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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON FRANCISCO GRANADO,

Defendant and Appellant.

D058198

(Super. Ct. No. FWV802050)

APPEAL from a judgment of the Superior Court of San Bernardino County,
Mary E. Fuller, Judge. Affirmed as corrected.

In this case the appellant was convicted of the attempted premeditated murder of a police officer. In addition, the jury found appellant was a felon in possession of a firearm, discharged a firearm, used a firearm, and committed the attempted murder for the benefit of a gang.

Appellant was stopped by a police officer and, following an initial attempt to flee on foot from the location of the traffic stop, exchanged multiple gunshots with the officer.

In his principal contentions on appeal, appellant makes related hearsay and confrontation clause arguments with respect to statements attributed to a witness whose home was invaded by appellant as appellant attempted to flee the scene of the shooting. The record suggests the witness was very frightened and made the disputed statements in an effort to obtain assistance from the police after his home had been invaded by the appellant and neither the witness nor the law enforcement personnel present were entirely sure appellant had been apprehended or was acting alone. As excited utterances, the statements were not barred by the hearsay rule. Moreover, the record shows the likelihood of excluding the statements on the alternative grounds they were testimonial and therefore barred by the confrontation clause of the United State Constitution was not very great and that the cost of requiring the prosecution to meet such a constitutional objection by elaborating further on the witness's frightened state of mind far outweighed the benefit of excluding what turned out to be the witness's fairly benign statements. Thus the trial court did not error in overruling trial counsel's hearsay objection and trial counsel, having been overruled on his hearsay objection, apparently made a valid tactical decision to forego a doubtful confrontation clause objection and instead move the jury's attention away from a further damaging discussion of the victim's mental state.

Importantly, even if the witness's statements were objectionable they were in no sense prejudicial. The witness's statement did not identify appellant as the shooter, but merely explained how law enforcement officers located the gun appellant used in the shooting and a shirt he was wearing. DNA evidence and other witness testimony, not the

witness's out of court statement, convincingly connected appellant to the gun and the shirt.

In addition to his hearsay and confrontation clause objections, appellant argues his trial counsel was ineffective in failing to raise objections to gang evidence offered by the prosecution and in failing to move to bifurcate trial of the gang allegations. We reject these contentions as well.

With one exception, we also reject appellant's contentions with respect to the sentence imposed by the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jason Francisco Granado is a member of the Pomona 12th Street Sharkeys, a criminal street gang. At approximately 10:00 in the morning on July 22, 2008, Granado was pulled over in an alley in Ontario by Ontario Police Officer Craig Pefferle. Pefferle stopped Granado because Granado failed to stop at a stop sign.

While Pefferle was waiting for a report on the license plate number on the car Granado was driving, Granado got out of the car, disobeyed Pefferle's order to get back in the car, and began running south in the alley. Pefferle chased Granado down the alley and drew his weapon; Granado ignored Pefferle's order to stop and get on the ground and instead jumped over a small wall and began running toward an adjacent street.

Pefferle returned to the alley where his patrol car and Granado's car were still parked. When Pefferle approached his patrol car, he saw Granado crouched on the driver's side of the car, near the driver's door, peeking over the hood of the patrol car. As

Pefferle approached the patrol car, Granado moved to the right rear of the patrol car; when Pefferle reached the front of the patrol car, Granado stood with both arms extended in front of him and fired three shots from a handgun at Pefferle. Pefferle fired one shot at Granado, who began running down a sidewalk. Pefferle chased Granado and fired two more shots at him.

Pefferle radioed to his dispatcher that shots had been fired and continued to pursue Granado. Pefferle got within 30 to 40 feet of Granado, who fired three or four more shots at Pefferle. At that point Pefferle returned to his patrol car to wait for backup. In the meantime, a bystander saw Granado climb over a wall at the rear of his next door neighbor's house. Shortly thereafter, the bystander and Pefferle saw Granado, who had been wearing a button down shirt, go out the front door of the neighbor's house wearing a tank top. Granado crossed the street and began walking toward a laundromat, where he was apprehended by other officers responding to Pefferle's report of shots being fired.

Another Ontario police officer, Sergeant James Renstrom, also responded to Pefferle's report. Renstrom found Pefferle near his patrol car and Pefferle appeared shaken and upset. Pefferle directed Renstrom to the house Granado had entered. As Renstrom and two other officers approached the front steps of the house, the occupant, who was only identified as Mr. Cuevas, came out onto the porch.

According to Renstrom, Cuevas was very upset and could barely speak. Through gestures and stuttering speech, Cuevas indicated that a man had come into his house with a gun and had demanded a ride. According to Cuevas, the invader took off his shirt,

wrapped the gun in the shirt and left the shirt and gun on a table near the front door of Cuevas's home. Cuevas appeared very anxious for the officers to go into his home and retrieve the gun; Renstrom believed that Cuevas was also concerned that other people were still in the home. Renstrom and the other officer went into Cuevas's home, determined that no one else was in the home and located the shirt and gun. Renstrom examined the gun and determined that it was unloaded. To assuage Cuevas's continuing fears, Renstrom posted an armed officer at the front door of Cuevas's home to make sure no one else entered the house.

After his inspection of Cuevas's home, Renstrom went to the location where Granado had been apprehended. Renstrom went there to conduct an infield identification of Granado as the shooter observed by Peferrle and the other witnesses who had seen the shooting. Renstrom found Granado in the back of an ambulance where he was being treated for a gash on his left arm. While Granado was in the ambulance, Granado told Renstrom he was trying to kill himself. Granado then told the ambulance driver "I'm going to be gone for a long time."

At or near the time Granado was apprehended, another Ontario detective was following up on a report that a different suspect in the shootings had been seen running in the area and getting on a bus. In response to that report, a police helicopter began following the bus and Ontario law enforcement personnel contacted police in the neighboring community of Chino, where Chino police eventually stopped the bus and

detained the suspect. The Ontario detective went to the Chino location where the suspect was detained, questioned him, and determined that he was not involved in the shooting.

After the shooting, police determined the car Pefferle stopped was registered to Granado's daughter. According to Granado's daughter, Granado had taken it without her permission earlier in the month and had not returned it.

At trial an investigator and a parole officer with the Arizona Department of Corrections both testified as to Granado's gang affiliations. According to the investigator, Granado admitted to being a member of both the Pomona 12th Street Sharkeys and the Surenos and had tattoos indicating his affiliation with the Pomona 12th Street Sharkeys. Granado also admitted to the parole officer that he was involved with the Surenos and the 12th Street Pomona Sharkeys. According to the parole officer, Granado failed to report for a September 2007 meeting with his parole officer, a parole warrant was issued and was outstanding at the time Pefferle stopped Granado.

A gang expert testified as to the extensive criminal activities of the 12th Street Pomona Sharkeys and opined that killing Pefferle would have enhanced both Granado's reputation within the gang and the overall reputation of the gang itself. Thus the gang expert believed the shooting was for the benefit of Granado's gang.

As we indicated at the outset, a jury found Granado guilty of premeditated attempted murder of a police officer and being a felon in possession of a firearm; the jury found true gun use, gun discharge and gang enhancements. In a separate proceeding the trial court found Granado had suffered seven prior strike convictions. The trial court

sentenced Granado to an indeterminate term of 70 years to life and a consecutive determinate term of 23 years.

DISCUSSION

I

In his principal arguments on appeal, Granado challenges admission of the statements Cuevas made to Renstrom on the porch of his house. As we noted, Granado contends the trial court erred in overruling his hearsay objection to the statements and that in failing to also object on confrontation grounds, his trial counsel was ineffective. Because it informs our discussion of Granado's ineffective assistance claim, we take up the hearsay argument first.

A. Hearsay

1. Additional Background

After testifying about Pefferle's shaken state, Renstrom testified he went to Cuevas's home and Cuevas came out on his porch to meet Renstrom and the officer who was accompanying him. At that point in his testimony, Renstrom was about to volunteer what Cuevas told him on the porch and Granado's counsel objected on hearsay grounds. In response to the objection, the prosecutor then laid a foundation for admission on the grounds Cuevas's statement was an excited utterance within the meaning of Evidence Code section 1240. In response to the prosecutor's foundational questions, Renstrom described in some detail how upset Cuevas was, how he was stuttering and pointing to the inside of his house. After an unreported sidebar conference, the prosecutor was

permitted to ask Renstrom what Cuevas said on the porch. Renstrom testified: "He told me that there was just a guy in his house with a gun demanding a ride from him. He said the guy took off his shirt and wrapped the gun up in the shirt and placed it on a table next to his front door." The prosecutor then asked a further question about Cuevas's demeanor and Renstrom responded: "He was visibly upset and he kept pointing into the house. He was very excited for us to go in there and look and to find the gun. I also thought maybe he was still scared to go back in the house maybe there was—maybe somebody else was in the house. He wasn't sure. He was just very upset."

According to Renstrom, he then went into the house, located the gun, made sure it was not loaded and determined no one else was in the house. Notwithstanding the fact that he did not find anyone in the house, Renstrom left an armed officer at the house with Cuevas so that no one else could enter the house. As we have noted, Renstrom then went to coordinate the infield identification of Granado.

2. Evidence Code Section 1240

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." The crucial element in determining whether a statement is spontaneous within the meaning of section 1240 is the mental state of the speaker and in determining that issue the trial court is vested with reasonable discretion. (See *People v. Farmer*

(1989) 47 Cal.3d 888, 903-904, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 729, fn. 6.)

There is no dispute Cuevas's statement described events he perceived. Contrary to Granado's argument, Renstrom's testimony about Cuevas's agitated behavior and state of mind were more than sufficient to establish Cuevas was still under the stress of the home invasion he had just endured. Indeed, as we have noted, Renstrom testified that shortly before meeting Cuevas he observed Pefferle and Pefferle was also still under the stress of the shots that had been fired at him by Granado. Although, as Granado points out Renstrom did not provide a detailed time line of when he spoke with Cuevas or what precise questions he asked Cuevas, Renstrom's testimony that he responded to the report of shots fired, located a still shaken Pefferle and then went to Cuevas's home, where he found an agitated and nearly speechless crime victim, are abundant evidence from which the trial court could conclude Cuevas's statements were not the product of deliberation or reflection but were in fact spontaneous utterances. (See *People v. Farmer, supra*, 47 Cal.3d. at pp. 903-904.) Thus we find no error in the trial court's ruling on Granado's hearsay objection.

Now we turn to Granado's related claim trial counsel should have also made a confrontation clause objection to Cuevas's statement.

B. *Ineffective Assistance of Counsel*

1. *Deficient Performance and Prejudice*

"An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.]

"To establish prejudice, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.] In demonstrating prejudice, the appellant 'must carry his burden of proving prejudice as a "demonstrable reality," not simply speculation as to the effect of the errors or omissions of counsel.' [Citation.]

"In determining whether counsel's performance was deficient, we exercise deferential scrutiny. [Citations.] The appellant must affirmatively show counsel's deficiency involved a crucial issue and cannot be explained on the basis of any knowledgeable choice of tactics. [Citations.]" (*People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146–1147.)

In particular, where " 'there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance.'

[Citation.] And, even when there was a basis for objection, ' "[w]hether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference [citations], failure to object seldom establishes counsel's incompetence." [Citation.] "In order to prevail on [an ineffective assistance of counsel] claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." [Citation]' [Citation.]" (*People v. Majors* (1998) 18 Cal.4th 385, 403.)

2. *Confrontation Clause*

In the landmark case of *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354] (*Crawford*), the United States Supreme Court held the confrontation clause of the Sixth Amendment to the United States Constitution requires that before a witness's out-of-court "testimonial" statement may be admitted in a criminal proceeding, the witness must be unavailable and the witness's prior statement must have been subject to the defendant's right of cross-examination. Although the court in *Crawford* expressly declined to provide a comprehensive definition of "testimonial," it concluded that at a minimum testimonial statements include "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations." (*Ibid.*) Thus, in *Crawford* the court held that a wife's statement to police while she was in custody and in response to police interrogation could not be admitted against her husband at his murder trial. (*Ibid.*)

Since *Crawford*, the Supreme Court has elaborated on the definition of testimonial statements subject to the protection of the confrontation clause. In a pair of domestic violence cases, *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266] (*Davis*) and *Hammon v. Indiana* (2006) 547 U.S. 813 (*Hammon*), which the court decided jointly, the court concluded that statements taken by law enforcement personnel during the course of an ongoing emergency are not testimonial and thus not subject to the requirements of the confrontation clause. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 547 U.S. at p. 822, fn. omitted.) In *Davis* the court found that the victim's recorded statement to a 911 operator reporting her boyfriend's ongoing attack was nontestimonial in that it reported ongoing events and was needed so that law enforcement personnel could resolve a present emergency. (*Davis, supra*, 547 U.S. at p. 827.) In contrast, in *Hammon* the court found that written and oral statements the victim gave to a police officer while her husband was physically separated from her by another police officer were testimonial. (*Hammon, supra*, 547 U.S. at pp. 829-830.) The court found that at that point the emergency had come to an end and that from an objective point of view it was clear the

statements were taken from the victim as a means of establishing her husband's culpability. (*Ibid.*)

More recently, in *Michigan v. Bryant* (2011) __U.S.__ [131 S.Ct. 1143] (*Bryant*), the Supreme Court elaborated further on the means by which we should evaluate the impact an ongoing emergency has on the admissibility of statements made by crime victims. In *Bryant* police officers interviewed the victim of a shooting who was lying next to his car in a gas station parking lot. The victim was in great pain and had difficulty speaking. In response to the officer's questions, the victim explained he had gone to the backdoor of the defendant's house, spoke with the defendant through the door, turned around, walked away and was shot through the door. The victim drove himself to the gas station. Shortly after making the statements, the victim was taken to a hospital, where he died.

The court in *Bryant* found the victim's statements were not testimonial. In reaching this conclusion, the court noted that statements made during an ongoing emergency are outside the protection of the confrontation clause for many of the reasons excited utterances are not excluded by the hearsay rule. "As our recent Confrontation Clause cases have explained, the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important circumstances informing the 'primary purpose' of an interrogation. [Citations.] The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than

'prov[ing] past events potentially relevant to later criminal prosecution.' [Citation.] Rather, it focuses them on 'end[ing] a threatening situation.' [Citation.] Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination." (*Bryant, supra, __U.S.__*, 131 S.Ct. at p. 1157, fn. omitted.)

"This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements 'relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,' [citations], are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. See *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) ('The basis for the "excited utterance" exception . . . is that such statements are given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation'); 5 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 803.04[1] (J. McLaughlin ed., 2d ed.2010) (same); Advisory Committee's Notes on Fed. Rule Evid. 803(2), 28 U.S.C.App., p. 371 (same). An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." (*Bryant, supra, __U.S.__*, 131 S.Ct. at p. 1157, fn. omitted.)

With respect to determining the impact of an emergency on a witness's or victim's statement, the court stated: "The existence of an ongoing emergency must be objectively assessed from the perspective of the parties to the interrogation at the time, not with the

benefit of hindsight. If the information the parties knew at the time of the encounter would lead a reasonable person to believe that there was an emergency, even if that belief was later proved incorrect, that is sufficient for purposes of the Confrontation Clause. The emergency is relevant to the 'primary purpose of the interrogation' because of the effect it has on the parties' purpose, not because of its actual existence." (*Bryant, supra*, __U.S.__, 131 S.Ct. at 1157, fn. 8.)

In addition to the circumstances under which a statement was made, "the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation." (*Bryant, supra*, __U.S.__, 131 S.Ct. at p. 1160.)

Of some pertinence here, the court in *Bryant* recognized that in any given emergency situation both police interrogators and crime victims may be acting with very mixed motives: "Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. See *New York v. Quarles*, 467 U.S. 649, 656, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984) ('Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect'); see also *Davis*, 547 U.S., at 839, 126 S.Ct. 2266 (THOMAS, J., concurring in judgment in part and dissenting in part) ('In many, if not most, cases where police

respond to a report of a crime, whether pursuant to a 911 call from the victim or otherwise, the purposes of an interrogation, viewed from the perspective of the police, are *both* to respond to the emergency situation *and* to gather evidence.')

"Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution. Taking into account a victim's injuries does not transform this objective inquiry into a subjective one. The inquiry is still objective because it focuses on the understanding and purpose of a reasonable victim in the circumstances of the actual victim—circumstances that prominently include the victim's physical state." (*Bryant, supra*, __U.S.__, 131 S.Ct. at pp. 1161-1162, fn. omitted.)

In applying these principles, the court in *Bryant* found the victim's identification of the shooter was not testimonial. The court relied on the fact that at the time the questioning took place, neither the victim nor the police knew the location of the shooter and the police did not know what circumstances had caused the altercation between the

victim and the shooter. (*Bryant, supra*, __U.S.__, 131 S.Ct. at pp. 1164-1165.) The court found the questions asked—" 'what had happened, who had shot him, and where the shooting occurred' "—sought information police needed to determine what action to take to protect themselves and the victim. (*Bryant, supra*, __U.S.__, 131 S.Ct. at p. 1166.) Finally, the court considered the informality of the setting—the parking lot of a gas station—as further evidence that the officers were trying to address what they viewed as an ongoing emergency rather than collect evidence. (*Ibid.*) The court found that these circumstances, taken together showed that the primary purpose of the interrogation was to enable police to meet an ongoing emergency and hence the victim's statements were not testimonial. (*Bryant, supra*, __U.S.__, 131 S.Ct. at p. 1167.)

3. *Analysis*

We begin our analysis by noting that, had a confrontation clause objection been made, under *Bryant* the prosecution could have made a fairly substantial argument Cuevas's statements were nontestimonial. Renstrom's description of Cuevas's agitated state not only supports the trial court's finding his statements were excited utterances, Cuevas's physical and mental state support the related conclusion his statements were made primarily as a means of obtaining police assistance in securing his home and the gun Granado had left. Of importance here also is the fact that at the time Renstrom spoke with Cuevas, Granado had not yet been positively identified as the shooter, and a second suspect had been identified by other witnesses and was being pursued by other law enforcement officers. Thus, although as he spoke to Cuevas, Renstrom may have known

that one suspect had been stopped, at that point in time it was not yet clear the actual shooter and any possible confederate had been apprehended. Those circumstances of course validate Cuevas's apparent fears that the crime or crimes were ongoing. It is also of some significance Cuevas's statements did not purport to identify Granado or anyone else as the invader, but was merely descriptive in fairly general terms of what Cuevas had just experienced.

Arguably then, Cuevas's statements themselves and all their attendant circumstances support a finding the statements were not given in contemplation of establishing anyone's guilt and therefore did not implicate Granado's constitutional right to confront the witnesses against him. (See *Bryant, supra*, __U.S.__, 131 S.Ct. at pp. 1166-1167.) Rather, the record supports the conclusion that at most this is a case of "mixed motives" and is insufficient to bar admission of a victim's statement. (See *Bryant, supra*, __S.Ct.__, 131 S.Ct. at pp. 1161-1162.) Thus we could conclude our analysis by simply determining a confrontation clause objection would not have had any merit and therefore trial counsel cannot be faulted for failing to make one. However, as we explain, while we do not believe trial counsel's representation was deficient, we reach that conclusion by way of a different analytical path.

On this record we are hesitant to simply conclude a confrontation clause objection would have been denied because, as Granado suggests, no confrontation clause objection was made and we do not know whether the trial court, which was vested with considerable discretion in making such an evidentiary ruling, would have sustained such

an objection. The trial court might have concluded that, notwithstanding Cuevas's frightened state, in going to Cuevas's home Renstrom's primary purpose was to collect evidence and his questioning was fundamentally designed to investigate a crime. Moreover, as Granado points out, because trial counsel did not pursue the matter beyond making a hearsay objection, we do not have a more complete record with respect to what Renstrom knew at the time he went to Cuevas's house or what precisely he asked Cuevas. Thus, Granado argues that in failing to make a better record on the confrontation clause issue, counsel was also deficient. This is where we part company with Granado: We believe the record with respect to counsel's excited utterance objection entirely vindicates counsel's apparent decision to dispense with an additional confrontation clause objection.

As we have noted, in responding to counsel's hearsay objection, the prosecution elicited vivid testimony from Renstrom about Cuevas's mental state following his encounter with Granado. Plainly, that foundational testimony did not engender any sympathy for Granado. Having heard the prosecution's foundation, the trial court then overruled the hearsay objection. The trial court's ruling on the hearsay objection, although not definitive with respect to a confrontation clause objection, did not bode well for the success of a constitutional objection. Thus the record shows that at that point in the proceedings a constitutional objection did not have a strong chance of being sustained and would give the prosecution the opportunity to continue focusing the jury's attention on the plight of Cuevas. In our view, trial counsel, in the heat of trial, wisely decided to cut Granado's losses and move the trial past Cuevas's plainly frightening experience. In

sum, we find no deficiency in counsel's unwillingness to raise an additional confrontation clause objection.

We not only conclude counsel acted appropriately, the record shows admission of Cuevas's statement did not prejudice Granado. Quite apart from Cuevas's statement, other admissible testimony and DNA evidence showed that Granado invaded Cuevas's home, that Cuevas was visibly upset and barely able to speak after the invasion, and most importantly, that Granado's shirt and gun were found in Cuevas's home. Cuevas's statement itself of course did not incriminate Granado because it did not purport to directly identify him. Thus, while somewhat helpful in explaining the circumstances under which Renstrom retrieved the shirt and gun, in light of other evidence about Granado's invasion of Cuevas's home and the limited nature of the statements, admission of Cuevas's statements was in no sense prejudicial. Our prejudice analysis is of course informed not only by the other evidence with respect to the invasion of Cuevas's home, but by the entire case against Granado, including Pefferle's testimony, the testimony of other witnesses who saw him fleeing and his own admissions to Renstrom after being apprehended.

In sum then, we reject Granado's claim his counsel was ineffective in failing to make an objection which, on the merits, was questionable, which would have opened the door to further damaging evidence related to Cuevas and which, it turns out, concerned a statement which was not prejudicial.

II

Next, Granado argues the trial court improperly permitted the prosecution's gang expert to testify he believed Granado attempted to kill Pefferle for the benefit of the 12th Street Sharkeys and that his trial counsel was ineffective in failing to object to the expert's testimony. We agree the expert's testimony was in an improper form and that an objection, had it been made, would have been sustained. However, because the expert went on to respond to an appropriate hypothetical question, which set forth facts which had been persuasively established and included a detailed recitation of Granado's gang participation, the other criminal acts of the 12th Street Sharkeys and the attempted murder of Pefferle, the expert's earlier more direct testimony about the benefit to the gang of the shooting was not prejudicial.

A. Additional Background

The prosecution's gang expert began his testimony by explaining in some detail the history, makeup and crimes committed by the 12th Street Sharkeys; in particular, the expert testified the gang was responsible for graffiti which stated "the only good cop is a dead cop." The prosecutor then posed the following question: "Now, sir, you reviewed—you reviewed the reports in this case, you watched the preliminary hearing in this case, you've looked at jail intake sheets, prison intake sheets, you've looked at the defendant's tattoos in person and in photographs, and you looked at—you've actually looked at the description of tattoos that the defendant has on his person. And based upon

that do you have an opinion on whether the defendant committed the act of attempted murder on a police officer with premeditation and deliberation for the benefit of, at the direction of or in association with a criminal street gang?" Granada's counsel objected to the question on the grounds it was leading and the objection was overruled. The expert then answered the question by stating he believed that not only did the 12th Street Sharkeys benefit from Granada's actions, "but also it benefits [Granada's] individual stature in the gang as well as in custody." In explaining his opinion, the expert stated that the gang benefits when a member attempts to kill a police officer: "Because it's what the top one percent of gang members are not willing to do, that type of activity, because they understand the ramifications that occur. But when somebody does something like that, not only does the gang receive a lot of publicity but that individual is respected for taking on what they consider to be the biggest nail in their side, a police officer. That person is respected not only by the gang, but also respected when they go into custody."

Later on in his direct testimony, the expert was asked the following hypothetical question: "Okay. So in essence, let me ask you hypothetically, if a person, he's got the Pomona tattoo across his back, 'Huero' tattoo across the top part of his back, who's got 'Sur' down his arm, who's got Pomona 12th Street Sharkeys on his hand, an actual depiction of a shark, and has got P12 on his leg, is stopped by the police and from that traffic stop he runs down an alleyway, jumps a fence, then goes back through the front yard, back to the police car where the officer has doubled back, shoots at that police officer three times, is shot at by the police officer while he's retreating three times,

retreats to an area, shoots at the officer again three times, then jumps over a wall, a wooden wall, breaks through a window, breaks through an interior door of a house, dumping a gun, dumping what he is wearing, his shirt, and walks down the street and is arrested 300 feet away, do you have an opinion as to whether that kind of activity benefits Pomona [12th Street Sharkeys]?

"And taking into account all the reports that you've looked at with all the jail—the jail intake sheets you looked at, the prison intake sheet that you've looked at, the reports from a parole agent that you looked at, taking all that into consideration, do you have an opinion as to whether that activity benefits the Pomona 12th Street Sharkeys?" Granado's trial counsel objected to the hypothetical on the grounds it called for the ultimate conclusion in the case and the objection was overruled. The expert again answered the prosecutor's question in the affirmative and stated: "Not only does it benefit 12th Street gang as a whole, it benefits [Granado] as an individual, because it will raise his stature not only in the gang but also he's been respected for what he just did, in hypothetical."

B. Legal Principles

Recently, in *People v. Vang* (2011) 52 Cal.4th 1038 (*Vang*), our Supreme Court discussed the principles which govern admissibility of both the initial direct question the prosecutor asked the expert here and the follow-up hypothetical question. In *Vang*, as here, it was alleged the defendants committed a felony—assault with force likely to commit great bodily injury—for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1). As here, in support of that allegation, the

prosecutor presented expert testimony with respect to the history, characteristics and motives of the gang. Significantly, as here, the prosecutor also asked the expert hypothetical questions which closely tracked the evidence presented against the defendant. The defendants objected to the hypotheticals and the objections were overruled. The Supreme Court found the hypotheticals, and in particular their recitation of the evidence against the defendants, were a proper means of presenting the expert's opinions.

In approving the use of the hypotheticals, the court noted that it had previously determined that the culture and habits of street gangs are sufficiently beyond common experience that expert opinion will assist a trier of fact. (*Vang, supra*, 52 Cal.4th at p. 1044, citing *People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Although approving an expert's express reliance on and consideration of the evidence presented at trial, the court nonetheless carefully reiterated and reaffirmed the rule which prevents an expert from offering an opinion as to a defendant's actual guilt or, as here, the actual truth of an alleged enhancement. The court stated: " 'A witness may not express an opinion on a defendant's guilt. [Citations.] The reason for this rule is not because guilt is the ultimate issue of fact for the jury, as opinion often goes to the ultimate issue. [Citations.] "Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." ' [Citations.]" (*Id.* at p. 1048, quoting *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) The court

pointed out that the expert had no personal knowledge as to whether any of the defendants had committed the underlying assault "and if so, how or why; he was not at the scene. The jury was as competent as the expert to weigh the evidence and determine what the facts were, including whether the defendants committed the assault. So he could not testify directly whether they committed the assault for gang purposes. But he properly could, and did, express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose." (*Vang, supra*, 52 Cal.4th at p. 1048.)

The court emphasized that hypotheticals which closely track evidence presented at trial and are, as a practical matter, indistinguishable from the case presented against a defendant, are quite distinct from direct opinions about a defendant's guilt or innocence. (*Vang, supra*, 52 Cal.4th at p. 1049.) Unlike questions of guilt or innocence, hypotheticals do not invade the province of the jury because: "First, [the jury] must decide whether to credit the expert's opinion at all. Second, it must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." (*Id.* at p. 1050.) The court noted with approval that the jury was instructed with a version of CALCRIM No. 332, which stated: " 'In examining an expert witness, the expert witness may be asked a hypothetical question. A hypothetical question asks a witness to assume that certain facts are true and then give an opinion based on those facts. *It's up to you to decide whether an assumed fact has, in fact, been proved.* If you conclude that an

assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion.' [Citations.]" (*Vang, supra*, 52 Cal.4th at p. 1050.)

C. *Analysis*

Here, it is clear the prosecutor's initial request for the expert's opinion as to whether in fact Granado attempted to murder Pefferle for the benefit of the Pomona 12th Street Sharkeys was improper because it involved the jury's duty to determine the underlying facts. The expert was not a witness to any part of the shooting and his implicit conclusion Granado was in fact the shooter and motivated by his gang membership was not helpful to the jury. (See *Vang, supra*, 52 Cal.4th at p. 1048.) As the court in *Vang* suggested, such an opinion was improper because it invaded the jury's role in determining whether the underlying events occurred in the manner suggested by the prosecution, including in particular whether Granado was the shooter. (*Ibid.*) As Granado argues on appeal, trial counsel's objection that this question was leading did not alert the trial court to the real defect in the question—its invasion of the jury's function—and thus did not preserve the issue for appeal.

In contrast however, and of some importance in considering whether Granado was prejudiced by admission of the expert's opinion as to truth of the gang enhancement allegation, the expert's later response to the detailed hypothetical was entirely proper. As the court in *Vang* held, such a detailed hypothetical, closely tracking the evidence presented, is an entirely proper method of eliciting gang expert opinion because, among other reasons, it leaves to the jury the critical task of determining whether the evidence

supports the facts assumed in the hypothetical. (*Vang, supra*, 52 Cal.4th at p. 1050.) We also note that, as in *Vang*, the jury was instructed with CALCRIM No. 332 and thus, as in *Vang*, directed to determine whether any fact assumed by the expert was proved.

In light of the appropriate hypothetical posed to the expert, his response and the trial court's use of CALCRIM No. 332, the earlier improper question did not prejudice the jury's determination the attempted murder of Pefferle was for the benefit of Granado's gang. Both the hypothetical and the earlier improper direct question relied on the same logical inference: that given the history of the gang, including in particular its expressed antipathy toward police officers, evidence of Granado's active participation in the gang, and the nature of the shooting, it was very likely that in attempting to kill Pefferle, Granado was acting as a means of amplifying the gang's reputation in the community and Granado's reputation within the gang. Thus, had an objection to the earlier question been made and sustained, it is indisputable the jury nonetheless would have been presented the expert's reasoning.

As we have seen, the vice in the earlier question and its distinction from the hypothetical is that the earlier question, instead of leaving to the jury the task determining whether there was evidence of the facts upon which the expert relied, purported to also resolve any underlying factual questions for the jury. Although improper, this aspect of the earlier question was not prejudicial here because there was other ample and powerful evidence of the facts relied upon by the expert. There was no dispute someone fired multiple times at Pefferle, and Pefferle, the other eyewitnesses and the DNA evidence

provided a virtual mountain of evidence that Granado was the shooter. No doubt of particular persuasive value was the fact that after the shooting police were able to determine the car Pefferle stopped was registered to Granado's daughter and she testified that Granado had taken it without permission earlier in the month, but had not returned it. Moreover in light of Granado's gang tattoos and admission that he was a gang member, there was no serious dispute Granado was an active gang member. Given this record, we have little doubt that in the absence of the improper question posed to the expert, the jury would have nonetheless concluded that the evidence fully supported the facts the expert relied on, both in convicting Granado of the substantive crimes and in finding true the gang enhancement.

In sum then, although the expert should not have been asked to opine on the question of whether the gang enhancement allegation was true, in light of the appropriate hypothetical that was posed to the expert and the volume of other evidence supporting the facts the expert relied on, the improper question did not prejudice Granado. Thus trial counsel's failure to object to it will not support a claim of ineffective assistance of counsel. (See *People v. Montoya*, *supra*, 149 Cal.App.4th at pp. 1146-1147.)

III

Granado contends his counsel was also ineffective in failing to move to bifurcate trial of the gang enhancement allegations from trial of the underlying substantive crimes. Our review of the record shows that there was very little likelihood the trial court would have granted such a motion and that in any event a separate trial of the substantive

offenses would not have given rise to a more favorable outcome. Thus, as we explain counsel did not act deficiently in failing to move to bifurcate the gang enhancements and in any event Granado was not prejudiced.

A. *Bifurcation*

Because of the efficiencies which are achieved by way of a joint trial of related matters, in order to prevail on a motion to bifurcate a gang enhancement, a defendant must " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 (*Hernandez*)). "In cases *not* involving the gang enhancement, we have held that evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.] But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Hernandez, supra*, 33 Cal.4th at pp. 1049–1050.)

"Even if some of the evidence offered to prove the gang enhancement would be inadmissible at a trial of the substantive crime itself . . . a court may still deny

bifurcation." (*Hernandez, supra*, 33 Cal.4th at p. 1050.) *Hernandez* explained that a "trial court's discretion to deny bifurcation of a charged gang enhancement is . . . broader than its discretion to admit gang evidence when the gang enhancement is not charged." (*Ibid.*)

In applying these principles, the court in *Hernandez* noted that much of the gang evidence presented in that case was relevant to the charged offense, specifically on the issues of motive and intent. (*Hernandez, supra*, 33 Cal.4th at p. 1051.) While the court in *Hernandez* acknowledged that some evidence of prior criminal acts by the defendants' fellow gang members and some of the expert testimony would not have been admissible at a trial that was limited to the charged offenses, the court found that the otherwise inadmissible evidence was nonetheless somewhat probative and not highly inflammatory as compared to the other gang evidence which would have been admissible even in a separate trial of the substantive offense. Thus the court found that the defendants had not shown any substantial danger of prejudice. (*Ibid.*)

B. *Analysis*

The record here is quite similar to the record the court considered in *Hernandez*. Gang evidence was plainly very relevant here in explaining Granado's motives and intent in first running from Pefferle and then attempting to ambush him when Pefferle returned to his car. Granado's gang affiliation, and indeed some of the gang expert evidence, would plainly have been admissible in a separate trial of the attempted murder count. The damaging impact of the relevant gang evidence was not materially amplified by the

additional gang evidence which was admitted because the gang enhancement was tried together with the attempted murder and weapons charges. Thus, although the trial court had discretion to grant a motion to bifurcate, given the added expense and inconvenience of doing so and the limited prejudice to Granado, we doubt a motion to bifurcate would have been granted and do not find any deficiency in counsel's failure to make a motion with such limited chance of success. (See *People v. Majors, supra*, 18 Cal.4th at p. 403 [deference to trial counsel's tactical choices].) Suffice it say, given the very limited prejudice caused by the joint trial of the enhancement and substantive charges, any error in failing to make a motion to bifurcate was not prejudicial and will not support a claim of ineffective assistance of counsel. (*Ibid.*)

IV

The trial court imposed a consecutive sentence of 25 years to life for Granado's conviction of being a felon in possession of a firearm. (§ 12021.) In doing so the court stated that the firearm possession offense was a separate, distinct act.

We reject Granado's claim his firearm sentence should have been stayed because it was not separate from his attempt to murder Pefferle. Where as here, the evidence shows a felon was in possession of a firearm before committing a separate crime using a firearm, the stay provisions of section 654 have no application. (See *People v. Jones* (2002) 103 Cal.App.4th 1139, 1144-1146.) " 'Commission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken

with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon. [Citations.]' " (*Id.* at p. 1146.)

Granado also claims the trial court's reference to the separate and distinct nature of the felon in possession conviction was not a sufficient statement of reasons for consecutive sentencing, as required by rule 4.406(b), California Rules of Court, and that his trial counsel erred in failing to request a statement of reasons. The Attorney General concedes the trial court's statement did not meet the requirements of the rule and that in failing to request one, counsel forfeited the issue on appeal. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.) However, as the Attorney General points out, this error did not prejudice Granado: "Where sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would impose a different sentence." (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.) Here, it is plain a remand to require the trial court to more fully articulate its obvious and fully adequate reasons for imposing a consecutive sentence would be an idle act and that any error by trial counsel was completely one of form and did not substantially prejudice Granado.

V

Finally, Granado points out that the abstract of judgment reflects that, with respect to the attempted murder conviction, the trial court imposed and stayed a 10-year term for

the section 186.22, subdivision (b) gang enhancement. Where, as here, a defendant commits a crime, which by its own terms, is punishable by imprisonment for life, the defendant is not subject to a determinate enhancement under section 186.22, subdivision (b)(1), but instead is subject to the 15-year parole minimum set forth in section 186.22, subdivision (b)(5). (*People v. Lopez* (2005) 34 Cal.4th 1002, 1006-1007.) Thus the abstract of judgment must be corrected to reflect the appropriate application of section 186.22, subdivision (5).

With respect to Granados' firearm conviction, the trial court imposed a three-year determinate gang enhancement under section 186.22, subdivision (b)(1)(A). Because the firearm conviction under former section 12021 did not, by its own terms, provide for a life sentence, the trial court could impose the three-year determinate gang enhancement. (See *People v. Montes* (2003) 31 Cal.4th 350, 360-362.)

DISPOSITION

The trial court is directed to correct the abstract of judgment so that it no longer imposes a 10-year gang enhancement on count 1 and instead reflects that, as to count 1, Granado is subject to a 15-year parole minimum under section 186.22, subdivision (b)(5).

The trial court is further directed to forward a copy of the corrected abstract to the Department of Corrections and Rehabilitation. As corrected, the judgment is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.