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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 07-08-2010  
PHILIP G. URRY, CLERK  
BY: DN

STATE OF ARIZONA, ) No. 1 CA-CR 09-0076  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
)  
) (Not for Publication -  
ROBERTO SALDANO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-104668-001 SE

The Honorable Connie Contes, Judge

**VACATED IN PART; AFFIRMED IN PART**

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**B R O W N**, Judge

¶1 Roberto Saldano appeals his convictions and sentences  
for attempted first-degree murder, aggravated assault, and

participation in a criminal street gang. He argues on appeal that the evidence was insufficient to support his conviction for participation in a criminal street gang, the trial court abused its discretion in allowing the State's expert on gangs to testify that the gang started in prison, and prosecutorial misconduct deprived him of a fair trial. For the reasons that follow, we vacate Saldano's conviction and sentence for participating in a criminal street gang, but affirm his remaining convictions and sentences.

#### **BACKGROUND**

¶2 This case arises from a stabbing outside a Mesa bar frequented by Native Americans. A heated exchange started inside the bar when Saldano commented to the victim, a member of the San Carlos Apache Indian tribe and a regular at the bar, that there were "a lot of f\*\*\*[ing] chiefs" inside the bar. The victim construed the remark as an insult to Native Americans, and replied that he was an "f\*\*\*[ing] chief." Saldano responded, "Natives ain't shit. In prison they ain't shit."

¶3 As the argument grew more heated, the bartender told a friend of Saldano that he needed to get him out of the bar. Saldano left, but the victim followed him, yelling profanities, prompting Saldano to attempt to reenter the bar where the victim had retreated. Saldano threatened to kill the victim, as well as the deejay and bartender who blocked his path. The victim

rushed out of the bar and tackled Saldano, who pulled out a knife and stabbed the victim in the side, causing serious injuries. Police arrested Saldano several weeks later, and, in a search of his home, found items that indicated his affiliation with a gang known as "La Nuestra Familia."

¶4 The victim testified he would not characterize the argument as gang-related, but rather, "I think more - it came to me as, you know, he just had a problem with Native Americans." The victim, who was by all accounts not a gang member, testified that he did not recall Saldano saying that he was a gang member. Saldano's friend, however, testified that he had heard the two exchange gang slurs during the argument, and the bartender testified that he believed "they were talking about, like gangs they may have been affiliated with."

¶5 A gang expert testified that Saldano had been identified as a member of La Nuestra Familia, and he believed the assault was "consistent with gang motivation."

¶6 The jury convicted Saldano of attempted first-degree murder, aggravated assault, and participation in a criminal street gang. The judge sentenced Saldano to concurrent terms, the longest of which was eighteen years for the attempted first-degree murder conviction. Saldano timely appealed.

## DISCUSSION

### I. Furtherance of Gang Objectives

¶17 Saldano argues that the evidence was insufficient to support his conviction for participation in a criminal street gang because it failed to show that his conduct was intended to promote or further the criminal objectives of La Nuestra Familia. In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict, and resolve all conflicts in the evidence against defendant. *State v. Girdler*, 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted).

¶18 The crime of participating in a criminal street gang is defined in pertinent part as "[k]nowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of the criminal street gang." Arizona Revised Statutes ("A.R.S.") section 13-2321(A)(2) (2010). A "criminal street gang" is defined in pertinent part as an association of persons "in which members or associates individually or collectively engage in the commission, attempted commission, facilitation or solicitation of any felony act[.]" A.R.S. § 13-105(8) (2010). Saldano argues that Police Detective

Pizzelle, the State's gang expert, failed to offer any evidence as to what La Nuestra Familia's criminal objectives were outside of prison, or how Saldano's aggravated assault on the victim would further those criminal objectives. He therefore argues that a jury could not have found the State proved this element beyond a reasonable doubt.

¶19 At trial, Detective Pizzelle described La Nuestra Familia as:

[A] prison gang that was formed in northern California in late 1960 . . . to combat what was deemed by them as the disrespect given them by southern Hispanics, which would be the Mexican Mafia. At the time the Mexican Mafia was a gang formed to protect Hispanic people that were in prison. Later the La Nuestra Familia once it was created was constantly at battle with the Mexican Mafia.

He further explained that such inmates are split up by race because "it makes it easier for everyone to get along." He did not, however, describe what La Nuestra Familia's criminal objectives were either inside or outside prison, other than mentioning that a person had to "shed blood" to become a member, and when a member reached fifty years of age he could opt not to be involved in "acts of violence" and could do other things that don't require them to be "out committing crimes." And although the prosecutor argued in closing that La Nuestra Familia is "one of the most violent and infamous gangs in the United States," no evidence was introduced to support this argument.

¶10 Detective Pizzelle also testified that he believed Saldano's assault on the victim was gang-motivated because "everything in prison is separated by race[,] and Saldano had made the statement that even "in prison, Natives ain't shit." Defense counsel argued in closing that no evidence had been introduced to show the criminal objectives of La Nuestra Familia, and the jury in turn asked the trial court to provide an additional definition for "criminal objectives of a street gang." After consultation with the parties' counsel, the court informed the jurors that "no further legal definition [was] available."

¶11 We agree with Saldano that the State failed to offer any evidence of the criminal objectives of La Nuestra Familia and thus the State failed to establish that Saldano engaged in the aggravated assault with the intent to further the criminal objectives of a street gang. Detective Pizzelle testified only that La Nuestra Familia was formed to keep the races separate. On its face, aligning with one's own race is not a criminal objective. Although the expert alluded to the gang's violence and criminality when he talked about members being allowed to opt out of these activities at age fifty, and briefly referenced a requirement that a person "shed blood" to become a member, he did not offer the jury any evidence on which to base its finding that Saldano's aggravated assault on the victim was intended to

further the gang's "criminal objectives." Detective Pizzelle acknowledged that the victim was not a gang member, the bar was not a gang hangout, and he knew of no other gang members present during the assault. No evidence was offered to suggest that this was gang territory. The gang expert merely testified that he believed the assault was gang motivated because it reflected the gang's intention to keep the races separate.

¶12 Moreover, the evidence in this case is unlike that in *State v. Ochoa*, 189 Ariz. 454, 943 P.2d 814 (App. 1997), on which the State relies. There, the shooter and the victim were in rival gangs, and although the gang expert did not "know" of any specific gang-related motive to commit the shooting at issue, he testified that generally "a drive-by shooting of rival gang members would further the interest of a criminal street gang by showing that the gang would not back down from confrontation and was ready to retaliate if it were wronged." *Id.* at 458, 943 P.2d at 818. In addition, a co-defendant told police about an ongoing feud between the two gangs and previous attacks on his sister and property, which he blamed on the rival gang; thus providing a motive for the shooting there. *See id.* As no such evidence was presented here, we find that the record cannot support the conviction for participating in a criminal street gang. We therefore vacate this conviction and the related sentence.

## II. Reference to Gang's Formation in Prison

¶13 Saldano next argues that the trial court abused its discretion by admitting evidence that La Nuestra Familia was a prison gang because this evidence was more prejudicial than probative. Saldano filed a motion in limine to preclude any reference to his prior convictions, which the trial court granted. Over Saldano's objection, however, the trial court allowed the prosecutor to elicit testimony that Saldano had told the victim that even "*[i]n prison [Natives] ain't shit,*" in part on the basis that Detective Pizzelle would testify that this comment made the argument more than just a racial dispute because of "the different dynamics between the races in prison" and its relation to gang affiliation. During that argument, defense counsel again objected to any reference to his client having been in prison. The prosecutor responded that he intended to limit the testimony to the fact that the gang that "was formed in prison back in the fifties, and there are members inside prison and outside prison." The trial judge then commented that she was "okay" with that expert testimony because it was not inconsistent with her ruling that the state could not bring up defendant's prior felony convictions. The following day, the judge noted that in allowing Detective Pizzelle to refer to the origin of the gang in prison without making any reference to Saldano's prior felony convictions, she evaluated its "403 implication," and



"still found . . . the balance weighing in favor of allowing the testimony as opposed to not allowing the evidence."

¶14 We review a trial court's ruling on the admissibility of evidence for abuse of discretion. *State v. Wood*, 180 Ariz. 53, 61, 881 P.2d 1158, 1166 (1994). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ariz. R. Evid. 403. Evidence is "unfairly prejudicial" when it has "an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993) (citing Fed. R. Evid. 403, advisory committee note).

¶15 We view the challenged evidence on appeal in the "light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *State v. Harrison*, 195 Ariz. 28, 33, ¶ 21, 985 P.2d 513, 518 (App. 1998) (citation omitted). Moreover, "[b]ecause the trial court is best situated to conduct the Rule 403 balance, we will reverse

its ruling only for abuse of discretion." *State v. Cañez*, 202 Ariz. 133, 153, ¶ 61, 42 P.3d 564, 584 (2002) (citation omitted).

¶16 Although it is a close question, on this record we find that the trial court did not abuse its discretion in allowing the testimony regarding the gang's origin in prison. The origin of La Nuestra Familia had some relevance to show Saldano's comment that even "[i]n prison [Natives] ain't shit," was evidence that the argument and the subsequent aggravated assault on the victim were motivated by Saldano's affiliation with a gang. The prison origin of the gang did have some tendency to unfairly prejudice Saldano simply because it suggested a decision on an improper basis—that he was either a convicted felon or that he associated with convicted felons. Under these circumstances, however, we decline to find an abuse of discretion.

¶17 Nonetheless, we agree with Saldano that any unfair prejudice was exacerbated by Detective Pizzelle's comments that California's "three strikes rule" had caused the migration of violent California gang members to Arizona. But Saldano failed to object to this testimony, limiting us to review for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). However, because Saldano defended on the basis that he was acting in self-defense, and

the State failed to show that Saldano associated with other members of the gang or that his conduct was designed to further the gang's criminal objectives, we cannot say that any error in admitting this testimony was either fundamental or prejudicial.

### III. Prosecutorial Misconduct

¶18 Saldano argues that reversal is required as a result of prosecutorial misconduct based upon improper vouching, elicitation of irrelevant and prejudicial testimony from the gang expert, and argument unsupported by any evidence. The record fails to show that Saldano objected to any of the alleged instances of misconduct at trial, limiting us to review for fundamental error only. *Id.*

¶19 "[P]rosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, 238-39, ¶ 11, 172 P.3d 423, 426-27 (App. 2007) (quoting *Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984)). To determine whether a prosecutor's remarks are improper, we consider whether the remarks called to the attention of jurors matters they would not be justified in considering, and the probability, under the

circumstances, that the jurors were influenced by the remarks. *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 360 (2000) (citation omitted). "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (citation omitted).

#### **A. Vouching**

¶20 Saldano argues first that the prosecutor improperly vouched for the detective's testimony by asking him whether "[a]t any point during your interrogation with the defendant, either the part that we saw or the parts that had to be redacted for the court, did the defendant ever complain to you about any injuries?" There are "two forms of impermissible prosecutorial vouching: (1) where the prosecutor places the prestige of the government behind its witness; [and] (2) where the prosecutor suggests that information not presented to the jury supports the witness's testimony." *State v. King*, 180 Ariz. 268, 276-77, 883 P.2d 1024, 1032-33 (1994) (citation omitted). "The first type of vouching consists of personal assurances of a witness's veracity[.] The second type involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside

the record." *Id.* at 277, 883 P.2d at 1033 (internal citation omitted).

¶21 We do not find that the prosecutor's question constituted vouching, as there were no assurances of the detective's truthfulness and the statement was not designed to bolster the credibility of the witness by suggesting that the redacted portions of the interrogation would support the detective's testimony. Moreover, Saldano has failed to demonstrate that this testimony influenced the jurors or prejudiced him in any way as necessary for reversal on this basis.

#### **B. Impeachment of Character Witness**

¶22 Saldano also argues that the prosecutor engaged in misconduct when he attempted to impeach Saldano's character witness on his peaceful nature by asking her if she would be surprised to hear that Saldano had once reacted violently to a detective's questions. He further contends the prosecutor improperly impugned defense counsel's integrity when he asked the witness if defense counsel had neglected to tell her that Saldano, who she had testified had poor eyesight, had been playing pool in a darkened pool hall. The prosecutor's examination of this character witness on specific instances of conduct relating to his character for peacefulness was permissible under Evidence Rules 404(a)(1) and 405(a), and was

not improper, nor did it constitute impermissible vouching. Nor do we find the prosecutor's examination of this witness on whether defense counsel had told her about Saldano's playing pool in a darkened pool hall constituted an improper attack on defense counsel rising to the level of deliberate misconduct, or in any way influenced the jurors or prejudiced Saldano.

### **C. Closing Argument**

¶23 Saldano next argues that the prosecutor engaged in misconduct when he stated at the beginning of his closing argument, without any support in the evidence, that La Nuestra Familia is "one of the most violent and infamous gangs in the United States," and, later, that it is "a huge organization." Although prosecutors have "wide latitude" in closing arguments, they "are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury." *Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360 (citation omitted). We agree that the prosecutor's remarks had no support in the evidence, and thus, were impermissible.

¶24 We reject the State's argument that these remarks "[were] merely rhetorical flourish and did not go to any fact at issue in the case." The argument that the gang was "one of the most violent and infamous gangs in the United States" not only was unsupported by the evidence, it was unfairly prejudicial in that it was an appeal to the jury to convict Saldano on the

basis of emotion and horror. Moreover, the nature of La Nuestra Familia's "criminal objectives" was at issue in this case, and the prosecutor's argument referred to nonexistent evidence relating to this issue. The statement that La Nuestra Familia was a "huge organization" was also unsupported by any evidence, and in contrast to the absence of any evidence that other members of La Nuestra Familia were at the bar where the incident occurred, or even in Mesa. The judge instructed the jury, however, that the lawyer's arguments were not evidence. The jury is presumed to have followed these instructions. *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996). Additionally, Saldano's counsel reminded the jury in his own closing argument that the lawyer's comments were not evidence. Thus, although the prosecutor's comments were improper, they did not result in fundamental error.

#### **D. Eliciting Irrelevant and Prejudicial Evidence**

¶25 Saldano also argues that the prosecutor engaged in misconduct by repeatedly eliciting testimony from the expert on the practices of the Mexican Mafia to explain practices of La Nuestra Familia. In the first instance, the expert testified that if a member of the Mexican Mafia "killed in the name of the gang," he could embellish his tattoo to reflect this fact, suggesting the distinctiveness of Saldano's La Nuestra Familia tattoo may have similar meaning. Second, he argues that the

prosecutor's questioning of the expert elicited the irrelevant and prejudicial testimony that violent gang members were moving to Arizona to avoid California's three-strikes rule. We find that the reference to the embellished tattoos was without foundation, and the reference to gang members moving to Arizona was improper. However our review of the record persuades us that the witness' testimony was unexpected, and thus, did not constitute prosecutorial misconduct. Further, we do not find the prosecutor's examination on this issue was intentionally improper, as is necessary to find it was prosecutorial misconduct. See *Aguilar*, 217 Ariz. at 238-39, ¶ 11, 172 P.3d at 426-27. Saldano has failed, moreover, to meet his burden of persuading us that the improper testimony from this gang expert deprived him of a fair trial, as necessary for reversal on appeal.



**CONCLUSION**

¶26 For the foregoing reasons, we vacate Saldano's conviction and sentence for participating in a criminal street gang, and affirm his convictions and sentences for aggravated assault and attempted murder.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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JON W. THOMPSON, Judge

/s/

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SHELDON H. WEISBERG, Judge