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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. REGINALD HOLMES, JR., Defendant and Appellant.	B262982 (Los Angeles County Super. Ct. No. TA090560)

APPEAL from the judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Connie H. Kan, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Reginald Holmes, Jr., of two counts of first degree murder with special circumstances and one count of being a felon in possession of a firearm.[1] (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(3) & (15), 12021, subd. (a)(1).)[2] The jury found true gang enhancement allegations as to each count. (§ 186.22, subd. (b)(1).) The jury also found true allegations that defendant personally used a gun in connection with the murders and, as to one murder count, that he intentionally discharged a firearm causing death. (§ 12022.53, subds. (b) & (c).) In a bifurcated bench trial, the court found that defendant had four prior convictions, including one strike prior. (§§ 667.5, subd. (b), 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) The court sentenced defendant to life in prison without the possibility of parole (LWOP) on each of the murder convictions plus four years for being a felon in possession of a firearm. The court added 23 years for the gang enhancements, 40 years for the gun enhancements (10 years of which were stayed), and nine years for the prior convictions (one year of which was stayed).

Defendant contends: (1) the court prejudicially erred in excluding exculpatory hearsay evidence; (2) the prosecutor committed misconduct in her manner of questioning a gang expert; (3) the court erred in finding that a witness was unavailable and, on that basis, allowing the witness's prior testimony into evidence; (4) the evidence is insufficient to support the murder convictions or the gang enhancements; and (5) the gang enhancements to the murder convictions were unauthorized. We reject these arguments and affirm the judgment.

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[1] Defendant was previously convicted of these charges in 2011. In 2013 we reversed the convictions based on evidentiary errors in an unpublished opinion. (See *People v. Holmes* (June 3, 2013, B236128) [nonpub. opn.] (*Holmes I*).) We previously granted defendant's request to take judicial notice of our prior opinion.

[2] All subsequent statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL SUMMARY

A. *Prosecution Case*

In April 2006, Marquita Hemingway, Patrick Hemingway,[3] Michael Taylor, and Leishane Ford lived in an apartment in Los Angeles. Marquita and Patrick were married; Taylor was Marquita's brother; and Ford was Taylor's girlfriend. Defendant lived with his wife Trisha in the same apartment complex.

Defendant was a high-ranking member of the Six Deuce Harvard Park Brims (Six Deuce Brims), a Blood gang. He was known as "Gunsmoke," "GS," and "Smoke." Taylor was not in a gang, but he "knew people" from the Crips gang. Although Bloods and Crips are enemies, defendant was always respectful and cordial toward Patrick and Taylor, and would occasionally sell them marijuana.

Marquita testified about the events at her apartment on April 21, 2006, and the early morning of April 22. In the afternoon of April 21, defendant asked Taylor for a ride to go buy some marijuana. Taylor agreed. The two left and later returned to the apartment complex. Later that evening, defendant came to the apartment when Patrick, Taylor, and Marquita were there. Defendant asked Taylor about getting the drug ecstasy. Taylor left to get the drug, and returned about 45 minutes or an hour later.

About 30 minutes after Taylor returned, defendant and Trisha came to the apartment and asked Taylor to get some more ecstasy. Taylor and Patrick left to do so while defendant and Trisha remained for some time in the apartment with Marquita. Patrick and Taylor returned after about 35 or 40 minutes.

Sometime after 10:00 or 11:00 p.m., defendant returned to the apartment. He asked for orange juice because, he said, it increases the potency of the ecstasy. Taylor and Patrick went to a store to buy orange juice. When they returned about 10 minutes later, defendant and Trisha were at the apartment. Defendant drank orange juice while

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[3] To avoid confusion, and without intending any disrespect, we will refer to Marquita Hemingway, Patrick Hemingway, and defendant's wife Trisha Holmes by their first names.

the others smoked marijuana and played dominoes. At some point, defendant and Trisha left the apartment.

From 1:00 a.m. until 6:00 a.m. on April 22, Marcus Nelson, then a Six Deuce Brims gang member, was monitoring security cameras at a so-called "trap house," where the gang sold narcotics. During that time, Trisha drove defendant to the trap house in her blue, box-style Toyota Scion. Defendant was in the passenger seat. At the trap house, defendant met with Michael Walton, a Six Deuce Brims "shotcaller" known as "Murder Rock" or "M-Rock." Walton gave defendant a Colt .45, and a .380 caliber firearm. Walton told Tony Craig, or "Tiny M-Rock," to go with defendant. Craig took the .380 caliber firearm and left with defendant.[4]

Around 2:30 a.m., defendant knocked on the door of Marquita's apartment. Defendant was wearing a gray sports jersey and sweating. He asked Taylor to take him to his "hood" because his "homeboy was waiting for him." Marquita asked Patrick to go with Taylor and defendant. While talking on the telephone to his girlfriend (Ford), Taylor told her that he and Patrick were going with defendant to get more marijuana.

Patrick and Marquita owned a silver Honda Civic, which they parked on the street outside their apartment complex. Through a window overlooking the street, Marquita watched Patrick get into the driver's seat of the Civic and Taylor get into the front passenger seat. Defendant got into the rear passenger seat just before the car drove away.[5] Ford arrived at the apartment a short time later.

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[4] At the 2011 trial, Nelson testified that defendant's protégé in the Six Deuce Brims, Abadji Franklin (known as Baby Gunsmoke), not Tony Craig, left with defendant. At the 2015 trial, Nelson testified that he lied about Franklin's involvement in 2011 in order to protect Craig, whom Nelson described as being like his little brother.

[5] Marquita testified that she saw Patrick and Taylor get into the car and saw defendant "walking around to the back passenger side." When asked if she saw defendant get in the back passenger side or see him in that area, Marquita responded: "When I saw him in that area the door was open. When I looked away, the door was closed and the lights were on. They drove off." She then stated that defendant was no longer there. We infer from this testimony that defendant got into the rear passenger seat of the Civic.

At approximately 3:00 a.m., Murray Howard was drinking beer and smoking crack cocaine on Gage Avenue near Western Avenue, across the street from a Primo Burgers restaurant.[6] He heard male voices talking, which drew his attention to the Primo Burgers parking lot. He saw a light-colored compact car and a dark vehicle that was shaped "[l]ike a box" parked next to each other in the lot.[7] The cars matched photographs of Patrick's Civic and Trisha's Scion. A man got out of the passenger side of the Scion and into the rear passenger side of the Civic. The driver of the Scion remained in the car. Howard heard several gunshots and saw flashes of gunfire inside the Civic. Two men exited the backseat of the Civic. The smaller of the two, the man who had been in the Scion, got out on the passenger side and returned to the Scion, which then turned right onto Gage Avenue and right again onto Western Avenue. The other, larger man left the Civic from the rear driver side of the car and ran toward 64th Street, away from Howard's vantage point. For that reason, Howard did not get a good look at him. Howard walked to the car, saw the victims, and called 911.

A security camera located on a building across Western Avenue and 64th Street recorded the incident. The video-recording has a time stamp indicating that two cars arrived at the Primo Burgers parking lot at about 2:59 a.m. The silent, black-and-white, "grainy" recording does not reveal distinguishing physical characteristics of individuals or the make, model, or color of the cars. After approximately two or three minutes, one vehicle leaves the parking lot onto 64th Street. Soon afterward, lights emanate from the remaining car. The car then appears to move forward and is obscured from the camera's view by the restaurant. A car is then seen driving away from Primo Burgers on Gage Avenue, then right onto Western Avenue. The video shows paramedics arriving about nine minutes later.

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[6] Howard was not available for trial. His testimony from the 2011 trial was read into the record.

[7] Howard described the cars he saw as a beige or light brown compact and a Black hardtop Jeep or miniature van shaped "[l]ike a box." When shown pictures of Patrick's Civic and Trisha's Scion, however, he identified them as the cars he saw that morning.

The paramedics found the Civic's back doors open, the gear in drive, and the engine running. Patrick had been shot three times in the head and neck. Taylor had been shot seven times from behind. They were pronounced dead at the scene. Stippling evidence indicated that the guns had been fired at close range.

Bullet casings and fragments taken from the scene indicated that two guns were used: a .380 caliber firearm and a .45 caliber firearm. Patrick's wallet and credit cards and Taylor's jewelry and wallet were recovered from their bodies.

According to Nelson, a "couple hours" after defendant and Craig left the trap house with the guns they had received from Walton, they returned and gave the guns back to Walton.

Around 7:00 a.m., Marquita woke to find Patrick missing. One of Taylor's relatives called and told Ford that the Civic was at Primo Burgers. Marquita and Ford went to the location where they saw the Civic with Patrick's and Taylor's bodies inside. Ford approached Detective Robert Guzman and said: " 'Where is the third person[?] There were three people in this car. Why is there only two people dead?' " She told the detective that defendant was the third person.

According to Theresa Cherry, a Six Deuce Brims affiliate or member, she met with defendant on April 23, the day after the murders. Defendant told her that he had killed the "two guys" because he believed they were setting him up to be killed.[8] He told Cherry that he was in the backseat of a car and the two guys were in the front seats; he arranged to have his wife follow them in her car; defendant had a gun with him and he made the victims pull over; then he shot them in the back of their heads and left in Trisha's car. Defendant gave Cherry a gun and asked her to watch his back.

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[8] Cherry's statements were made in police interviews in February 2007. The interviews were audio recorded. During the 2011 trial, Cherry denied that defendant admitted to killing the victims and said she lied when she implicated defendant in the police interviews and at defendant's preliminary hearing. The audio recordings were then played for the jury. At the 2015 trial, the court declared Cherry to be unavailable and allowed her 2011 testimony to be read and the 2007 audio recordings to be played.

The next day, Trisha, defendant's wife, was driving her Scion with Cherry in the car when police pulled them over. Trisha told Cherry, " ['Oh, shit they are going to take my car.'] " She began crying and said, " 'I'm never going to see my husband again.' " Cherry put the gun that defendant had given her inside a Subway sandwich bag. The police found the gun and arrested her. When the Scion was examined, a bloodstain was found on the headliner above the driver's seat.

Police arrested defendant and searched his apartment. They found a loaded gun inside a speaker box. Neither that gun nor the gun found in Cherry's possession fired any of the bullet casings found at the murder scene.

After his arrest, defendant told Detective Guzman that he last saw the victims when he opened up the apartment complex gate for them as they drove off to buy cigarettes.

In May 2006, Detective Guzman talked to Howard, the person who saw the shootings. Howard described the two men he saw exiting the Civic as teenagers weighing about 80 or 90 pounds. Detective Guzman met with Howard again in November 2006. He showed Howard a six-pack photo lineup. Howard selected the photograph of Arvin Kemp, a Six Deuce Brims member, from the lineup. Kemp is physically small, about 100 pounds, and a teenager. When he was shown a six-pack photo lineup that included a picture of defendant, Howard indicated that defendant looked familiar, but he did not identify him as a perpetrator in the murders. At that time, defendant was 30 years old, 5 feet 8 inches tall, and weighed about 200 pounds. In another six-pack photo lineup, Howard identified a second person (in addition to Kemp) as a possible suspect. All the men shown in the photo lineups are African-American.

At defendant's preliminary hearing, Howard identified defendant as one of the two men he saw leaving the Civic. He later identified defendant in the six-pack photo lineup as one of the "guy[s] who came out of the car." He explained that he did not previously identify defendant because of fear that defendant would hurt him and that he had identified the other, smaller person in the photo lineup because he knew he "could handle him."

While defendant was in the courtroom during the 2011 trial, Howard stated that neither of the two men who exited the Civic were in the courtroom. Later, he identified the two men from photographs, one of which was a photograph of defendant. The defendant, Howard said, was the person that came out from the rear driver's side of the Civic and ran from the scene away from Howard's view. He added that he never got a good look at that person.

Los Angeles Police Officer Everardo Amaral, the prosecution's gang expert, testified to the following. The Six Deuce Brims is a "Blood" gang. As a Blood gang, Crips are its enemies. The Six Deuce Brims's "territory" borders Western Avenue, where Primo Burgers is located. The territory does not include the apartments where defendant and the victims lived; the apartments were within territory claimed by a different Blood gang.

The primary activities of the Six Deuce Brims include murders, street robberies, bank robberies, narcotics sales, weapon sales, assaults on police officers, vandalism, burglaries, and minor thefts. Officer Amaral identified two "predicate" offenses committed by different Six Deuce Brims members. One, possession of cocaine for sale, was committed in March 2006; the other, a robbery, was committed in December 2005. Based on his personal contacts with defendant and defendant's "self-admissions," Officer Amaral knew defendant to be a member of Six Deuce Brims in April 2006. Officer Amaral considered defendant to be an "OG" or a "shotcaller"—positions at the top of the gang's hierarchy. Shotcallers not only commit crimes, but also plan crimes and send younger members to commit them. Defendant has a "Brim" tattoo and a "CK finest" tattoo. Officer Amaral stated that "CK" "stand[s] for Crip killer."

In response to a hypothetical question based on the prosecution's evidence, Officer Amaral opined that "[t]his crime was committed for the benefit and association of the Blood gang."

B. *Defense Case*

Mitchell Eisen, Ph.D., testified as an expert on memory. He described numerous ways in which memories are created and how they can be affected and impaired by phenomena such as stress, trauma, alcohol, intoxication, erroneous inferences, suggestion, the volume of information, and the passage of time. Statements made shortly after an event are generally more accurate than statements made later. Because of commitment bias, a person may confirm an erroneous identification even when later shown a photograph of the actual perpetrator.

Tasha Wilson was with Robert Coleman about a half-block away from Primo Burgers when the murders took place. Wilson heard gunshots and saw "some guys" running. One was wearing a blue and white jersey, and the other wore burgundy and white. She described them as Hispanic or Mexican. (Defendant and the accomplice identified by Howard are African-American.) She saw the men get into a blue, square car. On cross-examination, Wilson agreed that she had previously described the jersey that one person wore as gray.

Willie Grasty was near Primo Burgers that night, but farther from it than Wilson and Howard. He heard gunshots and then saw two Mexicans getting into a little red car.

Defendant testified that he lived down the hallway from Patrick and Taylor, and that they occasionally smoked marijuana together. On the night of April 21, 2006, he and Trisha went to Patrick and Taylor's apartment on several occasions and smoked marijuana and played dominoes with them. He agreed that Marquita's description of the evening was generally accurate, except for her testimony about the last time that he went to the apartment. According to defendant, he went to the apartment for the last time around 11:00 p.m. At that time, he asked Patrick and Taylor to drive him to meet a friend, but then remembered that the friend was working that night. He walked out of the apartment with Patrick and Taylor to get a cigarette, but did not get in the car with them. He did not go to the trap house to get guns; he did not go to Primo Burgers with Patrick and Taylor; he did not shoot Patrick or Taylor; and he did not direct anyone to shoot them.

Defendant said he had been a Six Deuce Brims member, but was not an active gang member at the time of the murders. "CK" on his tattoo means "Crip killer." He got that tattoo when he was 13 years old. He did not see Cherry on April 23 as she stated. He did see her on April 24, when she came over to write music and smoke marijuana. He did not tell her he had shot anyone.

DISCUSSION

I. *Exclusion of Robert Coleman's Hearsay Statement to Detective Guzman*

During defense cross-examination of Detective Guzman, the detective said he arrived at Primo Burgers around 6:30 a.m. and interviewed individuals who had been there at the time of the shooting, including Robert Coleman and Tasha Wilson. Defense counsel asked Detective Guzman if Coleman had told him "that there were Mexicans who had done this." The court sustained the prosecutor's hearsay objection. At a sidebar conference, defense counsel argued that Coleman's statement was admissible under "*Greenberger* and the post *Crawford* cases." Counsel further stated that Coleman had "passed away and it's essential." The trial court rejected the arguments because the statement was neither reliable nor trustworthy. The court noted that the *Greenberger* case "dealt with trustworthy declarations against interest."

Defendant contends that Coleman's statement was admissible under the spontaneous utterance exception to the hearsay rule. Under this exception, a hearsay statement about an event may be admitted if the statement was "made spontaneously while the declarant was under the stress of excitement caused by" the declarant's perception of the event. (Evid. Code, § 1240.) Such statements—or spontaneous utterances—are considered trustworthy because, "in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*People v. Farmer* (1989) 47 Cal.3d 888, 903.)

Defendant concedes that defense counsel failed to assert the spontaneous utterance exception at trial. Defendant has, therefore, forfeited the argument on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 435.) Anticipating this result, defendant

contends that his trial counsel was constitutionally deficient for failing to raise the argument.

To establish his claim of ineffective assistance, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" evaluated "under prevailing professional norms," and that counsel's dereliction caused prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 688; accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

In this case, if we assume that defendant established the first prong—that counsel's failure to assert the spontaneous utterance exception fell below the requisite standard of reasonableness—defendant would need to establish a reasonable probability that, if counsel had made that argument during trial, the court would have allowed the statement into evidence and that the outcome of the trial would have been different. The defendant bears the burden of proof on these issues by a preponderance of the evidence. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.)

Defendant asserts that "there was no evidence Mr. Coleman was not under the stress of nervous excitement when he talked to Detective Guzman." As the proponent of the evidence, however, defendant had the burden of establishing that Coleman was under the stress of the incident; it was not the prosecution's burden to establish the absence of such stress. (See *People v. Morrison* (2004) 34 Cal.4th 698, 724 [proponent of hearsay exception must establish the foundation requirements for admissibility].) Here, there is nothing in the record to support a finding that Coleman was under the stress of nervous excitement at the time he spoke with Detective Guzman. The shooting occurred at approximately 3:00 a.m., and Detective Guzman arrived at the scene at about 6:30 a.m. Even if the two spoke immediately upon Detective Guzman's arrival, at least three and one-half hours had elapsed since the incident. Although the passage of such time does

not necessarily preclude the possibility that Coleman was under the requisite stress when he spoke to the detective (see, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 893-894; *People v. Brown* (2003) 31 Cal.4th 518, 541-542), it is insufficient by itself to support a finding of such stress. Because the record discloses no further evidence bearing on Coleman's mental state at the time he met with Detective Guzman, defendant has failed to show a reasonable probability that the court would have admitted Coleman's statement if counsel had asserted the spontaneous utterance exception. Accordingly, we reject defendant's ineffective assistance claim.

Defendant further contends that if Coleman's statement was not admissible under the rules of evidence, its exclusion deprived him of his constitutional right to present a defense.[9] (See *Chambers v. Mississippi* (1973) 410 U.S. 284; *People v. Lucas* (1995) 12 Cal.4th 415, 464.) The statement, he explains, was a trustworthy, exculpatory statement, and an essential part of the defense case. We disagree. In discussing *Chambers*, our Supreme Court has stated that the "high court has never suggested [that its] decisions abrogated 'the respect traditionally accorded to the States' in formulating and applying reasonable foundational requirements. [Citations.] '[F]oundational prerequisites are fundamental to any exception to the hearsay rule. [Citations.]' [Citation.] 'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1178.) This is particularly true when the excluded evidence "would only have served to corroborate other testimony informing the jury of the same or comparable facts." (*Ibid.*) Here, evidence that the persons running from the scene of the shooting were Hispanic or Mexican was presented through the testimony of defense witnesses Tasha Wilson and Willie Grasty. Defendant was not deprived of his right to present a defense.

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[9] Defendant contends that his counsel's assertion at trial that Coleman's statement was "essential" preserved this argument on appeal. For purposes of our analysis, we will assume the argument was not forfeited.

II. *Exclusion of Karen Spotville's Hearsay Statement*

In August 2008, Karen Spotville told a defense investigator that Cherry confessed to her that she committed the murders with the aid of Abadji Franklin, a Six Deuce Brims member. According to Spotville, Cherry is a close friend of defendant's wife Trisha. Cherry told Spotville that "two guys" had made fun of Trisha's looks, which upset Trisha and Cherry. Cherry told defendant about the incident, but defendant refused to do anything. So Cherry "took it upon herself" to kill them. Cherry said she met the victims at Primo Burgers, where Cherry "hopped in the backseat" and "shot them in the back of the head." Spotville claimed that Cherry made this confession in April or May 2005. Spotville was confident of this timeframe because it occurred while her children were not living with her and, she explained, she "got [her] kids back in '06. February '06. So it had to [have] been the year before."

During trial, the defense indicated that it planned to call Spotville to testify as to Cherry's statements. Defense counsel argued that Cherry's hearsay statements were admissible as declarations against penal interest under Evidence Code section 1230.[10] Regarding the trustworthiness of the statements, defense counsel argued that Cherry and Spotville were friends who trusted each other; they lived together for some time; and were " 'homegirls' from the same neighborhood." Counsel also pointed out that Spotville caused a disruption at defendant's preliminary hearing when she wanted to speak, apparently about Cherry's confession, but was denied the opportunity.

The prosecutor asserted that the proffered testimony was not trustworthy because Cherry's alleged confession occurred in 2005, the year before the murders. In addition, although Spotville is a friend of defendant, she did not come forward with Cherry's alleged confession until August 2008—more than two years after the murders.

The court excluded the evidence, stating: "It is obvious . . . that Karen Spotville has some sort of relationship with the defendant; that she is extremely close to him."

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[10] Defense counsel further asserted that Cherry's statements constitute "affirmative third-party culpability evidence and should be allowed in on both federal and state constitutional grounds."

Under Evidence Code section 1230, a hearsay statement may be admissible if the declarant is unavailable, the statement was against the declarant's penal interest, and the statement is sufficiently reliable to warrant admission.[11] (*People v. Geier* (2007) 41 Cal.4th 555, 584; *People v. Lucas* (1995) 12 Cal.4th 415, 462.) Here, the prosecution did not dispute that Cherry was unavailable or that her statements to Spotville, if they were made, were against Cherry's penal interest. The issue was whether Cherry's statements were sufficiently reliable or trustworthy. In making this determination, the court should have taken " ' "into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." ' [Citation.]" (*Ibid.*)

Here, the court's explanation of its ruling was that Spotville had an "extremely close" relationship with defendant. The court said nothing about the circumstances surrounding the making of Cherry's statements, Cherry's possible motivation for making the statements, or Cherry's relationship to defendant. It thus appears that the court determined that *Spotville*, not Cherry, was unreliable. As defendant argues, this was error. The trustworthiness inquiry concerning hearsay is directed at the statements by the *out-of-court* declarant (i.e., Cherry), not the person testifying *in court* (i.e., Spotville). (See *People v. Cudjo* (1993) 6 Cal.4th 585, 608.) Unless Spotville's anticipated testimony was "physically impossible" or was one of the "rare instances of demonstrable falsity," the question of Spotville's credibility or trustworthiness was a matter for the jury. (*Id.* at p. 609.) Here, the court pointed only to Spotville's relationship with defendant as grounds for excluding her testimony, not to any impossibility or demonstrable falsity. The court erred in excluding her testimony on that ground.

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[11] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Generally, we will not reverse a judgment based on an erroneous evidentiary ruling unless it is reasonably probable that the defendant would have obtained a more favorable result in the absence of the error. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103, citing *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Partida*, *supra*, 37 Cal.4th at p. 439 [absent fundamental unfairness, state law error in ruling on evidence is subject to *Watson* standard].) Defendant has failed to establish prejudice under this standard.

First, although it was improper to preclude Spotville from testifying based on the court's perception that she was untrustworthy, issues concerning her credibility would have weakened her testimony. Not only was Spotville defendant's friend, as the court observed, but her testimony that Cherry confessed in 2005, one year before the murders took place, places the confession in doubt. The premature date of the confession is not easily dismissed as a mistake because Spotville expressed confidence about the timeframe and related it to an important event in her life—the return of her children. Either she was mistaken about the year her children were returned to her, or she did not tell the truth about the confession. Moreover, Spotville's testimony would likely be viewed with skepticism because Cherry's alleged confession is hearsay and conflicts with her recorded statements to police in 2007 implicating defendant.

Second, even if the jury believed that Cherry confessed to Spotville, the confession is unbelievable. According to Cherry, she killed Patrick and Taylor because they made derogatory comments about Trisha's looks. Although we are aware that gang members have killed for conduct less egregious than that, it is nevertheless implausible that Cherry killed the victims even though defendant—Trisha's husband and a high-ranking Blood gang member—was insufficiently bothered by the comments to respond in any way. Indeed, just hours before Cherry allegedly killed Patrick and Taylor, Trisha had been smoking and playing dominoes with the people who had allegedly insulted her. Even in a culture where violence does not require a rational explanation, the jury would probably consider unlikely the theory that Cherry killed two men over comments about a friend when the friend and the friend's shotcalling-husband were

apparently unoffended by the comments. Moreover, there is no explanation whatsoever as to how Cherry managed to lure Patrick and Taylor out of their apartment at 3:00 in the morning to a location within the Six Deuce Brims's territory.

Third, Cherry's alleged confession is uncorroborated. Although Howard's identification of the perpetrators was inconsistent as to size and age, neither he nor defense witnesses ever said they saw a woman getting out of the Civic or fleeing the scene. And although Cherry was carrying a gun when she was arrested two days after the murders, that gun was not used in the murders. Although defendant was likewise not in possession of a murder weapon when arrested, Nelson testified that defendant picked up and returned two guns (a .45 caliber and a .380 caliber—the same caliber used in the murders) from the gang's trap house that morning; no one said Cherry had picked up or returned any guns. There is, in short, nothing in the record connecting Cherry to the murders other than Spotville's hearsay statements.

Fourth, the testimony of defendant's guilt, although circumstantial, is strong. Nelson saw defendant pick up two guns and an accomplice at the Six Deuce Brims's trap house in the early morning of April 22, 2006, and saw defendant return the guns a couple hours later; Marquita saw Taylor and Patrick get into the front seat of the Civic as defendant got into the back seat of the Civic shortly before Patrick and Taylor were shot from behind at close range; Howard identified defendant (albeit not initially) as one of the persons fleeing from the victims' Civic and identified Trisha's Scion as the getaway car; and Cherry told police that defendant confessed the crimes to her the day after the murders. Cherry also identified a plausible motive—that defendant believed the victims were planning to set him up to be killed.

For all these reasons, it is not reasonably probable that the jury would have given Spotville's testimony about Cherry's confession any material weight or, therefore, that defendant would have obtained a more favorable result if the court had allowed the evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836; Evid. Code, § 354.) For the same reasons, the error was harmless even under the stricter standard for federal constitutional error under *Chapman v. California* (1967) 386 U.S. 18, 24.

III. *Prosecutorial Misconduct*

Defendant contends that the prosecutor committed misconduct by "deliberately" questioning Officer Amaral, the prosecution's gang expert, "in a way that allowed the officer to convey to the jury his belief that [defendant] was responsible for the murders of Patrick" and Taylor. By doing so, he argues, the prosecutor introduced evidence that we held was improper in *Holmes I.* We reject this argument.

In the 2011 trial, Officer Amaral interpreted defendant's "C.K. finest" tattoo "to mean that Holmes is a 'member of a Blood gang' and 'a Crip killer.' " (*Holmes I, supra,* B236128, at p. 9.) He also testified that the relationship between defendant and Abadji Franklin, a younger Six Deuce Brims member " 'was like a father and son relationship. [Defendant] was teaching the young member how to be, you know, a gang member. He was teaching him everything he knows as he can be as successful as a gang member.' " (*Ibid.*) Officer Amaral stated, defendant " 'possibly had some influence on actually motivating [the younger member] to go out and commit these crimes.' " (*Ibid.*)

We held that such statements were improper: "Officer Amaral's statements that [defendant] 'is a Crip killer' and that he 'possib[ly] had some influence on actually motivating [the younger gang member] to go out and commit these crimes' were not opinion testimony based on hypotheticals but rather expressions of opinion on [defendant's] responsibility for the crimes. Although an officer testifying as an expert on a particular gang may give his opinion on the gang's culture, including the gang-related significance of a defendant's tattoos [citation], Officer Amaral did more than state that 'C.K.' in [defendant's] tattoo stood for 'Crip killer.' The officer stated that the tattoo 'C.K. finest' showed that [defendant] 'is a Crip killer.' Such statement expressed the officer's belief that [defendant] is a killer. With respect to the officer's statement that [defendant] 'possibly had some influence on actually motivating [the younger gang member] to go out and commit these crimes,' the testimony was beyond the permissible scope of expert opinion because it expressed the officer's belief that [defendant] was involved in the charged crimes. The statements thus were not limited to opinion based on hypothetical questions but rather improperly encompassed the officer's opinion that

[defendant] was responsible for the crimes at issue." (*Holmes I*, *supra*, B236128, at p. 10.)

In the 2015 trial, Officer Amaral testified as follows:

"Q. And what exactly is a shotcaller?

"A. Shotcaller is one of your members within a gang that has a reputation in the gang, a high reputation or a high respect in the gang. And they are the ones that, you know, plan all crimes and send the younger members to commit these crimes.

"Q. And what about OG's, do they also have the same status?

"A. Yes, they do.

"Q. Now, Baby M-Rock, who you identified as Marcus Nelson, what would his role be within the gang, his hierarchy?

"A. He would be what they call a soldier.

"Q. And how about Tony Craig?

"A. He will also. [¶] . . . [¶]

"Q. Now, regarding the defendant, do you have an opinion as to where in the hierarchy he belongs within the gang?

"A. He is much older, so he would get that status of being an OG or even a shotcaller."

The prosecutor also asked Officer Amaral about the significance of a tattoo of the word "Brim" on defendant's neck. Officer Amaral stated that it is "a tattoo that the Six Deuce . . . Brims use to tattoo their body." He further explained that gang members "can earn [their] tattoos by committing crimes for the gang," which shows loyalty to the gang.

The prosecutor then showed Officer Amaral a photograph of defendant's "CK finest" tattoo, followed by this colloquy:

"Q. What do you recognize [the photograph] as?

"A. It's a tattoo on the right side of the neck. Right here on top is a C-K. And the bottom in cursive is 'finest.'

"Q. From your experience, what does CK stand for?"

At that point, defense counsel objected and the court and counsel held a sidebar discussion. The court overruled the objection based upon our decision in *Holmes I*, *supra*, B236128, and *People v. Ochoa* (2001) 26 Cal.4th 398. "Under the law of the case," the court concluded, "[T]he officer is entitled to state . . . that the 'CK finest' or 'CK' stands for Crip killer."

The prosecutor then continued her examination.

"Q. So as I was saying, you stated that the tattoo on his other side of his neck says 'CK's finest'; is that correct?

"A. Yes, ma'am.

"Q. And from your training and experience, what does CK stand for?

"A. In the gang world, it stand[s] for Crip killer."

In contrast to Officer Amaral's testimony in the 2011 trial, he did not interpret defendant's "CK finest" tattoo to mean that defendant " 'is a Crip killer.' " (*Holmes I*, *supra*, B236128, at p. 10.) As we explained in our prior decision, a gang expert "may give his opinion on the gang's culture, including the gang-related significance of a defendant's tattoos." This is what Officer Amaral did when he testified that "CK" "stand[s] for Crip killer." He did not make the further, impermissible statement that the tattoo means that *defendant is* a Crip killer. Nor did he opine, as he did in the 2011 trial, that defendant possibly had some influence on motivating another person to commit the crimes. In short, the prosecution and Officer Amaral avoided the mistakes they made in the 2011 trial. There was no prosecutorial error or misconduct.

IV. *The Prosecution's Diligence in Attempting to Locate Cherry*

During trial, the court found that Cherry was unavailable as a witness and, over defendant's objection, allowed the prosecution to read her testimony from the 2011 trial. Defendant contends that the trial court erred because the prosecution's "last-minute efforts to locate . . . Cherry did not meet the state or federal 'due diligence' standard." We disagree.

"A criminal defendant has the right, guaranteed by the confrontation clauses of both the federal and state Constitutions, to confront the prosecution's witnesses."

(*People v. Herrera* (2010) 49 Cal.4th 613, 620, citing U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) An exception to the right of confrontation exists when an unavailable witness testified and was subject to cross-examination at a prior judicial proceeding against the same defendant. (*People v. Herrera*, *supra*, at p. 620.)

This exception is codified in Evidence Code section 1291. That statute provides that "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a).) A witness is "unavailable" when (among other reasons) he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

Although the Evidence Code uses the term "reasonable" diligence, our Supreme Court describes the requirement as "due" diligence. (*People v. Fuiava* (2012) 53 Cal.4th 622, 675.) Due diligence, the court has explained, " 'is "incapable of a mechanical definition," ' " but it " ' "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations.]' " (*Ibid*; see also *Barber v. Page* (1968) 390 U.S. 719, 724-725 [a witness is not unavailable for purposes of the Sixth Amendment's right to confrontation unless the prosecution has made a good faith effort to obtain the witness's presence at trial].) Relevant considerations include whether the search for the witness was timely begun, the importance of the witness's testimony, and whether leads were competently explored. (*People v. Fuiava*, *supra*, at p. 675.)

Because the facts concerning the prosecution's efforts to locate Cherry are undisputed, we conduct an independent review of the trial court's ruling. (*People v. Cromer* (2001) 24 Cal.4th 889, 901.)

At a hearing to determine the prosecution's diligence in attempting to locate Cherry, Detective Guzman testified as follows. For the preceding nine years, Cherry has been transient and living with friends or boyfriends, or incarcerated. About two months before the hearing, Detective Guzman enlisted the help of a Federal Bureau of Investigation (FBI) agent in the "fugitive squad" to help locate Cherry. Members of the agent's "team" "spot-check[ed]" locations that had been associated with Cherry, but found no leads to her whereabouts.

Detective Guzman personally began looking for Cherry about two weeks before the hearing. He checked her criminal history, Department of Motor Vehicles (DMV) records, and records from utility providers.

Cherry's most recent arrest occurred on August 13, 2014, in Kern County. Detective Guzman obtained the incident report regarding the arrest, which indicated that Cherry was transient and referred to an address in Rosamond associated with Cherry's mother. He went to that location and knocked on the door, but no one answered. He watched the house for about an hour and a half, but no one came or left. He left a business card at the house, but received no response. Arrest reports for earlier incidents in Riverside County indicated that Cherry was transient and the reports provided no address.

The FBI provided Detective Guzman with several telephone numbers associated with Cherry and an Inglewood address for Cherry's mother. The agent had no addresses associated with Cherry. Detective Guzman went to the Inglewood address and knocked on the door, but there was no answer. He surveilled the location for about three hours without success.

Detective Guzman found a Facebook page for Cherry, but it was inactive. Cherry had not opened up any account with a public utility in the area, and DMV records showed only addresses from which Cherry had previously moved. Detective Guzman did not check for her at those addresses again. Cherry was not receiving any benefits from the State of California.

After hearing arguments, the court found that the prosecution had exercised "reasonable diligence" to locate Cherry and concluded that she was unavailable for purposes of Evidence Code section 1291.

Six days later, Detective Guzman updated the court with his efforts to locate Cherry. He testified that he had directed two police officers to surveil the Inglewood address the FBI had provided for Cherry's mother. No one appeared to be living at that address. Neighbors were shown a picture of Cherry, but none had seen her. Utility records for the address did not indicate any association with Cherry or her mother.

Electric utility records for the Rosamond address indicated a prior association with Cherry and her mother. However, power for that location was turned off in June 2014, about eight months before the hearing. Utility records for that house were subsequently updated with a different customer name. Officers checked with neighbors of the Rosamond location, but obtained no leads.

The court reaffirmed its finding of unavailability and stated that it would allow Cherry's prior testimony to be read.

The court properly concluded that the prosecution had exercised due diligence in attempting to locate Cherry. Based on Detective Guzman's testimony, Cherry has a history of being transient, which was confirmed by arrest records in Riverside and Kern counties. The most recent arrest record, from Kern County, indicated her mother had an address in Rosamond. Utility records indicate, however, that the house was vacated eight months earlier. An apartment in Inglewood was investigated and surveilled, without results, and neighbors did not recognize Cherry's photograph. Detective Guzman checked DMV records, utility records, and Facebook, and approximately two months prior to the hearing enlisted the aid of an FBI agent. Although the search for Cherry could have commenced earlier, as defendant argues, we are satisfied that the prosecution used reasonable diligence to locate Cherry.

V. *Sufficiency of the Evidence of the Gang Enhancement*

In order to establish that the charged offenses were committed "for the benefit of, at the direction of, or in association with any criminal street gang," the prosecution was required to prove, among other elements, that defendant's alleged gang engaged in a "pattern of criminal gang activity." (§ 186.22, subds. (b)(1) & (f).)[12] A " 'pattern of criminal gang activity' means that gang members have, within a certain time frame, committed or attempted to commit 'two or more' of specified criminal offenses (so-called 'predicate offenses')." (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, citing § 186.22, subd. (e).)

Here, defendant contends that the evidence is insufficient to support the gang enhancement under section 186.22 because there was no evidence that the Six Deuce Brims "allied with other [Blood] subsets to form a single Blood criminal street gang." He relies on our Supreme Court's recent decision in *People v. Prunty* (2015) 62 Cal.4th 59. In *Prunty*, the prosecution relied upon crimes committed by members of *different subsets* of the Norteño gang in order to prove the existence of two predicate offenses necessary to establish a pattern of gang activity. (*Id.* at p. 69.) The court explained that "where the prosecution's case positing the existence of a single 'criminal street gang' . . . turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets." (*Id.* at p. 71.)

Unlike the prosecution in *Prunty*, the prosecution in this case did not rely on evidence of crimes committed by different Blood subsets. The two predicate offenses the prosecution relied upon to establish a pattern of criminal activity were committed by other members of the Six Deuce Brims. *Prunty*, therefore, is not applicable.

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[12] Under section 186.22, subdivision (f), a criminal street gang "means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [specified] criminal acts . . . , having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity."

VI. *Sufficiency of the Evidence of the Murder Convictions*

Defendant contends that the evidence is insufficient to support the murder convictions. In particular, he argues: No evidence links defendant to the shootings; the testimony of Nelson and Cherry—both "admitted liars"—did not support each other; Nelson offered information incriminating defendant in order to avoid pending juvenile charges; Cherry was harassed and pressured by the police and concocted her story about defendant's confession based on details the police "fed" her about the crimes; and the eyewitness testimony of Howard and others "did not prove [defendant] was the shooter beyond a reasonable doubt." We reject these arguments.

Defendant points to conflicts in the evidence and provides reasons to doubt the credibility of some witnesses. In evaluating the sufficiency of the evidence, however, we cannot reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518; *People v. Jones* (1990) 51 Cal.3d 294, 314.) Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Johnson* (1980) 26 Cal.3d 557, 578), there is sufficient evidence linking defendant to the killings. The jury could have reasonably believed Nelson's testimony that defendant picked up two guns and an accomplice at the Six Deuce Brims's trap house in the early morning of April 22, 2006, as well as Marquita's testimony that she saw Patrick and Taylor get into the front seat of the Civic, as defendant got into the back seat of the Civic, shortly before Patrick and Taylor were shot from behind. They could also have believed Cherry's statements to police in 2007 that defendant had confessed to her the day after the murders, and rejected defendant's trial testimony to the contrary. Although Howard gave inconsistent statements concerning his identification of the persons fleeing the Civic, the jury could have reasonably relied upon his identification of defendant at the preliminary hearing and of his photograph at trial, as well as his identification of Trisha's Scion as a getaway vehicle. Such evidence is sufficient to support the jury's findings that defendant murdered Patrick and Taylor with premeditation and deliberation.

VII. *The 10-Year Gang Enhancements Are Authorized*

Defendant contends that the 10-year gang enhancements must be reversed because they cannot be imposed on his LWOP sentences. We disagree.

The court imposed the 10-year gang enhancements pursuant to section 186.22, subdivision (b)(1)(C). That subdivision provides for punishment of "an additional term of 10 years" when the gang enhancement applies to "a violent felony, as defined in subdivision (c) of Section 667.5." Murder is among the crimes defined in section 667.5, subdivision (c). There is nothing in section 186.22 that suggests that the additional 10-year term under section 186.22, subd. (b)(1)(C), does not apply when the defendant is sentenced to LWOP. The enhancements, therefore, are authorized and may have some significance in the future if the LWOP term is reduced.

Subdivision (b)(4) of section 186.22 provides an exception to the application of subdivision (b)(1). That subdivision, however, is expressly limited to persons "convicted of a felony enumerated in this paragraph." The felonies enumerated in that paragraph include: Home invasion robbery, carjacking, discharging a firearm from a vehicle, shooting at an occupied dwelling house, extortion, and criminal threats. (§ 186.22, subd. (b)(4)(B)-(C).) Murder is not among the enumerated felonies. The cases defendant cites to regarding this subdivision, *People v. Jefferson* (1999) 21 Cal.4th 86, 100, and *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486, applied a former version of section 186.22, subdivision (b)(4), that did not include the language limiting its application to enumerated felonies. They have no application here.

Defendant also relies on *People v. Lopez* (2005) 34 Cal.4th 1002, which interpreted subdivision (b)(5) of section 186.22. That subdivision provides that "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served." The *Lopez* court stated that this provision, applies to "*all* lifers, except those sentenced to life without the possibility of parole." (*Lopez, supra*, 34 Cal.4th at p. 1010.) *Lopez* merely observed that subdivision (b)(5), which imposes a minimum period of time before parole is possible, does not apply to those for

whom parole will never be possible. Contrary to defendant's suggestion, *Lopez* did not hold that the 10-year enhancement mandated by section 186.22, subdivision (b)(1)(C) does not apply to those sentenced to LWOP.[13]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.

[13] In his reply brief, defendant inexplicably states that the Attorney General agrees with him "that the ten-year enhancements imposed on counts one and two are unauthorized and should be stricken." To the contrary, the Attorney General expressly disagreed with defendant's assertion and argues that "the trial court properly imposed the two 10-year term enhancements pursuant to section 186.22, subdivision (b)(1)."