

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER MENA,

Defendant and Appellant.

B177713

(Los Angeles County
Super. Ct. No. VA079744)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Michael A. Cowell, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary
Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and
Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts Factual Background, II, III, and IV.

Defendant Javier Mena was one of five people arrested as they left a hotel room at a Ramada Inn in Norwalk, California. In a search of the room, police found large quantities of methamphetamine, items related to methamphetamine sales, and a .45 caliber pistol concealed in a hamper located between the bedroom and living room areas. The jury convicted defendant of possession of methamphetamine while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a), count 3), but deadlocked on the charge of possession of methamphetamine for sale (Health & Saf. Code, § 11378, count 1).¹ After the trial court dismissed the possession for sale charge, defendant admitted 10 prior convictions under the Three Strikes law (Pen. Code, §§ 667(b)-(i), 1170.12(a)-(d)). In a bifurcated non-jury trial, the court found an eleventh prior “strike” conviction true. The court sentenced defendant to 25 years to life in state prison.²

Defendant appeals from the judgment of conviction. He contends: (1) the trial court erroneously instructed on the “armed” element of count 3, possession of methamphetamine while armed with a firearm; (2) the court erred in failing to instruct on simple possession as a lesser included charge in that count; (3) the court erred in admitting gang evidence and in denying defendant’s motion for a mistrial; (4) trial counsel was ineffective; and (5) the evidence was insufficient to support the conviction on count 3.

In the published portion of our opinion, we disagree with *People v. Singh* (2004) 119 Cal.App.4th 905 (*Singh*), and hold that the former version of CALJIC

¹ All further undesignated section references are to the Health and Safety Code.

² Defendant was jointly tried with Jose Montano, one of his co-arrestees, who is not a party to this appeal. Montano was convicted of possession of methamphetamine for sale and possession of methamphetamine. He filed a notice of appeal, but the appeal was later dismissed.

No. 12.52, the pattern instruction on possession of a controlled substance while armed with a firearm, adequately conveyed the mental state required to find the “armed” element of that crime. In the unpublished portion of our decision, we conclude that defendant’s remaining arguments are unpersuasive, and affirm the judgment.

FACTUAL BACKGROUND

On October 2, 2003, around 10:30 p.m., officers of the Whittier Police Department conducted a surveillance at a Ramada Inn in Norwalk. They were watching a room on the third floor, a single suite consisting of a bedroom (room 5312-A) and living room (room 5312-B).

Positioned in an unmarked police vehicle in the parking lot, Detective James Uhl observed an apparent narcotics transaction conducted in the lot by a man later identified as Anthony Flick. At some point thereafter, Detective Uhl observed defendant come out onto the balcony of the room to smoke a cigarette, and then go back inside. A car then drove into the parking lot. Flick, who was in the parking lot, directed it where to park. The two occupants went upstairs with Flick to the room. Later, Flick and an unidentified man came out of the room and down the stairs. Flick tried to look through the tinted windows of Detective Uhl’s vehicle, but the windows are impenetrable to the naked eye. Flick and the man then got in Flick’s car and drove away.

Detective Uhl directed other officers to stop the vehicle. Soon he saw Flick’s car drive past at a high rate of speed with its lights out. It was pursued by a Los Angeles County Sheriff’s patrol car.

A few moments later, four men and a woman came out of the room and down the stairs. Among the men were defendant, his codefendant Jose Montano,

and two others later identified as Joe Jaimez and Jonathan Gomez. The woman was defendant's girlfriend, Judy Lopez.

Officers approached at gunpoint and directed the group to stop. All obeyed except Montano, who had separated from the group. An officer detained him nearby. On the sidewalk where Montano was stopped, perhaps 15 feet from the stairway, officers found a sock containing 73.6 grams of methamphetamine, a pack of cigarettes containing 1.01 grams of methamphetamine, and a syringe.

Having obtained a search warrant, officers searched the room. On the bed in the bedroom, they found a police scanner that was monitoring the channels of the Whittier police and Los Angeles County Sheriff. Detective Uhl could hear that the scanner was picking up the radio conversations of the surveillance team, even though the surveillance frequency was supposed to be secure. According to Judy Lopez, who testified as a prosecution witness, the group left the room "walking fast," headed to their cars, because "Flick had just left our room and it was said that he was -- the cops were there and on the whatchamacalit in the hotel."

Under the bed was a hand-held safe. Officers opened it.³ Inside were two plastic bags containing methamphetamine, one bag holding 111 grams, the other 3.44 grams. Also inside the safe were three photographs.⁴ One depicted defendant with a child; another showed defendant and his estranged wife, Theresa Garcia. The third photograph showed defendant's estranged wife with other unidentified

³ At trial, Detective Uhl testified that the safe was locked, and that officers pried it open. He identified a pry mark in a photograph of the safe. However, he was impeached by his prior testimony at the preliminary hearing that the safe was open and officers lifted the lid.

⁴ We have examined all the exhibits introduced at trial.

people. The safe also contained a money clip with \$400, and a box of .45 caliber ammunition.

In the nightstand next to the bed was a small notebook bearing the handwritten names “Judy and Javier” (referring to Lopez and defendant’s first names) and the date of “9/26/03.” Lopez testified that she had given the notebook to defendant, and was the one who had written in it. In the same drawer as the notebook was a scale, and a plastic bag containing 20.9 grams of methamphetamine.

In a search of a clothes dresser in the bedroom, police found a cable television bill in the name of defendant’s estranged wife, addressed to her home in Rosemead. They also discovered a bundle of \$20 bills totaling \$7,500, and a catalogue advertising Oakland Raider jerseys. A photograph of one sample jersey showed defendant’s last name, Mena, on the back of the garment. The catalogue was addressed to defendant at his estranged wife’s Rosemead address. Also in the same dresser were men’s undershirts in a “rather large” size.

Along one wall of the bedroom, officers found several CD’s and CD cases on which was written the nickname, “Skinny,” followed by the initials, “EMF.” The same nickname and initials were written on the top of a shoe box found on the night stand next to the bed. All the writing was in stylized, angular script. The parties stipulated that defendant used the nickname “Skinny.”

There was a clothes hamper in the area adjoining the bedroom and living room. In the hamper, under items of women’s clothing, and men’s clothing of a large size, police found a .45 caliber, semi-automatic pistol. The gun was loaded and operable. According to Detective Uhl, persons engaged in narcotics sales frequently carry firearms for protection.

Also in the bedroom officers found a CD case bearing the name, “Lil’ Silent.” The parties stipulated that Montano used that nickname.

Turning to the living room, on a dresser officers found smaller quantities of methamphetamine, and a collection of small plastic baggies typically used for packaging methamphetamine for sale. Also on the dresser were bottles of nail polish remover, bleach, and acetone -- liquids typically used to whiten methamphetamine so as to increase its street value. With these bottles was a bottle of denatured alcohol solvent, which is used to separate ephedrine, the main ingredient in methamphetamine, from binding material.

The total weight of the methamphetamine in the bedroom and living room areas was about one-half pound -- the equivalent of about 2,600 individual doses. Detective Uhl opined that the methamphetamine was possessed for sale.

According to Judy Lopez, she and defendant had spent the night of October 1, 2004 in the bedroom area. Another girl spent the night in the living room area. Defendant had brought clothing to the room, but he did not live there. Lopez and defendant had intended to spend only one night there. However, they were still present late on the night of October 2 when they were arrested.

The parties stipulated that the office manager of the Ramada Inn would testify that Anthony Flick rented the room beginning September 28, 2004, for a period of seven days. According to Detective Uhl, narcotics dealers frequently operate from rooms rented in the names of others.

I. The Trial Court's Instruction on the "Armed" Element of Count 3 Was Not Erroneous

Defendant was charged in count 3 with possession of methamphetamine while armed with a firearm (§ 11370.1, subd. (a)). The jury instruction on that charge did not expressly state that to be guilty, defendant must "knowingly" have a firearm available for immediate offensive or defensive use. Relying on *People v. Singh, supra*, 119 Cal.App.4th 905, defendant contends that this omission was

error. We conclude, however, that the instructional language implicitly included the element of knowledge, and that there is no reasonable likelihood the jury could have misunderstood. In reaching our conclusion, we disagree with *Singh*.

In instructing on possession of methamphetamine while armed with a firearm, the trial court used the former version of CALJIC No. 12.52, the pattern jury instruction on the crime. In relevant part, that instruction stated: “Every person who possesses any amount of a substance containing methamphetamine while armed with a loaded, operable firearm is guilty of a violation of Health and Safety Code section 11370.1, a crime. [¶] ‘Armed with’ means *having available for immediate offensive or defensive use*.” (Italics added.) The definition of “armed with” tracked the statutory language of section 11370.1, and did not expressly require a finding that defendant possessed methamphetamine while “knowingly” having a firearm available.

In *Singh, supra*, the court held that the “armed” element of section 11370.1, like the “armed” element of the enhancement allegation under Penal Code section 12022, subdivision (c), requires an element of knowledge. As is the case here, the trial court in *Singh* instructed the jury according to former CALJIC No. 12.52. Without considering the reasonable likelihood of how the instruction would be understood, the court in *Singh* held that “the trial court erred in failing to instruct the jury that defendant had to *knowingly* have the firearm available for immediate offensive or defensive use.” (*Singh, supra*, 119 Cal.App.4th at p. 913.) The court determined that the error was harmless, because the trial court properly instructed on the knowledge element in defining an “armed” allegation under Penal Code section 12022, and the jury returned a true finding on that allegation. The court also concluded that the omission of the knowledge requirement in former CALJIC

No. 12.52 was likely inadvertent, and urged the CALJIC Committee to change the instruction. (*Id.* at pp. 912-913.) The Committee later did so.⁵

We agree with *Singh's* conclusion that to be “armed” with a firearm under section 11370.1, one must have knowledge that the gun is available for use. We respectfully disagree, however, that former CALJIC No. 12.52 failed to include that requirement.

When a jury instruction is ambiguous, the reviewing court examines the record to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied the instructional language. (*People v. Clair* (1992) 2 Cal.4th 629, 663; see generally, 6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 17, pp. 469-470.) Further, although a specific element is not expressly recited in an instruction, it may nonetheless be implicit in the instructional language used. (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 279.)

Here, the instruction required a finding that defendant had a firearm “available for immediate offensive or defensive use.” This wording necessarily conveys the element of knowledge: one cannot have a firearm “available” for “immediate” use in attack or defense unless one *knows* of its availability for such use. Otherwise, it makes no sense to discuss whether the person has a gun “available” for any “immediate” use at all. We presume the jurors understood the common meaning of the language used, and applied common sense. The instruction does not refer to the mere physical location of the firearm, but rather to its immediate availability to a person for use as a weapon with which to attack or defend. Thus, the jury must have understood that an “armed” finding under the

⁵ New CALJIC No. 12.52 states in relevant part: “‘Armed with’ means knowingly to carry a firearm or have it available for offensive or defensive use.”

instructional language necessarily included a finding that defendant knew the firearm was available.

True, the instruction might have been clearer -- it could have expressly stated that “‘armed with’ means *knowingly* having available for immediate offensive or defensive use.” But that clarification was not necessary to convey the legal requirements of the charge. In any event, need for clarification does not necessarily equate to instructional error. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1016 [former CALJIC No. 2.50.01 not erroneous, although clarification was appropriate].) Only when an omission creates a reasonable likelihood that the jury misunderstood or misapplied the law is the instruction fatally flawed. Here, no reasonable interpretation of the instruction on count 3 would permit a finding that defendant was “armed” -- that is, had a firearm “available for immediate offensive or defensive use” -- without knowing he was “armed.”

Though not necessary, other instructions and the attorneys’ arguments reinforce our conclusion. The court instructed on the concurrence of conduct and general criminal intent. That instruction applied to both the count 3 charge of possession of methamphetamine while armed with a firearm, and the allegation in count 1 that defendant was armed under Penal Code section 12022, subdivision (c). For both those charges, the instruction required “a union or joint operation of act or conduct and general criminal intent. General intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful.” (CALJIC No. 3.30.)

The armed allegation under Penal Code section 12022 appeared in count 1, which charged defendant with possession of methamphetamine for sale (§ 11378). In defining the armed allegation in that count, the trial court instructed: “The term

‘armed with a firearm’ means *knowingly* to carry a firearm or have it available for offensive or defensive use.” (Italics added.)

Thus, the instructions equated the mental elements of the being “armed” in counts 1 and 3, and also expressly informed the jury of the knowledge requirement of the armed allegation in count 1. The instructions therefore implied that being armed in count 3 also required knowledge.

Further, nothing in the attorney’s arguments to the jury carried the implication that defendant could be “armed” in count 1 only if he knew the gun was available, yet could be “armed” in count 3 even if he did *not* know it was available. In his argument, defendant’s attorney never mentioned the elements required for a finding defendant was armed. Rather, he pursued an all or nothing strategy: the prosecution evidence failed to negate the possibility that someone else controlled the room and its contents; therefore, defendant was guilty of *nothing*.

The prosecutor drew no distinction between the elements of being armed as alleged in count 1 and count 3. The only time the prosecutor argued the legal requirements of being armed, she quoted the instruction on the armed allegation of Penal Code section 12022, subdivision (c) and its requirement of knowledge. She stated: “There’s a jury instruction you’re going to receive that talks about personally armed. Some of you could be concerned because the gun was found in a hamper. So really was anybody personally armed would be the question that you’re asking, but this instruction answers that. [¶] ‘The term armed with a firearm means knowingly to carry a firearm or have it available for offensive or defensive use.’ [¶] And so as to the allegation that Mr. Mena was personally armed when he was possessing the drugs for sale, the People respectfully request that you find that allegation to be true.”

Thus, to the extent the jury’s attention was directed to the issue of whether defendant was “armed” within the meaning of the law, the jury was referred to the instructional language that expressly required a finding of knowledge.⁶ There is simply no reasonable likelihood that the jury could have been misled into convicting defendant of count 3 without necessarily finding he *knowingly* had a firearm available for immediate offensive or defensive use.⁷

II. The Error in Failing to Instruct on Simple Possession As a Lesser Included Offense of Count 3 Was Harmless

Defendant contends that the trial court erred in not instructing on simple possession of methamphetamine (§ 11377, subd. (a)) as a lesser included offense of the charge in count 3, possession of methamphetamine while armed with a

⁶ Defendant argues that the jury “was unable to convict [defendant] of possession of methamphetamine for sale charged in count 1 *or to find true that [defendant] was personally armed with a firearm under [Penal Code] section 12022, subdivision (c).*” (Italics added.) To the extent he is asserting that the jury deadlocked on the armed enhancement in count 1 as well as the substantive charge, he is incorrect. The jury’s disagreement went only to the charge of possession for sale. The jury never reached the armed allegation under Penal Code section 12022, subdivision (c), and there is no indication in the record that the jurors were unable to agree whether defendant “knowingly” had the gun available. Indeed, when the jury informed the court of the deadlock on count 1, the jury also informed the court that the “verdict re: Possession of a controlled substance with a firearm [is] completed.” Hence, before any deadlock on count 1, the jury had already found defendant guilty of count 3, including a finding that he had the firearm “available for immediate offensive or defensive use.” As we have noted, such a finding implicitly requires a finding of knowledge.

⁷ Defendant contends that if we conclude the trial court had no duty to give a correct instruction on count 3, then his trial counsel was ineffective for failing to request such an instruction. Because we conclude that the trial court’s instruction was not erroneous, and there is no reasonable likelihood the jury was misled, we do not discuss the ineffective assistance claim.

firearm (§ 11370.1, subd. (a)). Although the trial court erred, the error was harmless.

A. Background

Defendant and Montano were jointly charged in count 1 with possession of methamphetamine for sale (§ 11378). The court instructed on this crime, and also instructed that simple possession of methamphetamine was a lesser included offense of that crime. Further, the court instructed: “If you find either defendant not guilty of Possession for Sale of methamphetamine in violation of Health and Safety Code section 11378 you must then determine whether that defendant is nevertheless guilty of Possession of methamphetamine, a controlled substance, in violation of Health and Safety Code section 11377(a).” The elements of simple possession of methamphetamine were set forth in the court’s instruction on count 2.

The court also instructed on count 3 that defendant was charged with possession of methamphetamine while armed with a firearm. The court did not instruct that possession of methamphetamine was a lesser included offense of that charge.

During deliberations, the jury sent out the following note: “Jury is hung on possession for sale of a controlled substance [count 1]. Should we now consider possession only? [¶] Verdicts re: possession of a controlled substance with firearm [count 3] and all charges re: Montano are completed.”

The trial court convened out of the jury’s presence. Montano’s attorney was present, and stated that he was standing in for defendant’s attorney. The prosecutor was also present. The court stated that the prosecutor and defendant’s attorney were in agreement that that the jury should not consider simple possession. The prosecutor concurred with that assessment. The court then

addressed Montano's attorney: "So you are standing in for [defendant's attorney] and . . . both of you have spoken to him by phone and he indicated that's his feeling?" Montano's attorney replied, "That's correct."

The court then instructed the jury not to consider simple possession as to defendant on count 1: "That is not offered as a lesser offense which is why you don't have a guilty or not guilty verdict form on that offense for [defendant]." After a brief inquiry, the court declared a mistrial on count 1 against defendant. The jury foreperson confirmed that the jury had "a verdict on the other count for [defendant]." The court then took the verdicts for both defendant and Montano, which included defendant's guilty verdict on count 3, possession of methamphetamine while armed with a firearm.

B. *Harmless Error*

"The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 771, 827 (*Cooper*)). Respondent concedes, as it must, that simple possession of methamphetamine is a lesser included offense of possession of methamphetamine while armed with a firearm. Respondent further concedes that there was substantial evidence from which the jury might infer that defendant committed the lesser offense of simple possession of methamphetamine without committing the greater offense of possession of methamphetamine while armed with a firearm.

From these concessions (with which we agree, based on our independent review of the law and record) it is apparent that the trial court had a sua sponte duty to instruct on simple possession as a lesser included offense in count 3.

Though not expressly conceding error, respondent argues that “any error” in failing to instruct was invited and harmless.

We quickly dispose of the “invited error” argument. “[A] defendant may not invoke a trial court’s failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court’s failure to give the instruction.’ [Citation].” (*People v. Horning* (2004) 34 Cal.4th 871, 905 (*Horning*)). Respondent finds invited error in the brief discussion among court and counsel concerning the jury’s written inquiry. However, the discussion concerned whether to instruct on simple possession as a lesser included offense of possession for sale charged in count 1. It had nothing to do with whether to instruct on simple possession as a lesser included offense of count 3. Thus, the objection by defendant’s counsel (communicated by Montano’s attorney) did not “invite” the court’s error in failing to instruct on the lesser offense in count 3. The doctrine of invited error applies only when the defendant “persuades” the trial court to commit the particular error at issue. (*Horning, supra*, 34 Cal.4th at p. 905; see *Cooper, supra*, 53 Cal.3d at p. 827 [invited error found where “the court would have given the instructions [on lesser included offenses] but for defendant’s repeated objections”].)

However, we conclude that the error in failing to instruct on simple possession as a lesser included offense in count 3 was not prejudicial. In a non-capital case, an error in failing to instruct on a lesser included offense requires reversal only if the error is prejudicial under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 -- that is, only if it is reasonably probable that defendant would have obtained a more favorable result if the error had not occurred. (*People*

v. Breverman (1998) 19 Cal.4th 142, 178.) “Appellate review under *Watson* . . . focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result. Accordingly, a determination that a duty arose to give instructions on a lesser included offense, and that the omission of such instructions in whole or in part was error, does not resolve the question whether the error was prejudicial. Application of the *Watson* standard of appellate review may disclose that, though error occurred, it was harmless.” (*Id.* at pp. 177-178, fn. omitted.) Put simply, to find the error prejudicial, the entire record must show that if given the choice between the lesser and the greater offenses, it is reasonably probable the jury would have convicted of the lesser. (*Id.* at p. 178, fn. 25.)

Here, the question of prejudice turns on whether it is reasonably probable that the jury would have found defendant possessed methamphetamine, but *not* that he had the firearm available for immediate offensive or defensive use. We conclude that such a result is not reasonably probable.

There was no dispute that the firearm was, in fact, physically present in a place that made it available for immediate use -- it was discovered in the clothes hamper located between the bedroom and living room areas of room 5312-A and -B. Because having a firearm available for immediate offensive or defensive use necessarily means that one *knows* it is available, the evidence presented only one question: whether *defendant* (either alone or with others) knew the gun was available in the hamper. In his argument to the jury, defendant’s attorney never suggested that defendant might have known about the methamphetamine and

related activity in the room, but not about the gun in the hamper. Rather, as we have already noted, his strategy was all or nothing: because (according to counsel) the prosecution had failed to negate the possibility that someone else (most likely Anthony Flick) controlled the room and its contents, defendant was not guilty of all charges. Thus, nothing in defense counsel's argument (and nothing in the prosecutor's argument either) suggested that the jury could conclude that defendant knowingly possessed methamphetamine in the room, but not the gun in the hamper.

Further, the evidence supporting a finding that defendant knew the gun was available for immediate use was relatively strong compared to the evidence supporting a different conclusion. (*Id.* at p. 177.) True, several persons other than defendant had been present in the room before the arrests: there were defendant's four co-arrestees (Montano, Judy Lopez, Joe Jaimez, and Jonathan Gomez); there was Anthony Flick, who rented the room, and the unidentified man with whom Flick left before officers closed in; and there was (apparently) the unidentified girl that Judy Lopez testified spent the previous night in the living room area.

The evidence showed, however, that of all of these persons, defendant was the only one reasonably connected to the pistol. According to Lopez, she and defendant had spent the night of October 1 in the bedroom. When the arrests occurred late on the night of October 2, defendant and Lopez were still there. There can be no doubt that defendant knew of the methamphetamine activity that was occurring: methamphetamine and related items were present throughout the bedroom and living room; a police scanner in the bedroom room was picking up police broadcasts, including a broadcast about the pursuit of Anthony Flick. There can also be no doubt that defendant had more than a casual connection to the room. In the nightstand drawer next to the bed was a notebook bearing Lopez and defendant's names. In the clothes dresser was a cable television bill in the name of

defendant's estranged wife, addressed to her home in Rosemead. Also in the room was a catalogue advertising Oakland Raider jerseys, addressed to defendant. Along one wall of the bedroom were several CD's bearing defendant's nickname, "Skinny."

Most importantly, under the bed in which defendant and Lopez had slept the previous night was a hand-held safe. It contained one photograph of defendant, and two of his estranged wife. It also contained a box of .45 caliber ammunition, the same caliber as the loaded pistol found in the hamper. Although the safe also contained a cigarette case bearing the nickname "Bullet," a nickname for someone named Daniel Gonzales, there was no evidence showing who Gonzales was, and no evidence that he was ever physically present in the room. Indeed, the safe contained nothing to connect it to *any* occupant of the room other than defendant. The compelling inference was that defendant controlled the safe *and* the .45 caliber ammunition found in the safe. Of course, his control of the .45 caliber ammunition reasonably tied him to the loaded .45 caliber pistol in the hamper.

Finally, the .45 caliber pistol was discovered underneath women's underwear, as well as men's clothing in a large size. Judy Lopez testified that defendant brought clothing to the room. The trial record does not reveal defendant's precise height and weight. Nonetheless, the record demonstrates that he is heavy-set.⁸ The prosecution introduced a photograph of defendant as he appeared on the date of arrest (People's Exh. 4). It shows defendant to be heavy. The record also shows that his male co-arrestees were neither heavy nor tall. The prosecution introduced a photograph of Montano (People's Exh. 3), which shows

⁸ In his opening statement, defendant's attorney informed the jury that defendant's nickname, "Skinny," was ironic: "He is not a skinny person. [He is] one of those, you know, you call a six foot four guy Shorty. It's an irony and his nickname is 'Skinny.'"

Montano to be of considerably slighter build than defendant. Defendant's other two co-arrestees were of relatively small size and light weight: Joe Jaimez was five feet eight inches tall, and weighed 160 pounds; Jonathan Gomez was five feet ten inches tall, and weighed 150 pounds. Defendant's attorney argued that Anthony Flick lived in the room. But Flick was only five feet three inches, to five feet four inches tall, and weighed 130 to 140 pounds.

Thus, defendant's heavy-set stature as compared to the other men who had been in the room tended to connect him to the large-sized male clothing under which the gun was concealed. Moreover, it may reasonably be inferred that because defendant was the only one (according to the trial evidence) who slept in the room, he was most likely the one who discarded dirty clothing in the hamper.

Faced with this record, it is *possible* that a reasonable jury *could* have found defendant possessed methamphetamine in the room, but did not have the .45 caliber pistol available for immediate offensive or defensive use. But what a reasonable jury *could* do is not the test under *Watson*. The test, rather, is whether it is reasonably probable the jury *would* have found he did not have the gun available in the room, despite possessing methamphetamine there. We find such a result entirely unlikely. Speculation aside, the evidence disclosed that only one person who had been present in the room had a reasonable connection to the gun: defendant. We conclude it is not reasonably probable that this jury, if instructed to consider the lesser charge, would have convicted defendant of possession of methamphetamine present in the room, but would *not* have found, in conjunction with that possession, that he had the pistol available for immediate offensive or

defensive use. Therefore, the trial court's error in failing to instruct on the lesser offense does not require reversal.⁹

III. The Trial Court Did Not Err in Ruling Evidence of Gang Affiliation Admissible, and in Denying Defendant's Motion for a Mistrial

Defendant contends that the trial court erred in admitting testimony concerning gang affiliation, and erred in denying defendant's motion for a mistrial. We are not persuaded.

A. Background

In cross-examining Detective Uhl, Montano's attorney sought to suggest that the evidence did not connect Montano to the room and the methamphetamine and related items found inside. Thus, he elicited testimony that Detective Uhl did not find any clothing in the room belonging to Montano. When he asked whether the Detective had found "any paperwork that belonged" to Montano, Detective Uhl answered that he had found a CD case bearing Montano's nickname. Montano's attorney then asked: "One of the people that you [arrested] had the same type of nickname too[,] isn't that correct?" The Detective responded, "Correct." Next, counsel asked, "So the person that you arrested had the same nickname as Mr. Montano?" The Detective answered, "Yes, however, there's one other important factor that made me realize it did not belong to the other person." Montano's counsel objected, and the court did not permit the Detective to finish his answer.

⁹ Defendant contends that if we determine the trial court was not required to instruct on simple possession as a lesser included offense in count 3, then his trial counsel was ineffective in failing to request such an instruction. Because we conclude that the trial court erred in not giving such an instruction, but that the error was not prejudicial, we do not discuss the ineffective assistance claim.

In cross-examining Detective Uhl, defendant's attorney tried to minimize defendant's connection to the room. Thus, he elicited testimony that in the bedroom police found items bearing nicknames other than defendant's -- nicknames including "Bullet" (on a cigarette case found in the safe), and "Silencer"¹⁰ and "Scrappy" (on CD cases).

At a break, out of the jury's presence, the prosecutor noted that Montano's attorney had elicited testimony that another arrestee, later identified as Joe Jaimez, used the same nickname as Montano -- "Lil' Silent." This evidence could raise a doubt as to whether it was Montano or Jaimez who was connected to the contents of the room. As the prosecutor observed, however, several items in the room bore the nickname "Lil' Silent" followed by the initials "EMF." Those letters were an abbreviation for the gang to which Montano belonged -- El Monte Flores. Jaimez belonged to a different gang, one from Huntington Park. Thus, the presence of the "EMF" abbreviation and an explanation of what it meant would tend to tie Montano to the items in the room, and tend to exclude Jaimez. In particular, an envelope found in the room contained the handwritten names: "Silencer," "Skinny" (defendant's nickname), and "Lil' Silent," all followed by "EMF Flores."

Over defendant and Montano's objections, the trial court ruled that Detective Uhl could testify that EMF stood for El Monte Flores, and could also testify about Huntington Park, without specifying they were gangs. The court reasoned in part: "The whole thrust of your entire questioning has been to show there are different names and different items [and] that there are people who are not there who nonetheless have their names and items discovered and therefore a reasonable doubt exists. . . . [¶] But at the same time the court can't have the jury misled and

¹⁰ "Silencer" was one of Montano's nicknames.

if you're going to be arguing that . . . there are two people named 'Lil' Silent' . . . there's an ambiguity . . . the People are entitled to resolve. . . . [I]t would be like showing that you have the same first and last name but glossing over the fact there are different middle names." The court agreed to give an instruction limiting consideration of the evidence to Montano.

In the jury's presence, the prosecutor directed Detective Uhl's attention to the envelope. The Detective testified that the envelope contained the nickname, "Lil' Silent," followed by initials "indicative of a criminal street gang known as El Monte Flores." He also testified that there were two other nicknames, "Silencer" and "Skinny," both followed by "EM Flores." Finally, the Detective testified that Jaimez (the other "Lil' Silent") was a "Huntington Park Vario Locos gang member," and therefore "it would be unreasonable for him to put 'Lil' Silent EMF' when he's a Huntington Park gang member."

At sidebar, defendant's counsel moved for a mistrial. He noted that although the court had ruled that there would be no mention that EMF was a gang, Detective Uhl had testified that EMF stood for a "criminal street gang." Montano's counsel joined in the motion.

Finding the decision a "close call," the court denied the motion for a mistrial. It reasoned: "[T]he reason I'm not going to grant it is because the reality of the situation [is that] the court has been trying to . . . not allow[] any reference to gangs . . . since there is no allegation that there is gang activity. [¶] Nonetheless, the inescapable reality of this case is these are both gang members. I don't know if the record has been quite clear, but one of them [Montano] has the letters EMF tattooed in huge block letters across the back of his . . . almost shaved skull. [¶] The entire jury panel, while sitting behind him during voir dire -- seminarians do not usually have the names of their organizations tattooed across the back of their skull. I don't think there's anybody in any jury[,] unless someone who is brain

dead, who could possibly avoid the connection of gangs. [¶] Also the writing involved in these exhibits is in that distinctive . . . angled script that we see every day on walls[.] [N]o one who is alive and breathing could look at these [defendants] and say they are not members of a gang.”

Then, at the request of defendant’s attorney, the court instructed the jury: “While Detective Uhl was testifying . . . he referred to EMF as an organization involving Mr. Montano as a criminal street gang. [¶] I’m going to admonish you that you’re to disregard that. That statement is stricken from the record. [¶] Allegations of gang affiliation are not part of this case. The People are not alleging gang activity or any gang participation in this and you’re not to speculate as to any gang affiliation or membership on the part of either defendant. That’s something that you simply cannot consider or allow to enter into your deliberations [in] any way. It is not relevant to this case.”

B. The Trial Court Properly Admitted Evidence of Gang Affiliation

The trial court did not abuse its discretion in ruling evidence of Montano’s gang affiliation admissible. When Montano was detained after leaving the room, not far from the stairwell where the others were detained, Montano did not possess any methamphetamine or related items on his person. Rather, on the sidewalk where he was stopped, officers found a sock containing 73.6 grams of methamphetamine, a pack of cigarettes containing 1.01 grams of methamphetamine, and a syringe. Montano’s theory of defense, as articulated in his attorney’s closing argument, was that there was insufficient evidence to connect Montano to the room, and that any one of the arrestees could have tossed the methamphetamine found on the sidewalk. In support of this defense, the cross-examination of Detective Uhl by Montano’s attorney left the impression that

perhaps items found in the room bearing the nickname “Lil’ Silent” referred to co-arrestee Joe Jaimez, who also used that nickname.

There was strong evidence, however, that the reference to “Lil’ Silent” referred to Montano: the abbreviation “EMF” that appeared along with “Lil’ Silent” signified affiliation with the El Monte Flores gang. Because Montano belonged to El Monte Flores, testimony explaining the meaning of the abbreviation, and the significance of its use with the nickname “Lil’ Silent,” was compelling evidence tying Montano to the room and its contents. The evidence also excluded the other “Lil’ Silent,” Joe Jaimez, because Jaimez was a member of another gang, Huntington Park. As the trial court rightly observed, *not* admitting the evidence would be the equivalent of permitting Montano to show that he and Jaimez “have the same first and last name but glossing over the fact that there are different middle names.” Further, tying Montano to the room through the presence of items bearing his name tended to prove that he (as opposed to Jaimez) had taken the methamphetamine from the room, and dropped it on the sidewalk.

Thus, the probative value of this evidence against Montano was significant.¹¹ Unquestionably, therefore, the evidence was admissible against Montano. Of course, to the extent that defendant’s nickname, “Skinny,” appeared on items along with the abbreviation “EMF,” the evidence would also tend to connect defendant to El Monte Flores. However, the court sought to minimize the potential prejudice by precluding any reference to EMF or Huntington Park as

¹¹ Indeed, we note that although the mention of gangs carried potentially prejudicial implications, paradoxically it also carried strong probative value. That is, the expression of affiliation was all the more probative against Montano precisely because it related to a gang as opposed to some benign organization. A member of one gang does not identify himself in writing as a member of another gang.

“gangs,” and by agreeing to an instruction limiting consideration of the evidence to Montano alone. This ruling was well within the trial court’s discretion.

C. The Court Did Not Abuse Its Discretion in Denying a Mistrial

As presented to the jury, the testimony did not come out as the trial court expected. The court had excluded any reference to gangs. Detective Uhl testified in part, however, that the abbreviation “EMF” was “indicative of a criminal street gang known as El Monte Flores,” and that Jaimez was a “Huntington Park Vario Locos gang member.”

Defendant contends that the “gang” references deprived him of a fair trial, and required the granting of a mistrial. We disagree.

Throughout the trial the trial court attempted to sanitize the evidence, and keep any express reference to gangs from the jury. Yet the properly admitted evidence contained the obvious subtext that Montano and defendant were gang members. No amount of sanitizing could erase that reality. As the trial court observed, Montano had “the letters EMF tattooed in huge block letters across the back of his . . . almost shaved skull.” The prospective jurors could not help but see the tattoo while sitting behind him during jury selection. Many of the items admitted into evidence displayed writing in the stylized script typical of gang writing often seen in the community. The parties stipulated that defendant used the nickname “Skinny” and Montano used the nickname “Lil’ Silent.” These nicknames appeared with others -- “Scrappy,” “Bullet,” “Silencer” -- on certain items found in the room. It was *defendant’s* attorney who called attention to these nicknames to undercut the inference that defendant constructively possessed the methamphetamine in the room. The nicknames, however, possessed unmistakable gang significance. The presence of such nicknames necessarily suggested defendant and Montano’s own gang membership. The trial court rightly noted: “I

don't think there's anybody in any jury . . . who could possibly avoid the connection of gangs. [¶] . . . No one who is alive and breathing could look at these [two defendants] and say they are not members of a gang.”

“A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. [Citation.]” (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) Even without Detective Uhl's description of El Monte Flores as a “criminal street gang,” it could not have escaped the jury's notice that defendant and Montano *were* gang members, *and* that they were engaged in crime. Given this reality, the court's remedy was appropriate to the circumstance: it struck the reference to Montano being a member of a criminal street gang; instructed the jury that gang membership was not relevant; and admonished the jury not to consider it. The efficacy of this remedy is shown by the results of the trial. There was considerable evidence of defendant's guilt of possession of methamphetamine *for sale*. Yet, the jury deadlocked on that count, and convicted defendant of possession of methamphetamine while armed with a firearm. Hence, it is clear that the mention of El Monte Flores as a criminal street gang did not cause the jury to desert its role as an impartial judge of the facts, and convict without conscientiously evaluating the evidence.

IV. Substantial Evidence Supports Defendant's Conviction on Count 3

Defendant contends that the evidence was insufficient to support his conviction of count 3, possession of methamphetamine while armed with a firearm. We disagree. We have already discussed the evidence supporting the “armed” element of that offense. That evidence was more than sufficient. Further, without belaboring the point, we also find the circumstantial evidence that defendant

constructively possessed a usable quantity of methamphetamine to be overwhelming.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, J.

We concur:

EPSTEIN, P.J.

HASTINGS, J.