."

Defense counsel didn't immediately object to this argument. Instead, a day later, October 29, 2014, the jury had retired for deliberations, and the trial court and counsel were discussing exhibits. The prosecutor argued that the FI cards, with redactions, should come in "[b]ecause they were testified to by the officer" and formed the basis of his opinion. As he had previously argued, defense counsel responded that they were inadmissible: "FI cards do not go to the jury. Police reports do not go to the jury. It never has and never will. [¶] She commented on FI cards that were not shown to the jury and were not testified to regarding incidents, regarding the Ballesteros brothers." The court reminded both counsel that it had told the jury the day before that FI cards do not go in.[8]

The next day, October 30, 2014, the jury asked to see the FI cards. The trial court told the jury the cards "were used to help render an opinion by Officer Mark Maldonado whether or not the crime alleged was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang member. However, [FI cards] are hearsay document. Hearsay is an out of court statement offered for the truth. Thus, it was not admitted by the Court (People's #20 and People's #26).

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[8] The day before, during Officer Maldonado's testimony, the court told the jury that the cards were hearsay. It is unclear if the court was extrapolating from this an admonition to the jury that it wouldn't get the cards as exhibits.

[¶] You may request read back of Officer Mark Maldonado's testimony" about FI cards.

The jury then asked for read back of Officer Maldonado's testimony. Defense counsel objected, pointing out that the court had ruled the cards to be hearsay and made the prosecutor take them down: "seems illogical to say you can't have the F.I. cards because they are hearsay and then turn around and say, but I will let you read in [*sic*] exactly what's on the F.I. cards because that was hearsay. That's the reason you told them they don't get the F.I. cards because the information contained on them is hearsay." The trial court responded that an expert can rely on hearsay, therefore "if the jury wants to hear his testimony by way of readback, that will be allowed." The court said it would tell the jurors to disregard the contents of the FI cards as hearsay.

Before read back could occur, the jury asked for the " '[d]ates of F.I. cards for both' " defendants. Defense counsel objected again, pointing out that the prosecutor had mentioned dates in her closing that the officer had not testified about. He asked the court to instruct the jury to disregard those dates. The prosecutor asserted that she argued about the dates because the court had not yet ruled on the admissibility of the FI cards. The court refused to instruct the jury to disregard the prosecutor's comments about the dates "because that is misleading the jurors because that paints the picture that the D.A. was lying," and she clearly wasn't lying about the dates contacts with defendants were made. The court said it would not give dates beyond what was in Officer Maldonado's testimony, which was then read to the jury.

The next court day (November 3, 2014), the jury again asked for the dates of the FI cards. Before the court responded, the jury reached a verdict.

B. *The trial court abused its discretion.*

Gang experts have commonly testified that in forming their opinion the defendant is a gang member they relied on otherwise inadmissible hearsay, which often includes FI cards containing information about which the testifying officer might have no personal knowledge. (See generally *People v. Gardeley* (1996) 14 Cal.4th 605, overruled by *Sanchez*, *supra*, 63 Cal.4th 665.)[9] Thus, defendants argue that even if Officer Maldonado could rely on FI cards to form his opinion, the trial court abused its discretion by allowing the prosecutor to display them because they contained inadmissible prior bad acts evidence. We

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[9] *Sanchez* was filed after briefing in this matter had concluded. No party requested leave to brief that case. *Sanchez* reexamined the scope of the rule allowing experts to testify about inadmissible hearsay they relied on to form their opinion. In the context of gang expert testimony, *Sanchez* held that several categories of out-of-court statements (police reports and Street Terrorism Enforcement and Preservation Act notices) are inadmissible testimonial hearsay that may not be referenced by a gang expert in testifying. The court indicated that FI cards similarly may constitute testimonial hearsay but declined to definitively address the issue based in part on the state of the record.

Because testimony relevant to the confrontation clause issue was similarly undeveloped here, we also decline to address it. And as we explain, any confrontation clause violation is not vital to our analysis given our reversal on other grounds.

conclude that the court did abuse its discretion, to defendants' prejudice.

We focus on two problems with the FI cards. First, although "an expert may base an opinion on reliable hearsay, such evidence is not independently admissible." (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495.) Testimony relating the "testifying expert's own, independently conceived opinion is not objectionable, even if that opinion is based on inadmissible hearsay. [Citations.] A testifying expert can be cross-examined about these opinions. The hearsay problem arises when an expert simply recites portions of a report prepared by someone else, or when such a report is itself admitted into evidence. In that case, out-of-court statements in the report are being offered for their truth" and may violate the confrontation clause. (*People v. Leon* (2015) 61 Cal.4th 569, 603.)

Therefore, even in the pre-*Sanchez* world, it was, at a minimum, unusual for FI cards prepared by a nontestifying officer to be admitted into evidence. Here, however, Officer Maldonado created just one of seven cards about Alejandro. He didn't create either of the two about Oswaldo. Yet, the trial court allowed all of the cards to be marked for identification. It is unclear under what circumstance the court thought the FI cards Officer Maldonado did not prepare would go to the jury. Nor do the cases the Attorney General cites support their admissibility. In none does it appear that FI cards were admitted or displayed. (See, e.g., *People v. Velasco* (2015) 235 Cal.App.4th 66; *People v. Ruiz* (1998) 62 Cal.App.4th 234; *People v. Valdez* (1997) 58 Cal.App.4th 494.)

Second, the FI cards referenced inadmissible prior bad acts of defendants. Only relevant evidence is admissible. (Evid. Code,

§ 350.) Also, evidence a defendant committed misconduct other than that currently charged is generally inadmissible to prove he or she had a propensity to commit the charged crime. (See generally Evid. Code, § 1101, subd. (a); *People v. Jones* (2013) 57 Cal.4th 899, 929-930; *People v. Rogers* (2009) 46 Cal.4th 1136, 1165.) Even if evidence is admissible under Evidence Code section 1101, subdivision (b) because it is relevant to some other issue such as motive or intent, the evidence may be excluded under Evidence Code section 352. Evidence Code section 352 accords the trial court broad discretion to exclude even relevant evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is substantially more prejudicial than probative if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.' " (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) We review a trial court's ruling under Evidence Code section 352 for an abuse of discretion. (*People v. Leon*, *supra*, 61 Cal.4th at pp. 597, 599.)

Here, the front of Alejandro's FI card, which was displayed to the jury, indicated he "has record" and was "on probation." The back of the FI card, which was also displayed to the jury, indicated he was stopped with Antonio Hernandez and was "[d]etained for 166 PC viol w/ ESW gangmember [¶] Warned for violation [¶] Associating with Gangmember." The officer explained that this meant Alejandro and his companion were stopped for violating a gang injunction. It wasn't until this point that the trial court sustained the objection of defense counsel (who had been objecting all along) and struck the testimony about the gang injunction. Oddly, the trial court then allowed

the prosecutor to display Oswaldo's FI card, the front of which also indicated that he "has record" and "gang activity." The back of Oswaldo's FI card said, "PC Battery D/V (arrested) 273.5 PC Booked at [illegible] jail."

Neither the prosecutor below nor the Attorney General on appeal argue this evidence didn't fall under Evidence Code section 1101. Instead, the Attorney General argues that the FI cards were "potentially" admissible under Evidence Code section 1280, the hearsay exception for official records and writings. No argument or evidence to support that exception was raised below, and we need not address admissibility under it because the prior bad acts evidence should have been excluded at least under Evidence Code section 352, given its irrelevance. Indeed, the trial court impliedly agreed, because it struck the evidence as to Alejandro and instructed the jury not to consider it, and told the prosecutor to take down the projection of Oswaldo's card.

Such error in admitting evidence of uncharged offenses is evaluated under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 652, 656, 659.) That is, we determine whether it is reasonably probable a result more favorable to defendants would have resulted had the evidence not been admitted. Because evidence relating to uncharged misconduct may be highly prejudicial, its admission requires careful analysis. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404; see also *People v. Jones*, *supra*, 57 Cal.4th at p. 930.)

The prejudice here arises not from the extent to which the FI cards established that defendants were gang members. Officer Maldonado's properly admitted testimony about his prior contacts with defendants, their tattoos, and Woodfin's and

Paster's testimony about the gang challenges established that. Therefore, details on the FI cards that the defendants had tattoos and were Eastside Wilmas were merely cumulative or duplicative of other admissible evidence about whether defendants were gang members.

The same cannot be said of the prior bad acts. They tended to show that defendants are not just gang members, but they are gang members who have committed crimes. That Alejandro was subject to a gang injunction and that Oswaldo had a battery and a "273.5" made it more likely the jury would believe that defendants committed the current assaults to benefit or in association with Eastside Wilmas. Nor is it certain that these were the only prior bad acts to which the jury was exposed. Although Officer Maldonado did not highlight this, Alejandro's card said he was "on probation" and "has record." Cards the officer did not prepare indicate that Alejandro had been arraigned for burglary (card No. 4) and was engaged in "gang activity" (card Nos. 2 & 7). The Attorney General's characterization of these references—"has record" and "on probation"—as "minimal" is thus unpersuasive. Rather, when coupled with the other inadmissible evidence possibly displayed to the jury, the references are substantial.

True, the trial court struck the evidence Alejandro was subject to a gang injunction and gave limiting instructions during Officer Maldonado's testimony and at the close of evidence.[10]

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[10] In addition to the limiting instructions given during the officer's testimony, the jury was later instructed, "Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crimes for which the defendant is on trial. [¶] This evidence, if

Sanchez, however, calls into question the utility of such limiting instructions in this context. The court held that "hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 684.)

The limited utility of a limiting instruction is apparent in this case. Here, the FI cards were hotly disputed, drawing at least five objections, three sidebars, and three limiting instructions during Officer Maldonado's testimony alone. Given this drama, it is perhaps unsurprising the jury, during deliberations, asked to see the FI cards. The trial court instructed the jury the FI cards were hearsay and were not admitted. But the court also told the jury Officer Maldonado's testimony could be read back to them. The jury therefore asked to have that testimony read to them.

Before read back occurred, the jury asked for the dates of the FI cards. This request almost certainly flowed from what

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believed, may not be considered by you to prove that the defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in this case. [¶] You are not permitted to consider such evidence for any other purpose."

occurred during closing argument. The prosecutor argued that defense counsel misled the jury when he said the FI cards were from "[s]ix or eight years ago. Didn't get any one last year, the year before." To rebut this argument, the prosecutor said that other FI cards were dated 2007, 2011 and 2012 for Alejandro and 2010 and 2011 for Oswaldo. There was, however, no evidence of these dates, because Officer Maldonado did not testify about them and the FI cards were not admitted into evidence. The trial court therefore agreed with defense counsel that the dates could not be given to the jury "because it is not evidence." The jury, however, asked for the dates a second time.

Although we need not determine whether the prosecutor's argument amounted to misconduct (see, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 77 [misconduct for a prosecutor to mischaracterize the evidence or assert facts not in evidence], disapproved on another ground by *People v. Romero* (2015) 62 Cal.4th 1, 44 & fn. 17), her argument, at a minimum, compounded the prejudice.[11] Officer Maldonado had personal contacts with defendants, but the last one was six to eight years ago. The prosecutor's statements that other FI cards reflected more recent stops, of which Officer Maldonado had no personal knowledge, was clearly something they were interested in.

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[11] Because we reverse the true findings on the gang enhancement allegations on the ground the trial court abused its discretion, we need not decide whether reversal of those allegations would be warranted based on any prosecutorial misconduct. We also need not consider defendants' other contentions regarding whether the FI cards violate their confrontation rights and the sentencing error.

Notwithstanding instruction that counsels' statements are not evidence, the jury asked for the dates of the FI cards.

We cannot ignore the suggestion arising from these events that the jury was focused on the FI cards or preclude the possibility that the subject of their fascination was the inadmissible portions of those cards or the portions not in evidence. We therefore find that the display of the FI cards and of the inadmissible hearsay contained therein was prejudicial error. The true findings on the gang allegations must be reversed.[12]

[12] At oral argument, appellants' counsel conceded that the only remedy sought is reversal of the gang allegations.

DISPOSITION

The true findings on the gang enhancement allegations are reversed. The judgments of conviction are otherwise affirmed and the matter is remanded to the trial court for proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, Acting P. J.

We concur:

LAVIN, J.

GOSWAMI, J.*

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