Filed 10/23/12

**CERTIFIED FOR PARTIAL PUBLICATION***

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GONZALO ALARCON,<br><br>Defendant and Appellant. | B233444<br><br>(Los Angeles County<br>Super. Ct. No. KA092630) |

APPEAL from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal and the California Appellate Project, for Defendant and Appellant.

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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 the Facts section and parts A and C of the Discussion section.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric Reynolds and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Gonzalo Alarcon was convicted of attempted murder and shooting at an occupied motor vehicle. He contends the judgment must be reversed due to inadequacy of the evidence, instructional error, and the admission of irrelevant and inflammatory evidence. In the published portion of this opinion, we reject appellant's contention that under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the gun enhancement allegations in the accusatory pleading required the trial court to instruct the jury regarding assault with a deadly weapon as a lesser included offense of attempted murder. In the unpublished portions of the opinion, we reject his remaining contentions. We therefore affirm.

## RELEVANT PROCEDURAL BACKGROUND

On February 2, 2011, an information was filed charging appellant with the attempted willful, deliberate, and premeditated murder of Javier Partida (Pen. Code, §§ 187, subd. (a), 664), and with shooting at an occupied vehicle (Pen. Code, § 246).[1] Accompanying the counts was an allegation that appellant caused great bodily injury to Partida by personally and intentionally discharging a handgun (§ 12022.53, subd. (d)), together with other gun use allegations (§12022.53, subds. (b), (c)). In addition, the information alleged that appellant had suffered one prior felony conviction for purposes of section 667, subdivision

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**1** All further statutory citations are to the Penal Code.

(a)(1); had served one prior prison term for purposes of section 667.5, subdivision (b); and had two convictions for purposes of the "Three Strikes" Law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Appellant pleaded not guilty and denied the special allegations.

A jury found appellant guilty as charged and found the gun use allegations to be true. Appellant waived a jury trial on the prior conviction allegations. After dismissing one of these allegations, the trial court found the remaining prior conviction allegations to be true. Appellant was sentenced to a total term of 49 years to life.

## FACTS

A. *Prosecution Evidence*

Beginning in May 2009, appellant had a brief relationship with Erika Horta. Horta sometimes called appellant, "Chalo." In July 2009, when Javier Partida began dating Horta, he saw appellant, who lived near Horta. Partida also saw pictures of appellant on Horta's phone.

Regarding the offenses charged against appellant, Partida testified that after he began dating Horta, he took up residence in her house, which she shared with her parents. In May 2010, when Partida returned from a trip to Las Vegas, Horta's mother told him that Horta had not come home the night before. Unable to contact or locate Horta, Partida left the house and took his belongings with him.

The next day, May 24, 2010, at 5:00 or 6:00 p.m., Partida parked a short distance from the house and drank beer. Soon afterward, he saw a Nissan Altima enter the parking lot of a nearby school. Partida could not see the driver. When Partida observed Horta leave the Nissan through a passenger door, he walked up to the Nissan and threw a beer bottle at it. Although the bottle hit the driver's door, the driver did not get out of the Nissan. Instead, the car drove away.

Partida confronted Horta, who said that "a friend of a friend" had given her a ride. At Partida's urging, Horta entered his car, and they went for a drive, during which he attempted to reconcile with her. When she asked him to take her home, he drove back to the school parking lot near her house, stopped his car, and continued to talk to her.

While Partida and Horta conversed, the Nissan returned. Carrying a gun, appellant left the Nissan's passenger side, moved to the front of Partida's car, and asked Horta, "Who the fuck is this?" Partida answered, "That's my girl now. What's up?" Appellant walked to Partida's side of the car, where Partida's door was open, pointed the gun at Partida's head, and asked, "You want to throw beer bottles, motherfucker?" When Horta cried out, "No, Chalo, no," appellant re-aimed his gun at Partida's "midsection area," that is, his stomach or "privates." In anticipation of a shot, Partida moved his body up and lifted his leg. Appellant fired the gun, hitting Partida near his kneecap. Appellant then ran back to the Nissan, which left.

Accompanied by Horta, Partida drove to a nearby hospital emergency room. During the drive, Horta stated that she loved Partida, and explained that appellant had only given her a ride in the Nissan. After arriving at the hospital, they agreed to tell a false story regarding the shooting. When Los Angeles County deputy sheriffs interviewed Partida in the hospital, he said he did not know who had shot him. He described the shooting as an incident of road rage, and suggested that his assailant may have been a gang member. According to Partida, he lied because his parents were felons and his upbringing made him distrust police officers.[2] Partida was released from the hospital after a six-hour stay.

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[2] Partida acknowledged that he had been expelled from many schools and had a criminal record.

Following the shooting, Partida resumed his relationship with Horta until October 2010, when Horta began to treat him coolly. In early November 2010, after spying on her, he discovered that she was involved with appellant. In an effort to preserve his relationship with Horta, Partida left voice mail messages for her, sent her text messages, and communicated with her on MySpace. He acknowledged that his numerous messages often contained "hate-filled" language directed at her. On November 14, 2010, Partida gave a different report of the May 24 shooting at a Los Angeles County Sheriff's station. He identified appellant as the shooter, and told the investigating officers that he had lied in denying knowledge of the assailant. According to Partida, he failed to make the report earlier because he initially thought he should retaliate against appellant rather than be a "snitch," but he could not bring himself to shoot appellant. In addition, he wanted no trouble with appellant, whom he regarded as "a dangerous guy."

At trial, Horta provided a different account of the shooting and its aftermath. According to Horta, on May 24, 2010, she rode a bus home from the college she was attending. After getting off the bus, she began the short walk to her house when she saw Partida drive by. He stopped his car, left it, and threw a beer bottle at a passing car. He then accused Horta of seeing other people. Horta believed that he was drunk. She agreed to go for a drive in his car, during which they argued.

After two and a half hours, Partida stopped his car in the school parking lot near Horta's house. While Partida and Horta talked, Partida opened his car door. A man whom Horta did not recognize left a car parked nearby, walked to Partida's car carrying a handgun, and accused Partida of throwing bottles at cars. Standing approximately three to four feet from Partida, the man shot at him and fled. Later, at Partida's urging, Horta corroborated the gang-related account of the shooting that Partida initially gave to the deputy sheriffs at the hospital. However, when the

deputy sheriffs accused her of being the shooter, she told them that Partida had been shot by the driver of the car Partida had hit with a bottle.

In September 2010, Horta stopped seeing Partida and resumed her relationship with appellant. Because Partida's hostile communications and other conduct frightened her, she sought a restraining order against him. After appellant was arrested, Horta told investigating officers that appellant had fired the gun that injured Partida. According to Horta, she identified appellant as the shooter at Partida's urging because appellant's arrest left her vulnerable to Partida. Horta acknowledged that she never told the officers she was afraid of Partida. She also testified that she loved appellant and wanted him out of custody.

B. *Defense Evidence*

Appellant presented no evidence.

## DISCUSSION

Appellant contends (1) there was insufficient evidence to support his conviction for attempted willful, deliberate, and premeditated murder, (2) the trial court erred in failing to instruct the jury on assault with a deadly weapon as a lesser included offense of attempted murder, and (3) the trial court improperly admitted evidence that Partida feared appellant. As explained below, we reject these contentions.

A. *Attempted Murder*

We begin with appellant's challenge to his conviction for attempted murder. He argues there was no evidence that he intended to kill Partida. We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the

defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Generally, "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) As our Supreme Court explained in *People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*), the requisite intent is essentially identical to the state of mind denominated as "express malice." To establish this element of the offense, the prosecution was obliged to show that "the assailant '"'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' [Citation.]"' [Citations.]" (*Ibid*.)

Two principles govern this showing. (*Smith, supra,* 37 Cal.4th at p. 740.) First, motive, although not an element of attempted murder, "is often probative of intent to kill." (*Id*. at pp. 740-741.) Second, evidence of motive aside, absent direct evidence of the defendant's intent, express malice may be inferred from the defendant's conduct and the circumstances of the crime. (*Id*. at p. 741.) "These principles, taken together, reflect that the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive, although again, where

motive is shown, such evidence will usually be probative of proof of intent to kill." (*Id*. at p. 742.)

Instructive applications of these principles are found in *Smith* and *People v. Lashley* (1991) 1 Cal.App.4th 938 (*Lashley*). In *Smith*, a woman drove with her boyfriend and infant to a friend's house, where they immediately encountered the defendant, who had threatened to "'slap the shit out of'" the woman when they last spoke nine months earlier. (*Smith*, *supra*, 37 Cal.4th at pp. 736-737.) The defendant said, "'Don't I know you, bitch?'", and displayed a gun to her boyfriend. (*Id*. at p. 737.) As the woman drove away with her infant and boyfriend, the defendant fired a single shot through the car's rear window, which narrowly missed the woman and her infant in the back seat. (*Ibid*.) The court in *Smith* held on these facts that substantial evidence supported the jury's determination that the defendant had intended to kill the woman and her infant. (*Id*. at p. 744.)

Again, in *Lashley*, the defendant stood on his apartment balcony and shouted racial insults at the victim, who was fishing nearby, and then fired a .22 caliber rifle once in the victim's direction, piercing the victim's lung. (*Lashley*, *supra*, 1 Cal.App.4th at pp. 942-943.) The court concluded that these facts adequately supported the jury's determination that the defendant had intended to kill the victim. (*Id*. at p. 945.) In so concluding, it observed that the jury was free to reject the defendant's trial testimony that he had merely tried to scare the victim or inflict a nonfatal wound. (*Id*. at p. 946.)

In view of this authority, there is ample evidence that appellant intended to kill Partida. According to Partida, after he saw Horta leaving the Nissan at the school parking lot, he hit the Nissan with a bottle. Later, appellant arrived at the lot in the Nissan, approached Partida's car while carrying a gun, and angrily asked Horta to identify Partida. When Partida answered, "That's my girl now," appellant walked to Partida's side of the car, asked, "You want to throw beer bottles,

motherfucker?," and aimed his gun at Partida's head through the open driver's door. After Horta said, "'No, Chalo, no,'" appellant pointed his gun at Partida's "midsection area" -- that is, his stomach or "privates" -- and fired the gun. Appellant then fled. As this testimony established that appellant had a motive (or motives) to kill Partida and "purposefully fir[ed] a lethal weapon at [him] at close range," the jury properly found that appellant acted with an intent to kill Partida. (*Smith*, *supra*, 37 Cal.4th at pp. 740-742.)

Appellant contends the record fails to show that he possessed the requisite intent because he altered his aim after Horta cried out, fired only a single shot that wounded Partida near his kneecap, and left without ensuring Partida's death. He maintains this evidence is consistent with the inference that he intended only to maim Partida. However, the fact that "the bullet misses its mark or fails to prove lethal" does not compel the inference that the defendant lacked the intent to kill. (*Smith*, *supra*, 37 Cal.4th at p. 742.) Furthermore, the fact that the record might support other inferences about appellant's state of mind did not preclude the jury from properly determining that he possessed the requisite intent to kill. (*Lashley*, *supra*, 1 Cal.App.4th at p. 946.) That is the case here.

Although appellant may have shifted his aim in response to Horta's cry, he merely redirected the gun at Partida's midsection, where a bullet wound was highly likely to be fatal. As explained in *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690, "[t]he act of firing toward a victim at a close, but not point blank range, 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .'" (Quoting *Lashley*, *supra*, 1 Cal.App.4th at p. 945.) Here, Partida's testimony supports the reasonable inference that the bullet would have hit his midsection if he had not lifted his body and raised his leg in anticipation of a shot. Furthermore, "[t]he fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear

does not compel the conclusion that he lacked the animus to kill in the first instance." (*Ibid.*) Because Partida testified that appellant "ran like a sprint runner" to the Nissan after shooting him, the jury could reasonably infer that appellant feared being held responsible for the shooting, and thus fled without firing a second shot. In sum, there is sufficient evidence to support appellant's conviction for attempted murder.

B. *Lesser Included Offense*

Appellant contends the trial court erred in declining to instruct the jury regarding assault with a deadly weapon as a lesser included offense of attempted murder. Relying on gun use enhancement allegations accompanying the attempted murder count in the information, appellant argues that assault with a deadly weapon must be regarded as included within the charged attempted murder. For the reasons explained below, we reject this contention.

Generally, the trial court is obligated to instruct sua sponte on lesser included offenses that the evidence tends to prove, even if the parties object to the instruction on tactical grounds. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).) For purposes of this rule, courts apply the so-called "'accusatory pleading'" test, which "looks to whether '"'the charging allegations of the accusatory pleading include language describing the [charged] offense in such a way that if committed as specified [the proposed] lesser offense is necessarily committed.'"'"[3] (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035,

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**3** In certain other contexts, courts apply the so-called "elements" test to decide whether an offense is necessarily included within a charged offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.) "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Ibid.*) This test is properly employed in
*(Fn. continued on next page.)*

quoting *People v. Lopez* (1998) 19 Cal.4th 282, 288-289.) However, in *People v. Wolcott* (1983) 34 Cal.3d 92, (*Wolcott*), our Supreme Court held that a gun use enhancement allegation in an accusatory pleading containing a robbery count could not be used to establish that assault with a deadly weapon was included within the charged robbery. (*Wolcott, supra*, 34 Cal.3d at pp. 100-102.) Following *Wolcott,* courts have concluded that under the accusatory pleading test, gun use and great bodily injury enhancement allegations accompanying an attempted murder charge do not render assault with a deadly weapon a lesser included offense of the charged attempted murder. (*People v. Parks* (2004) 118 Cal.App.4th 1, 6; *People v. Richmond* (1991) 2 Cal.App.4th 610, 616.)

Appellant maintains that *Wolcott* was "overruled sub rosa" by *Apprendi, supra*, 530 U.S. 466 and *People v. Seel* (2004) 34 Cal.4th 535 (*Seel*). In our view, this contention is mistaken. As explained below, *Apprendi* and *Seel* establish that an enhancement allegation specifies an element of a greater crime only for certain purposes *not* encompassing the accusatory pleading test.

In *Apprendi*, the defendant's sentence was doubled because the trial court found that racial animus had motivated the underlying crime. (*Apprendi, supra,* 530 U.S. at p. 471.) The United States Supreme Court held that enhancing sentences in this manner violated the rights to due process and to a jury trial afforded defendants under the Fifth, Fourteenth and Sixth Amendments of the United States Constitution. (*Apprendi*, at pp. 476-477, 490.) The court stated: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490.) On this matter, the court

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determining whether a defendant may be convicted of multiple charged crimes. (*Id*. at p. 1231.)

explained that "when the term 'sentence enhancement' is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict." (*Id*. at p. 494, fn. 19.)

In *Seel*, our Supreme Court applied *Apprendi* in the context of the double jeopardy clauses of the federal and state Constitutions. There, a jury found the defendant guilty of attempted murder, and found true allegations that the attempted murder was willful, deliberate, and premeditated, and that the defendant had personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). (*Seel*, *supra*, 34 Cal.4th at p. 540.) After a Court of Appeal concluded there was no substantial evidence of premeditation and remanded the premeditation allegation for retrial, the Supreme Court held that double jeopardy principles barred retrial of that allegation, stating that "*Apprendi* compels the conclusion that [the premeditation allegation] constitutes an element of the offense" for purposes of the double jeopardy clauses in the federal and state Constitutions. (*Id*. at pp. 548-550.) In so concluding, the court overruled *People v. Bright* (1996) 12 Cal.4th 652, 669-671, which had relied in part on *Wolcott*.

However, since *Seel*, our Supreme Court has affirmed the vitality of *Wolcott* and the limited scope of *Apprendi*. In *People v. Sloan* (2007) 42 Cal.4th 110, 115-123, the court held that enhancements may not be considered to determine whether an offense is necessarily included within another crime, for purposes of the rule barring multiple convictions based on lesser included offenses. In so concluding, the court discussed with approval an appellate court decision that relied on *Wolcott*, and rejected a contention predicated on *Apprendi*. (*Id*. at pp. 119-120, 122-123.) Furthermore, in a companion case, the court determined that *Apprendi* did not mandate that enhancements -- in isolation from the charges that they accompany -- are subject to the multiple conviction rule. (*People v. Izaguirre*

(2007) 42 Cal.4th 126, 130-134.) Later, in holding that *Apprendi* did not transform enhancement allegations into elements of greater offenses for purposes of a double jeopardy statute (§ 1023), the court underscored its rejection of "the notion that the high court's 'functional equivalent' statement requires us to treat penalty allegations as if they were actual elements of offenses for all purposes under state law." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 137.) Accordingly, neither *Apprendi* nor *Seel* undermined *Wolcott* and its progeny, which are dispositive here.

Appellant maintains that *Apprendi* must be viewed broadly to encompass the accusatory pleading rule, arguing that unless juries are instructed on assault with a deadly weapon under the circumstances presented here, courtrooms will function as "'gambling halls,'" rather than as "'forums for the discovery of truth'" (quoting *People v. Barton* (1995) 12 Cal.4th 186, 196 (*Barton*)). In our view, this contention misapprehends the reach of *Apprendi*.

As explained in *People v. Birks* (1998) 19 Cal.4th 108, 118-119 (*Birks*), the rule requiring instructions on lesser included offenses flows from the trial court's duty under California law to provide instructions adequate for the case. The instructional rule implements this general duty in a manner that benefits both defense and prosecution. (*Id*. at p. 119.) The rule preserves the prosecutor's discretion over the offenses to be charged, ensures that the defendant has adequate notice of the offenses alleged, and prevents either party from "gambling on an inaccurate all-or-nothing verdict when the pleadings and evidence suggest a middle ground . . . ." (*Id*. at pp. 118, 127.) Regarding the latter interest, the Supreme Court has stated: "Our courts, we have stressed, '"are not gambling halls but forums for the discovery of the truth."' [Citations.]" (*Id*. at p. 127, quoting *Barton*, *supra*, 12 Cal.4th at p. 196.)

Both before and after *Apprendi*, our Supreme Court has stated that this rule arises *only* under California law, insofar as it operates in noncapital cases. (E.g.,

*Breverman, supra*, 19 Cal.4th at p. 169 ["[T]he rule [in noncapital cases] requiring sua sponte instructions on all lesser included offenses supported by the evidence derives exclusively from California law."]; *People v. Rundle* (2008) 43 Cal.4th 76, 148, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 ["[E]xcept for the limited situation in a capital case in which the state has created an artificial barrier to the jury's consideration of an otherwise available noncapital verdict, there is no federal constitutional right to instruction on lesser necessarily included offenses."].) California law thus determines the balancing of interests reflected in the rule, including the weight properly attached to the interest in the discovery of truth. (See *Breverman*, *supra*, 19 Cal.4th at pp. 155-156, 169; *Birks*, *supra*, 19 Cal.4th at pp. 118-119, 120-124.[4]) For this reason, *Wolcott* controls the application of the instructional rule, insofar as the rule relies on the accusatory pleading test. In sum, the trial court did not err in declining to instruct on assault with a deadly weapon as a lesser included offense of attempted murder.

C. *Testimony Regarding Partida's Fear of Appellant*

Appellant contends the trial court erred in admitting testimony from a police detective that Partida feared appellant. He argued that the testimony was inadmissible as hearsay. As explained below, appellant has failed to show reversible error.

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**4** We note that appellant appears to contend that *Apprendi* undermined *Birks*, which held that the court may not instruct on a lesser *related* offense over the prosecution's objection (*Birks*, *supra*, 19 Cal.4th at p. 136, fn. 19). As this holding is not relevant to our analysis, we do not examine appellant's contention.

1. *Underlying Proceedings*

During a recess in Partida's testimony, he told the trial court outside the jury's presence that appellant's brother and another man seated in the courtroom had made hostile gestures toward him. According to Partida, the brother had been "flipping [him] off," and his companion had been "staring [him] down" in a manner that Partida viewed as saying, "I'm going to kill you when I see you." Partida further said that the gestures made him fearful, but had not affected his testimony.

After the trial court learned that the two men had left the courthouse at defense counsel's request, the prosecutor resumed his direct examination of Partida, inquiring why he had waited several months to make an accurate report of the shooting. Partida replied that his upbringing encouraged him to favor taking revenge over acting as a "snitch," but that he could not bring himself to shoot appellant. He added: "I didn't want no trouble with this guy. This guy's a dangerous guy." The trial court denied a motion to strike this portion of the answer predicated on an objection that no question was pending when Partida offered the testimony.

Later, during the prosecutor's re-direct examination of Partida, he asked why Partida had referred to appellant's brother in a voice mail message he left for Horta. Partida replied that the message was intended to express defiance of appellant's brother and his gang, stating, "For a long time I lived in fear." Following this testimony, the trial court admonished the jury sua sponte that the testimony was admitted only to establish Partida's state of mind, and could not be considered as evidence that appellant was "a bad character" or "a member of a gang." Shortly afterward, Partida again testified that he "had been in fear."

The prosecution's final witness was Los Angeles County Sheriff's Department Detective Glen Eads, who assumed responsibility for the investigation

into the shooting in November 2010. With no objection from appellant, Eads testified as follows:

"[Prosecutor]. And has [Partida] ever expressed to you any fear with respect to being involved in this prosecution?

"[Eads]. Yes, he did.

"[Prosecutor]. Was the first time on [November 16, 2010]?

"[Eads]. Yes.

"[Prosecutor]. How did that happen?

"[Eads]. He told us that he was -- he was scared of [appellant]. He was scared to come forward and talk to us about it because he knew his history."

In response to further questioning, Eads stated that Partida told him that he was fearful before and after he identified appellant in a photographic lineup.

Later, when the prosecutor asked Eads whether Partida said that he was fearful after the November 16 interview, appellant's counsel asserted a hearsay objection, which the trial court overruled. Eads then testified that Partida had done so on several occasions.

2. *Analysis*

Appellant contends the trial court erred in admitting Eads's testimony regarding Partida's expressions of fear over the hearsay objection noted above. He argues (1) that no exception to the hearsay rule encompassed the testimony, and (2) that it was not relevant to whether fear affected Partida's own testimony, as Partida denied any such influence.

We conclude that appellant failed to preserve his contention for appeal, as the record shows no timely objection to the testimony. Evidence Code section 353 provides that no judgment will be reversed due to the "erroneous admission of evidence" unless a timely and specific objection was presented to the trial court.

Thus, "'[questions] relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations].' [Citations.]" (*People v. Belmontes* (1988) 45 Cal.3d 744, 766, disapproved on another ground in *People v. Doolin, supra,* 45 Cal.4th at p. 421, fn. 22.) Furthermore, the objection before the trial court must be "on the exact ground being raised on appeal. [Citations.]" (*People v. Bury* (1996) 41 Cal.App.4th 1194, 1201.) Here, the record establishes that well before appellant asserted his hearsay objection, Eads repeatedly testified that Partida expressed his fears of appellant to Eads.

Moreover, even were we to address appellant's contention, we would discern no prejudice from the error (if any) in the admission of the testimony to which appellant objected.[5] Prior to the hearsay objection, the jury heard abundant testimony from Partida and Eads regarding Partida's fear of appellant, which the prosecutor elicited to explain Partida's delay in making an accurate report of the shooting. As appellant raised no objection to the relevance of this testimony before the trial court, he may not attack its relevance on appeal; furthermore, he has forfeited any challenge predicated on the sole objection in the record, namely, the motion to strike, as he has not resurrected this objection on appeal. Accordingly, if the trial court had sustained appellant's hearsay objection and excluded the testimony that it targeted, the outcome of the trial would not have been affected.

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**5** Generally, the improper admission of evidence is reviewed for prejudice in light of the test stated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. O'Shell* (2009) 172 Cal.App.4th 1296, 1310, fn. 11.) Under that test, an error is reversible only if "it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error." (*Watson, supra,* 46 Cal.2d at p. 836.)

## DISPOSITION

The judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.