

CERTIFIED FOR PARTIAL PUBLICATION*
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO SERGIO RODRIGUEZ,

Defendant and Appellant.

D055704

(Super. Ct. No. SCD214408)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed.

Sachi Wilson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Felicity Ann Senoski, Deputy Attorney General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts III.A. and III.B.

I.

INTRODUCTION

The People charged Arturo Sergio Rodriguez and codefendant Carlos Nicolas Covarrubias with three counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a))¹ (counts 1, 3, and 5), and five counts of assault with a deadly weapon or force likely to produce great bodily injury (§ 245, subd. (a)(1)) (counts 2, 4, 6, 7, and 8).² With respect to each count and each defendant, the People alleged a gang sentence enhancement (§ 186.22, subd. (b)(1)). As to counts 1, 3, and 5, the People alleged that Rodriguez personally used a dangerous and deadly weapon within the meaning of section 12022, subdivision (b)(1). As to counts 2, 4, 6, 7, and 8, the People alleged that Rodriguez personally used a dangerous and deadly weapon within the meaning of section 1192.7, subdivision (c)(23). The People also alleged that Rodriguez had suffered a prison prior (§§ 667.5, subd. (b), 668), a serious felony prior (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and a strike prior (§§ 667, subd. (b), 668, 1170.12) in connection with an August 2000 conviction.

A jury found Rodriguez guilty of counts 2, 4, 6, and 8. The jury found Rodriguez not guilty of the charged offense in count 7 (§ 245, subd. (a)(1)), but guilty of the lesser offense of simple battery (§ 242) as to that count. With respect to count 8, the jury found that Rodriguez personally used a dangerous and deadly weapon within the meaning of section 1192.7, subdivision (c)(23). The jury was unable to reach a verdict on the

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

² Covarrubias is not a party to this appeal.

remainder of the counts and allegations. The trial court declared a mistrial as to counts 1, 3, and 5, and later dismissed those counts and the balance of the allegations, pursuant to the prosecutor's motion. After the jury returned its verdicts, Rodriguez admitted having suffered the prior conviction. The trial court sentenced Rodriguez to an aggregate sentence of 13 years in prison.

On appeal, Rodriguez claims that the trial court erred in admitting expert testimony pertaining to gangs in general, and in particular, in admitting expert testimony concerning the attitudes of gang members toward "snitches." In addition, Rodriguez contends that the court erred in denying his motion to bifurcate trial of the substantive crimes from the gang enhancement allegations.

We conclude that Rodriguez has forfeited his evidentiary claims by failing to make adequate objections in the trial court and/or by failing to present an adequate argument on appeal. We further conclude that the trial court did not abuse its discretion in denying Rodriguez's motion to bifurcate.

Rodriguez also requests that this court independently review the transcript and the records that the trial court reviewed at its in camera *Pitchess*³ hearing, to determine whether the trial court properly denied his motion for discovery of a police detective's personnel file. As is frequently the case in this court, appellate counsel has failed to ensure that the *Pitchess* materials are part of the record on appeal. While we have exercised our discretion to order the record on appeal augmented to include the *Pitchess* materials, we

³ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

publish a portion of this opinion to remind appellate counsel that it is counsel's responsibility to ensure that the record is perfected in cases in which a *Pitchess* claim is raised. On the merits, we conclude the trial court did not err in determining that there were no discoverable materials in the detective's personnel file.

II.

FACTUAL BACKGROUND

A. *The June 21, 2008 assaults*

On June 21, 2008, Marco Hernandez was attending a party in a neighborhood in southeast San Diego known as Shelltown. Hernandez was working on a car with a few other people outside the residence at which the party was being held. Covarrubias, who had nearly gotten into a fight with Hernandez at a liquor store the previous day, rode by the residence on a bicycle. Covarrubias was accompanied by two other men, who were also riding bicycles. According to the testimony of San Diego Police Officer Mike Hall, one of the men who was working on the car with Hernandez said that Covarrubias and the other men "mad-dogged" Hernandez and his friends by giving them "dirty looks."

Approximately 10 minutes later, Covarrubias returned with a group of about 10 others, including Rodriguez. Rodriguez was armed with a two-by-four piece of wood, and others in the group had knives. Covarrubias challenged Hernandez to a fight. Some members of Covarrubias's group yelled out "38th Street" and "Shelltown 38," and Covarrubias and Hernandez began to fight (count 7).

While Covarrubias and Hernandez were fighting, several of the party-goers came outside the residence. A large melee ensued. George Arciniega was stabbed multiple

times (count 2); Jorge Martinez was stabbed three times (count 4); Javier Martinez was punched and stabbed (count 6); and Jacinto Martinez was hit in the head with a piece of wood by a person who a witness described as having "1920" tattooed across his neck (count 8). Rodriguez has such a tattoo. After the stabbings, Covarrubias's group ran from the scene.

B. *Gang related evidence*

San Diego Police Detective Greg Pinarelli testified as a gang expert at trial. Pinarelli recounted the history of the Shelltown 38 gang, and stated that the attack occurred on the gang's turf. Detective Pinarelli described several prior crimes that Shelltown 38 members had committed for the purpose of proving the existence of the gang.

Detective Pinarelli also testified concerning gang culture, including gang members' unwillingness to cooperate with law enforcement, and their willingness to use violence against those who do. Detective Pinarelli testified that gang members achieve status within their gangs by committing crimes on behalf of the gang. In addition, fellow gang members are expected to provide assistance if another member of their gang is involved in an assault. Detective Pinarelli also stated that gangs commit violent acts in order to instill fear in the community, and to boost their status among rival gangs.

Rodriguez is a documented member of the Shelltown 38 gang. In prior contacts with police, Rodriguez admitted his affiliation with Shelltown 38. Rodriguez also has tattoos that reflect his affiliation with the gang, including the number "1920" on his neck. That number represents the 19th letter of the alphabet, "S," and the 20th letter, "T," which is an abbreviation for Shelltown.

III.

DISCUSSION

A. *Rodriguez has forfeited all of his claims pertaining to the admissibility of expert testimony concerning gangs*

Rodriguez claims that the trial court erred in admitting expert testimony pertaining to gangs in general, and in particular, in admitting expert testimony concerning the attitudes of gang members toward "snitches." We conclude that Rodriguez has forfeited these claims.

1. *Forfeiture*

"Under Evidence Code section 353, subdivision (a), a judgment can be reversed because of an erroneous admission of evidence only if the record contains an objection both ' "timely made and so stated as to make clear the specific ground of the objection" ' or motion. [Citation.] If a defendant fails to make a timely objection on the precise ground asserted on appeal, the error is not cognizable on appeal. (*Ibid.*)" (*People v. Polk* (2010) 190 Cal.App.4th 1183, 1194.)

"[A]n in limine motion, without a contemporaneous objection at trial, is sufficient to preserve an objection for appeal only when '(1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.' " (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 160, quoting *People v. Morris* (1991) 53

Cal.3d 152, 190; *Morris* disapproved on another ground by *People v. Stansbury* (1995) 9 Cal.4th 824.)

In *In re S.C.* (2006) 138 Cal.App.4th 396, 406-407, the court described an appellant's burden to demonstrate that the appellant properly preserved its appellate claims in the trial court:

"The party . . . must cite to the record showing exactly where the objection was made. [Citations.] When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited. [Citations.]"

In addition to properly preserving and presenting evidentiary claims on appeal, an appellant must present a reasoned legal argument in support of reversal. " ' "Where a point is merely asserted by counsel without any argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." ' [Citation.]" (*People v. O'Neil* (2008) 165 Cal.App.4th 1351, 1355, fn. 2.)

2. *Application*

a. *The trial court's admission of expert testimony pertaining to gangs*

Rodriguez argues that the trial court erred in admitting certain expert testimony by Detective Pinarelli concerning gangs. For example, Rodriguez claims, "The other crimes committed by the gang, the gang identifiers for Mr. Covarrubias and Mr. Rodriguez, the

discussion of witness intimidation, all had no tendency to prove that either defendant had committed the crimes charged." We conclude that Rodriguez has forfeited this claim.⁴

Rodriguez does not cite to a single objection raised in the trial court to the admission of the testimony at issue. Rodriguez notes that the trial court granted the People's motion in limine to permit the introduction of a gang expert's testimony, but does not contend in his opening brief that he opposed the People's motion in limine. Rather, citing *People v. Morrison* (2004) 34 Cal.4th 698, 724 (*Morrison*), Rodriguez contends that "the prosecution had the burden to establish the relevance of the gang testimony."

The law is well-established that a party has no burden to establish the relevance of proffered evidence in the absence of an objection. For example, in *People v. Davis* (2008) 168 Cal.App.4th 617, 628, the court noted: "[T]he proponent must be prepared to defend the propriety of the evidence, but in the absence of an objection, the evidence will be admitted. It has long been held that inadmissible evidence may support a criminal conviction where no objection has been interposed." *Morrison* is not to the contrary. The *Morrison* court's statement that "[t]he proponent of proffered testimony has the burden of establishing its relevance" came after the court had noted that a party had raised hearsay and relevance objections to the admissibility of the evidence in the trial court. (*Morrison, supra*, 34 Cal.4th at p. 724.) *Morrison* does not hold, as Rodriguez suggests, that the

⁴ While Rodriguez claims that much of the expert testimony was irrelevant to prove the underlying offenses, he does not appear to question that the evidence was relevant to prove the gang enhancement allegations. We need not address whether Rodriguez's claim fails for this reason, in light of our conclusion that he has forfeited the claim. We address Rodriguez's contention that the trial court erred in denying his motion to bifurcate trial of the underlying offenses from the gang enhancement allegations in part III.B., *post*.

proponent of proffered evidence has the burden of establishing the relevance of evidence in the absence of an objection. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1091 (conc. opn. of Baxter, J.) ["And, as is true with all evidence, *if an objection is made to introduction of evidence* about battered women's syndrome, the proponent of this evidence bears the burden of establishing its particular relevance" (italics added)].)

In his reply brief, Rodriguez contends that he preserved his claim pertaining to the admissibility of Detective Pinarelli's expert testimony by joining in Covarubbias's objection to the prosecution's motion in limine to introduce expert testimony concerning gangs. We are not persuaded. Putting aside the fact that Rodriguez raises this contention for the first time in his reply brief (*People v. Lewis* (2008) 43 Cal.4th 415, 536, fn. 30 ["Generally, a contention may not be raised for the first time in the reply brief"]), and offers no legal argument as to whether the in limine proceedings in this case excused the need for a contemporaneous objection at trial (*People v. Morris, supra*, 53 Cal.3d at p. 190), Covarubbias's objection to the introduction of the expert testimony was based on the fact that *Covarubbias* was not a documented gang member—an argument that does not apply to Rodriguez, since it is undisputed that Rodriguez *is* a documented gang member. Thus, the fact that Rodriguez joined in Covarubbias's opposition to the People's motion in limine did not preserve Rodriguez's claim on appeal that the expert testimony concerning gangs was irrelevant in proving the charged offenses, and therefore, inadmissible.

b. *Detective Pinarelli's expert testimony concerning how gang members regard "snitches"*

Rodriguez claims that the court erred in admitting Detective Pinarelli's testimony concerning how gang members regard "snitches." Rodriguez maintains that "the court (*over objections from the defendants*) allowed the gang expert . . . to testify at length about gangs' hatred of snitches." (Italics added.) In support of this assertion, Rodriguez cites two portions of the reporter's transcript of Detective Pinarelli's testimony during which Pinarelli testified, *without objection*, about how gang members regard snitches. Rodriguez's claim on appeal as to this testimony is forfeited. (*People v. Polk, supra*, 190 Cal.App.4th at pp. 1193-1194.)

Rodriguez also cites an excerpt of a conference held in chambers during the trial, at which Covarubbias's attorney objected to Detective Pinarelli's anticipated testimony about writings concerning "snitches" contained in a notebook that police found in Covarubbias's residence.⁵ In raising this objection, Covarubbias's attorney referred to evidence that had been presented earlier in the trial concerning Covarubbias's brother having threatened one of the witnesses not to testify. Covarubbias's attorney objected on the ground that the writings in the notebook were drafted long before the incident involving Covarubbias's brother, and that there was a risk of "confusing the jury as to the chronology" The court overruled the objection.

⁵ Detective Pinarelli testified that the notebook said "rest in piss, mother fuckers snitches," "fuck snitches," and "stop snitching."

Even assuming that we may treat Covarubbias's objection as having been made by Rodriguez (but see *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1656 ["[o]n appeal, a defendant cannot take advantage of objections made by a codefendant in the absence of stipulation or understanding to that effect' [citation]"]),⁶ Rodriguez fails to make any argument on appeal as to how an objection that was based on the timing of the drafting of the notebook excerpts preserves his claim on appeal that the trial court erred in permitting Detective Pinarelli to present expert testimony concerning the attitudes of gang members toward "snitches." Accordingly, we conclude that Rodriguez's claim is forfeited. (*People v. Polk, supra*, 190 Cal.App.4th at pp. 1193-1194; *People v. O'Neil, supra*, 165 Cal.App.4th at p. 1355, fn. 2.)

B. *The trial court did not abuse its discretion in denying Rodriguez's motion to bifurcate*

Rodriguez claims that the trial court erred in denying his motion to bifurcate trial of the substantive crimes from trial of the gang enhancement allegations. We review this claim for an abuse of discretion. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1044 (*Hernandez*).) "[W]e review the trial court's ruling . . . based on a review of the record that was before the trial court at the time of the ruling." (*People v. Burch* (2007) 148 Cal.App.4th 862, 867.)

1. *Factual and procedural background*

Prior to trial, the People filed a trial brief that indicated that the People intended to present evidence that the charged offenses were gang related. For example, the People

⁶ Rodriguez does not cite to any such stipulation in this case.

stated that the crime occurred in the "middle of 'Shelltown 38' street gang territory"; that Covarrubias had " 'mad dogged' " the victim shortly before he returned with a group of armed men; that Rodriguez had a gang related tattoo on his neck; that the assailants yelled out "This is 38th Street Life!" during the attack; that a victim had identified several Shelltown 38 gang members as having been involved in the attack; and that police found gang graffiti at Covarrubias's home when they arrested him shortly after the attack. The People also filed a separate motion in limine seeking permission to introduce expert testimony pertaining to gangs. (See pt. III.A.2.a., *ante*.)

At a pretrial hearing, Rodriguez's counsel stated, "Very briefly, your honor. We didn't file anything or brief it, but we would be moving to bifurcate the gang allegations in this case if your honor allows the prosecution to introduce gang evidence." The court indicated that it would hear the motion "at a later time."

At a later point during the same hearing, Rodriguez's attorney stated, "Then there's defendant Rodriguez's motion to bifurcate that we just brought up orally today." The court summarily denied the motion to bifurcate.

2. *Governing law*

In *Hernandez*, *supra*, 33 Cal.4th at page 1048, the defendants claimed that the trial court had erred in failing to bifurcate trial of a gang enhancement allegation. The *Hernandez* court noted that bifurcation is clearly not required to the extent that evidence of a defendant's gang membership is admissible on the charged offenses, without regard to any gang enhancement allegation:

"[E]vidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.] To the extent the evidence supporting the gang enhancement would be admissible at a trial of guilt, any inference of prejudice would be dispelled, and bifurcation would not be necessary. [Citation.]" (*Id.* at pp. 1049-1050.)

The *Hernandez* court further made clear that "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.) Noting the benefits of unitary trials, the *Hernandez* court 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.*) Bifurcation is required only where a defendant can " 'clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*Id.* at p. 1051.)

In applying this law, the *Hernandez* court 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. 1050.) The *Hernandez* court 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 (*id.* at p. 1051), but held that the trial court had acted within its discretion in denying the motion to bifurcate. (*Ibid.*)

3. *Application*

The People's trial brief suggested that the gang related evidence would be highly relevant to the issues of motive and intent with respect to the underlying offenses. (See *Hernandez, supra*, 33 Cal.4th at p. 1050.) Rodriguez acknowledges in his brief that "[t]he main factual issue the prosecution faced was showing that the defendants were responsible for all of the injured victims under the 'natural and probable consequences' doctrine." It is well established that whether a defendant is participating in gang activity at the time the underlying offense is committed is among the circumstances to be considered in determining whether a charged offense is a natural and probable consequence of a target offense. (E.g., *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1451-1452 ["Defendant was . . . properly found liable for the homicide as a natural and probable consequence of the planned gang assault"]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.) Further, even assuming that some of the gang-related evidence would not have been admissible at a trial limited to the charged offenses, Rodriguez presents no argument on appeal as to how the need for bifurcation outweighed the benefits of a unitary trial in this case. (See *Hernandez, supra*, 33 Cal.4th at pp. 1050-1051.) Accordingly, he has not demonstrated that the trial court abused its discretion in denying his motion to bifurcate.

C. *The trial court did not abuse its discretion in denying Rodriguez discovery of Detective Pinarelli's personnel records*

Rodriguez requests that this court conduct a review of Detective Pinarelli's sealed personnel file to determine if the file contains discoverable materials.

1. *Factual and procedural background*

In the trial court, Rodriguez filed a motion pursuant to *Pitchess*, *supra*, 11 Cal.3d 531, in which he sought discovery of Detective Pinarelli's personnel records. In his motion, Rodriguez argued that Detective Pinarelli may have "tainted" two eyewitness identifications of Rodriguez "in order to strengthen his case against Mr. Rodriguez." Rodriguez claimed that Detective Pinarelli harbored a "grudge" against him based on prior contacts between the two men. The trial court conducted a hearing on the motion. During the hearing, the court concluded that it would review the personnel records in camera "as to evidence of police misconduct along the lines of coercing witnesses to change testimony or something similar." After reviewing Detective Pinarelli's personnel records in camera, the court determined that there were no records that were discoverable.

2. *Governing law*

a. *Discovery of a police officer's personnel records*

In *People v. Gaines* (2009) 46 Cal.4th 172, 179, the Supreme Court summarized the manner by which a party may discover evidence in confidential police officer personnel records under *Pitchess* and its progeny:

"[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. [Citation.] Good cause for discovery exists when the defendant shows both ' "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.] If the defendant establishes good cause, the court must review the requested records in camera to determine what

information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citations], 'the trial court should then disclose to the defendant "such information [that] is relevant to the subject matter involved in the litigation." ' [Citations.]"

On appeal, this court is required to review the "record of the documents examined by the trial court" and determine whether the trial court abused its discretion in refusing to disclose the contents of the officer's personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229; see also *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

- b. *Appellate counsel has a responsibility to ensure that the record is perfected in cases in which a Pitchess claim is raised*

The sealed transcript of a *Pitchess* hearing and any personnel documents that the trial court reviewed pursuant to a *Pitchess* motion are not part of the normal appellate record. (Cal. Rules of Court, rule 8.320.) Therefore, to the extent that an appellant's claim is dependent upon appellate review of the sealed transcript and the confidential personnel documents, appellate counsel is required to apply to the superior court for an order that the record include such materials, pursuant to California Rules of Court, rule 8.328(c). In the absence of such an application, the record on appeal will not contain the *Pitchess* materials, making it impossible for this court to review an appellant's *Pitchess* claim.

This court has exercised its discretion in this case—as it has had to do in many other cases—to augment the record to include the relevant *Pitchess* materials, in order to be able to address the issue. However, the failure of counsel to perfect the record delays the processing of cases and wastes judicial resources. Accordingly, we urge appellate counsel to ensure that the record is properly perfected in cases in which a *Pitchess* claim is raised.

3. *The trial court did not abuse its discretion in denying Rodriguez discovery of Detective Pinarelli's personnel file*

We have examined Detective Pinarelli's personnel records in camera and conclude that the trial court did not abuse its discretion in denying discovery of the records.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.