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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. WALTER FERNANDEZ, Defendant and Appellant.	B232277 (Los Angeles County Super. Ct. No. BA363324)

APPEAL from a judgment of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed in part, reversed in part with directions.

Steven A. Brody and Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Shawn McGahey Webb, and Louis W. Karlin, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III, and IV of the Discussion.

A jury convicted defendant Walter Fernandez of second degree robbery (Pen. Code, § 211) (count 1)[1] and willful infliction of corporal injury on a spouse, cohabitant, or child's parent (§ 273.5, subd. (a)) (count 2); as to count 1, the jury further found that (1) in the commission of the offense, the defendant personally used a dangerous and deadly weapon, to wit, a knife, within the meaning of section 12022, subdivision (b)(1), and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, within the meaning of section 186.22, subdivision (b)(1). Defendant pled nolo contendere to possession of a firearm by a felon (§ 12021, subd. (a)(1))[2] (count 3), short barreled shotgun or rifle activity (§ 12020, subd. (a)(1))[3] (count 4), and possession of ammunition (§ 12316, subd. (b)(1))[4] (count 5). The trial court imposed a sentence of 14 years.

In this appeal from the judgment, defendant contends: (1) the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his apartment; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred in denying defendant's *Pitchess*[5] motion.

In the published portion of the opinion, we conclude the trial court properly denied defendant's suppression motion. In the unpublished portion, we reject defendant's remaining claims, with the exception of his contention of *Pitchess* error. We

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[1] All further statutory references are to the Penal Code.

[2] Section 12021, subdivision (a)(1) was repealed and replaced by section 29800 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

[3] Section 12020, subdivision (a)(1) was repealed and replaced by section 33215 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

[4] Section 12316, subdivision (b)(1) was repealed and replaced by section 30305 without substantive change. (Stats. 2010, ch. 711, § 6, operative Jan. 1, 2012.)

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

conditionally reverse the section 273.5, subdivision (a) conviction for the trial court to conduct an in camera review of one officer's personnel file; in all other respects, we affirm the judgment.

STATEMENT OF FACTS

I. Prosecution Case

A. Percipient Testimony

1. Abel Lopez

On October 12, 2009, at about 11:00 a.m., Abel Lopez was approached after cashing a check near the corner of 14th Street and Magnolia in Los Angeles by a man with light skin, a grey sweater, and a tattoo on his bald head. The man, whom Lopez later identified as defendant, asked what neighborhood Lopez was from. Lopez said, "I'm from Mexico." Defendant laughed and said Lopez was in his territory and should give him his money. He then said, "The D.F.S. rules here. They rule here." Defendant took a knife out of his pocket and pointed it towards Lopez's chest. Lopez put up his hands to protect himself and defendant cut Lopez's wrist.

Lopez tried to run away and, while running, took out his cell phone and called 911. He told the 911 operator he needed help because someone wanted to kill him. Defendant then whistled loudly and three or four men ran out of a building on 14th Street and Magnolia. They hit Lopez in the face and all over his body, knocking him to the ground, where they continued to hit and kick him. When he got up, Lopez did not have his cell phone or wallet.[6] He saw the men running back to the building from which they had come. As a result of the attack, Lopez suffered a deep cut on his left wrist and bruising and swelling over his body.

Several minutes after the attack, the police and paramedics arrived. Lopez participated in a field showup, where he identified defendant.

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[6] Lopez told police he had approximately $400 in his wallet.

2. Detective Clark and Officer Cirrito

Detective Kelly Clark and Officer Joseph Cirrito responded to a police radio dispatch on October 12, 2009. Because the police dispatcher indicated possible involvement by members of the Drifters gang in an assault with a deadly weapon, Clark and Cirrito drove to an alley near Magnolia and 14th Street where they knew Drifters gathered. As they stood in the alley, two men walked by and one said, "[T]he guy is in the apartment." The speaker appeared very scared and walked away quickly. When he returned, he again said, "He's in there. He's in the apartment." Immediately thereafter, the detectives saw a tall, light-skinned, Hispanic or white male wearing a light blue t-shirt and khaki pants run through the alley and into the house where the witness was pointing. The house had been restructured into multiple apartments and was a known gang location. A minute or so later, the officers heard sounds of screaming and fighting from the apartment building into which the suspect had run.

Clark and Cirrito called for backup and, once additional officers arrived, knocked on the door of the unit from which they had heard screaming. The door was opened by Roxanne Rojas, who was holding a baby and appeared to be crying. Her face was red and she had a big bump on her nose that looked fresh. She had blood on her shirt and hand that appeared to come from a fresh injury. Cirrito asked what happened and she said she had been in a fight. Cirrito then asked if anyone else was inside the apartment, and she said only her son. When Cirrito asked her to step outside so he could conduct a sweep of the apartment, defendant stepped forward. He was dressed only in boxer shorts and seemed very agitated. He said, "You don't have any right to come in here. I know my rights." Cirrito removed him from the residence and took him into custody.

While Cirrito and Clark arrested defendant at the rear of the house, two men ran out of the front of the house. Officers detained them for questioning.

After defendant was removed from the scene, officers secured the apartment. Clark then went back to Rojas, told her that defendant had been identified as a robbery suspect, and asked for Rojas's consent to search the apartment. Rojas gave consent, orally and in writing. During the ensuing search, officers found Drifters gang

paraphernalia, a butterfly knife, boxing gloves, and clothing, including black pants and a light blue shirt. None of the items stolen from the victim was ever found.

The officers interviewed Rojas about her injuries. She said that when defendant entered the apartment, she confronted him about his relationship with a woman named Vanessa. They argued, and defendant struck Rojas in the face. The officers also spoke to Rojas's four-year-old son, Christian, who told them defendant had a gun. Officers recovered a sawed-off shotgun from a heating unit where Christian told them it was hidden.

Two days later, Cirrito interviewed Rojas again. She said several times that she did not want to be a "rat" and that defendant would be very upset if he knew she was talking to the police. She denied that defendant struck her and said she had been struck in the face by Vanessa.

B. Expert Testimony

1. Defendant's Active Gang Membership

Cirrito testified for the prosecution as a gang expert, opining that defendant was an active member of the Drifters, a Latino street gang. He said that the Drifters began as a "car club," but moved into criminal activities in the 1980's. By the 1990's, they began to engage in more violent crimes, such as assaults, carjackings, attempted murders, and narcotics sales. As of October 2009, there were about 140 active Drifters members. In 2009, defendant told officers he had been a member of the Drifters (12th Street Bagos clique) for nine years.

The Drifters' territory includes a "stronghold" in the area between 14th Street and 15th Street, and between Hoover and Menlo. The stronghold is an area where gang members can retreat if there is danger, and from which members can escape through secret passageways.

Cirrito testified that defendant had at least four tattoos that indicated his affiliation with the Drifters: "D.F.S.," an abbreviation for Drifters, was tattooed on his leg; "Drifters" was tattooed on his back; "L.A." was tattooed on his chest; and a gas mask and

fedora were tattooed on his back. According to Cirrito, "[N]ot everyone that gets an 'L.A.' on there is a gang member, but there is a trend that gang members, especially the Latino gangs[,] will use that L.A. logo. It represents L.A. where they take a lot of pride [in] where they're from." Cirrito also testified that the gas mask and fedora represent an underground rap group called Psychoheads, which "talk[] a lot about weed, smoking weed and so on. It's an underground group, but they're very popular with the neighborhood gangsters. A lot of gang members will put that on because, again, it's — we talk about reputation and pride in the area. Psychoheads came from the Pico Union area, which is close by that particular area of the Drifters."

Cirrito testified that a "moniker" is a nickname typically given to a gang member. Defendant's moniker is "Blocks." The moniker "Blocks" appeared in a Drifters "roll call" (list of active gang members) on a water heater near defendant's apartment. "Blocks" also appeared in tagging on a garage door a few days after defendant's arrest, which read "D.F.S. [Drifters], Bagos, Block[s]." "Bagos" is the Drifters clique in the area in which defendant lives.

Cirrito testified that an art book recovered from defendant's bedroom on October 12, 2009, also evidences defendant's gang membership. Specifically, he noted that the book contains a roll call with monikers and references to "D.F.S. 13," "D.F.S. 12th Street, Bagos," "Blocks," "Rox," "Roxy, 12th Street," "Drifters," and "Drifters 13." Cirrito said that "13" indicates an affiliation with the Mexican mafia, the "M.A."

Cirrito testified that baseball caps were also recovered from defendant's living room following his arrest; one cap was brown, with "L.A." and "Drifters" written inside, and another was blue and embroidered with the name "Trigger," a documented Drifters member.

In summary, Cirrito opined that defendant was an active member of the Drifters because he had tattoos that reference the Drifters gang; he goes by the moniker "Blocks"; he admitted to officers that he has been a member of the Drifters; he had gang paraphernalia in his home; he lived in a Drifters stronghold; and during the incident for which he was arrested, he said, "Where are you from? D.F.S. rules here."

2. Cirrito's Opinion That the Robbery Was Gang-related

Cirrito testified that gang members care deeply about their gang's reputation in the community because "reputation means everything to them." He said that gangs want respect from rival gangs, but they also want to terrorize the neighborhoods in which they operate so people will be afraid to come forward and talk about the gang's criminal activities. A gang makes itself known in the community in several ways, primarily by committing crimes and tagging.

The Drifters establish their territory "[b]y committing crimes in — just open daylight. There's fear and intimidation . . . . [S]ome of these younger people . . . want to be gang members. Some of them, it's almost peer pressure. Some of them are actually forced because they live in that neighborhood. They get beat up. They're getting — I'll say attacked or pocket checked, and, eventually, they give in to just be part of this gang."

Cirrito opined that Drifters members individually and collectively engage in a pattern of criminal gang activity. Their primary activities are robbery, grand theft auto, assault with a deadly weapon, narcotics, and attempted murder.

The prosecutor asked Cirrito the following hypothetical: "I want you to assume that the location we're talking about is 14th and Magnolia, that it is twelve o'clock in the day, broad daylight for other people to see and that you have an individual who had recently been to a check cashing location or a similar location. He is leaving his girlfriend's house in that area, 14th and Magnolia. He's alone. He is approached by someone with a distinctive tattoo on the top of their head who is taller than that individual, that that person comes up to the man who is alone and asks that person, 'Where are you from?' That the person says — we'll call the smaller person the victim. He says, 'I'm not from anywhere. I'm from Mexico,' that the suspect says 'Drifters rule here,' in Spanish. 'This is Drifters, D.F.S.,' something to that effect multiple times, and the location is 14th and Magnolia. The suspect then demands the wallet of the victim and takes out a knife, points the knife at the victim, and the victim, in an attempt to defend himself, puts [his] wrist in front of [his] body, and the knife actually punctures through

the sweater into the wrist of the victim. The victim starts to run, at which point the suspect then whistles, and three to four additional presumably other gang members come to attack the victim. The victim calls 911 and is subsequently punched, kicked, beaten and has his wallet stolen, his Mexican ID is stolen, his cell phone is stolen, and the cash that he had recently cashed at the check cashing is taken. He sees the suspect with the knife and the tattoo along with the three to four others, then all flee, and he participates in a field showup and is able to identify the person with the tattoo, the person with the knife. His property is never recovered. Under that set of circumstances, would you believe, Officer, based on your background, training and experience, that that hypothetical, whether the act, the robbery itself, would be committed for the benefit of or at the direction of or in association with a criminal street gang, assuming that that particular location, 14th and Magnolia, was the stronghold of that gang with the specific intent to promote, further or assist in criminal conduct by gang members[?]"

Cirrito opined that, for the following reasons, he believed the hypothetical crime to be gang-related: "It almost falls under the definition of what a gang is. A gang has three or more people who formally or informally have a common name, sign[,] or symbol[,] who engage or have engaged individually or collectively in a crime that causes fear and intimidation within a community, and . . . one of the crimes under this definition of 186.22 is a robbery. And the fact that it was done in broad daylight in this gang location, it's very bold to do that in daylight. You must feel — that individual must feel that he has a lot of power in that community. That person must feel that . . . no one is going to rat me out. No one's going to tell them who I was. The idea that he whistles others, that it was premeditated, that they're waiting, they have this all set up, and that these three other individuals or four individuals assist this one individual in taking property of one person. To even go back on that, when that person walks up on this person and says, 'Where are you from?' For most citizens who live in this area, when they hear that, they know I'm getting banged on. He's asking me where I'm from. If you think about it, an individual — anybody that approaches you and you don't know who they are and they engage in a conversation, you get a little defensive like what does this person want?

Now, he's telling you 'Drifters rule here.' I'm basically now thinking — well, this person is thinking I'm either going to get robbed; I'm going to get jumped; beat up. I might even be killed because this guy's a gang member, and it's not just him that I have to fight. It's all — it's the gang. He's telling me he's from a gang, Drifters, for example. So in my opinion, this is for the benefit of a gang. The robbery itself — the cell phones could be used. They could change out the SIM card. They could be used for narcotics sales. They could be pawned off for a few bucks. The Mexican ID could be used to — for someone that doesn't have ID. They could change it. It could be used for fraud, identity theft. The $400 could be used for buying more narcotics. It could be for buying guns, weapons. It could be paying for books for people who have recently been incarcerated and are in jail and that they need books for phone calls and cigarettes and anything else that they need. So my feeling is that this crime was done for the benefit of a gang."

II. Defense Case

Roxanne Rojas testified that on October 12, 2009, she and defendant were living together in the apartment where defendant was arrested. At about 11:00 a.m., defendant left the apartment to buy tacos and cigarettes; Rojas remained home with their two-month-old daughter and four-year-old son. While defendant was gone, a woman named Vanessa came to the apartment, and she and Rojas fought. Rojas and Vanessa were both injured during the fight. When defendant returned to the apartment through the back door, Vanessa left out the front door. Defendant saw that Rojas was injured and began to yell at her. Moments later, an officer arrived. The officer asked Rojas to let him in, and Rojas "didn't say yes. I didn't say no. I said let me get my children." Rojas agreed that defendant has a Drifters tattoo, but said he was no longer active in the gang.

Defendant testified that he had been involved with the Drifters earlier in his life. He was "forcibly jumped in" when he was 18 or 19 years old and he "had to basically like go with the flow." He was never heavily involved with the Drifters; "[i]t always was just about like simply like me living there . . . like I'm out there doing stuff in the

neighborhood . . . hanging out with people I grew up with." He admitted that he had been convicted of receiving stolen property and served time in prison. He said he was released in 2007 and turned his life around. He began working and got an apartment in Marina del Rey for himself, Rojas, and her son. When Rojas got pregnant with her second child, the family moved to a two-bedroom apartment on 15th Street and Magnolia, but he had nothing to do with the Drifters.

Defendant testified that on the morning of October 12, 2009, he woke up late, played with his son, and then went out to get tacos for the family. On 14th Street, he was approached by a Hispanic man who appeared to be drunk. The man said, "Crazy Riders," which is rival gang from the area. Defendant ignored him and kept walking. The man continued to talk to him and then "got into the point where he's coming at me." Defendant pushed him away, and the two men got into a fist fight. When it was over, defendant continued to the liquor store to buy cigarettes and then went home. Defendant never saw the man again. When he returned home, Rojas told him a girl had come to the house looking for him, and she and the girl had gotten into a fight. Defendant was upset that Rojas had let the girl in, and he and Rojas began yelling at one another. He did not hit Rojas during the argument. The police arrived a few minutes later and arrested him.

On cross-examination, defendant conceded that he has four prior felony convictions for theft-related crimes. He said "Blocks" or "Blockhead" is his nickname, but it is not a gang moniker.

III. Sentencing and Appeal

On October 8, 2010, defendant pled nolo contendere to counts 3, 4, and 5 (firearms and ammunition possession). In connection with defendant's plea, the parties agreed that defendant's son would not be called as a witness in the jury trial and the prosecution would not reference a gun seized at defendant's home after his arrest. On October 25, 2010, the jury convicted defendant of counts 1 and 2 (second degree robbery and corporal injury on a spouse, cohabitant, or child's parent); as to count 1, the jury further found that (1) in the commission of the offense, defendant had personally used a

dangerous and deadly weapon, and (2) the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang.

As to count 1, the court sentenced defendant to 14 years (midterm of three years, plus an additional consecutive term of 10 years pursuant to § 186.22, subd. (b)(1)(A), plus an additional term of one year pursuant to § 12022, subd. (b)(1)). As to count 2, the court sentenced defendant to the midterm of three years, to run concurrent with the principal term. As to counts 3, 4, and 5, the court sentenced defendant to the midterm of two years, to run concurrent with the principal term.

Defendant timely appealed.

DISCUSSION

Defendant contends: (1) the trial court erred by denying his motion to suppress evidence seized in his apartment during a warrantless search; (2) the trial court abused its discretion by admitting evidence that a suspect was arrested for attempted murder in defendant's apartment; (3) there was insufficient evidence to support the true finding on the gang allegation; and (4) the trial court erred by denying defendant's *Pitchess* motion. We consider these issues below.

I. The Trial Court Did Not Err by Denying Defendant's Motion to Suppress

Prior to trial, defendant filed a motion pursuant to section 1538.5 to suppress evidence seized during a warrantless search of his apartment following his arrest. Specifically, defendant sought to exclude (1) a Mossberg New Haven 20-gauge shotgun, (2) Remington 20-gauge shotgun ammunition, (3) a knife with a four and a half-inch stainless steel blade, (4) any currency seized during the search, and (5) any other evidence seized, including clothing, notebooks, and boxing gloves. The trial court denied the motion to suppress. We review the order de novo to determine whether, on the facts found by the trial court on the basis of substantial evidence, the search or seizure was

reasonable under the Fourth Amendment. (*People v. Duncan* (2008) 160 Cal.App.4th 1014, 1017.)

Defendant contends that the trial court erred by denying the motion to suppress, noting that the officers did not obtain a search warrant and he objected to their entry into his apartment. Citing *Georgia v. Randolph* (2006) 547 U.S. 103, 114 (*Randolph*), and *United States v. Murphy* (9th Cir. 2008) 516 F.3d 1117 (*Murphy*), he urges that Rojas's subsequent consent to a search of their apartment was invalid and any evidence obtained was inadmissible. The Attorney General disagrees, contending that Rojas's consent provided a constitutionally permissible basis for the search once defendant was lawfully removed from the apartment.

We begin by discussing *Randolph*, in which the United States Supreme Court held that police officers may not constitutionally conduct a warrantless search of a home over the express refusal of consent by a physically present resident, even if another resident consents to a search. We then discuss the split of authority among the federal circuit courts as to *Randolph's* application to a case like the present one, where consent to search is given by a defendant's cotenant after the defendant is arrested and removed from the residence. We conclude that under the circumstances of the present case, the search was lawful.

A. Georgia v. Randolph

In *Randolph*, *supra*, 547 U.S. 103, defendant's wife, Janet Randolph, called police to the family home and complained that her husband was a cocaine user. An officer asked defendant's permission to search the house; he refused. The officer then sought Mrs. Randolph's consent to search, which she gave. In defendant's bedroom, the officer discovered cocaine and drug paraphernalia. (*Id.* at p. 107.)

Defendant moved to suppress the evidence as products of a warrantless search. (*Randolph, supra*, 547 U.S. at p. 107.) The Supreme Court granted certiorari "to resolve a split of authority on whether one occupant may give law enforcement effective consent

to search shared premises, as against a co-tenant who is present and states a refusal to permit the search." (*Id*. at p. 108.)

The court noted that to the Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable per se, "one 'jealously and carefully drawn' exception, *Jones v. United States*, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958), recognizes the validity of searches with the voluntary consent of an individual possessing authority, [*Illinois v.*] *Rodriguez*, 497 U.S. [177,] 181, 110 S.Ct. 2793 [(1990)]. That person might be the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent, [*United States v.*] *Matlock*, [415 U.S. 164,] 170, 94 S.Ct. 988 [(1974)]." (*Randolph, supra*, 547 U.S. at p. 109.) The exception recognized in those cases "'does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.'" (*Id*. at p. 110.)[7]

The "constant element" in assessing Fourth Amendment reasonableness in the consent cases, the Supreme Court explained, is "the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property,

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[7] In *Illinois v. Rodriguez*, *supra*, 497 U.S. at pages 179-180 (*Rodriguez*), defendant's girlfriend consented to an officer's entry into the apartment she and defendant shared, where defendant was then sleeping. The Supreme Court held that evidence seized during the warrantless search of the apartment could be introduced against defendant because the authorities reasonably believed his girlfriend had the authority to consent. (*Id*. at p. 189.) In *United States v. Matlock*, *supra*, 415 U.S. 164, 166, 177 (*Matlock*), the court held that evidence seized during a warrantless search of defendant's bedroom could be admitted against him because his girlfriend consented to the search; defendant's consent was neither sought nor obtained, although he was at the time of the search in police custody in the front yard of the home.

but not controlled by its rules. [Citation.] *Matlock* accordingly not only holds that a solitary co-inhabitant may sometimes consent to a search of shared premises, but stands for the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." (*Randolph*, *supra*, 547 U.S. at p. 111.) Such an understanding includes an assumption tenants "usually make about their common authority when they share quarters. They understand that any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another. As *Matlock* put it, shared tenancy is understood to include an 'assumption of risk,' on which police officers are entitled to rely[.]" (*Ibid*.)

The situation differs, however, when a cohabitant is present and denying entrance: "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions. . . . The visitor's reticence without some such good reason would show not timidity but a realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority." (*Randolph*, *supra*, 547 U.S. at pp. 113-114.) "In sum, there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders." (*Id*. at p. 114.)

Applying these principles, the court concluded that "[s]ince the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." (*Randolph*, *supra*, 547 U.S. at p. 114.) It held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present resident* cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." (*Id*. at p. 120, italics added.)

The court then reaffirmed the continuing vitality of *Matlock* and *Rodriguez*, explaining as follows: "Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

"This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it. For the very reason that *Rodriguez* held it would be unjustifiably impractical to require the police to take affirmative steps to confirm the actual authority of a consenting individual whose authority was apparent, we think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. There is no ready reason to believe that efforts to invite a refusal would make a difference in many cases, whereas every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector. Better to accept the formalism of distinguishing *Matlock* from this case than to impose a requirement, time consuming in the field and in the courtroom, with no apparent systemic justification. The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent [fn. omitted], albeit imprudently, a fact that undercuts any argument that the police should try to locate a

suspected inhabitant because his denial of consent would be a foregone conclusion." (*Randolph*, *supra*, 547 U.S. at pp. 121-122.)

The case before it, the court concluded, "invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant. Scott Randolph's refusal is clear, and nothing in the record justifies the search on grounds independent of Janet Randolph's consent. The State does not argue that she gave any indication to the police of a need for protection inside the house that might have justified entry into the portion of the premises where the police found the powdery straw (which, if lawfully seized, could have been used when attempting to establish probable cause for the warrant issued later). Nor does the State claim that the entry and search should be upheld under the rubric of exigent circumstances, owing to some apprehension by the police officers that Scott Randolph would destroy evidence of drug use before any warrant could be obtained." (*Randolph*, *supra*, 547 U.S. at pp. 122-123.)

B. United States v. Murphy

In *Murphy*, *supra*, 516 F.3d 1117, the Ninth Circuit extended *Randolph* to hold that if a defendant expressly withholds consents to search, a warrantless search conducted *after* the defendant has left or been removed from the residence is invalid even if a cotenant subsequently consents. In *Murphy*, the defendant was living in a storage unit rented by Dennis Roper. Officers arrested the defendant, who refused to consent to a search of the storage unit; later, they arrested Roper, who consented to a search. During the search, officers seized a methamphetamine lab.

The defendant challenged the validity of Roper's consent to the search. (*Murphy*, *supra*, 516 F.3d at pp. 1119-1120.) The Ninth Circuit held that the search violated the Fourth Amendment, rejecting the government's contention that the present case was distinguishable from *Randolph* because the defendant was not present when Roper consented to the search. It explained: "The . . . distinction that the government attempts to make between this case and *Randolph* is that in the former, unlike in the latter, the

objecting co-tenant was not physically present when the other tenant gave consent to the search. Here, Murphy refused consent and was subsequently arrested and removed from the scene. Two hours later, officers located Roper and obtained consent from him to search the units. Roper did not know that Murphy had previously refused consent and Murphy was not present to object once again to the second search. We see no reason, however, why Murphy's arrest should vitiate the objection he had already registered to the search. We hold that when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant.

"We find support for our holding in the *Randolph* Court's treatment of the related issue of police removal of a tenant from the scene for the purpose of *preventing* him from objecting to a search. [Citation.] The Court held that third party consent to a search is valid only '[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection.' [Citation.] If the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made. Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects. The rule that *Randolph* establishes is that when one co-tenant objects and the other consents, a valid search may occur only with respect to the consenting tenant. It is true that the consent of either co-tenant may be sufficient in the absence of an objection by the other, either because he simply fails to object or because he is not present to do so. Nevertheless, when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him. [Fn. omitted.] Rather, as in this case, in the absence of exigent circumstances, the police must obtain a warrant before conducting the search." (*Murphy, supra*, 516 F.3d at pp. 1124-1125.)

C. Subsequent Case Law

Four federal circuit courts and at least two state Supreme Courts have rejected the Ninth Circuit's analysis in *Murphy*; they hold that even if a defendant expressly refuses to allow officers to search his residence, a cohabitant's consent given after a defendant leaves or is lawfully removed will support a warrantless search. *United States v. Hudspeth* (8th Cir. 2008) 518 F.3d 954 (*Hudspeth*) is one such case. There, officers executed a search warrant at the defendant's workplace and discovered child pornography on the defendant's computer. The defendant was arrested for possession of child pornography. The arresting officer asked the defendant for permission to search his home computer; he refused. Law enforcement officers then went to the defendant's home, where his wife gave permission to seize the home computer. On that computer, investigators found additional child pornography. (*Id*. at pp. 955-956.) The defendant was indicted for possession of child pornography and pled guilty after unsuccessfully moving to suppress the evidence seized during the searches of his work and home computers. (*Id*. at p. 956.)

As relevant here, the Eighth Circuit held that the warrantless search of the defendant's home computer did not violate the Fourth Amendment. It explained as follows: "The legal issue of whether an officer's knowledge of the prior express refusal by one co-tenant negates the later obtained consent of another authorized co-tenant is a matter of first impression in this court. We will answer this compound legal question by answering the separate legal questions involved.

"First, we know Mrs. Hudspeth was a co-tenant authorized to give the officers consent to search. [Citation.] . . .

"Second, unlike *Randolph*, the officers in the present case were not confronted with a 'social custom' dilemma, where two physically present co-tenants have contemporaneous competing interests and one consents to a search, while the other objects. Instead, when Cpl. Nash asked for Mrs. Hudspeth's consent, Hudspeth was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus, this rationale for the

narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here.

". . . . . .

"The *Randolph* opinion repeatedly referred to an 'express refusal of consent by a *physically present* resident.' *Randolph*, 547 U.S. at 120, 126 S.Ct. 1515 (emphasis added); *e.g.*, *id*. at 108, 109, 114, 121-23, 126 S.Ct. 1515. The *Randolph* majority candidly admitted 'we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact *at the door and objects*, the co-tenant's permission does not suffice for a reasonable search.' *Id*. at 121, 126 S.Ct. 1515 (emphasis added). Hudspeth was not at the door and objecting and does not fall within *Randolph's* 'fine line.' . . .

"The Fourth Amendment does not prohibit warrantless searches and seizures, nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure. 'What [Hudspeth] is assured by the Fourth Amendment itself, however, is . . . no such search will occur that is "unreasonable."' *Rodriguez*, 497 U.S. at 183, 110 S.Ct. 2793. As the Supreme Court explains, 'it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.' *Matlock*, 415 U.S. at 171 n. 7, 94 S.Ct. 988. And the absent, expressly objecting co-inhabitant has 'assumed the risk' that another co-inhabitant 'might permit the common area to be searched.' *Id*. The authorized co-tenant may give consent for several reasons including an unawareness of contraband on the premises, or a desire to protect oneself or others (as here, Mrs. Hudspeth, in the self-interest of herself and her children, consented to the seizure of the home computer to prevent the placement of an armed, uniformed law enforcement officer in her home to guard the evidence while a search warrant was obtained).

"Under the totality of circumstances of the present case, maintaining the Fourth Amendment's touchstone requirement against unreasonable searches and seizures, we conclude the seizure of Hudspeth's home computer was reasonable and the Fourth Amendment was not violated when the officers sought Mrs. Hudspeth's consent despite having received Hudspeth's previous refusal. We affirm the district court's denial of

Hudspeth's motion to suppress the evidence obtained from the warrantless seizure of Hudspeth's home computer." (*Hudspeth, supra,* 518 F.3d at pp. 960-961.)

The Seventh Circuit followed *Hudspeth* (and declined to follow *Murphy*) in *United States v. Henderson* (7th Cir. 2008) 536 F.3d 776 (*Henderson*). There, police were called to the home of the defendant and his wife, Patricia, to investigate a report of domestic abuse. Patricia admitted police into the home, where in "unequivocal terms" the defendant ordered them out.[8] (*Id*. at p. 777.) The officers arrested the defendant for domestic battery and took him to jail. After his arrest and removal from the scene, Patricia signed a consent-to-search form and led the police on a search that uncovered firearms, crack cocaine, and items indicative of drug dealing. The defendant was indicted on federal weapon and drug charges.

The defendant moved to suppress the evidence recovered from his home, arguing that the search was unreasonable under the Fourth Amendment based on the Supreme Court's decision in *Randolph.* (*Henderson, supra,* 536 F.3d at p. 777.) The Seventh Circuit disagreed: "Henderson argues that his objection remained in force to override Patricia's subsequent consent. He, like the Ninth Circuit, interprets *Randolph* as not confined to its circumstances, that is, as *not* limited to a disputed consent by two contemporaneously present residents with authority. On this broader reading of *Randolph,* a one-time objection by one is sufficient to permanently disable the other from *ever* validly consenting to a search of their shared premises. We think this extends *Randolph* too far. *Randolph* itself, we observed in [*United States v.*] *Groves,* [530 F.3d 506 (7th Cir. 2008)], 'expressly disinvites' any reading broader than its specific facts.

"Like the Eighth Circuit, we see the contemporaneous presence of the objecting and consenting cotenants as indispensable to the decision in *Randolph.* Indeed, the fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared

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[8] According to the court: "After a brief exchange, Henderson told the officers to '[g]et the [expletive] out of my house'—which the district court reasonably construed as an objection to a search." (*Henderson, supra,* 536 F.3d at pp. 777-778.)

premises, would not, '[w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph*, 547 U.S. at 113, 126 S.Ct. 1515. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it, or perhaps (if we understand the Court's rationale correctly) because the affront to his authority to assert or waive his privacy interest is no longer an issue. As between two present but disagreeing residents with authority, the tie goes to the objector; police may not search based on the consent of one in the face of 'a physically present inhabitant's express refusal of consent' to search. *Id*. at 122, 126 S.Ct. 1515. We do not read *Randolph* as vesting the objector with an absolute veto; nothing in the majority opinion suggests the Court was creating a rule of continuing objection." (*Henderson*, *supra*, 536 F.3d at pp. 783-784.)

"Neither the Eighth nor the Ninth Circuit considered the limiting effect of Justice Breyer's concurrence on the scope of the majority opinion. As we have noted, Justice Breyer joined the other four members of the majority with the understanding that the Court's opinion was 'case specific' and 'does not apply where the objector is not present and objecting.' *Id*. at 126-27, 126 S.Ct. 1515 (Breyer, J., concurring) (internal quotation marks omitted). That, and the specific limiting language in the majority opinion itself, convince us that *Randolph's* holding ought not be extended beyond the circumstances at issue there. *See id*. at 106, 126 S.Ct. 1515 ('We hold that, *in the circumstances here at issue*, a *physically present* co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.') (emphasis added).

"The Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph*, expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers. If an objecting co-occupant's presence is not required, are there any limits to the superiority or duration of his objection? What circumstances (if any) operate to reinstate a co-occupant's authority to consent to a search? May an occupant arrested or interviewed away from the home preemptively object to a police request to search and effectively disable his co-occupants from consenting even in his absence? *Murphy's* answer—that

the objecting occupant's objection is binding until he, and only he, objectively manifests his consent to a search—ignores *Randolph's* social-expectations foundation. A prior objection by an occupant who is no longer present would not be enough to deter a sensible third party from accepting an invitation to enter by a co-occupant who is present with authority to extend the invitation. Under these circumstances even an initially reluctant guest would feel confident he was not breaking any unwritten social rules by entering. Just as a tenant's mere presence is not enough to override his cotenant's consent, *see Rodriguez*, 497 U.S. at 177, 110 S.Ct. 2793 (tenant asleep in the next room), so too his objection is not enough if he is absent from the later entry by authorities with the voluntary consent of his cotenant.

". . . . . .

"Our conclusion, like the Eighth Circuit's, implements *Randolph's* limiting language and the Court's stated intent to maintain the vitality of *Matlock* and *Rodriguez*. Absent exigent circumstances, a warrantless search of a home based on a cotenant's consent is unreasonable in the face of a present tenant's express objection. Once the tenant leaves, however, social expectations shift, and the tenant assumes the risk that a cotenant may allow the police to enter even knowing that the tenant would object or continue to object if present. Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him.

"Here, it is undisputed that Henderson objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent rendered the warrantless search reasonable under the Fourth Amendment, and the evidence need not have been suppressed. (Fn. omitted.)" (*Henderson, supra*, 536 F.3d at pp. 784-785.)

At least two other federal circuit courts and two state Supreme Courts have followed *Hudspeth* and *Henderson* and declined to follow *Murphy*. (See *United States v. Shrader* (4th Cir. 2012) 675 F.3d 300, 307; *United States v. Cooke* (5th Cir. 2012) 674

F.3d 491, 499; *People v. Strimple* (Colo. 2012) 267 P.3d 1219, 1221-1226; *State v. St. Martin* (Wis. 2011) 334 Wis.2d 290, 306-310.)

D. Analysis

We conclude that *Randolph* does not require exclusion of the evidence obtained in the warrantless search of defendant's home. We begin by noting that, like the federal appellate cases discussed above, the facts here differ in a critical way from those of *Randolph*. While the defendant in *Randolph* was present and continued to object to a search of his home, in the present case defendant had been arrested and removed from the apartment before Rojas consented to a search. Thus, unlike in *Randolph*, there was in this case no co-tenant "*who is present* and states a refusal to permit the search." (*Randolph, supra*, 547 U.S. at p. 108, italics added.)

Defendant's absence from the home when Rojas consented to a search of the apartment is, we believe, determinative. *Randolph* did not overturn prior cases holding that a co-inhabitant may give effective consent to search a shared residence; to the contrary, the *Randolph* court explicitly affirmed the vitality of those cases. (*Randolph, supra*, 547 U.S. at p. 121.) It did so, moreover, even though it noted that the defendants in both *Matlock* and *Rodriguez* were nearby when each cotenant's consent was secured—indeed, the *Rodriguez* defendant was asleep inside the apartment—and thus could have been asked to consent as well. In other words, the *Randolph* court distinguished between cases in which a defendant *was present and objected* to a search, on the one hand, and cases in which a defendant was *not present* and therefore could not object to a search, on the other. The court recognized that it was "drawing a fine line," but believed its formalism was justified so long as there was no evidence that police had removed a potentially objecting tenant from the scene for the sake of avoiding a possible objection. (*Ibid.*)

We believe that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*. As in *Randolph*, the line we draw is a clear one, distinguishing between cases in which a defendant is present and objecting to a search, and those in

which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence. It thus preserves the "simple clarity of complementary rules" established by *Randolph*. (*Randolph, supra*, 547 U.S. at p. 121.)

Further, our rule preserves the law enforcement prerogatives recognized by *Randolph*. As we have said, *Randolph* expressly reaffirmed the holdings of *Matlock* and *Rodriguez*, noting that "it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." (*Randolph, supra*, 547 U.S. at p. 122.) We believe that requiring officers who have already secured the consent of a defendant's cotenant to also secure the consent of an absent defendant would similarly and needlessly limit the capacity of law enforcement to respond to "ostensibly legitimate opportunities in the field." (*Ibid*.)

We note, as the Seventh Circuit did in *Henderson*, that the rule advocated by defendant and adopted by the Ninth Circuit in *Murphy* permits "a one-time objection" by one cotenant to "permanently disable the other [co-tenant] from *ever* validly consenting to a search of their shared premises." (*Henderson*, *supra*, 536 F.3d at p. 783.) Like *Henderson*, we think such a rule "extends *Randolph* too far." (*Ibid*.)

Finally, like the Fourth, Fifth, Seventh, and Eighth Circuits, we believe that the defendant's presence was indispensible to the decision in *Randolph*. We again quote *Henderson*, which well articulated the analysis: "[T]he fact of a conflict between present co-occupants plays a vital role in the *Randolph* majority's 'social expectations' premise; a third party, attuned to societal customs regarding shared premises, would not, '[w]ithout some very good reason,' enter when faced with a disputed invitation between cotenants. *Randolph*, 547 U.S. at 113, 126 S.Ct. 1515. The calculus shifts, however, when the tenant seeking to deny entry is no longer present. His objection loses its force because he is not there to enforce it[.]" (*Henderson*, *supra*, 536 F.3d at pp. 783-784.)

For all of these reasons, we conclude that Rojas's consent to a search of the apartment she shared with defendant was valid, and thus the trial court did not err in denying defendant's motion to exclude.

II. The Trial Court Did Not Err When It Admitted Evidence of a Prior Arrest in Defendant's Apartment

Defendant contends that the trial court abused its discretion by admitting evidence that an attempted murder suspect was arrested in his apartment. He urges that the evidence was substantially more prejudicial than probative, and there is a reasonable probability that the outcome would have been more favorable to him if the evidence had been excluded. For the following reasons, we disagree.

A. Facts

Officer Cirrito testified that on September 12, 2009, one month before the arrest in the present case, Drifters members Michael Rocco and Samuel Cruz were arrested for attempted murder. They were convicted on August 27, 2010. Rocco was arrested in defendant's living room; Rojas, with defendant behind her, opened the apartment door to the officers who arrested Rocco. Cruz was arrested in the crawl space under defendant's apartment building.

Defendant moved to exclude evidence of the arrest under Evidence Code section 352, contending that the evidence was unduly prejudicial because "[t]he risk of guilt by association is obviously extreme." The prosecutor disagreed, noting that Rojas denied defendant was an active gang member, and "This is very fresh. This is something that happened a month before the incident in this case, which would corroborate the fact that he is an active gang member that's benefiting the gang. He's hiding out gang members in his apartment to avoid getting arrested."

The court denied the motion to exclude, explaining as follows: "The People have to prove that the crime was committed for the benefit of, at the direction or in association with a criminal street gang. So to some extent, the law permits guilt by association as

proof because they don't have to show that Mr. Fernandez was an active gang member at the time, only if it was one of those three things now, that may be evidence of one of those three things, but that's not. It's true it is somewhat prejudicial to the defendant, but I don't think unduly so, and that's the statutory basis, and I think it is highly probative and also to impeach Ms. Rojas. So after weighing it under 352, I find that the probative value does outweigh any undue prejudice to the defendant, and I'm going to allow that."

B. Analysis

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "'Evidence is substantially more prejudicial than probative . . . [only] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' (*People v. Waidla* (2000) 22 Cal.4th 690, 724.)" (*People v. Tran* (2011) 51 Cal.4th 1040, 1047 (*Tran*).) A trial court's ruling on the admission of evidence is reviewed for abuse of discretion. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The evidence challenged here was admitted to prove that defendant was an active participant in a criminal street gang as defined by the California Street Terrorism Enforcement and Prevention Act (the STEP Act; § 186.20 et seq.). The STEP Act criminalizes active participation in a criminal street gang (§ 186.22, subd. (a)), defined as any ongoing association that has as one of its primary activities the commission of certain criminal offenses and engages through its members in a "pattern of criminal gang activity." (§ 186.22, subd. (f); see *Tran*, *supra*, 51 Cal.4th at p. 1044.) A pattern of criminal gang activity is "the commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" specified criminal offenses within a certain time frame, on separate occasions, or by two or more persons (the "predicate offenses"). (§ 186.22, subd. (e); see *Tran*, *supra*, at p. 1044.)

In *People v. Tran*, *supra*, 51 Cal.4th 1040, the California Supreme Court considered whether a predicate offense may be established by evidence of an offense committed by the defendant on a separate occasion. Although the court acknowledged that such evidence is "[w]ithout doubt . . . inherently prejudicial" (*id.* at p. 1047), it held that a predicate offense may be established by such evidence. It explained: "[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang's criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang's criminal activities. That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant. In short, the use of evidence of a defendant's separate offense to prove a predicate offense should not generally create 'an intolerable "risk to the fairness of the proceedings or the reliability of the outcome."' (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.)" (*Tran*, *supra*, at p. 1048.)

The *Tran* court rejected the defendant's contention that evidence of a defendant's separate offense on another occasion should not be admitted when the prosecution has the ability to develop evidence of offenses committed on separate occasions by other gang members. "[D]efendant cites no authority for the argument that the prosecution must forgo the use of relevant, persuasive evidence to prove an element of a crime because the element might also be established through other evidence. The prejudicial effect of evidence defendant committed a separate offense may, of course, outweigh its probative value if it is merely cumulative regarding an issue not reasonably subject to dispute. [Citations.] But the prosecution cannot be compelled to '"present its case in the sanitized fashion suggested by the defense."' [Citation.] When the evidence has probative value, and the potential for prejudice resulting from its admission is within tolerable limits, it is not *unduly* prejudicial and its admission is not an abuse of discretion. Further, a rule requiring exclusion of evidence of a defendant's separate offense on the theory the prosecution might be able to produce evidence of offenses committed by other gang

members would unreasonably favor defendants belonging to large gangs with a substantial history of criminality. That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require exclusion of evidence of a defendant's own separate offense to show a pattern of criminal gang activity. [Fn. omitted.]" (*Tran, supra,* 51 Cal.4th at pp. 1048-1049.)

In the present case, evidence of Rocco's arrest in defendant's living room was not unduly prejudicial; indeed it was substantially less so than the evidence admitted in *Tran* that the defendant *himself* had committed a prior offense for the benefit of a criminal street gang. Moreover, the evidence of Rocco's arrest in defendant's apartment was relevant to prove both that defendant was an active member of the Drifters (a fact that defendant and Rojas denied) and that the Drifters are a criminal street gang within the meaning of the statute. The trial court did not err in admitting the evidence.

III. Sufficiency of the Evidence to Support the Gang Enhancement

Defendant urges there is no evidence that he committed the robbery of which he was convicted with the "specific intent to promote, further, or assist in any criminal conduct by gang members," as section 186.22, subdivision (b)(1)(C) requires. For the following reasons, we disagree.

In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding; "'[a] reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*Ibid.*)

California law is clear that the commission of a crime "'in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322; see also *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ['very fact that defendant committed the charged crimes in association with fellow gang members' supports the enhancement].)" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412; see also *People v. Romero* (2006) 140 Cal.App.4th 15, 19-20 ["Thus, the specific intent element is satisfied if appellant had the specific intent to 'promote, further, or assist' Moreno in the shootings of Dennard and King. There was ample evidence that appellant intended to commit a crime, that he intended to help Moreno commit a crime, and that he knew Moreno was a member of his gang. This evidence creates a reasonable inference that appellant possessed the specific intent to further Moreno's criminal conduct."].)

Defendant contends that because his associates were never identified, there is no evidence he acted in concert with other gang members. We do not agree. There was extensive evidence that defendant was a member of the Drifters, including defendant's admission that he had been a member of the Drifters, the gang paraphernalia in his home, defendant's Drifters tattoos, and his residence in a Drifters stronghold. Further, there was evidence that (1) defendant immediately identified himself as a Drifters member when he approached Lopez; (2) defendant then whistled for three or four other men, who assisted defendant in attacking Lopez; and (3) the other men emerged from, and then retreated to, a building on 14th Street and Magnolia, which Cirrito identified as a Drifters stronghold. Although defendant theoretically could have planned a street crime with individuals who were not members of his gang, if he had done so it is extremely unlikely that he would have identified the Drifters immediately before committing the crime or made use of a Drifters stronghold immediately afterwards. Thus, although the other men who helped defendant rob Lopez were not identified, the evidence was sufficient to permit the jury to infer that defendant's confederates were fellow gang members.

Further, even without evidence that defendant robbed Lopez in concert with other Drifters members, the evidence still would have been sufficient to support the jury's finding that defendant had the specific intent to further criminal conduct by Drifters members. Cirrito testified that a gang benefits when members openly commit crimes within the gang's territory because "[t]hey put fear in the neighborhood. People are afraid to come forth and talk about the crimes." Based on this testimony, the jury properly could infer that defendant intended to benefit the Drifters and its members in precisely this manner when he robbed Lopez in the middle of the day on a well-traveled street. The inference is strengthened by the fact that defendant identified himself as a member of the Drifters immediately before robbing Lopez; indeed, it is difficult to imagine that defendant would have identified himself as a Drifters member for any reason *other than* to benefit the gang and the criminal conduct of its members. (See *In re Cesar V.* (2011) 192 Cal.App.4th 989, 1000 ["There was no reason for Cesar and Antonio to make a gang challenge except to promote further criminal activity by Poor Side Chicos gang members."]; *People v. Margarejo* (2008) 162 Cal.App.4th 102, 109-110 (*Margarejo*) ["It is remarkable for a person in a high-speed chase to make gang signs to pedestrians and *to the police*. Why bother with this effort to communicate? It cannot aid the ordinary goal of an attempted escape, which is to escape. Without objection, an officer testified Margarejo's signing was to 'intimidate the community, intimidate us.'"].)

Although we "cannot look into people's minds directly to see their purposes," we "can discover mental state . . . from how people act and what they say." (*Margarejo, supra*, 162 Cal.App.4th at p. 110.) Here, defendant "acted like he wanted to help his gang": He repeatedly announced his gang's dominance while committing a violent crime in broad daylight. (*Ibid.*) As in *Margarejo*, "[t]he message he broadcast—the *only* message he broadcast—was the gang message. The logical purpose was to accomplish the foreseeable effect: to proclaim the gang's dominance[.]" (*Ibid.*) Thus, the jury could reasonably conclude defendant had "the specific intent to . . . assist [other] criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

IV. *Pitchess* Motion

Defendant contends that the trial court erred by denying his motion for discovery under *Pitchess*, *supra*, 11 Cal.3d 531. He contends that the motion clearly articulated the grounds on which the discovery was being sought and set forth a logical connection between the proposed defense and charges, as required by Evidence Code section 1043. For the following reasons, we agree in part.

A. Facts

Officer Cirrito filed a police report following defendant's arrest. As relevant to the *Pitchess* motion, it stated that on October 12, 2009, Officers Corona, Clark, and Cirrito conducted a domestic violence investigation at 2223 West 15th St. They were met at the door by "Roxann R." (Roxanne Rojas), who stated she was in the house with her children. She had redness and swelling on the bridge of her nose and forehead, and blood smeared on her shirt and right wrist. Cirrito questioned her about her injuries and she "replied [that] she got into a fight." Cirrito interviewed Rojas again after defendant was arrested and removed from the scene. According to the police report, she told Cirrito as follows: "Roxann R. stated she was upset at [defendant] because she observed him talking to another girl, Vanessa, earlier. Roxann R[.] stated she got into a confrontation with Vanessa and was very upset. Roxann R. confronted [defendant] in the apartment. Both [defendant] and Roxann R. got into a verbal confrontation over the other girl, Vanessa. [Defendant] became enraged and struck Roxann R. on the face causing swelling and bruising to her nose, forehead, left eye and left temple area. Roxann R. stated [defendant] struck her once and then walked away into another room." According to the police report, Detective Clark also interviewed Rojas's son, Christian, who said that defendant "hit his mom and made her cry and bleed."

Defendant filed a motion for pretrial discovery. The motion sought evidence of "[a]ll complaints from any and all sources relating to acts of violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,] false arrest, perjury, dishonesty, writing of

false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284" against Officers Clark, Cirrito, and Corona. In support, defense counsel declared that according to police reports, "Roxann R." (Roxanne Rojas) told officers that defendant had struck her in the face, but "[b]ased upon information and belief, Roxann R. never told the officers that she had been struck by [defendant]. Rather, after they came to her door and knocked for her to open the door, she told them repeatedly that her injuries had been caused by a fight she had gotten into earlier that morning with a girl named Vanessa. She got into a confrontation with Vanessa at the apartment complex and entered into a physical fight with her. She was then arguing verbally with [defendant] about his relationship with Vanessa before the officers came to the door, but no blows were exchanged between her and [defendant] at any time."

The court denied the *Pitchess* motion, stating that it did not believe it plausible that officers lied about what Rojas told them because "[defendant's] son also said that [defendant] struck his mother, and that's in the police reports."

B. Analysis

In *Pitchess, supra,* 11 Cal.3d 531, the California Supreme Court held that a criminal defendant may in some circumstances compel the discovery of evidence in a law enforcement officer's personnel file. In 1978, the California Legislature codified the procedures surrounding so-called "*Pitchess* motions" through the enactment of sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 69 (*Garcia*).) A trial court has broad discretion in ruling on a *Pitchess* motion, and we review the court's decision for abuse of discretion. (*Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1086; *People v. Hughes* (2002) 27 Cal.4th 287, 329.)

To obtain *Pitchess* information, the defendant must file a written motion. (Evid. Code, § 1043, subd. (a).) The motion "must describe 'the type of records or information sought' and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.' [Fn. omitted.] (§ 1043, subd. (b)(2), (3).)[9] This good cause showing is a 'relatively low threshold for discovery.' [Citation.] Assertions in the affidavits 'may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information.' [Citation.] If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be disclosed. (*Ibid*.; § 1045, subd. (b).)" (*Garcia*, *supra*, 42 Cal.4th at pp. 70-71.)

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9 Evidence Code section 1043 provides: "(a) In any case in which discovery or disclosure is sought of peace or custodial officer personnel records or records maintained pursuant to Section 832.5 of the Penal Code or information from those records, the party seeking the discovery or disclosure shall file a written motion with the appropriate court or administrative body upon written notice to the governmental agency which has custody and control of the records. The written notice shall be given at the times prescribed by subdivision (b) of Section 1005 of the Code of Civil Procedure. Upon receipt of the notice the governmental agency served shall immediately notify the individual whose records are sought.

"(b) The motion shall include all of the following:

"(1) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the peace or custodial officer whose records are sought, the governmental agency which has custody and control of the records, and the time and place at which the motion for discovery or disclosure shall be heard.

"(2) A description of the type of records or information sought.

"(3) Affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.

"(c) No hearing upon a motion for discovery or disclosure shall be held without full compliance with the notice provisions of this section except upon a showing by the moving party of good cause for noncompliance, or upon a waiver of the hearing by the governmental agency identified as having the records."

In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*), our Supreme Court described the necessary evidentiary support for a *Pitchess* motion as follows: "The supporting affidavit 'must propose a defense or defenses to the pending charges.' (*Id*. at p. 1024.) To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' (*Id*. at p. 1021.) The information sought must be described with some specificity to ensure that the defendant's request is 'limited to instances of officer misconduct related to the misconduct asserted by the defendant.' (*Ibid*.)

"Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. (*Warrick, supra,* 35 Cal.4th at pp. 1024-1025.) 'That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' (*Ibid*.) 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id*. at p. 1025.) Corroboration of or motivation for alleged officer misconduct is not required. (*Ibid*.) Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' (*Id*. at p. 1026.) A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. (*Ibid*.) 'A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' (*Ibid*.) A defendant who meets this burden has demonstrated the materiality requirement of section 1043. (*Warrick*, at p. 1026.)" (*Garcia, supra,* 42 Cal.4th at p. 71.)

In the present case, there is a logical link between the crime charged (corporal injury to a spouse, cohabitant, or child's parent) and the proposed defense. The police

report authored by Officer Cirrito says that immediately after the officers arrested defendant, Rojas told Cirrito that defendant hit her in the face. According to defense counsel's declaration, however, Rojas never told the officers that defendant hit her; instead, she said repeatedly that her injuries resulted from a fight she had gotten into earlier that morning with Vanessa. Rojas's statement to the police about who caused her injury plainly is relevant, and any evidence that Cirrito previously had falsified a police report would tend to undermine Cirrito's testimony that Rojas initially blamed defendant for her injuries. Consequently, counsel's declaration was sufficient to require the trial court to conduct an in camera review of Cirrito's personnel file. The declaration was *not* sufficient to require the trial court to conduct an in camera review of the personnel files of Clark and Corona, however, as neither officer authored the police report or was the apparent source of any statements in Cirrito's report about who Rojas blamed for her injuries.

The Attorney General contends that the trial court was within its discretion in finding that the allegation that Cirrito fabricated Rojas's statements was "implausible" in light of what Rojas's son indisputably told the police. We do not agree. The *Pitchess* threshold is "relatively low": A defendant must show a scenario of officer misconduct "might" or "could have" occurred, but need not show that such a scenario is "credible" or "believable." (*Warrick, supra*, 35 Cal.4th at p. 1026.) As the Supreme Court explained in *Warrick*, to require a criminal defendant to present a "credible" or "believable" factual account of police misconduct "suggests that the trial court's task in assessing a *Pitchess* motion is to weigh or assess the evidence. It is not. . . . The trial court does not determine whether a defendant's version of events, with or without corroborating collateral evidence, is persuasive—a task that in many cases would be tantamount to determining whether the defendant is probably innocent or probably guilty." (*Ibid.*) The trial court therefore erred in failing to conduct an in camera review of Officer Cirrito's personnel files based on the asserted "implausibility" of counsel's representation.

The remedy for a failure to conduct an in camera review of an officer's personnel records was established by the Supreme Court in *People v. Gaines* (2009) 46 Cal.4th 172

(*Gaines*). There, the court said that the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera "is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand." (*Id*. at p. 180.) After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information; if so, it should reinstate the judgment. If the trial court determines on remand that relevant information exists and should be disclosed, the trial court "'must order disclosure, allow [defendant] an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed.'" (*Id*. at p. 181.)

In the present case, we conditionally reverse only count 2 (corporal injury on a spouse, cohabitant, or child's parent), because that is the sole count to which the declaration submitted in support of the *Pitchess* motion is relevant. On remand, the trial court shall review the relevant portions of Officer Cirrito's personnel records in chambers. If it determines after doing so that the records contain no relevant information, it shall reinstate the judgment as to count 2. (*Gaines*, *supra*, 46 Cal.4th at p. 181.) If the court's review reveals relevant information, it shall disclose that information to defendant and give him a reasonable opportunity to investigate. The court shall order a new trial only if defendant demonstrates a reasonable probability of a different outcome had the evidence been disclosed; if not, it shall reinstate the judgment. (*Ibid*.)

DISPOSITION

The conviction on count 2, willful infliction of corporal injury on a spouse, cohabitant, or child's parent, is conditionally reversed, with directions to the trial court to review relevant portions of Officer Cirrito's personnel records in chambers. If the trial court determines that the records contain no relevant information, it shall reinstate the judgment as to count 2. If it determines that the records contain some relevant

information, it shall give defendant a reasonable opportunity to investigate the disclosed material and order a new trial if he demonstrates a reasonable probability of a different outcome had the evidence been disclosed; otherwise, the court shall reinstate the judgment as to count 2. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.