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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY LANCE ZAYAS,

Defendant and Appellant.

F062556

(Super. Ct. No. VCF226445A)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, and Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

-ooOoo-

A jury convicted appellant Rodney Lance Zayas of second degree murder and made true findings on gang and weapons enhancements. He challenges his conviction on the grounds that the trial court committed error in (1) denying his motion to bifurcate the trial on the gang enhancement from the substantive offense, (2) failing to conduct an adequate inquiry into juror bias, and (3) admitting inflammatory evidence. He also claims there was prosecutorial misconduct, ineffective assistance of counsel, and cumulative error. We reject Zayas's contentions and affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

About 7:45 p.m. on August 28, 2009, Tulare County Sheriff's Sergeant Douglas Winslow was dispatched to investigate a report of a shooting. When he arrived at the scene, there were 25 to 30 people standing on the sidewalk, and the victim, Arturo Bello, was lying face down in the road about eight feet from the sidewalk. Winslow found no weapons at the scene. Emergency personnel arrived and confirmed Bello was dead. Bello was dressed in the color blue.

Sheriff's Detective Michael Yandell responded to a felony traffic stop that same night. The four occupants of the car, including Zayas, were removed from the car at gunpoint and detained and a gunshot residue test was conducted on Zayas's hands. One witness at the "in-field show-up" positively identified all four occupants of the car as being involved in the shooting of Bello and identified Zayas as the shooter.

In a taped interview that night, Zayas waived his rights and agreed to be interviewed. Zayas briefly discussed that his brother had been shot and killed by Surenos. Zayas had Norteno gang tattoos and when asked about them he stated he gravitated toward the people with whom his brother had associated. At the time of Bello's shooting, Zayas claimed he was "very intoxicated" and did not "remember too much." Zayas eventually acknowledged that he pulled out a gun because he "fel[t] threatened." He did not recall how many times he fired his gun and claimed he did not see the person he shot.

On August 29, 2009, a search pursuant to a search warrant was conducted at a residence. The search uncovered indicia that Zayas lived in a bedroom at that residence. In the bedroom was a shotgun loaded with five live rounds, letters addressed to Zayas from incarcerated inmates, and red clothing.

Zayas, Joshua Lee Hernandez, Richard Miguel Garcia, and Santos Hernandez were charged with conspiracy to commit murder, the murder of Bello, and the attempted murder of G.C. It was alleged as to all three counts that they were committed for the benefit of a criminal street gang. A special circumstance appended to the murder count alleged that the murder was committed by active participants in a criminal street gang and that it furthered the activities of the gang.

Prior to trial the trial court granted the prosecutor's motion to sever the trials of the four defendants and the motion to dismiss the conspiracy count. Also, Zayas moved to bifurcate the trial on the gang allegations from the substantive offense, which the trial court denied. Zayas then moved to limit the admissibility of gang evidence. The trial court heard argument and made a tentative ruling.

At trial the analysis of the gunshot residue test of Zayas's hands established that he had gunshot residue on both his right and left hands. Expert testimony established that Bello was identifying himself as a Sureno. Expert testimony also established that the Nortenos and Surenos were enemies, that Zayas and his companions, on the evening of the shooting, were Norteno gang members, and that the charged crimes were committed for the benefit of the Norteno gang.

Zayas testified on his own behalf. He testified regarding his brother's death, his decision to carry a gun, interviews he gave to the police, and questionnaires he filled out at the time of booking. Zayas claimed he was a certified medical assistant and was on a waiting list at Fresno City College for the nursing program.

Zayas said he and his companions had been drinking and "smoking pot" on the day Bello was shot. While driving through a neighborhood, Zayas said some people

wearing the color blue threw something at the car they were in, so they stopped and got out of their car. One of the persons wearing blue approached them. Zayas thought he saw something “shine” or “glare” from the person’s waistband, so he pulled out his gun and shot at the person.

The jury found Zayas not guilty of first degree murder as charged but guilty of second degree murder. The jury found true that a principal personally discharged a firearm and that the crime was committed for the benefit of a criminal street gang. The jury found him not guilty of attempted murder. On May 20, 2011, Zayas was sentenced to a term of 40 years to life.

## **DISCUSSION**

Zayas contends the trial court committed error in (1) denying his motion to bifurcate the trial on the gang enhancement from the substantive offense, (2) failing to conduct an adequate inquiry into juror bias, and (3) admitting evidence of gang affiliation. He also claims there was ineffective assistance of counsel, prosecutorial misconduct, and cumulative error.

### **I. Bifurcation Motion**

#### ***Standard of Review***

The denial of a motion to bifurcate the trial of a gang enhancement is reviewed for abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) Even if some of the evidence offered to prove a gang enhancement would be inadmissible at a trial of the substantive offense, a trial court still may deny bifurcation. (*Id.* at p. 1050.)

#### ***Analysis***

Gang evidence may be relevant to establish “identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*Hernandez, supra*, 33 Cal.4th at p. 1049.) Under these circumstances, a gang enhancement is inextricably intertwined with the substantive

offense and bifurcation would not be necessary. (*Id.* at pp. 1048-1050.) “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.]” (*Id.* 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.*)

The *Hernandez* opinion 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.) *Hernandez* acknowledged that 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 offense (*ibid.*), but held that the trial court had acted within its discretion in denying the motion to bifurcate (*ibid.*).

Here, gang evidence was inextricably intertwined with the substantive offense. It clearly was relevant to establish motive and intent and to dispel the claim of self defense. Zayas told officers that Surenos had shot and killed his brother in 2001. After his brother’s death, Zayas affiliated himself with the Nortenos, including obtaining Norteno gang tattoos. The victim, Bello, was wearing the color blue, identified with Sureno gang members, and shoes, Nike Cortez, that commonly are worn by Sureno gang members.

Santos Hernandez stated he and his companions, including Zayas, “went out looking to go and retaliate against Southern gang members” the night Bello was shot. Zayas, though, claimed he “was just defending himself” and was “acting in self-defense.” Bello had no weapon on or near him at the time of the shooting.

Under the facts of this case, we conclude the trial court acted within its discretion in refusing to bifurcate trial of the gang enhancement from trial of the charged offenses. (*Hernandez, supra*, 33 Cal.4th at pp. 1050-1051.)

We also reject Zayas's due process claim. The trial court dispelled any potential for prejudice by correctly and expressly instructing the jury on the limited use of gang evidence. The jury was informed that the gang evidence could not be used to establish Zayas was a person of bad character or that he had a predisposition to commit crimes. We presume the jury followed the instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

## **II. Juror Inquiry**

### ***Factual Summary***

During the presentation of the defense case and outside the presence of the jury, the trial court stated that Juror No. 2 had approached the bailiff and indicated that "she may recognize one of the family members from working in the same school." The bailiff clarified that Juror No. 2 was not certain if it was the person she knew because she did not "have her glasses on" and that there had been no contact or interaction between Juror No. 2 and this person in court.

The trial court had Juror No. 2 brought into the courtroom. She confirmed that when she left for lunch, she noticed a "young lady over there" that she either "used to work with" or still worked with, but she was not certain. She did not "want to do anything wrong" by failing to report what she had noticed. When questioned by the trial court, Juror No. 2 stated she worked at an elementary school.

Juror No. 2 related that the person she knew worked at the same elementary school; however, they did not have much contact. The trial court asked Juror No. 2 to assume it was the person she knew and then asked, "[W]ould that in any way influence your ability to reach a fair verdict in this case?" Juror No. 2 responded that it would not affect her verdict.

Juror No. 2 then added that the school where she worked had “a reputation where it’s at” and that she was “a little bit bothered” for “safety purposes.” She stated, “I don’t know if this is the person. They know who I am and where I work and I just don’t know.” The trial court responded that Juror No. 2 was “going to have to let us know,” and that the trial court could inquire as to the identity of the young lady if necessary. The trial court then asked Juror No. 2 if she could listen to the evidence and base her decision on the evidence and “not from any other source.” Juror No. 2 responded affirmatively.

After Juror No. 2 left the courtroom, the trial court asked the prosecutor and defense counsel if there was anything else. Defense counsel indicated he felt Juror No. 2 had expressed fear about reaching a decision. The trial court opined that it viewed Juror No. 2’s comments as concern about the location of the school where she worked, but that she had unequivocally stated she could reach a verdict based purely on the evidence. Defense counsel submitted the matter and the trial court ruled that Juror No. 2 would remain.

Zayas now contends Juror No. 2 should have been dismissed or a further inquiry should have been made.

### ***Standard of Review***

“The decision whether to investigate possible juror bias, incompetence, or misconduct, as well as the ultimate decision whether to retain or discharge a juror, rests within the sound discretion of the trial court. [Citation.] If any substantial evidence exists to support the trial court’s exercise of its discretion, the court’s action will be upheld on appeal. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 434.) As our Supreme Court notes, “a hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his [or her] duties and would justify his [or her] removal from the case.” (*People v. Ray* (1996) 13 Cal.4th 313, 343 (*Ray*).)

### ***Analysis***

A trial court must conduct a sufficient inquiry when put on notice that cause to discharge a juror may exist. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1117.) The ultimate decision whether to retain or discharge a juror is subject to the discretion of the trial court. That discretion is limited to the extent that the juror's inability to perform his or her functions must appear in the record as a "demonstrable reality" and the trial court must not presume the worst of a juror. (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.)

Here, by questioning Juror No. 2, the trial court elicited her response that she could evaluate the case based only upon the evidence, not consider facts from any other source, and she felt she could be fair to both sides in the case. Juror No. 2's expression of being "a little bit bothered" and being "scared" in the past were, as the trial court noted, expressions of concern about the location of the school where she worked. The trial court did not abuse its discretion in concluding that further inquiry was not needed. (*Ray, supra*, 13 Cal.4th 313, 344.)

Zayas's claim that defense counsel rendered ineffective assistance by failing to request a more detailed inquiry fails in light of our conclusion that the trial court conducted an adequate inquiry and did not abuse its discretion in concluding that further inquiry was not needed.

### **III. Evidence of Gang Affiliation**

Zayas contends the trial court abused its discretion in admitting evidence that a shotgun and three letters from Norteno jail inmates were found in his bedroom as a result of a search conducted pursuant to a search warrant and that admission of this evidence denied him due process. On appeal, we apply an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 724 (*Waidla*).

### ***Factual Summary***

Initially, the trial court granted a defense request to exclude evidence of a stolen shotgun found hidden in Zayas's bedroom when it was searched. The trial court's initial ruling on the three letters from Norteno gang members was that they were admissible to help establish Zayas's gang affiliation.

Shortly thereafter, a discussion ensued regarding admissibility of photographs, some of which depicted the stolen shotgun and shotgun shells. The defense argued the pictures were inadmissible, as the shotgun had not been used in the current offense. The prosecutor argued the shotgun was found with gang indicia and was relevant to show Zayas was an active gang member.

Ultimately, the trial court ruled that the photos of the shotgun and ammunition would be admissible, but no mention was to be made of it being stolen. The trial court articulated that the gang expert would be testifying regarding gang indicia, including that gang members carry weapons.

The officer who conducted the search of Zayas's bedroom testified that the shotgun had not been used in the commission of the charged offenses. The gang expert testified that it was "common for gang members to carry firearms" but also acknowledged that nongang members own weapons.

As for the three letters, the same officer testified that "three pieces of inmate-generated mail" were found in Zayas's bedroom and were addressed to Zayas; the return address was the local jail. On cross-examination, the officer acknowledged he was unaware the letters were from relatives of Zayas's. The gang expert opined that Zayas was a Norteno gang member, an opinion the expert reached in part based upon Zayas's receipt of three letters from Norteno gang members. The expert testified on cross-examination that he had not read the three letters and did not know they were from family members.

When Zayas was questioned after his arrest, he denied ever owning “any shotguns in the past.” When Zayas testified at trial, he explained he owned the shotgun found in his room in “the present,” and he had not owned any shotguns in the past. Zayas testified he acquired the shotgun for protection of his home and stated the three letters were from relatives who he thought were in jail for drug offenses, not gang offenses.

In closing arguments, the prosecutor briefly mentioned the three letters. Defense counsel also briefly mentioned the three letters and the shotgun.

### ***Analysis***

Article I, section 28, subdivision (f)(2) of the California Constitution provides in relevant part that “relevant evidence shall not be excluded in any criminal proceeding.” Evidence Code section 351 declares that “Except as otherwise provided by statute, all relevant evidence is admissible.” Relevant evidence is that “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (*Id.*, § 210.) The only limitation on the admission of relevant evidence found in the Evidence Code, absent a specific exclusion, is that its probative value not be outweighed substantially by a danger of undue prejudice, or it necessitates undue consumption of time. (*Id.*, § 352.)

Here, the trial court conducted an Evidence Code section 352 hearing. The prosecutor contended the items found in Zayas’s bedroom helped establish Zayas was a gang member. Zayas was charged with a gang special circumstance appended to the murder count and also with the gang enhancement set forth in Penal Code section 186.22, subdivision (b). The defense claimed the items were not relevant. Ultimately, the trial court determined the items were relevant and probative of whether Zayas was an active participant in a criminal street gang.

As a general rule, evidence of gang membership and activity is admissible if it is relevant to some material issue in the case. Consequently, gang evidence may be relevant to establish a defendant’s motive, intent, or some fact concerning the charged offenses.

(*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224 (*Albarran*)). Zayas was charged with both the gang offense and the gang enhancement set forth in Penal Code section 186.22, subdivision (b); therefore, any evidence tending to support those charges was relevant under Evidence Code section 351. The evidence regarding the shotgun and the three letters was used by the gang expert as support for his opinion that Zayas was a gang member. The evidence of the shotgun also was admissible to rebut Zayas's statement to officers after his arrest.

The decision on whether evidence, including gang evidence, is relevant and not unduly prejudicial, and therefore admissible, rests within the discretion of the trial court. (*Albarran, supra*, 149 Cal.App.4th at pp. 224-225.) When a discretionary power is statutorily vested in the trial court, its exercise of that discretion should not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner. (*Id.* at p. 225.) Zayas has the burden of proving an abuse of discretion. (*Ibid.*)

Zayas has failed to establish that admission of the evidence was an abuse of discretion. There was nothing arbitrary, capricious, or patently absurd about the trial court's ruling. An Evidence Code section 352 hearing was held; the trial court determined the evidence was relevant to a charged offense and an enhancement; and there was nothing inflammatory or prejudicial about the evidence. The prejudice the statute seeks to avoid is not the damage to a defense that naturally flows from highly probative evidence. (*People v. Karis* (1988) 46 Cal.3d 612, 638.) "Rather, the statute uses the word in its etymological sense of 'prejudging' a person or cause on the basis of extraneous factors." (*People v. Farmer* (1989) 47 Cal.3d 888, 912, overruled on another ground in *Waidla, supra*, 22 Cal.4th at p. 724, fn. 6.)

We conclude the trial court did not abuse its discretion in admitting this evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

#### **IV. Ineffective Assistance of Counsel**

Zayas contends his defense counsel rendered ineffective assistance by offering into evidence his application to attend a community college, which disclosed that Zayas had lied by falsely representing he had no criminal convictions when he had misdemeanor convictions. We decline to address his contention.

##### ***Factual Summary***

Zayas testified he had graduated as a certified medical assistant and was on a waiting list at Fresno City College to enter the nursing program. This testimony was presented in response to the gang expert testifying that it would be “rare” for a gang member to become a certified medical assistant or to attend college to become a nurse.

Defense counsel apparently obtained the school records in response to a subpoena duces tecum in order to bolster Zayas’s testimony regarding his medical assistant certification and application for nursing school. The records were subpoenaed into court and opened in court. The prosecutor then used the documents to impeach Zayas’s asserted reputation for truthfulness and honesty by showing that he had falsely signed the college document indicating he had no criminal convictions.

##### ***Standard of Review***

“The burden of proving ineffective assistance of counsel is on the defendant.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) A criminal defendant must show both deficient performance (“that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates”) and prejudice (“that it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s failings”). (*People v. Price* (1991) 1 Cal.4th 324, 386.) Zayas has failed to meet this burden.

##### ***Analysis***

It has been said on numerous occasions that a claim for ineffective assistance of counsel is more properly addressed in a petition for writ of habeas corpus. “[N]ormally a

claim of ineffective assistance of counsel is appropriately raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the two-pronged inquiry of whether counsel's 'representation fell below an objective standard of reasonableness,' and whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 111.)

Here, an ineffective assistance of counsel claim is more properly raised in a petition for writ of habeas corpus. Clearly, the documents were subpoenaed by defense counsel and requested to be produced in open court, thereby depriving defense counsel of the opportunity to review the documents before they were admitted. What the record does not show is whether Zayas was ever asked, or whether he ever informed his counsel, that he had made false statements in the college application documents. This information was wholly within Zayas's knowledge, and the record does not disclose whether Zayas informed his counsel of the false statements in the application, as one would expect knowing the documents had been subpoenaed, or if defense counsel made inquiries of Zayas and Zayas failed to answer counsel truthfully.

Since the appellate record does not show the reasons for defense counsel's actions, the proper method for addressing an ineffective assistance of counsel claim is by a petition for writ of habeas corpus rather than by an appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1031 (*Cunningham*).)

## **V. Prosecutorial Misconduct**

Zayas contends the prosecutor committed misconduct by cross-examining Zayas about the circumstances surrounding his brother's shooting.

Zayas testified about the shooting of his brother on direct examination to explain in part why he always carried a handgun on his person and had gang tattoos on his body.

In response to Zayas's testimony on direct examination, the prosecutor cross-examined him about the facts and circumstances surrounding his brother's death, suggesting the brother was armed with a handgun at the time of the shooting, the brother was the instigator in the incident that led to the shooting, and the shooting was the result of gang rivalry between the Nortenos and Surenos.

Zayas now contends the prosecutor's cross-examination amounted to misconduct because the prosecutor was implying or insinuating she had more evidence than was presented. We reject this contention for two reasons. First, there was no objection to the prosecutor's questions on cross-examination; thus, any claim of misconduct is forfeited. Failure to object and seek a curative admonition forfeits appellate review of any claim of prosecutorial misconduct. (*People v. Foster* (2010) 50 Cal.4th 1301, 1354.)

Second, when a defendant voluntarily testifies in his own defense, as Zayas did, the prosecution may fully cross-examine him by inquiring into facts and circumstances surrounding his assertions or introducing evidence that refutes his statements. (*People v. Harris* (1981) 28 Cal.3d 935, 953.) Although it is improper for a prosecutor to ask questions of a witness that suggest facts harmful to the defendant absent a good faith belief such facts exist, there is nothing in the record to suggest the absence of a good faith belief. (*People v. Osband* (1996) 13 Cal.4th 622, 695.) Here, there was no request that the prosecutor make an offer of proof regarding the suggested circumstances surrounding Zayas's brother's death and this court therefore cannot conclude the prosecutor would have been unable to present evidence if asked. (*People v. Earp* (1999) 20 Cal.4th 826, 860.)

We also reject any claim of ineffective assistance of counsel. The record before us discloses nothing improper about the cross-examination. Defense counsel's failure to request an offer of proof from the prosecutor may have been tactical. Zayas's testimony on direct examination was that he witnessed the entire incident involving the shooting and killing of his brother; yet, on cross-examination, Zayas claimed he could not

remember any specifics when asked by the prosecutor. Defense counsel may have preferred not to have additional evidence of the gang shooting of Zayas's brother since Zayas was present and involved in that incident. We do not second-guess defense counsel's tactical decisions on appeal. (See *People v. Knight* (1987) 194 Cal.App.3d 337, 346.) Furthermore, as explained in part IV. above, claims of ineffective assistance of counsel are more properly brought in a petition for writ of habeas corpus, not in an appeal. (*Cunningham, supra*, 25 Cal.4th at p. 1031.)

#### **VI. Cumulative Error Warranting Reversal**

Zayas has asserted numerous reversible errors, and we have concluded each claimed error to be either unfounded or not cognizable on appeal. Since Zayas has failed to persuade us that any error occurred, his cumulative error argument fails. (*People v. Heard* (2003) 31 Cal.4th 946, 982.)

#### **DISPOSITION**

The judgment is affirmed.

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CORNELL, Acting P.J.

WE CONCUR:

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GOMES, J.

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FRANSON, J.