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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NELSON BARRERA,

Defendant and Appellant.

A131818

(San Francisco County
Super. Ct. No. 204141)

I. INTRODUCTION

After a jury trial, appellant was convicted of second degree murder with personal use of a firearm, carrying a concealed firearm with a prior misdemeanor firearms conviction, and carrying a loaded firearm. (Pen. Code, §§ 187, subd. (a); 12022.53, subd. (d); 12025, subd. (b)(1), and 12031, subd. (a)(1).)¹ The trial court sentenced him to 40 years to life in state prison. He appeals, claiming that the trial court erred in (1) instructing the jury with a modified version of CALCRIM No. 1403, an instruction regarding the jury's consideration of gang activity, and (2) admitting into evidence the factual circumstances relating to appellant's prior misdemeanor conviction. We find no merit in either contention, and hence affirm the conviction.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 6, 2005, Robert Mariano, a 21-year-old resident of the Mission District in San Francisco, was shot dead by appellant after an argument between the two.

¹ All subsequent statutory references are to the Penal Code.

The circumstances surrounding that shooting, as developed in the trial of this case, will be discussed further below.

On February 8, 2008, appellant was charged with one count of second degree murder under section 187, subd. (a), with personal use of a firearm (§ 12022.53, subd. (d)), and the other two offenses noted above.

On February 7, 2011, a jury trial lasting about five weeks commenced. Numerous witnesses testified for both the prosecution and the defense. We will summarize the evidence presented by both sides and the instructions given the jury insofar as they are pertinent to the two legal issues before us.²

Appellant was born in El Salvador in 1980 and moved to the United States, specifically to Oakland, in 1998 at age 18. When he was in El Salvador, he was a member of a group called MS-13, and served as a “messenger” for it there. According to a San Francisco police gang expert, in this country the MS-13 group is a “subsection” of the Sureño gang, which congregates in San Francisco in the vicinity of 20th Street between Mission and Valencia.³ The Sureño gang wears and favors the color blue. The rival Norteños favor the color red, do not welcome Sureños into their neighborhoods, and congregate around 24th Street between Mission and Potrero in San Francisco. The Norteños refers to the Sureños as “scraps,” and the two gangs are enemies.

Although appellant lived in Oakland in 2005, he often came to San Francisco both to use a bank to send money to his sister in El Salvador and also to meet his girlfriend, Ester Portillo, who lived on Hampshire Street in the Mission District of San Francisco, with her then nine-year-old son, Javier.

Across the street from Portillo and her son lived the Mariano family, which included Robert Mariano, who was 21 in 2005, his girlfriend, mother, brother, sister,

² Put another way, in view of the two specific claims of error presented by appellant in his briefs to us, we will not summarize the entire evidence presented in the lengthy trial of this case, but only that evidence, and the trial court’s rulings regarding it, which are relevant to those two issues.

³ Appellant’s opening brief to us is thus incorrect when it states that “there was no evidence that Appellant was part of either gang. MS-13 is a separate gang.”

brother-in-law, and several of their children. Many people on that block, including Mariano, “claimed red,” meaning that they either were members of or associated with the Norteño gang. One San Francisco Police Department gang expert who testified for the defense opined that Mariano was an associate of that gang.

Mariano did not get along with appellant’s girlfriend, Portillo. They often had arguments because, among other things, Mariano accused her of bringing men to the neighborhood who “claimed blue,” i.e., that they were somehow associated with the Sureño gang. Mariano demanded that Portillo stop bringing boyfriends into the neighborhood who might be allied with the Sureño faction. Mariano also had arguments and fistfights with several such men, including Francisco Ramos, the father of Portillo’s son.

Sometime in October 2005, a few months before the shooting death of Mariano, appellant waived a blue rag out of Portillo’s apartment window. Mariano, who lived across the street, yelled at him to “knock it off.”

On December 6, 2005, various altercations began which ended with appellant shooting Mariano to death. First, Mariano and his girlfriend, Lena Bergara, argued for several hours, after which Mariano “stormed out of the house.” At around the same time, Portillo and her son, Javier, were walking toward a store. Mariano followed them there, and argued with Portillo. This argument continued when Portillo exited the store and walked back to her apartment. Many neighbors in the area heard Mariano yelling at Portillo near her apartment, although Portillo did not appear to be afraid of him; in fact, Mariano was heard telling Portillo that he did not have a problem with her and did not want to fight with her.

One of the people in the neighborhood who heard the argument between Mariano and Portillo was Mariano’s sister, Janet Mariano (hereafter Janet). She heard Mariano yelling at Portillo, calling her names such as “hoe,” “bitch,” and “whore.” Mariano told Portillo to stop bringing “those trouble-making scraps” (meaning, as noted above, Sureños) into the neighborhood. Janet was embarrassed and called up to Mariano’s

girlfriend, Bergara, apparently hoping she could calm Mariano down. Janet did not hear her brother threaten Portillo or her nine-year-old son, Javier.

While looking up at her building, Portillo made a call from her cell phone. At about that time, Janet, who was heading down her front steps, saw appellant look out of the window of Portillo's apartment. A few minutes later, appellant walked out of the building and addressed Mariano, saying: "What the fuck is your problem?" Mariano promptly took a "fighting stance," albeit not lifting up his shirt, apparently not armed, and not making any aggressive move toward Portillo or her minor son. Rather, he raised his hands, moved his fingers toward himself and said to appellant: "Let's go nigga." Appellant pulled out a gun he had put in his waistband and shot Mariano four times. Mariano fell to the ground and later died; no gun was found on him when his body was examined about 10 minutes later by the police and paramedics.

Appellant fled the scene and went to a nearby liquor store where he bought a red cap. Over a month later, i.e., on January 25, 2006, appellant was arrested when a car in which he was a passenger was pulled over by officers for a traffic violation. The arresting officers noted that the car he was travelling in had markings on the dashboard that read both "MS" and "MS-13." One of the arresting officers also noted that appellant had the letter "M" tattooed on his right shoulder and the letter "S" tattooed on his left shoulder. The same officer also found a piece of paper containing "gang monikers" in appellant's wallet.

Appellant testified in his own defense. He admitted shooting and killing Mariano on December 6, 2005, but asserted that he did not plan on doing so. He testified that, when Mariano said "Let's go nigga," he also reached into his waistband. Appellant thought Mariano had a gun there, so he started shooting at him (he had already armed himself with the gun he had bought earlier), and then ran from the scene. He went into the store to buy the red hat, took a BART train to the Fruitvale station in Oakland, tossed the gun he had used into a gutter there, and decided to go to Los Angeles, where his aunt lived and where he was later arrested.

Appellant also testified that he was a member of and a “messenger” for the MS-13 gang while he was a youth in El Salvador. However, after moving to Oakland, he claimed that he did not engage in any gang activity. He explained that he got his tattoos in 2004 or 2005, i.e., about the time of the arguments with and shooting of Mariano, because he had begun working for a paint company that had a number of other Salvadoran workers, and he wanted to reassure them that he was not a “snitch” for the police. He also admitted that he owned an earring with the label “MS-13” on it, but claimed he never wore it.

He went on to testify that he began dating Portillo in October 2004, and often stayed overnight in her apartment in San Francisco; soon thereafter, he realized that that neighborhood was predominately Norteño in population. Portillo also told him about the earlier problems she had had with Mariano regarding some of her prior boyfriends, including his calling some of them “scraps.” Appellant testified that he had some concern about this, because he did not want to have any problems when he visited with Portillo in San Francisco.

Appellant specifically denied ever waving a blue rag out of the window of his girlfriend Portillo’s apartment.

According to testimony from appellant, Portillo, and appellant’s mother, a few weeks prior to the shooting, Mariano confronted appellant, Portillo, her nine-year-old son, appellant’s mother, and Portillo’s nephew Edwin, at a bus stop in the Mission District. Mariano, who was in a vehicle with a Black male, pointed a gun at them and said “Puronorte,” [sic] meaning “northside.” Appellant felt that Mariano was challenging him and, after that incident, bought a gun to protect himself.

The factual background regarding the two issues raised in this appeal, i.e., the giving of a modified CALCRIM No. 1403 instruction and the admission of evidence regarding appellant’s prior misdemeanor conviction will be discussed in the following section of this opinion.

After being instructed and hearing argument from counsel, on March 15, 2011, the jury found appellant guilty of second degree murder, carrying a concealed weapon with a

prior misdemeanor firearms conviction, and carrying a loaded firearm. The jury also found the personal use of a firearm allegation in the information to be true.

On April 6, 2011, the trial court sentenced appellant to 40 years to life in state prison.

The same day, appellant filed a notice of appeal.

III. DISCUSSION

A. The Issues Before Us and Our Standard of Review.

As noted above, appellant raises two issues in support of his claim that his conviction was improper and should be reversed. First, he contends that, for a variety of reasons, the trial court erred in instructing the jury with a modified version of CALCRIM No. 1403. Secondly, he contends that the trial court erred in allowing the prosecution to present evidence of appellant's prior misdemeanor conviction for carrying a loaded firearm.

With regard to the alleged instructional error, clearly our standard of review is de novo. (See *People v. Burgener* (1986) 41 Cal.3d 505, 538-540, disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 754; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-280; see, generally, 5 Witkin, Cal. Criminal Law (3d ed. 2000) §§ 663 & 664.) However, with regard to the admission of the evidence relating to appellant's prior conviction, our standard of review is whether the trial court abused the discretion granted it by Evidence Code section 352. (See, e.g., *People v. Wheeler* (1992) 4 Cal.4th 284, 295-297 (*Wheeler*).)

B. The Modified Version of CALCRIM No. 1403 Was Properly Given.

The first reason—of several—why appellant's argument that the trial court erred in giving the modified version of CALCRIM No. 1403 (hereafter No. 1403) fails is that such an objection was clearly forfeited in the trial court.

The prosecution originally requested that the court give No. 1403. After the court and the prosecutor agreed on several initial changes in that instruction, defense counsel spoke up and stated he was "going to object to giving the instruction." The trial court promptly stated that "it is going to be given" and suggested that defense counsel offer

“any amendments that you would like to put in there to . . . soften it of any of its effect.” Defense counsel accepted that offer, and counsel and the court then discussed—and agreed upon—several changes to it—indeed, one over the objection of the prosecutor.

Defense counsel then stated regarding No. 1403: “I wanted to maybe give this some thought too in terms of adding something regarding Mr. Mariano, since there was evidence induced [sic: adduced] regarding his gang activity being an associate.”

The court then made this suggestion to defense counsel: “Why don’t you do this: Get on your computer, then redo this. And put in a factor regarding him that you think that you want. And we’ll talk about it tomorrow.” Defense counsel responded: “Okay. Very good.” The parties then moved on to the next proposed instruction, i.e., regarding carrying a concealed firearm.

The following morning, the court inquired of the prosecutor whether he had gone “through the instructions that we had discussed yesterday?” The prosecutor replied in the affirmative: “Mr. Conroy [defense counsel] has given me his suggestion of how to modify the gang instructions, and I’ll incorporate the changes. *They’re all fine.*” (Emphasis added.)

Nothing more was said on the subject of that instruction and the jury was thus instructed with the agreed-upon modified version of No. 1403. Under these circumstances, any objection defense counsel had to the giving of the modified version of No. 1403 was forfeited.⁴

Further, under the circumstances of this case, *some version* of No. 1403 had to be given. In the multi-week trial of this case, over two dozen witnesses testified for one side or the other. There were, even moderately speaking, repeated references in their

⁴ In his opening brief, appellant’s counsel asserts that although “[d]efense counsel made a couple of comments in response” to the trial court’s query re possible modification, “he never wavered from his objection to the entire instruction,” citing to pages 2644-2646 of the reporter’s transcript. This is clearly incorrect, as a reading of two subsequent pages of the March 9 and the first page of the March 10 reporters’ transcripts makes clear.

Curiously, however, the People do not raise the forfeiture issue in their brief to us.

testimony to the two gangs active in the community, i.e., the Norteño and Sureño gangs, their colors, their views of one another, and the fact that appellant was clearly associated with one such gang and the victim, Mariano, with the other. Under these circumstances, it was appropriate if not necessary to instruct the jury with some version of No. 1403.

The law is clear that a court may not give No. 1403 sua sponte but, if requested—as it was here, by the prosecution—it must be given. (See, e.g., *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051-1052 (*Hernandez*); *People v. Jones* (2003) 30 Cal.4th 1084, 1116.)

Recently, our colleagues in the Second District explained the pertinence of No. 1403 thusly: “California courts have long recognized the potential prejudicial effect of gang evidence. As a result, our Supreme Court has condemned the introduction of such evidence ‘if only tangentially relevant, given its highly inflammatory impact.’

[Citations.] Because gang evidence creates a risk that the jury will infer that the defendant has a criminal disposition and is therefore guilty of the charged offense, ‘trial courts should carefully scrutinize such evidence before admitting it.’ [Citation.]

“Nonetheless, evidence related to gang membership is not insulated from the general rule that all relevant evidence is admissible if it is relevant to a material issue in the case other than character, is not more prejudicial than probative, and is not cumulative. [Citations.]

“Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related. [Citation.] ‘ “[B]ecause a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence.” [Citations.]’ [Citations.] Gang evidence is also relevant on the issue of a witnesses credibility. [Citations.]

“CALCRIM No. 1403, as given here, is neither contrary to law nor misleading. It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime

and the credibility of witnesses.” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167-1168 (*Samaniego*); cf. also *People v. Garcia* (2008) 168 Cal.App.4th 261, 275; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413.)

We agree. For the reasons stated in *Samaniego*, not only was the abundant evidence of the different gang loyalties of appellant and his victim relevant to the circumstances surrounding the death of the victim, it may well have been error not to have instructed the jury with No. 1403, especially since the content of the version given here had been agreed to by both parties.⁵

Appellant contends that it was error to give this instruction because the information did not charge any offense under section 186.22, the section dealing with gang participation or enhancement. This is clearly incorrect; there is nothing in the language or the authority regarding No. 1403 that suggests it may be given only in cases brought pursuant to that section. Indeed, the holding of the court in *Samaniego* makes this point. Although one of several counts in that case charged a violation of section 186.22, the *Samaniego* court made clear that this was not the only reason giving No. 1403 was appropriate in that case. It was also relevant and appropriate, that court held, regarding the defendant’s “motive and credibility.” (*Samaniego, supra*, 172 Cal.App.4th at pp.1168-1169.) Just so here, because the modified version of No. 1403 given here mentioned (in paragraphs 1 and 7) *both* motive and credibility.

Next, appellant contends that the giving of No. 1403 was error because its “basic premise” was “unsupported by sufficient evidence” and “[t]here was no evidentiary foundation to support an instruction that gang evidence was relevant to [the] credibility of Appellant’s belief that he needed to exercise self-defense.” This argument also lacks merit.

⁵ Appellant attempts to distinguish *Samaniego* by arguing that (1) in that case there was “adequate” evidence regarding “how gang membership affected credibility,” which there was not here and (2) it “says nothing about the applicability of [No.] 1403 to the defendant’s own credibility, nor does it authorize use of evidence of activity of gangs of which the defendant was not a member.” For reasons discussed herein, both these efforts to distinguish *Samaniego* fail.

In the first place, appellant's arguments overlook that the essential purpose of No. 1403, both in its original version and as revised per the agreement of the parties and the court in this trial, is to make clear to the jury that the admission of evidence related to gang membership and activities is not intended, in and of itself, to be used adversely to the defendant. Put more succinctly, No. 1403 is, at its core, an instruction designed to avoid undue prejudice *to a defendant*. Thus the key phrase "limited purpose" in the introductory clause of both versions and the key final paragraph in both versions: "You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant or the victim is a person of bad character or that either has a disposition to commit crime."

More specifically regarding this contention, there certainly was "sufficient evidence" before the jury regarding the gang loyalties of both appellant and Mariano. Indeed, in the discussion before the court regarding the rewording of No. 1403 to make it harmonious with the evidence presented to the jury, it was *defense counsel* who first suggested "adding something regarding Mr. Mariano, since there was evidence induced [sic: adduced] regarding his gang activity being an associate." And exactly that was done without, apparently, any objection by the prosecutor: the version of No. 1403 given to the jury included the phrase: "The victim acted in conformity with his reputation as an associate of Norteño gangs."

This addition, and indeed the entire text of the modified version of No. 1403 read to the jury, was entirely consistent with, and indeed required by, the evidence adduced at trial. Although we have not undertaken a headcount, clearly a majority of the dozens of witnesses who testified, including the relatives and friends of Mariano and appellant, were repeatedly asked questions about the affiliations of those two young men with, respectively, the Norteños and Sureños, how long they had lasted, where they had started, what specific things each had said about his affiliation, the marks or jewelry (e.g., "MS-13," which relates to a subsection of the Sureño gang) appellant had, etc., etc. And *all* of this evidence came in without any substantive objection from trial defense counsel that

gang evidence relating to either appellant or Mariano was irrelevant or otherwise inappropriate.⁶

In short, the argument of appellant that “there was insufficient evidentiary foundation to support several of the inferences [instruction No.1403] authorized” is completely without merit.

So, too, is appellant’s argument that No. 1403 was somehow inappropriate in this case because it referenced witnesses’ “credibility,” necessarily including that of appellant. In this connection, appellant argues that (1) “there was no foundation to support the inference that gang evidence was relevant to Appellant’s credibility when he said he believed that he needed to exercise self-defense” and (2) “there was no evidence that gang activity affected the credibility of the key witnesses, such as Appellant.” But his counsel concedes: “Appellant’s credibility was crucial here,” but then goes on to argue that the jury’s determination of such “was thrown out of balance, when the jury was incorrectly told that it could use gang evidence to determine Appellant’s credibility.”

But what the jury was told via the penultimate paragraph of No. 1403 was that it “may” consider “this evidence when you evaluate the credibility or believability of a witness . . .,” phraseology consistent with the standard version of No. 1403. In view of the constant and repeated gang-related antagonism between appellant and Mariano (including, e.g., appellant’s alleged waving of the blue rag out of the window of an apartment opposite that of Mariano), clearly gang evidence *was* relevant to appellant’s credibility regarding his shooting of Mariano. As our Supreme Court held in *People v. Carter* (2003) 30 Cal.4th 1166, 1194: “Although evidence of a defendant’s gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged—and thus should be carefully scrutinized by trial courts—such evidence is admissible when relevant to prove identity

⁶ Even without the giving of No. 1403, our Supreme Court has made clear that “[i]n general, [t]he People are entitled to “introduce evidence of gang affiliation and activity where such evidence is relevant to an issue of motive or intent.” [Citation.]’ [Citation.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 655.)

or motive, if its probative value is not substantially outweighed by its prejudicial effect.” (See also *People v. Williams* (1997) 16 Cal.4th 153, 193.)

Appellant next argues that giving No. 1403 violated “due process.” First of all, this argument is clearly forfeited because it was never made in the trial court. (See, e.g., *People v. Thomas* (2012) 53 Cal.4th 771, 816.) Second, and especially in view of the huge amount of evidence adduced from many witnesses at the trial, the trial court almost certainly had to give No. 1403 to, among other reasons, define for the jury the very limited purposes for which they could—and the many reasons regarding which they should *not*—consider that evidence. There was clearly no due process violation in the giving of No. 1403.

Next, appellant argues that the inclusion in the modified version of No. 1403 of the phrase authorizing the jury to consider whether the gang evidence was relevant to considering whether appellant “acted in the heat of passion” was error. Appellant argues that the inclusion of this phrase “could have caused the jury to discount heat of passion because it believed that Appellant, because he was a gang member, had a quicker trigger finger,” and also because the inclusion of that phrase in the version of No. 1403 given (and also in the original version) (see CALCRIM No. 1403) is somehow inconsistent with CALCRIM No. 570, an instruction which defines voluntary manslaughter as a killing “because of [a] sudden quarrel or in the heat of passion.”

First of all, once again appellant’s trial counsel never objected to that part of No. 1403 and, secondly, we see absolutely no inconsistency between No. 1403 and CALCRIM No. 570. The latter states, consistently with the applicable Penal Code statute, that voluntary manslaughter is a killing committed in “heat of passion.” (§ 192, subd. (a).) No. 1403 is not in the slightest contrary to this, as it simply permits a jury (i.e., “you *may* consider evidence of gang activity”) to decide whether “[t]he defendant acted in the heat of passion.” (Italics added.)

Finally regarding No. 1403, and in addition to the various responses to appellant’s arguments on this issue, we agree with respondent Attorney General that there was no prejudice to appellant in the giving of that instruction. In the first place, and as noted

above, No. 1403 is essentially an instruction designed to guard against a jury's inappropriate consideration of gang-related evidence that has been admitted, i.e., to tell them the *only specific matters* regarding which it "may consider evidence of gang activity." (No. 1403.) Secondly, the evidence that appellant shot Mariano multiple times with a gun he had apparently just placed in his waistband before coming out onto the street was overwhelming. Many witnesses who testified saw the shooting,⁷ and it was also clear that Mariano was not armed. Under *People v. Watson* (1956) 46 Cal.2d 818, 856, even if there was some instructional error regarding the giving of No. 1403, in view of the overwhelming evidence of appellant's guilt—and his immediate flight, disposal of his gun, and exit to Los Angeles—any such error was clearly harmless.

C. *It was not Error to Admit into Evidence the Circumstances Regarding Appellant's Prior Misdemeanor Conviction.*

As noted above, the only other issue appellant raises is that the trial court erred in admitting "the factual circumstances" of his prior conviction.

During the course of the presentation of appellant's case, his counsel moved to exclude from evidence his 2004 conviction under section 12025 for carrying a concealed firearm in a car, arguing that such was not a crime involving moral turpitude. The matter was argued to the trial court and it indicated, based on the holding of *People v. Robinson* (2005) 37 Cal.4th 592 (*Robinson*) that it was inclined to admit the evidence of that conviction. It stated: "In an abundance of caution, I'm going to wait until the end of the examination. Neither side should mention the fact of the conviction. [¶] I'm inclined, if it comes in, I would just let the fact of the conviction—it's a 12025 conviction [¶] That doesn't mean you can't go into the facts, Mr. Conroy [defense counsel], but I would at least limit it to them. [¶] But whether it comes in at all depends on what I hear in examination and cross-examination, just in an abundance of caution; so there we are."

During the course of his direct examination by his counsel, appellant testified that he did not call the police after Mariano waved a gun at him at the bus stop because he had

⁷ These witnesses included Janet and Sharon Mariano, Everado Cabral, Eddie Juarez, Greg Rasmussen, Sergio Rivera, and appellant's girlfriend, Ester Portillo.

“had a conviction of firearms before.” On cross-examination, the prosecutor explored the circumstances surrounding that conviction; that examination was as follows:

“[The Prosecutor]: Now you mentioned something on the stand about having a prior weapon possession case. In fact, you were arrested and convicted of having a weapon concealed in a vehicle, a gun in San Pablo about a year earlier. Isn’t that right?”

“A. Yes, sir. That’s right.

“Q. And on that occasion, when you were arrested in San Pablo, you were in a car with two other men. Do you remember that?”

“A. Yes, sir.

“Q. And the two other men were young Latin men. Is that true?”

“A. Yes, sir.

“Q. And one of them had MS on his torso. Do you remember that?”

“A. Yes, sir.

“Q. And you guys were dressed in blue. Isn’t that right?”

“A. Yes, sir.

“Q. And you had a blue bandana with you; isn’t that right?”

“A. Yes, sir.

“Q. And you guys had—because I guess your tattoos weren’t sufficiently visible, you wrote on your hands the number 13 and MS on your hands?”

“Mr. Conroy [defense counsel]: Objection. That assumes a fact not in evidence that he was tattooed.

“The Court: You can rephrase the question.

“Mr. Clark [prosecutor]. Sure

“Q. At that time you guys wrote MS and 13 on your hands; didn’t you?”

“A. I don’t remember that I had that on my hands but I believe that the report of the deputy say[s] that I had something. Probably, the other people, two occupants in the car, they might have tattoos on their hands.”

We disagree that allowing this brief cross-examination of appellant was improper. As the trial court noted, in *Robinson* our Supreme Court—although affirming the trial

court’s discretionary exclusion of the evidence offered in that case—specifically held that a misdemeanor conviction for possessing a concealed handgun is “a crime of moral turpitude and therefore . . . relevant to the witnesses’ honesty and veracity.” (*Robinson, supra*, 37 Cal.4th at p. 626.) As that court ruled very specifically in *Wheeler*, even though a misdemeanor *conviction* may not be introduced by the prosecution for impeachment purposes (as it was not here—appellant conceded the conviction himself on direct examination), that rule does not apply to evidence of “impeaching misdemeanor misconduct.” (*Wheeler, supra*, 4 Cal.4th at p. 300, fn. 14.) Indeed, appellant concedes that this is the rule by stating, in his opening brief: “Accordingly, under *Wheeler*, the proponent is not allowed to introduce the actual misdemeanor conviction, but he is allowed to introduce evidence of the facts underlying that misdemeanor to make up for the fact that he is not allowed to introduce the actual conviction.”

Appellant then cites, in support of this principle, *People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1507 (*Cadogan*), where the court held: “[T]he court properly allowed the impeachment of defendant based on conduct involving moral turpitude. Although defendant was improperly asked about his misdemeanor *convictions* rather than his prior *conduct* leading to misdemeanor convictions, defendant did not raise a timely hearsay objection to the prosecutor’s questions and is therefore foreclosed from seeking relief on appeal.” (See also *id.* at pp. 1514-1515.) In *People v. Chatman* (2006) 38 Cal.4th 344, 373 (*Chatman*), our Supreme Court summarized this rule—one very applicable here—in one succinct sentence: “Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court’s exercise of discretion. [Citation.]”

This statement in *Chatman* negates appellant’s argument that “[o]nce Appellant admitted the misdemeanor conviction,” pursuant to Evidence Code section 1101, subdivisions (a) and (b), “the prosecution should not have been allowed to delve into the circumstances surrounding it.” This contention is explicitly refuted by the holdings of *Wheeler*, *Chatman*, and *Cadogan*.

Appellant argues that there was an abuse of discretion here even under the broad standard of Evidence Code section 352 (section 352). He argues that the trial court erred in allowing the prosecution “to delve into the circumstances surrounding” appellant’s prior conviction once he had admitted his conviction, because those facts were “less probative than prejudicial, once Appellant admitted the crime.” We disagree. A trial court has “broad discretion” under section 352. (See, e.g., *Chatman, supra*, 38 Cal.4th at p. 374; see also *People v. Clark* (2011) 52 Cal.4th 856, 932 [“Because the court’s discretion to admit or exclude impeachment evidence ‘is as broad as necessary to deal with the great variety of factual situations in which the issue arises’ [citation], a reviewing court ordinarily will uphold the trial court’s exercise of discretion. [Citations.]”].)

In the exercise of that discretion, trial courts “may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value.” (*Wheeler, supra*, 4 Cal.4th at pp. 296-297.) Clearly, here, the brief questioning of appellant regarding the circumstances of his prior misdemeanor arrest (less than two pages out of 55 pages of cross-examination in the reporter’s transcript) strongly suggests there was no “undue time, confusion, or prejudice” involved in the brief cross-examination of appellant regarding the factual circumstances of his prior (and recent, i.e., a year before) misdemeanor conviction.

Appellant then argues, albeit very briefly, that he received ineffective assistance of counsel because, although that counsel moved in limine to exclude any evidence relating to appellant’s prior conviction and renewed that motion before appellant testified, he did not object to the limited and specific questions posed to respondent on cross-examination (quoted above) regarding such. This argument fails because of (1) the law just cited⁸ and (2) the fact that timely and appropriate objections were made by trial counsel before

⁸ As our Supreme Court has observed: “Representation does not become deficient for failing to make meritless objections.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 463.)

appellant's brief testimony on cross-examination regarding the circumstances surrounding his 2004 conviction.

Finally, appellant argues that the evidence regarding his prior conviction was prejudicial. We do not need to reach this issue because, as already noted, there was no error in admitting the limited testimony regarding those circumstances. In any event, and assuming error in the admission of this evidence, any such error was harmless for precisely the same reasons noted above regarding instruction No. 1403. (See *ante*, p. 13.)

IV. DISPOSITION

The judgment is affirmed.

Haerle, Acting P.J.

We concur:

Lambden, J.

Richman, J.