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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ERIK EFRAIN SAUCEDA, Defendant and Appellant.	D058876 (Super. Ct. Nos. SWF027777, RIF150505)

APPEALS from a judgment of the Superior Court of Riverside, Sherrill A. Ellsworth, Judge. Affirmed as modified.

In two consolidated cases, a jury found Erik Efrain Sauceda guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)),[1] battery against a peace officer (§ 243, subd. (b)) and first degree burglary (§ 459). The trial court sentenced Sauceda to prison and issued orders which, among other things, prohibited him from owning, possessing or controlling any firearm, deadly weapon or related paraphernalia for the rest of his life.

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1 Undesignated section references are to the Penal Code.

Sauceda appeals, contending his convictions must be reversed because the trial court erred in instructing the jury regarding his counsel's failure timely to disclose a defense witness's statement and in ordering consolidation of the two cases. Sauceda also contends the order prohibiting him from owning, possessing or controlling any firearm, deadly weapon or related paraphernalia must be reversed to the extent it includes deadly weapons and related paraphernalia. We affirm the convictions and modify the sentence to delete in its entirety the prohibitory order challenged only partially by Sauceda.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Incident at the Restaurant*

Juan Estrada, a deputy sheriff for Riverside County, was off duty having dinner with his girlfriend at a restaurant where he saw Sauceda seated at another table with three other men. Estrada saw Sauceda exit the restaurant and then reenter, when Estrada heard Sauceda say, "F**k that guy." Sauceda then returned to the table where he had been sitting and briefly conversed with the three other men. All four men then stood up and proceeded toward the exit. As they did so, Estrada saw one of the men had a knife in his right hand and heard that man say, "I'm gonna stab somebody."

Less than a minute later, Estrada saw Sauceda and one of his companions reenter the restaurant and approach Tyler Johnson, who was standing at a counter where food is ordered. Sauceda threw a beer glass at Johnson. Sauceda and his companion then began hitting Johnson.

At this point, Estrada decided to intervene. Estrada grabbed Sauceda and pulled him off Johnson. Estrada also showed his badge and told Sauceda he was a police officer. Sauceda responded, "F**k that," and began punching Estrada. Estrada struck back at, and distanced himself from, Sauceda. Estrada then scuffled alternately with Sauceda and his companion until the latter two fled the restaurant.[2]

B. *The Incident at the Berry Residence*

Two months after the incident at the restaurant, Jason and Kara Berry and Jason's stepbrother, Leoncio Barbosa, were at home when they heard a loud knock at the front door. Kara got up, looked through the peephole, and saw three men in hooded sweatshirts. Barbosa asked who was at the door, but no one answered.

Suddenly, the window next to the front door shattered. When Barbosa opened the door to see what was going on, Sauceda, his brother and a friend barged into the house. Sauceda approached Jason in a threatening manner, yelling and cussing about a debt Jason owed him.

Sauceda and his brother then scuffled with Jason and Barbosa. Sauceda's brother punched Barbosa in the side of the head, and Sauceda struck Barbosa in the ribs with a screwdriver. Meanwhile, the Saucedas' friend chased after Kara with a shovel as she

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[2] Coincidentally, Lois Guillory, an off-duty deputy sheriff for San Diego County, was also at the restaurant when Sauceda fought with Johnson and Estrada. She saw Sauceda and two other Hispanic men confront Johnson. Guillory saw one of the men throw a beer glass that hit Johnson in the head and then start fighting. Guillory also saw Sauceda fighting with Estrada, and she heard Estrada tell Sauceda he was a police officer and to stop fighting.

headed for her cell phone to call 911. The friend "wrestl[ed]" with Kara, snatched her cell phone and "smashed it to pieces." Kara broke free, ran outside and screamed for her neighbors to call 911, whereupon all three intruders fled.

C. *Pretrial Proceedings*

In connection with the incident at the restaurant, the People charged Sauceda with assault with a deadly weapon (pint glass) (§ 245, subd. (a)(1)) and battery against a peace officer (§ 243, subd. (b)).

In connection with the incident at the Berry residence, the People charged Sauceda in a separate pleading with burglary (§ 459), assault with a deadly weapon (screwdriver) (§ 245, subd. (a)(1)), dissuading a witness (§ 136.1, subd. (a)(1)) and vandalism (§ 594, subd. (b)).

The People moved to consolidate the two cases against Sauceda on the ground they involved offenses of the same class. (See § 954.) Sauceda opposed the motion on the ground the two cases concerned different crimes that occurred at different times and places, and involved different people. The trial court granted the motion and ordered the People to file an amended information.[3]

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[3] The amended information included all counts from the two consolidated cases; renumbered the counts; designated a different statutory provision in the dissuading a witness count (§ 136.1, subd. (b)(1)); and added an allegation that Sauceda committed the offenses while he was released on bail in connection with earlier offenses (§ 12022.1).

D. *Sauceda's Trial Counsel's Late Disclosure of a Defense Witness Statement*

During a conference on jury instructions, after the last witness for the People's case-in-chief had testified, Sauceda's trial counsel informed the court and the prosecutor that she might call Sauceda's brother as a witness. According to counsel, the brother's testimony would support Sauceda's argument he acted in defense of his brother when he threw the beer glass at Johnson. When the prosecutor pressed Sauceda's counsel on the matter, counsel stated she needed to discuss the matter with her client before she could determine whether to call Sauceda's brother to testify. Later that evening, Sauceda's counsel informed the prosecutor she would call Sauceda's brother as a witness for the defense.

The next day, Sauceda's trial counsel informed the court she intended to call Sauceda's brother and also had a statement from him, which Sauceda's counsel had received from an attorney who handled the case before she began representing Sauceda. The statement concerned the incident at the restaurant and had been taken more than a year before Sauceda's trial counsel disclosed it.

The prosecutor objected to the late disclosure of Sauceda's brother as a witness and to the failure to provide any statement from him in discovery. As a sanction for the discovery violation, the prosecutor moved to exclude Sauceda's brother as a witness.

The trial court ruled the failure to turn over the statement to the prosecutor constituted a violation of Sauceda's discovery obligations. (See §§ 1054.3, subd. (a)(1), 1054.7 [at least 30 days before trial, defendant's attorney must disclose to prosecutor statements of witnesses other than defendant intended to be called at trial].) The court,

however, permitted Sauceda's brother to testify, but limited his testimony to matters within the scope of his prior statement.

E. *Verdicts and Sentence*

The jury found Sauceda guilty of assault with a deadly weapon (pint glass), battery against a peace officer and first degree burglary. It found him not guilty of dissuading a witness and vandalism. The jury was unable to reach a verdict on the charge of assault with a deadly weapon (screwdriver).

After the jury returned its verdicts, Sauceda waived his right to a trial on the allegation he committed the offenses while he was released on bail and admitted the allegation.

The trial court sentenced Sauceda to an aggregate term of seven years in prison, plus four months in county jail, and ordered him to pay victim restitution and various fines. At the sentencing hearing the court also stated, "You are not to own, possess or have under your control any firearm or deadly weapon or related paraphernalia for life pursuant to [former section 12021[4]] as well as the U.S. Code."

II

DISCUSSION

Sauceda contends we must reverse his convictions because the trial court prejudicially erred when it instructed the jury regarding his trial counsel's late disclosure

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4 Effective January 1, 2012, former section 12021 was repealed and reenacted as section 29800 et seq. There were no substantive changes to the provisions at issue here. All section 12021 references in this opinion are to the former version.

of a statement of a defense witness and when it ordered consolidation of the two cases against him. Sauceda also contends the trial court's order prohibiting him from possessing firearms, deadly weapons or related paraphernalia for life is unauthorized and must be reversed. As we shall explain, we agree the challenged sentencing order is unauthorized but reject Sauceda's other contentions.

A. *The Trial Court Did Not Err by Instructing the Jury Regarding Sauceda's Trial Counsel's Late Disclosure of a Defense Witness Statement*

Sauceda's primary argument on appeal is that the trial court violated his constitutional rights to a fair trial, the effective assistance of counsel and a reliable determination of guilt by instructing the jury with a modified version of CALCRIM No. 306 regarding his trial counsel's late disclosure of the statement from Sauceda's brother. According to Sauceda, his convictions must be reversed because the instruction "invited" the jurors to punish him for his trial counsel's "misstep." We disagree.

Where, as here, a defendant's counsel does not comply with discovery obligations, "the court may advise the jury of . . . any untimely disclosure." (§ 1054.5, subd. (b); see *People v. Thomas* (2011) 51 Cal.4th 449, 480.) The trial court so advised Sauceda's jury with the following modified version of CALCRIM No. 306:

> "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial.
>
> "An attorney for the defense failed to disclose in a timely manner: an investigative report by defense investigator, Ryan Ward, dated on or about May 19, 2009, which memorialized Mr. Ward's interview of Christian Sauceda, which occurred on May 19, 2009.

> "In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure.
>
> "However, the fact that the defendant's attorney failed to disclose evidence within the legal time period is not evidence that the defendant committed a crime."

Citing cases that discussed superseded instructions similar to CALCRIM No. 306, Sauceda complains the quoted instruction (1) permitted the jury to draw an adverse inference against him based on a violation of the discovery statute committed solely by his trial counsel, and (2) failed to provide explicit guidance to the jury on the relevance of the discovery violation to its deliberations. (See *People v. Riggs* (2008) 44 Cal.4th 248, 307, 308 (*Riggs*); *People v. Bell* (2004) 118 Cal.App.4th 249, 255-257 (*Bell*).) The instruction given to the jury does not suffer from these vices.

First, the instruction did not, as Sauceda contends, permit the jury to find Sauceda guilty based on his trial counsel's discovery violation. The instruction twice advised the jury it was counsel, not Sauceda, who failed timely to disclose the report of the interview of Sauceda's brother. In addition, "the instruction given by the trial court limited the inferences the jury could draw by expressly directing the jury that it could consider a discovery violation in assessing the weight [and significance] of the [late-disclosed report]." (*Riggs*, *supra*, 44 Cal.4th at p. 307.) And, most importantly, the instruction expressly advised the jury that counsel's untimely disclosure did not constitute evidence that Sauceda committed a crime.[5] We presume the jury understood and followed these

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[5] The lack of such an advisement in CALJIC No. 2.28, the predecessor to CALCRIM No. 306, was one of the major flaws the courts found with CALJIC No. 2.28. (See, e.g., *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1248 (*Lawson*); *Bell*, *supra*,

various advisements, and did not impermissibly draw an inference of guilt from, or punish Sauceda for, the discovery violation committed by his trial counsel. (See, e.g., *People v. Lewis* (2001) 26 Cal.4th 334, 390; *People v. Archer* (1989) 215 Cal.App.3d 197, 204.)

Second, the instruction provided adequate guidance to the jury on how the late disclosure bore on its deliberations. The instruction explained that Sauceda's counsel's untimely disclosure of the statement from Sauceda's brother could have adversely affected the People's ability to respond to that evidence at trial; and the instruction advised the jury it could consider the effect, if any, of the late disclosure on the weight and significance it should attribute to that statement. The instruction thus properly limited the inferences the jurors could draw from the untimely disclosure by directing them to the weight and significance to be given to the late-disclosed witness statement. (See *Riggs*, *supra*, 44 Cal.4th at p. 307.) And again, most importantly, by stating that Sauceda's counsel committed the discovery violation and that her violation was not evidence Sauceda committed a crime, the instruction "provid[ed] the jury some guidance as to how it should consider the discovery violation" by "includ[ing] a warning that the jury cannot infer a consciousness of guilt from the discovery violation." (*Lawson*, *supra*, 131 Cal.App.4th at p. 1248.) We therefore reject Sauceda's contention "the instruction

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118 Cal.App.4th at p. 256.) As noted in the text, this flaw has been eliminated in the "more narrowly and carefully written" CALCRIM No. 306. (*Lawson*, at p. 1249; see also *People v. Thomas*, *supra*, 51 Cal.4th at p. 484, fn. 6 [noting CALJIC No. 2.28 has been modified to address concerns expressed in *Bell* and its progeny].)

effectively invited the jurors to do something about trial counsel's shortcomings but did nothing to guide the jurors in what that should be."

Finally, "[e]ven were we to conclude that the giving of this instruction in the present case was error under state law, or deprived [Sauceda] of his federal constitutional rights, we would conclude there is no reasonable probability that an outcome more beneficial to him would have been achieved in the absence of the instruction [citation] and that any federal constitutional error was harmless beyond a reasonable doubt [citation]." (*Riggs*, *supra*, 44 Cal.4th at p. 311.) This was not a close case in which the giving of the instruction likely made a difference to the jury's verdicts.

The evidence of Sauceda's guilt was very strong. Several credible eyewitnesses testified to his involvement in the events at the restaurant and at the Berry residence. Indeed, Sauceda admitted at trial that he (1) threw a beer glass at Johnson; (2) punched Estrada; and (3) entered the Berry residence to collect a debt owed by Jason, and, while there, was "verbally aggressive" toward and "cussing" at Jason as Sauceda's brother and friend assaulted Barbosa and Kara. This evidence established the offenses of which Sauceda was convicted: (1) assault with a deadly weapon on Johnson; (2) battery against a peace officer, Estrada; and (3) burglary of the Berry residence. The testimony of Sauceda and his brother that Sauceda's acts were justified because they were undertaken in self-defense or in defense of his brother (see §§ 692-694) was "exceedingly dubious" (*Riggs*, *supra*, 44 Cal.4th at p. 311), given its inconsistency with the testimony of the other witnesses, the brothers' obvious motivation to lie, and Sauceda's brother's admission

he and Sauceda conferred during trial so that Sauceda's brother could "get [his] story straight."

"Moreover, reliance on the instruction regarding the discovery violation was but a small part of the prosecution's devastating arguments concerning the credibility of [Sauceda's brother]." (*Riggs*, *supra*, 44 Cal.4th at p. 311.) The prosecutor emphasized his prior felony convictions, nervous demeanor on the witness stand, and testimonial inconsistencies and falsehoods. The instruction given to the jury concerning the late disclosure of Sauceda's brother's statement thus "was merely a vehicle for credibility challenges that would have been made even in the absence of the instruction." (*People v. Saucedo* (2004) 121 Cal.App.4th 937, 943.)

Accordingly, we conclude that in light of the strong and largely undisputed evidence of Sauceda's guilt and the minor significance of the instruction regarding the discovery violation, "there is no reasonable possibility or probability that the challenged instruction, even if erroneous, affected the outcome or fairness of [Sauceda's] trial." (*Riggs*, *supra*, 44 Cal.4th at p. 311; see also *People v. Thomas*, *supra*, 51 Cal.4th at p. 484 [error in giving CALJIC No. 2.28 (predecessor to CALCRIM No. 306) harmless when no indication instruction affected jury's deliberations and case was not close].)

B. *The Trial Court Did Not Err by Consolidating the Cases Against Sauceda*

Sauceda next complains the trial court erroneously consolidated the two cases against him. According to Sauceda, the court should have denied the People's motion to consolidate because "the incidents were so different that there was no cross-admissibility

between the two incidents even under subdivision (b) of Evidence Code section 1101." We disagree.

A trial court may consolidate two or more accusatory pleadings that charge a defendant with offenses that are "connected together in their commission" or are "of the same class of crimes or offenses." (§ 954.) "Offenses falling within this description, but charged in separate pleadings, may be consolidated for trial in order to promote judicial efficiency [citation], and a trial court's rulings on joinder are reviewed for abuse of discretion [citation]." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1074 (*Koontz*).) In reviewing a challenge to an order consolidating charges for trial, we proceed from the premise that the law prefers consolidation of charges (*People v. Ochoa* (2001) 26 Cal.4th 398, 423 (*Ochoa*)), because consolidation ordinarily promotes judicial efficiency (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220). As we shall explain, the trial court did not abuse its discretion in following the preferred procedure here.

The two cases were subject to consolidation because they charged offenses of the same class. (See § 954.) Both accusatory pleadings charged Sauceda with a common offense, assault with a deadly weapon. This is sufficient to satisfy the statutory requirements for consolidation. (See, e.g., *Koontz*, *supra*, 27 Cal.4th at pp. 1074-1075 [case charging petty theft from one victim properly consolidated with case charging vehicle taking, robbery and murder of another, because both involved wrongful taking of another's property]; *Ochoa*, *supra*, 26 Cal.4th at pp. 422-423 [charge of homicide of one victim properly joined with charges of homicide and attempted robbery of another].)

Because the statutory requirements for joinder were satisfied, Sauceda "can establish error only on a clear showing of prejudice." (*Koontz*, *supra*, 27 Cal.4th at p. 1075.) On appeal, Sauceda's only contention regarding prejudice is that the trial court should not have consolidated the cases because evidence was not cross-admissible. But, cross-admissibility of evidence concerning offenses is not required for consolidation of accusatory pleadings charging offenses of the same class. (§ 954.1; *People v. Thomas* (2011) 52 Cal.4th 336, 350.) Furthermore, "even if cross-admissibility did not support consolidation of the cases, the absence of cross-admissibility alone would not be sufficient to establish prejudice where (1) the offenses were properly joinable under section 954, and (2) no other factor relevant to the assessment of prejudice demonstrates an abuse of discretion." (*People v. Geier* (2007) 41 Cal.4th 555, 577.) Because Sauceda does not even urge any other factor relevant to the assessment of prejudice, he has failed to make the clear showing of prejudice required to demonstrate an abuse of discretion. (*Koontz*, at p. 1075 [no error in consolidating cases when defendant failed to show prejudice]; *People v. Spector* (2011) 194 Cal.App.4th 1335, 1372, fn. 12 [issues not raised in appellant's opening brief are forfeited].)

In any event, Sauceda suffered no prejudice from the consolidation of the two cases against him. "Neither [case] was especially likely, or more likely than the other, to inflame the jury's passions." (*People v. McKinnon* (2011) 52 Cal.4th 610, 631.) Rather, both cases involved similar physical altercations between groups of people, and neither incident was significantly more violent than the other. Moreover, "[t]his was not a matter in which a weak case was joined with a strong case, or with another weak case, thereby

'causing a spillover effect that might have unfairly altered the outcome of the trial.'" (*Ibid.*) As previously noted, there were multiple eyewitnesses to Sauceda's involvement in the events at the restaurant and at the Berry residence, and Sauceda admitted committing the acts that underlay all the offenses of which he was convicted. Although the jury did not convict Sauceda on all counts, it did find him guilty of offenses committed during both incidents. Thus, we conclude "[s]trong evidence supported both cases," and there was no abuse of discretion in consolidating them for trial. (*Ibid.*)

C. *The Trial Court Erred in Ordering Sauceda Not to Own, Possess or Control Any Firearm, Deadly Weapon or Related Paraphernalia for Life*

Sauceda challenges as unauthorized the trial court's order, pronounced at the sentencing hearing, that he is "not to own, possess or have under [his] control any firearm or deadly weapon or related paraphernalia for life pursuant to [section 12021] as well as the U.S. Code."[6] Sauceda acknowledges California law prohibits convicted felons from possessing firearms (see § 12021, subd. (a)(1)), but insists "the trial court was utterly without discretion to prohibit appellant from owning, possessing or controlling deadly weapons or related paraphernalia for the rest of his life in connection with the imposition of a prison sentence." The People ignore the prohibition as it relates to deadly weapons and related paraphernalia, and assert the trial court was merely advising Sauceda that the

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6 The court was apparently referring to section 922(g)(1) of title 18 of the United States Code, which makes it "unlawful" for a convicted felon "to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

law prohibits him, as a convicted felon, from possessing a firearm for the rest of his life. Sauceda has the better of this argument.

Although the trial court may have intended its statement regarding firearms, deadly weapons or related paraphernalia to be advisory only, when read in the context of the entire imposition of sentence, it was mandatory. As the People point out, the trial court had a duty to notify Sauceda at the time of sentencing that the law prohibits him, as a convicted felon, "from owning, purchasing, receiving, possessing or having under his . . . custody or control, any firearm." (§ 12021, subd. (d)(2).) That notice, however, is supposed to be "provide[d] on a form supplied by the Department of Justice" (*ibid.*), and it does not pertain to deadly weapons or "related paraphernalia." Furthermore, the court announced the challenged prohibition immediately after it imposed prison terms on each of Sauceda's convictions and immediately before it ordered him to submit fingerprints and DNA samples, and to pay victim restitution and various fines. And, most significantly, the trial court phrased the prohibition regarding firearms, deadly weapons and related paraphernalia the same way it phrased its directives regarding fingerprints, restitution and fines — "You are not to own . . ."; "You are to submit . . ."; "You are to pay . . . ." Those directives are clearly orders. On this record, then, the trial court's statement prohibiting Sauceda from possessing firearms, deadly weapons or related paraphernalia was not merely advice; it was an order.

The trial court, however, had no authority to include that order as part of Sauceda's sentence. When sentencing a defendant convicted of a crime, the court must determine and impose only the punishment prescribed by statute. (§§ 12, 13; *People v. Lara* (1984)

155 Cal.App.3d 570, 574.) Here, the statute cited by the trial court in support of its order — section 12021 — makes it unlawful for a convicted felon to deal with firearms, and it prescribes penalties to be imposed on a convicted felon who subsequently does so. Section 12021 does not, however, prescribe a prohibition against future possession of a firearm by a felon that may be imposed as a form of punishment on a defendant being sentenced for conviction of another felony. The court therefore had no power to issue what was in effect a prohibitory injunction to enforce Sauceda's prospective compliance with section 12021. (See *People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 320 [penal laws not enforceable by injunction unless specific statute authorizes injunction].) Further, section 12021 says nothing about either nonfirearm deadly weapons or "related paraphernalia." Accordingly, although Sauceda may be punished if in the future he ever "owns, purchases, receives, or has in his . . . possession or under his . . . custody or control any firearm" (§ 12021, subd. (a)(1)), the trial court's present order prohibiting Sauceda from owning, possessing or controlling any firearm, deadly weapon or related paraphernalia constitutes an unauthorized sentence.

An appellate court may correct an unauthorized sentence when the error is brought to its attention. (E.g., *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1249.) Although Sauceda challenges the prohibitory order only as it relates to his ownership, possession or control of any deadly weapon or "related paraphernalia," the order is also unauthorized as it relates to his ownership, possession or control of any firearm. We therefore vacate in its entirety the portion of Sauceda's sentence that prohibits him from owning, possessing or controlling any firearm, deadly weapon or related paraphernalia.

DISPOSITION

Sauceda's sentence is modified to delete the order prohibiting him from owning, possessing or having under his control any firearm, deadly weapon or related paraphernalia during his lifetime. In all other respects, the judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.