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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALONSO REYES CARRILLO,

Defendant and Appellant.

G049634

(Super. Ct. No. 12NF0734)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

A jury convicted defendant Alonso Reyes Carrillo of vandalism (count 2 — Pen. Code, § 594, subds. (a), (b)(2)(A))<sup>1</sup>, witness dissuasion (count 3 — § 136.1, subd. (b)(1)); active participation in a criminal street gang (count 4 — § 186.22, subd. (a)); and conspiracy to commit vandalism (count 5 — § 182, subd. (a)(1)).<sup>2</sup> The jury found true he committed counts 2, 3, and 5 for the benefit of a gang. (§ 186.22, subd. (b)(1).) Defendant admitted a prior strike conviction (§ 667, subds. (d), and (e)(1)), a serious prior felony (§ 667, subd. (a)(1)), and two prison priors (§ 667.5, subd. (b)). The court sentenced defendant to a total prison term of 12 years.

On appeal defendant contends the court violated his right to confrontation by excluding evidence that the People's gang expert had suffered a prior misdemeanor conviction involving allegedly violent behavior. Related to this contention, defendant requests this court to review the sealed transcript of the court's in camera hearing held pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). Defendant's final contention is that the court improperly sentenced him; the Attorney General concedes the sentencing errors.

We conclude the court properly exercised its discretion, and did not violate defendant's right to confrontation, by admitting evidence of the expert's prior misconduct that was most relevant to his possible bias against taggers and his credibility and reliability as a gang expert witness. We further conclude there was no *Pitchess* error. We agree with the parties that the court committed sentencing errors. We therefore remand the case to the trial court for resentencing in accordance with this opinion.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The jury was unable to reach a verdict on count 1 (attempted second degree robbery). The court granted defendant's motion for a mistrial on count 1, and subsequently granted the People's motion to dismiss count 1 for insufficient evidence and in the interest of justice.

## FACTS

On an afternoon in February 2012, defendant (a member of Fullerton Tokers Town, a criminal street gang) drove a Ford Explorer into an alley in an area claimed by a rival gang. Defendant wore an orange South Park hat and a navy blue bandana. Three other males, who had arrived in the Ford Explorer, tagged garages with a spray can.

Adriana Araujo worked at an after school program in the neighborhood. She walked toward the Explorer with some parents of children in the program. The parents yelled, "Hey," at the taggers and asked who they were. The taggers got back into the Ford Explorer, which then drove into another alley.

Araujo followed the Explorer. She came to a community center where children who had been playing outside were being sent inside due to the neighborhood disturbance. Her neighbor Crystal, who volunteered in the neighborhood, was there in a vehicle, dropping off some girls. Araujo stood at Crystal's window and told Crystal what she had seen. Defendant's Ford Explorer reappeared and came up to them, still being driven by defendant. Araujo was scared.

On the other side, a guy was tagging. Araujo starting taking photos with her cell phone, trying to get the Ford Explorer's license plate. The girls in Crystal's vehicle screamed.

Defendant called Araujo over, saying, "Redhead, come over." Araujo went to defendant's open window. Defendant asked for her name and address, but she said, "I don't know." Defendant told her to give him her phone. Araujo refused. Defendant said, "I know you took pictures," and asked, "Why are you doing this to us?" At some point, defendant put the bandana on his face. He asked Araujo to get her phone. Araujo went to Crystal's vehicle, got Crystal's phone (an old one), went back to defendant, and

gave him the phone. Defendant said, “That’s not your phone. Get your real phone.” Araujo refused. She felt scared.

Defendant looked in the rear view mirror and nodded his head at a male in the back. The male behind the passenger seat opened his door and was halfway out when the passengers started talking. The male got back in the vehicle, which drove off.

Wendy Esparza lived in the neighborhood and was walking toward the community center on the afternoon in question to do her after school volunteer work. A male who was tagging garages approached Esparza and said, “This is Tokers Town.” Esparza said, “Okay, I don’t care.” The tagger asked, “Oh, what, are you a watermelon?” She replied, “No, I don’t bang.” Another male told defendant, “I have the pistol ready.” Esparza heard a “chk-chk” sound from a gun. She ran.

The People’s gang expert, Christopher Wren, testified that the graffiti in this case related to Fullerton Tokers Town gang.

The repair cost for the vandalism was about \$100, which covered the cost for paint and for an apartment manager’s labor to paint over the graffiti on the apartment garages.

Within a month after the incident, Araujo changed her hair color because she was scared.

## DISCUSSION

### *The Court Properly Exercised Its Discretion in Admitting Limited Evidence of Wren’s Prior Misconduct*

Defendant contends the court improperly excluded evidence of a prior misdemeanor conviction suffered by Wren (the People’s gang expert) and the allegedly violent aspects of Wren’s underlying misconduct. Defendant argues the court’s evidentiary ruling violated his Sixth Amendment right to confront adverse witnesses.

## 1. *Background*

The prosecutor and defense counsel were initially unaware that, in 2009, a San Bernardino County complaint had charged Wren with misdemeanor battery. (§ 242.) The ultimate outcome of the San Bernardino County case was that Wren had pleaded nolo contendere to false imprisonment (§ 236), had been placed on probation for three years, and had subsequently had the conviction expunged pursuant to section 1203.4.<sup>3</sup>

Defense counsel learned of Wren's prior misdemeanor conviction at some point during the People's direct examination of Wren. Defense counsel asked the prosecutor to obtain and provide information about it.

In a hearing outside the presence of the jury and of Wren, the court asked defense counsel what information he wished to elicit on cross-examination of Wren. Defense counsel stated, inter alia: "My understanding, if this is a misdemeanor, then it's the conduct, not the conviction."

The court stated defense counsel could impeach Wren with the misdemeanor *conduct*. The court reasoned that, because a felony conviction expunged under section 1203.4 may not be used to attack a witness's credibility (Evid. Code, § 788, subd. (c)), neither can an expunged misdemeanor *conviction* be used to impeach a witness. Defense counsel did not disagree, and indeed asked the court "to look at the entire conduct, not just what's been pled to . . . ."

The prosecutor moved to exclude the evidence in its entirety.

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Section 1203.4 applies when a defendant has successfully completed the conditions of probation, or has been discharged prior to the termination of probation, or where the court, in its discretion and the interests of justice, determines the defendant should be granted relief. The record does not reveal the basis for the section 1203.4 dismissal of the 2009 charges against Wren.

After reviewing information about the San Bernardino incident, defense counsel specified he wished to elicit the following evidence: “That in 2009, [Wren] grabbed a 14-year-old boy who he suspected of tagging, took him to the ground, searched him, [and] threatened to harm him further to the point where the kid was so scared . . . . [Wren] did find two magic markers on him, but [Wren] didn’t have any evidence that the kid actually tagged anything. That goes to his bias to any opinions he may render in this case about the gang.” “When the kid tried to get away from [Wren], [Wren] foot-swept him, took him to the ground, climbed on top of him, pinned the kid’s arms down to the ground and then allegedly, according to the [police] report, threatened the kid that if he moved, he’d snap his fuckin’ neck.”

The prosecutor argued Wren used force to detain the minor because Wren suspected the minor had recently vandalized Wren’s home. The prosecutor argued the conduct constituted a battery, which is not a crime of moral turpitude.

Defense counsel reiterated, “[L]ike the court has said, it’s the conduct; it’s not the charge.”

The court reviewed in camera the Fullerton Police Department’s personnel file on Wren and ordered the disclosure to defense counsel that Wren had been disciplined with a “Chief’s reprimand” in the San Bernardino case.<sup>4</sup>

The court denied the People’s motion to exclude all evidence of the San Bernardino incident, finding that the misconduct was relevant to Wren’s potential bias and credibility as an expert and was more probative than prejudicial. The court ruled the relevant admissible evidence was that Wren, while off duty, had jumped to the conclusion that the minor was a tagger and that Wren had been disciplined because his

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<sup>4</sup> We have reviewed the sealed reporter’s transcript of the *Pitchess* hearing and have determined the trial court did not abuse its discretion in requiring only the disclosure that Wren was disciplined with a Chief’s reprimand. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039 [trial court’s ruling on motion for discovery of peace officer personnel records is reviewed for abuse of discretion].)

conclusion turned out to be wrong. The court excluded evidence of (1) Wren's allegedly violent conduct or threats of violence (on grounds they were not acts of moral turpitude) and (2) Wren's misdemeanor conviction for false imprisonment (on grounds it was expunged under section 1203.4). The court also ruled the defense could call the victim to testify "in a limited capacity."

At trial, Wren testified about the San Bernardino incident as follows. On January 30, 2009, someone tagged Wren's home. At the exact same time the next day, Wren detained in his front yard a 14-year-old minor. The minor wore an over-sized black t-shirt bearing "tagging style graffiti," *not* "gang style graffiti." Wren searched the minor's backpack and found two markers, a bottle of white-out, and a "piecebook" with pages of tagging style graffiti. The minor told Wren he used the markers for an art class in school. Wren never saw the minor tag his home. The police department reprimanded Wren. Wren explained that such a reprimand is "a form of discipline which . . . states, 'don't do that again.'"

After the People rested their case, the court noted Wren had created the impression that the minor, S.R., perhaps had done the tagging and perhaps was a member of a tagging crew. The court therefore allowed defense counsel to question now 19-year-old S.R. about (1) whether S.R. tagged Wren's home or is affiliated with a gang or tagging crew; (2) whether the encounter with Wren occurred in Wren's yard or across the street;<sup>5</sup> and (3) whether Wren told S.R.'s father that he (Wren) did not believe S.R. did the tagging.

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<sup>5</sup> In a 2009 interview with the San Bernardino County Sheriff's Department, Wren stated he saw the minor "walking in the middle of the street" and called the minor over to him. But on cross-examination in the instant case, Wren denied that the minor was walking down the street when Wren first saw him.

S.R. testified that in 2009, as he walked home from school, a person who lived up the street from him accused him of tagging that person's house. At the time, S.R. was 14 years old and in eighth grade and was wearing a "Southpole" shirt. S.R. denied tagging Wren's house or property. He denied ever being affiliated with a tagging crew or a gang. S.R. said he had not walked onto Wren's front yard on his way home from school that day. He had Sharpie markers in his backpack for his art class at school. He never used the markers to tag Wren's house or property. He said the "piecebook" contained art, not graffiti. He did not recall whether the piecebook had block letters in it. S.R. heard Wren tell S.R.'s father that he (Wren) did not think S.R. had tagged his house.

The prosecutor re-called Wren, who denied telling S.R.'s father he did not believe S.R. tagged his property.

## 2. *Analysis*

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931.) "[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*Id.* at p. 932.) "When the witness subject to impeachment is not the defendant, [the factors to be considered by the trial court] prominently include whether the conviction (1) reflects on honesty and (2) is near in time." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) "A trial court's decision to admit or exclude impeachment evidence under Evidence Code section 352 is reviewed for an abuse of discretion." (*People v. Johnson* (2015) 61 Cal 4th 734, 766.)<sup>6</sup>

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Defendant contends the de novo standard of review should apply here, arguing the court's exclusion of evidence of Wren's prior conviction and allegedly violent behavior violated his right to confront an adverse witness. That constitutional

Here, the court properly exercised its discretion to exclude the allegedly violent aspects of Wren’s misconduct. The court found the evidence of violence “add[ed] very little to this case.” As stated in *People v. Mansfield* (1988) 200 Cal.App.3d 82, the use of force against a person, i.e., a simple battery, “does not necessarily show readiness to do evil or necessarily involve moral turpitude” (*id.* at p. 88). The court properly exercised its discretion under Evidence Code section 352 to limit the evidence of the San Bernardino incident to the fact that Wren was disciplined by the police department for jumping to a quick conclusion that a 14-year-old was a tagger and for detaining the minor. The court properly determined such evidence was most relevant to Wren’s credibility and to the reliability of his gang-related opinions. Defendant argues that Wren’s grabbing of S.R.’s arm and using a leg sweep to force S.R. to the ground, showed Wren harbored, not just a bias against perceived taggers, but a “personal animosity” toward them. The court acted well within its discretion by impliedly finding Wren used the grabbing and the leg sweep motions to prevent S.R. from running away, not out of personal animosity.

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right guarantees a criminal defendant an opportunity to cross-examine a witness about his or her “motivation in testifying” (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678), i.e., a bias affecting the witness’s reliability (*id.* at p. 679). But, “[i]t does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel’s inquiry into the potential bias of a prosecution witness.” (*Ibid.*) “Moreover, reliance on Evidence Code section 352 to exclude evidence of marginal impeachment value that would entail the undue consumption of time generally does not contravene a defendant’s constitutional rights to confrontation and cross-examination.” (*People v. Brown* (2003) 31 Cal.4th 518, 545.)

Here, the court allowed cross-examination of Wren about his prior misconduct, but appropriately limited the scope of such examination. For the same reason, we reject defendant’s related argument that the court violated his right to confrontation.

Defendant has forfeited his contention concerning Wren's prior *conviction*. Defendant never sought below to admit the prior conviction into evidence. He never objected below to the court's exclusion of the prior conviction. It appears defense counsel may have chosen for tactical reasons to focus on Wren's prior misconduct, rather than on his prior conviction for false imprisonment. “[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.”” (*People v. Williams* (2008) 43 Cal.4th 584, 620.) Defendant argues the court's ruling involved a pure question of law (i.e., whether a prior misdemeanor conviction expunged pursuant to section 1203.4 may be used to impeach a witness's credibility) and therefore his contention on appeal is not subject to forfeiture. He supports his contention, however, with authority unrelated to evidentiary rulings. (*In re P.C.* (2006) 137 Cal.App.4th 279, 287 [challenge to constitutionality of statute was a question of law not subject to forfeiture]; *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1227 [same as to enforcement of surrogacy contract].)

#### *The Court's Sentencing Errors Must Be Corrected on Remand*

Defendant contends, and the Attorney General agrees, that the court erred in sentencing him and that those errors must be corrected on remand. We agree.

The court, after initially sentencing defendant to a prison term of 12 years, realized it had erroneously used the gang enhancement for count 2 twice — once to elevate the vandalism misdemeanor<sup>7</sup> to a felony (§ 186.22, subd. (d)), and once to add an additional three years (§ 186.22, subd. (b)). As a result, the court met with counsel in chambers and, according to the minute order (not a reporter's transcript), resentenced

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Although the jury verdict on count 2 states that jury found defendant guilty of a felony, the verdict continued: “[T]o wit: a violation of Section 594(a)/(b)(2)(A) . . . (VANDALISM IN AN AMOUNT UNDER \$400).”

defendant. At the time, defendant remained in a holding cell. The court resentenced defendant to a total prison term of 12 years, comprised of six years in prison on count 3, “which is double the Middle term,” plus five years for his serious prior felony conviction (§ 667, subd. (a)(1)) and one year for a prison prior (§ 667.5, subd. (b)). The court sentenced defendant to a concurrent prison term on count 2 of six years, “which is double the Middle term.”

“A sentence not authorized by law is subject to correction whenever the error comes to the attention of the trial court or a reviewing court.” (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 434.) The court erred by resentencing defendant without giving him an opportunity to be present and to have the corrected sentence pronounced orally on the record. (§ 1193, subd. (a); Cal. Rules of Court, rules 4.406(a) & 4.420(e); *People v. McGahuey* (1981) 121 Cal.App.3d 524, 530.)

Furthermore, the court erred by erroneously stating the midterm doubled was six years for witness dissuasion and six years for felony vandalism. The midterm for witness dissuasion is two years (§§ 18, subd. (a), 136.1, subd. (b)), therefore the doubled midterm is four years. The same holds true for misdemeanor vandalism elevated to a felony pursuant to section 186.22, subdivision (d).

Finally, the court erred by staying counts 4 and 5 pursuant to section 654, without imposing sentence. “A trial court must impose sentence on every count but stay execution as necessary to implement section 654.” (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472.)

## DISPOSITION

The sentence is reversed. On remand, the trial court shall give defendant the opportunity to be present at the resentencing hearing and to have the court’s sentencing choices and reasons pronounced on the record. The trial court shall impose

sentence on counts before staying any execution of a sentence pursuant to section 654.

Finally, the court shall select the correct statutory term(s) of imprisonment.

In all other respects, the judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.