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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO SERRANO IBARRA et al.,

Defendants and Appellants.

D057714

(Super. Ct. No. SCN261785)

APPEALS from judgments of the Superior Court of San Diego County, Robert F. O'Neill, Judge. Affirmed as modified.

Eduardo Serrano Ibarra and Alvaro Guadalupe Reyes appeal judgments sentencing them to prison after a jury found them guilty of two counts of robbery and one count of vandalism and found true certain gang and firearm enhancement allegations. They contend the trial court erred in admitting songs and photographs found on codefendants' pages at a social networking Web site and in admitting evidence of prior uncharged offenses. Ibarra also contends the trial court erroneously imposed both gang and firearm

enhancements for his convictions on the robbery counts. We modify the judgment against Ibarra to correct the term of the firearm enhancement, but otherwise affirm.

## I

### FACTUAL BACKGROUND

On May 9, 2009, at approximately 10:00 p.m., Jonathan Martinez and Orlando Escobedo stopped at a restaurant in Valley Center. As Martinez exited the restaurant and approached Escobedo's truck, two men approached him. One of the men asked Martinez, "Where are you from?"<sup>1</sup> and took his hat. After a third man appeared, Martinez feared a fight was developing and started to run toward Escobedo's truck.

Escobedo then exited the restaurant and saw Alvaro Guadalupe Reyes (also known as Alvaro Bojorquez) enter the restaurant holding a shotgun and wearing a bandana over his face while another man, also wearing a bandana, stood guard outside. Escobedo saw Martinez was being harassed and asked what was going on. A group of at least four men then surrounded Escobedo and inquired, "Where are you from?" One of the men, Luis Alberto Bojorquez,<sup>2</sup> Reyes's brother, demanded \$10 from Escobedo. As Escobedo

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<sup>1</sup> According to the People's gang expert, a member of a criminal street gang may initiate contact with another person in gang territory by asking, "Where are you from?" or "Do you bang?" If the other person is from a rival gang and identifies himself as such in response to the question, a violent confrontation usually ensues. If the other person is not affiliated with a gang and answers accordingly, the gang member may attack the person and inform him he is in gang territory.

<sup>2</sup> At trial, Escobedo identified Bojorquez by photograph. At the preliminary hearing, Escobedo had identified his attackers by their seating position in court and briefly described the involvement of each in the attack. At trial, the preliminary hearing

reached for his wallet, Reyes exited the restaurant and told the group surrounding Escobedo and Martinez, "Beat them up. F\*\*k them up."

One of the men, Cesar Adrian Orosco,<sup>3</sup> struck Escobedo with a crowbar, slicing off a piece of his ear. Escobedo tried to escape by running toward his truck, but the group caught up with him and struck him repeatedly with fists and a crowbar. When Reyes joined the group, he asked Escobedo where he was from, struck him in the mouth with a shotgun, and shoved the shotgun in his face. During the assault, Escobedo saw Eduardo Serrano Ibarra standing behind Reyes holding what appeared to be a knife and heard the group say, "You are in Valley Center. Remember Valley Center."

Eventually, Escobedo was able to get inside his truck and start the engine. One of Escobedo's attackers, Orosco or Nicolas Gaspar,<sup>4</sup> also got inside the truck; the intruder smashed the truck's stereo, snatched Escobedo's mobile telephone, and took something out of his wallet. As Escobedo started to drive away, the intruder jumped out; and Orosco and Gaspar (who was wearing a jersey) then smashed the windshield and side windows of the truck.

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seating chart was introduced as an exhibit; and Escobedo identified his attackers and their respective involvements in the attack exactly as he had at the preliminary hearing.

<sup>3</sup> At trial, Escobedo identified Orosco by photograph, in the same manner he had identified Bojorquez. (See fn. 2, *ante.*)

<sup>4</sup> At trial, Escobedo identified Gaspar by photograph, in the same manner he had identified Bojorquez and Orosco. (See fns. 2 & 3, *ante.*)

Escobedo had to maneuver around a white Jeep Grand Cherokee as he exited the parking lot of the restaurant. He spotted Martinez on the side of the street, picked him up, and drove to a nearby Indian tribal casino to summon assistance.

A sheriff's deputy arrived at the casino and spoke to Martinez and Escobedo. The deputy also spoke to a tribal security officer, who reported a white Jeep Grand Cherokee had been seen in the vicinity. The deputy spotted the vehicle and followed it.

The deputy determined the Jeep Grand Cherokee was registered to Bojorquez and attempted to pull it over. The vehicle accelerated, however, and led the deputy on an 18-mile, high-speed chase. During the chase, the deputy saw an object thrown from the vehicle. A San Diego Chargers jersey was later recovered in the path of the chase. The chase ended when Bojorquez crashed his vehicle into a tree.

After the crash, Reyes and Ibarra remained in Bojorquez's vehicle, but the other occupants fled. Reyes and Ibarra were taken into custody. Orosco was found hiding in a nearby creek bed. Bojorquez was arrested at his residence approximately one hour after the crash. By the time of trial, Gaspar had not been apprehended.

When law enforcement officers searched Bojorquez's vehicle, they found a partially consumed case of Budweiser beer, baseball bats, a crowbar, a bandolier containing shotgun shells, and an expended shotgun shell. They also found Escobedo's mobile telephone and Costco card, as well as Martinez's hat.

## II

### PROCEDURAL BACKGROUND

In an amended information, the People charged Ibarra, Reyes, Bojorquez, Orosco and Gaspar with several crimes. Ibarra and Reyes were charged with robbery of Martinez (count 2; Pen. Code, § 211),<sup>5</sup> robbery of Escobedo (count 3; § 211) and vandalism of Escobedo's vehicle (count 5; § 594).

With respect to counts 2, 3 and 5, the People alleged Ibarra and Reyes committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further or assist criminal conduct by gang members. (§ 186.22, subd. (b)(1).) The People also alleged that in the commission of the robberies, Reyes personally used a firearm (§ 12022.53, subd. (b)); Ibarra personally used a deadly and dangerous weapon (a knife) (§ 12022, subd. (b)(1)); and both Reyes and Ibarra were principals, and at least one principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)).

The case went to jury trial against Ibarra and Reyes.<sup>6</sup> The jury found them guilty on counts 2, 3 and 5, and also found true the attached gang enhancement allegations.

With regard to the robbery of Martinez (count 2), the jury: (1) found not true the allegations Ibarra personally used a deadly or dangerous weapon, or was a principal and

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<sup>5</sup> Subsequent undesignated section references are to the Penal Code.

<sup>6</sup> Bojorquez and Orosco pled guilty to count 3, admitted certain enhancement allegations, and were sentenced to prison.

at least one principal personally used a firearm (§§ 12022, subd. (b)(1), 12022.53, subds. (b), (e)(1)); (2) found not true the allegation Reyes personally used a firearm (§ 12022.53, subd. (b)); and (3) found true the allegation Reyes was a principal and at least one principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)).

With regard to the robbery of Escobedo (count 3), the jury: (1) found true the allegations Ibarra and Reyes were both principals and at least one principal personally used a firearm (§ 12022.53, subds. (b), (e)(1)); (2) found not true the allegation Ibarra personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)); and (3) was unable to reach a verdict on the allegation Reyes personally used a firearm (§ 12022.53, subd. (b)).

The court sentenced Ibarra to prison for an aggregate term of 27 years eight months. Following the probation officer's recommendation, the court selected count 2 as the principal count; imposed the upper term of five years; and added a consecutive term of 10 years for the gang enhancement. (§§ 213, subd. (a)(2), 186.22, subd. (b)(1)(C).) For the conviction on count 3, the court imposed a consecutive prison term of one year (one-third the middle term); added a consecutive term of 10 years for the firearm enhancement; and imposed but stayed execution of a consecutive term of three years four months (one-third of 10 years) for the gang enhancement. (§§ 213, subd. (a)(2), 186.22, subd. (b)(1)(C), 1170.1, subd. (a), 12022.53, subds. (b), (e)(1), (j).) For the conviction on count 5, the court imposed consecutive prison terms of eight months (one-third the middle term), plus one year (one-third the middle term) for the gang enhancement. (§§ 18, subd. (a), 186.22, subd. (b)(1)(A), 1170.1, subd. (a).)

The court sentenced Reyes to an aggregate prison term of 21 years. Because Reyes raises no claim of error regarding his sentence, we do not set out its components in detail.

### III

#### DISCUSSION

Ibarra and Reyes both contend the judgments must be reversed because the trial court erroneously admitted photographs, rap songs and evidence of other crimes. Reyes contends the cumulative effect of the erroneous evidentiary rulings requires reversal. Ibarra contends his prison sentence must be reduced because the sentencing court erroneously imposed both firearm and gang enhancements. We shall address each contention in turn.

A. *The Trial Court Properly Admitted the Songs and Photographs Found on Codefendants' Social Networking Web Site Pages*

Ibarra and Reyes contend their convictions must be reversed because the trial court erroneously admitted rap songs and photographs found on codefendants' social networking Web site pages. They argue this evidence was irrelevant and so inflammatory that its admission violated Evidence Code section 352 and their constitutional rights to due process and a fair trial. After setting forth additional pertinent facts, we shall explain why this argument has no merit.

1. *Additional Pertinent Facts*

At trial, the People called Anthony Tripoli, a deputy sheriff, to testify as an expert on criminal street gangs. In the three years before trial, Tripoli had worked as a gang

investigator and was responsible for documenting and contacting members of the Valleros criminal street gang, which operated in the Valley Center area.

As part of his gang investigative duties, on May 7, 2009, Tripoli was conducting research on the Internet when he located several pages at MySpace, a social networking Web site, that belonged to Valleros gang members. He printed out content posted on pages belonging to Gaspar, Orosco and Bojorquez, including photographs of: (1) Gaspar, Orosco, Bojorquez and Reyes forming the letters "V" and "C" with their hands; (2) Gaspar and Bojorquez wearing a bandana in such a way that its pattern formed the letter "V"; (3) Orosco posing with a sawed-off shotgun in front of a white Jeep Grand Cherokee with a box of Budweiser beer in the back; (4) tattoos of "I am a soldier for the Valley" and "Valley Center" across Gaspar's chest and abdomen; and (5) the letters "VC" spray-painted at the restaurant where Martinez and Escobedo were attacked. The pictures also showed Gaspar, Orosco, Bojorquez and Reyes wearing items of clothing identical to items worn by the men who attacked Martinez and Escobedo.

After the attack, Tripoli returned to the MySpace Web site and found several rap songs had been posted. He played the songs and recognized the voices of Gaspar and another Valleros gang member. The songs referred to the destruction of evidence, including guns and clothes; witness intimidation; and conflict with a rival gang. One of the songs mentioned the gang moniker of Ibarra's younger brother and his detention in a juvenile hall, which occurred after Tripoli arrested him in connection with the service of a search warrant issued as part of the investigation of the attack on Martinez and Escobedo. The same song also mentioned "the homie on the run," whom Tripoli took to

mean Gaspar, the only Valleros gang member involved in the attack on Martinez and Escobedo who had not been apprehended at the time of trial.

The People moved in limine for an order allowing them to introduce the photographs and songs that Tripoli found on the MySpace Web site as evidence in support of the gang enhancement allegations. Reyes and Ibarra moved in limine for an order excluding the photographs and songs as "irrelevant" and "highly prejudicial." The court ruled the photographs and songs were admissible.

The photographs and songs Tripoli found on the MySpace Web site were admitted at trial. Tripoli relied on that evidence, as well as Ibarra's tattoo of "Valley Center" and evidence of Ibarra's and Reyes's gang monikers and past gang activity, in concluding they were active members of the Valleros criminal street gang on the day Martinez and Escobedo were attacked. Tripoli also explained the commission of a robbery benefits a criminal street gang because the gang members can use the money or property obtained to finance gang activities and because the violent nature of the crime spreads fear and intimidation throughout the community.

## 2. *Legal Analysis*

We must determine whether the trial court properly admitted the photographs and rap songs Tripoli found on the MySpace Web site or whether, as Ibarra and Reyes contend, the court should have excluded that evidence as irrelevant and unduly prejudicial. We begin by setting forth the established legal principles that guide our determination.

"No evidence is admissible except relevant evidence." (Evid. Code, § 350.)

Evidence is relevant if it has "*any* tendency in reason to prove or disprove *any* disputed fact that is of consequence to the determination of the action." (*Id.*, § 210, italics added.)

Evidence is relevant if it tends logically, naturally and by reasonable inference to establish a material fact, such as identity, intent or motive. (*People v. Lee* (2011) 51 Cal.4th 620, 642.) Evidence is relevant if it tends to prove an issue before the jury, even though it may be weak. (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.)

One statutory exception allows a trial court to exclude relevant evidence if its probative value is "substantially outweighed" by the probability its admission will take too much time, "create substantial danger of *undue* prejudice," confuse the issues or mislead the jury. (Evid. Code, § 352, italics added.) Evidence is not likely to cause *undue* prejudice simply because it supports the proponent's case or damages the opponent's; the evidence is likely to cause *undue* prejudice, and should therefore be excluded, *only* when the evidence is of such a nature that it likely would induce the jury to reward or punish one side due to an emotional or other reaction that is not based on a logical evaluation of the evidence in relation to the issue to which it is relevant. (*People v. Scott* (2011) 52 Cal.4th 452, 490-491 (*Scott*).

We apply the deferential abuse of discretion standard when reviewing a trial court's rulings on relevance, including rulings under Evidence Code section 352. (*Scott*, *supra*, 52 Cal.4th at p. 491; *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35 (*Zepeda*).

Under that standard, the trial court's ruling will not be disturbed on appeal unless the

court exercised its discretion in an arbitrary, capricious or patently absurd manner that caused a manifest miscarriage of justice. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329 (*Foster*); *People v. Garcia* (2008) 168 Cal.App.4th 261, 275 (*Garcia*)). As we explain below, the trial court did not abuse its discretion by admitting the photographs and rap songs Tripoli found on the MySpace pages.

The photographs were relevant to the gang enhancement allegations. To establish those allegations, the People had to prove the charged crimes 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." (§ 186.22, subd. (b)(1).) Generally, "[g]ang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167 (*Samaniego*)). In particular, photographs indicating a defendant's gang affiliation are relevant and admissible in cases charging the defendant with gang-related crimes. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1433-1434, 1437 (*Valdez*) [photograph of defendant making gang signs and other content from MySpace page properly admitted to explain gang motive for crime]; *Garcia, supra*, 168 Cal.App.4th at pp. 276-278 [photographs of defendants making gang signs and holding shotgun properly admitted to prove intent].)

Here, the photographs of four of the five defendants making gang signs, displaying gang tattoos, or wearing gang clothing tended to establish their membership in the Valleros gang. The photographs of gang graffiti at the restaurant where Martinez and Escobedo were attacked; Reyes and codefendants Bojorquez, Gaspar and Orosco wearing

items of clothing identical to those worn by the attackers; and codefendant Orosco posing with a shotgun next to the vehicle Escobedo saw as he drove away from the restaurant, tended to connect defendants to the attack. The various photographs were therefore relevant and admissible because together they supported an inference the attack was gang related. (See Evid. Code, §§ 210, 351; *Valdez, supra*, 201 Cal.App.4th at p. 1437; *Samaniego, supra*, 172 Cal.App.4th at p. 1167; *Garcia, supra*, 168 Cal.App.4th at pp. 277-278.)

Like photographs indicating gang affiliation, rap lyrics describing gang activities are relevant and admissible in cases charging gang-related crimes. (*Zepeda, supra*, 167 Cal.App.4th at p. 35 [songs showed defendant's gang had motive and intent to kill rival gang members]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372-1373 (*Olguin*) [rap lyrics properly admitted when crime allegedly gang related because gang membership "obviously important," and evidence tending to show it "highly relevant"].) Here, the rap songs Tripoli found on MySpace were sung by codefendant Gaspar and another Valleros gang member and generally referred to membership in and loyalty to the gang, criminal activities of the gang and rivalry with another gang. One song alluded to Gaspar's disappearance after the attack on Martinez and Escobedo, and to the confinement of Ibarra's younger brother who was arrested and sent to juvenile hall in connection with the investigation of the very attack at issue in this case. As in *Zepeda* and *Olguin*, the songs had some tendency to connect the Valleros gang to the charged crimes and thus were relevant and admissible on the issue whether the crimes were gang related. (See § 186.22, subd. (b)(1).)

Ibarra and Reyes contend, however, the photographs and rap songs were irrelevant because Ibarra was not depicted in any of the photographs, Reyes was depicted in only two, and neither of them sang or was mentioned in the rap songs. We disagree. Although Ibarra was not depicted in any of the photographs, they support an inference Reyes and the other codefendants, who were depicted therein and with whom Ibarra committed the charged crimes, were Valleros gang members. Similarly, although the rap songs do not mention and were not sung by Ibarra or Reyes, the lyrics link codefendant Gaspar and the Valleros gang to the crimes with which Ibarra and Reyes were charged. Hence, the photographs and songs *at a minimum* support an inference that Ibarra and Reyes committed the charged crimes "in association with [a] criminal street gang" and with the "intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 [non-gang member's commission of crime with known gang member supports inference crime was gang related]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [gang member's commission of crime with fellow gang members supports inference crime was gang related].) No more was required for that evidence to be relevant and admissible. (Evid. Code, §§ 210, 351.)

Finally, we reject Ibarra's and Reyes's arguments that exclusion of the rap songs and photographs was required on the ground the probative value of the evidence was "substantially outweighed" by the probability its admission would cause "undue prejudice." (Evid. Code, § 352.) We agree the photographs and songs illustrated what Ibarra and Reyes describe as a "sinister" or "nefarious gang lifestyle." But that lifestyle

was a central issue in this case because the charged offenses were all alleged to be gang related. The "fact probative evidence reflects negatively on a defendant is not grounds for its exclusion" under Evidence Code section 352. (*Valdez, supra*, 201 Cal.App.4th at pp. 1437-1438; see also *Olguin, supra*, 31 Cal.App.4th at p. 1373 ["The mere fact the lyrics might be interpreted as reflective of a generally violent attitude could not be said 'substantially' to outweigh their considerable probative value."].) Rather, as noted earlier, the type of prejudice with which Evidence Code section 352 is concerned is that which tends to evoke an emotional bias against a party or to cause a jury to prejudge a party based on factors other than the evidence presented at trial. (*Scott, supra*, 52 Cal.4th at pp. 490-491; *People v. Tran* (2011) 51 Cal.4th 1040, 1048 (*Tran*).) The photographs and songs challenged here were much less graphic and inflammatory than the brutal attack Escobedo described and "did not rise to the level of evoking an emotional bias against [either] defendant as an individual *apart from what the facts proved*." (*Zepeda, supra*, 167 Cal.App.4th at p. 35, italics added.)

In sum, the trial court did not abuse its discretion in admitting the photographs and songs Tripoli found on the MySpace Web site. (See *People v. Williams* (1997) 16 Cal.4th 153, 193 ["in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect"].) Further, by admitting those items in accordance with the generally applicable rules of evidence, including Evidence Code section 352, the trial court did not violate Ibarra's or Reyes's constitutional rights to due process or a fair trial. (See, e.g., *People v. Kraft* (2000) 23 Cal.4th 978, 1035 ["Application of the ordinary rules of evidence

generally does not impermissibly infringe on a capital defendant's constitutional rights."].)

B. *The Trial Court Properly Admitted Evidence of Prior Offenses*

Ibarra and Reyes also complain the trial court committed prejudicial error when it admitted evidence of other crimes committed on the same night they robbed Martinez and Escobedo and vandalized Escobedo's truck. Ibarra and Reyes contend this evidence should not have been admitted because the other crimes were not sufficiently similar to the charged robberies and vandalism to be probative of identity, intent or motive; and because its admission violated Evidence Code section 352 and deprived them of a fair trial. We will again set forth additional pertinent facts and then explain why we reject this claim of error.

1. *Additional Pertinent Facts*

On the same night as the attack on Martinez and Escobedo, two other incidents involving Valleros gang members occurred in Valley Center:

At approximately 8:00 p.m., Erick Pamatz and Juan Lopez were attending a friend's birthday party. Gaspar arrived at the party wearing a San Diego Chargers jersey. Gaspar asked Lopez whether he was "a gang banger." When Lopez said he was not, Gaspar grabbed Lopez's shirt and punched him in the mouth.

After Gaspar punched Lopez, Gaspar joined four or five other men in a white Jeep Grand Cherokee that Bojorquez was driving. As they departed in the vehicle, the men yelled "Valleros" and fired gunshots.

At approximately 9:00 p.m., Genaro Rodriguez and his wife were leaving a baptismal party and walking toward their car when five men approached and began insulting them. As the Rodriguezes returned to the party, one of the men followed and said, "We are Valleros." From inside the house, Rodriguez heard the windows and headlights of his car being smashed. He also heard gunshots as the men drove away in a white Jeep Grand Cherokee.

Another guest at the baptismal party heard men yelling "Valleros" as they smashed the windows and headlights of Rodriguez's car. The guest identified two of the men as Oroasco and Bojorquez.

The People moved in limine for an order allowing them to introduce evidence of the prior incidents described above for two purposes: (1) to prove the firearm enhancement allegations, and (2) to prove the identity of those who attacked Martinez and Escobedo. Reyes and Ibarra moved in limine for an order excluding evidence of the prior incidents on the grounds it was "very weak," had "no probative value" and was "highly prejudicial." The court ruled the evidence of the prior incidents was admissible.

At trial, witnesses testified about the prior incidents, as detailed above. The jury was instructed it could consider those incidents only in deciding whether "[t]he defendants were the people who committed the offenses alleged in this case," whether "a firearm was used by one of the defendants or another principal in the alleged offenses," or whether the charged offenses were gang related. (See CALCRIM No. 375.)

## 2. *Legal Analysis*

As with the rap songs and photographs, we must determine whether the trial court properly admitted the evidence of the prior crimes or whether, as Ibarra and Reyes contend, the court should have excluded that evidence as irrelevant and unduly prejudicial. Again, we begin by setting forth the established legal principles that guide our determination.

Evidence of a defendant's commission of a crime for which he has not been charged is not admissible to show bad character or predisposition to criminality. (Evid. Code, § 1101, subd. (a); *People v. Roldan* (2005) 35 Cal.4th 646, 705 (*Roldan*), disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Such evidence may be admitted, however, to prove a material fact at issue. (Evid. Code, § 1101, subd. (b).) In particular, "that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent and motive in the present crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*Roldan*, at p. 705.)

Because evidence the defendant committed a crime on a separate occasion is "inherently prejudicial" (*Tran, supra*, 51 Cal.4th at p. 1047) and ""may be highly inflammatory, its admissibility should be scrutinized with great care"" (*Roldan, supra*, 35 Cal.4th at p. 705). When the prosecution seeks to prove the defendant committed the charged offense by evidence he committed uncharged offenses, admissibility depends

upon proof the charged and uncharged offenses share common marks sufficiently distinctive to raise an inference of identity. (*Ibid.*) To establish identity, "[t]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." [Citation.] Requiring a 'highly unusual and distinctive nature [for] both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense.'" (*Id.* at p. 706.) Less similarity is required to show a common plan or scheme, and still less similarity is required to show intent. (*Id.* at p. 705.)

We review a trial court's ruling on the admissibility of other-crimes evidence under Evidence Code sections 352 and 1101 for abuse of discretion. (*Tran, supra*, 51 Cal.4th at p. 1050; *Roldan, supra*, 35 Cal.4th at p. 705.) As we shall explain, no such abuse occurred here because the evidence of the incidents at the birthday party and the baptismal party was relevant and admissible to prove the identity, intent and motive of the perpetrators of the subsequent attack on Martinez and Escobedo.<sup>7</sup>

Ibarra and Reyes concede identity was an issue at trial. (See, e.g., *Roldan, supra*, 35 Cal.4th at pp. 705-706 [defendant placed issue of identity of perpetrator in dispute by pleading not guilty].) They complain, however, that "the prior incidents did not have sufficient distinctive similarities to be relevant to establish identity," and that "[t]here was

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<sup>7</sup> Because we conclude the other-crimes evidence was admissible on the issues of identity, intent and motive, we need not and do not address the parties' arguments regarding the admissibility of that evidence as circumstantially tending to prove that a firearm was used in the commission of the charged offenses.

nothing so distinctively similar in the incidents that would distinguish the prior incidents from other crimes of the same variety." Specifically, Ibarra and Reyes point out that no witness placed them at the scenes of the prior incidents, and insist the only similarity among the three incidents was that they were eventually apprehended in the white Jeep Grand Cherokee identified in each incident. Thus, they claim the other-crimes evidence was not probative of identity and should not have been admitted. We disagree.

Many factors suggested the same group of people committed the offenses at the birthday party, the baptismal party and the restaurant: (1) geographical proximity (*People v. Miller* (1990) 50 Cal.3d 954, 988-989); (2) temporal proximity (*People v. Prince* (2007) 40 Cal.4th 1179, 1271); (3) use of the same weapon (a shotgun) (*Roldan, supra*, 35 Cal.4th at p. 706; *People v. Miller, supra*, 50 Cal.3d at p. 988); (4) use of the same vehicle (Bojorquez's white Jeep Grand Cherokee) (*Roldan, supra*, at p. 706; *People v. Miller, supra*, 50 Cal.3d at p. 988; *People v. Medina* (1995) 11 Cal.4th 694, 748); (5) utterance of similar statements (gang references) (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1448-1449; *People v. Donnell* (1975) 52 Cal.App.3d 762, 776); (6) presence of the same number of individuals at all three scenes wearing similar clothing (*Roldan, supra*, at p. 706; *Donnell, supra*, at p. 776); and (7) common accomplices (codefendants Bojorquez, Orosco and Gaspar), whom independent witnesses placed at one or both of the scenes of the prior crimes (*People v. Cavanaugh* (1968) 69 Cal.2d 262, 274-275 (*Cavanaugh*); *People v. Haston* (1968) 69 Cal.2d 233, 249-250 (*Haston*); *People v. Robinson* (1995) 31 Cal.App.4th 494, 503). These factors, when considered together,

"yield a distinctive combination" (*Haston*, at p. 246)<sup>8</sup> supporting an inference that the men identified and apprehended after Bojorquez crashed his vehicle were the same men who assaulted Lopez at the birthday party, vandalized Rodriguez's car at the baptismal party, and attacked Martinez and Escobedo at the restaurant. Hence, the evidence of the prior incidents at the birthday and baptismal parties was relevant and admissible on the issue of identity of the perpetrators of the attack at the restaurant. (Evid. Code, § 1101, subd. (b); *Roldan*, at p. 706.)

The evidence of the earlier offenses also tended to prove the gang enhancement allegations. As noted, the evidence established that within a span of three hours and

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<sup>8</sup> Reyes contends *Haston*, *supra*, 69 Cal.2d 233, on which the trial court primarily relied, does not support the admissibility of the other-crimes evidence in this case. In *Haston*, our Supreme Court held the "presence of Donald McDowell as one of the perpetrators of both the charged and uncharged offenses" was "a mark whose distinctive nature tends to differentiate those offenses from other[s]" and to give evidence of the uncharged offenses "some probative value on the issue of identity." (*Id.* at p. 249.) Reyes attempts to distinguish *Haston* on two grounds: (1) unlike the defendant in *Haston*, Reyes did not admit he committed the prior offenses; and (2) unlike the codefendant in *Haston*, Ibarra did not plead guilty to the current offenses. The Supreme Court, however, rejected this distinction on the same day it decided *Haston*: "In *Haston* the common confederate, McDowell, pleaded guilty to the charged offenses, and both he and the defendant took the stand and admitted they had jointly committed the uncharged offenses. In the case at bar defendant complains that the participation of Joseph Ponte was not similarly proved. But the record contains ample affirmative evidence, in the form of eyewitness testimony, that Ponte was defendant's confederate in both the charged and uncharged offenses. The People were not required, in prosecuting defendant, to prove Ponte guilty of these crimes beyond a reasonable doubt; it was enough to show the fact of his participation, like any other common mark, by a preponderance of the evidence. [Citation.] That burden was clearly sustained." (*Cavanaugh*, *supra*, 69 Cal.2d at p. 273, fn. 9.) The record here contains similar eyewitness testimony that Bojorquez, Orosco and Gaspar were Reyes's accomplices in the prior and charged offenses. Thus, the common accomplice rule of *Haston* applies and supports the trial court's decision to admit the other-crimes evidence.

within the same geographical area, a group of five individuals traveled in the same vehicle from one crime scene to the next; announced they were Valleros gang members at each scene; brandished or discharged a firearm at each scene; and threatened, beat or robbed victims at each scene. From these facts and other evidence introduced at trial,<sup>9</sup> the jury reasonably could conclude the attack on Martinez and Escobedo was part of a crime spree by Valleros gang members. Accordingly, the evidence of the incidents at the birthday and baptismal parties was relevant and admissible to prove the motive and intent for the subsequent incident involving Martinez and Escobedo at the restaurant. (See Evid. Code, § 1101, subd. (b) [evidence of defendant's prior crimes admissible to prove motive or intent]; *People v. Martin* (1994) 23 Cal.App.4th 76, 81-82 [evidence of defendant's prior gang-related acts admissible to prove gang enhancement].)

Ibarra and Reyes complain, however, that any probative value of the other-crimes evidence was substantially outweighed by its prejudicial effect (Evid. Code, § 352), and its admission deprived them of due process and a fair trial (U.S. Const., 14th Amend.). Again, we disagree. "[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.'" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550; accord, *Samaniego, supra*, 172 Cal.App.4th at p. 1168.) In addition, the evidence of the offenses at the birthday and baptismal parties "was less

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<sup>9</sup> Tripoli testified the Valleros gang's criminal activities include intimidation of witnesses, assault with a deadly weapon, robbery and murder.

inflammatory than the testimony about the charged offenses" (*Tran, supra*, 51 Cal.4th at p. 1050): although Lopez was punched at the birthday party, Rodriguez's car was vandalized at the baptismal party and shots were fired at both parties, the charged offenses involved a brutal beating with a shotgun and a crowbar that resulted in substantial bodily injury to Escobedo. Finally, the trial court reduced the likelihood of any undue prejudice when it "gave [two] limiting instruction[s], telling the jury evidence of separate criminal acts by gang members could not be considered to prove defendant was a person of bad character or had a disposition to commit crimes." (*Ibid.*; see CALCRIM Nos. 375, 1403.) We presume the jury understood and followed these limiting instructions. (*People v. Lindberg* (2008) 45 Cal.4th 1, 26 (*Lindberg*); *People v. Williams* (2009) 170 Cal.App.4th 587, 607.)

In sum, the probative value of the evidence concerning the incidents at the birthday and baptismal parties "far outweighed its prejudicial effect, justifying the trial court's decision to admit it." (*Tran, supra*, 51 Cal.4th at p. 1050.) And "because the evidence was relevant to prove a fact of consequence, its admission did not violate [Ibarra's or Reyes's] due process rights." (*Foster, supra*, 50 Cal.4th at p. 1335; see also *Lindberg, supra*, 45 Cal.4th at p. 26 [rejecting defendant's contention that admission of uncharged offenses violated his rights to due process and a fair trial].)

C. *No Cumulative Effect of Error Requires Reversal*

Reyes contends the cumulative effect of the trial court's erroneous evidentiary rulings requires reversal of the judgment against him. We have concluded, however, that the trial court did not err in admitting the evidence of which he complains on appeal.

Without any error, there obviously can be no cumulative effect of error requiring reversal. (E.g., *People v. Dement* (2011) 53 Cal.4th 1, 58; *People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

D. *The Trial Court Erred by Imposing a 10-year Firearm Enhancement for Ibarra's Conviction on Count 3*

Ibarra contends the trial court erroneously imposed both a 10-year gang enhancement for his conviction on count 2 (robbery of Martinez) and a 10-year firearm enhancement for his conviction on count 3 (robbery of Escobedo). According to Ibarra, because the jury was unable to reach a verdict on whether Reyes personally used a firearm in the robberies, "increasing his [i.e., Ibarra's] sentence with both firearm-use enhancement and criminal street gang enhancement was barred by section 12022.53, subdivision (e)(2)." Ibarra thus argues the firearm enhancement should be stayed or stricken. The People contend the sentencing court properly imposed the firearm enhancement, but erred in imposing the full 10 years. We agree with the People.

A defendant who does not personally use or discharge a firearm but participates in a gang-related crime in which a principal personally uses or discharges a firearm is subject to additional punishment under *either* section 12022.53 *or* section 186.22, but *not both*. (§ 12022.53, subd. (e)(2); *People v. Brookfield* (2009) 47 Cal.4th 583, 593-594 (*Brookfield*)). In sentencing the defendant, the court must select the statute that will yield the longer prison sentence. (§ 12022.53, subd. (j); *Brookfield*, at p. 596.) When a defendant who did not personally use or discharge a firearm is convicted of multiple violent and gang-related crimes against multiple victims in which a principal personally

used or discharged a firearm, the court must make this selection for each conviction because the additional punishments prescribed by sections 12202.53 and 186.22 both potentially apply. (§§ 186.22, subd. (b)(1) [additional punishment applies to person convicted of "a felony" that is gang related], 12022.53, subd. (f) [additional punishment applies "for each crime"]; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402-1403 [gang enhancement applied to each of defendant's three convictions of attempted murder of separate victims]; *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 711-712 [firearm enhancement applied to each of defendant's murder and robbery convictions], disapproved on unrelated grounds by *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130, fn. 8.)

Here, the jury found Ibarra guilty on count 2, but found only the attached gang enhancement allegation true; it did not find the attached firearm enhancement allegation true. The sentencing court therefore did not have to select between the firearm enhancement and the gang enhancement, and properly imposed only the additional 10-year prison term for the latter. (§ 186.22, subd. (b)(1)(C).)

On count 3, however, the jury found Ibarra guilty and also found the attached firearm and gang enhancement allegations both true.<sup>10</sup> The court therefore had to select

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<sup>10</sup> Although Ibarra correctly points out the jury did not find Reyes personally used a firearm in the commission of the robbery charged in count 3, the jury did find "at least one principal personally used a firearm" in the commission of that crime. Thus, the jury apparently had reasonable doubt whether Reyes personally used a firearm, but had no reasonable doubt at least one of Ibarra's codefendants was a principal who personally used a firearm. The jury's finding that at least one principal personally used a firearm in the robbery charged in count 3, coupled with its true finding on the gang enhancement

between the two enhancements. Because the gang enhancement does not prescribe a longer prison term than the firearm enhancement — both specify an additional term of 10 years (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (b), (e)(1)) — the court was required to impose only the firearm enhancement. (§ 12022.53, subds. (e)(2), (j); *Brookfield, supra*, 47 Cal.4th at p. 596.) Following the probation officer's recommendation, the court properly imposed the firearm enhancement, and also imposed, but stayed execution of, the gang enhancement. (See *People v. Sinclair* (2008) 166 Cal.App.4th 848, 854-855 [when court imposes firearm enhancement under § 12022.53, subd. (e)(2), it must impose and stay execution of gang enhancement unless it strikes gang enhancement].)

The court, however, erred by imposing the full 10 years for the firearm enhancement attached to count 3. (See § 12022.53, subds. (b), (e)(1).) Because the court imposed consecutive sentences for Ibarra's convictions and selected count 2 as the principal count, the court was required to sentence Ibarra to prison for only one-third of the 10-year term (i.e., three years four months) prescribed for the firearm enhancement. (§ 1170.1, subd. (a); *People v. Hill* (2004) 119 Cal.App.4th 85, 91.) We modify the judgment against Ibarra accordingly. (See *People v. Moody* (2002) 96 Cal.App.4th 987, 994 [modifying judgment to reduce § 12022.53, subd. (b) enhancement from 10 years to three years four months for conviction on subordinate count].)

#### DISPOSITION

The judgment against Reyes is affirmed.

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allegation in that count, was sufficient to subject Ibarra to the firearm enhancement. (§ 12022.53, subds. (b), (e)(1); *Brookfield, supra*, 47 Cal.4th at pp. 593-594.)

The judgment against Ibarra is modified by reducing the term of imprisonment for the firearm enhancement attached to the conviction on count 3 from 10 years to three years four months. This will reduce Ibarra's aggregate prison term from 27 years eight months to 21 years. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment that reflects these modifications, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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IRION, J.

WE CONCUR:

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NARES, Acting P. J.

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AARON, J.