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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR ROJAS, Defendant and Appellant.	B267014 (Los Angeles County Super. Ct. No. TA093299)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sean D. Coen, Judge. Affirmed.

Robert Hartmann for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Jonathan M. Krauss and Wyatt E. Bloomfield, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Arthur Rojas of six counts of willful, deliberate, and premeditated attempted murder, and found true firearm and gang allegations on each count. Rojas contends the trial court erred by admitting evidence of his statement in violation of *Miranda v. Arizona*[1] and gang expert testimony in violation of *People v. Sanchez.*[2] We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

On the evening of September 16, 2007, Rojas, a member of the Compton Varrio 155 criminal street gang, went on a shooting spree in territory claimed by a rival gang, the Campanella Park "Pyros." Within a half-hour period, in three separate incidents, he shot at six people: three members of the Cazares family; Brian Glass and Anthony Jones; and Darnell Williams. After the shootings Rojas fled to Mexico and was not apprehended until seven years later.

a. *The attempted murder of the Cazares family*

On September 16, 2007, at about 8:50 p.m., Amalia Alvaro, her husband Felipe Cazares, and their young daughter, C.C., were driving in their Yukon GMC near Campanella Park. A white sport utility vehicle (SUV) with fancy rims stopped at the corner of Cahita and 148th Streets. Cazares slowed to make a U-turn. The SUV's occupants rolled down their windows, fired three to four shots at the Yukon, and drove off.

The family flagged down a police car and reported the shooting. Alvaro and Cazares described the SUV as a white Lincoln Aviator, with televisions inside. They stated that a

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[2] *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).

photograph of Rojas's SUV looked similar to the shooter's car. Cazares described the driver as a thin, male Hispanic.

b. *The attempted murders of Glass and Jones*

About 10 minutes later, at approximately 9:00 p.m., cousins Glass and Jones were in the driveway of Glass's home, located near Campanella Park. As Jones was backing his motorcycle out of the driveway, a white SUV on the wrong side of the street pulled up approximately 10 feet from Jones and Glass. The SUV's driver's side window was down and three or four people were inside. The driver asked where they were from. Jones answered that he was an old man who did not "bang," and Glass replied, " 'Man, I'm at home. What are you talking about?' " The driver responded that Jones was lying, said " 'I hate you fucken slobs,' " and called the men " 'you punto slobs' " or similar words. "Slobs" was a reference to a local gang. The driver then shot at the men. One shot hit Jones in the right knee.

Jones told police the shooter was Hispanic, and both men described the vehicle as a white SUV. Deputies found two 9-millimeter shell casings in front of the house. Both Jones and Glass identified Rojas as the shooter in separate six-pack photographic lineups, and at trial. Both identified a photograph of a Lincoln Aviator as similar to the shooter's SUV.

c. *The attempted murder of Williams*

At approximately 9:15 that evening, Williams was driving from a friend's home near Campanella Park, and, in his rear view mirror, saw a white SUV driving toward him very rapidly. He pulled over to let the SUV pass, but it pulled up alongside him and stopped. Three people were inside. The front passenger leaned back and the driver pointed a gun at Williams. Williams ducked and then heard six gunshots, three of which hit his car.

Williams identified Rojas as the shooter in a six-pack photographic lineup, and at trial.

d. *The investigation*

Los Angeles County Sheriff's Department Detective Carlos Herrera suspected that gang members from Compton Varrio 155 had committed the shootings. He knew Rojas to be a Compton Varrio 155 member, who drove a white Lincoln Aviator similar to the vehicle described by the victims. On September 20, 2007, detectives searched Rojas's house and Lincoln Aviator. They found a loaded, nine-millimeter Beretta handgun under Rojas's bedroom dresser. Forensic testing revealed that the two 9-millimeter shell casings found outside Glass's home had been fired from that gun. Rojas's Aviator contained an unexpended nine-millimeter Luger cartridge and had television screens, as described by Alvaro and Cazares.[3]

After searching the house, Detective Herrera telephoned Rojas and asked him to come back and talk. Rojas stated he was not coming back. He fled to Mexico and was arrested approximately seven years later, in 2014. Detectives Davis and Rodriguez picked Rojas up at the Mexican border and

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[3] Some of the witnesses testified or told police that Rojas's vehicle differed in some respects from the shooter's. Cazares described the shooter's car as both a Lincoln Navigator and a Lincoln Aviator, and thought the wheel rims were different than those on Rojas's car. Jones and Glass likewise thought the wheel rims on the shooter's car were different, and Glass thought the shooter's car was a Lincoln Navigator. When shown a photograph of Rojas's vehicle Williams testified that it was not the car used in the shooting; the shooter's car had had a stripe or trim that was not present on Rojas's car.

transported him back to Los Angeles on August 27, 2014. Herrera and another detective, Hernandez, interviewed Rojas the next day.

e. *Rojas's statements*

Detectives audio-recorded two conversations between themselves and Rojas. First, on August 27, 2014, while Rojas was being transported from Mexico to Los Angeles, detectives recorded a portion of their conversation. The detectives did not give Rojas *Miranda* warnings prior to the conversation, and it was not admitted into evidence. After Rojas's arrival in Los Angeles, Detective Herrera booked Rojas. Rojas wanted to talk to Herrera, but Herrera told him he would talk to him later in an interview room.

The following day, August 28, 2014, Detectives Herrera and Hernandez recorded Rojas's in-custody interrogation in Los Angeles. The detectives gave *Miranda* advisements near the start of the interrogation, but after Rojas admitted his membership in the Compton Varrio 155 gang. Rojas confessed to his involvement in the crimes and admitted shooting at the victims during one of the incidents. Evidence of Rojas's statement during the August 28 interrogation was admitted over a defense objection.[4]

f. *Gang testimony*

The People presented the testimony of Detective Richard Sanchez, a gang expert. Also, Detective Herrera specifically testified that Rojas was a gang member.

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[4] We discuss evidence related to both the August 27 and August 28 conversations in more detail below.

g. *Defense evidence*

The defense presented evidence that Glass told a deputy he did not know whether the SUV's driver was the shooter. Cazares and Williams had told a deputy that the SUV was a white Navigator with green trim.

h. *Rebuttal and stipulation*

The parties stipulated to the dimensions of the 2003 Lincoln Navigator and Aviator, which were not identical. In rebuttal, Detective Herrera testified that Rojas's vehicle was a white, 2003 Aviator.

2. *Procedure*

The jury found Rojas guilty of the willful, deliberate, and premeditated attempted murders of Cazares, C.C., Alvaro, Jones, Glass, and Williams. (Pen. Code, §§ 664, 187, subd. (a).)[5] As to each count, the jury found Rojas, and a principal, personally and intentionally used and discharged a firearm (§12022.53, subds. (b), (c), (e)(1)), and that the offense was committed for the benefit of, at the direction of, or in association with, a criminal street gang (§186.22, subd. (b)). As to each count, the trial court sentenced Rojas to consecutive terms of life in prison, with a minimum 15-year parole eligibility period pursuant to section 186.22, subdivision (b)(5), plus 20 years for the personal and intentional firearm discharge. It imposed a $200 restitution fine, a $200 suspended parole revocation restitution fine, a $180 criminal conviction assessment, and a $240 court security fee.

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

DISCUSSION

1. *Admission of Rojas's statement*

a. *Contentions*

Rojas contends admission of the evidence of his August 28, 2014 statement violated the Fifth Amendment because: (1) detectives used the two-step interrogation process condemned in *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*); (2) statements made during the pre-advisement portion of the August 28 stationhouse interrogation violated *People v. Elizalde* (2015) 61 Cal.4th 523 (*Elizalde*)*;* (3) detectives impermissibly continued the August 28 interrogation after he invoked his right to counsel; and (4) his August 28 admissions were involuntary because the detectives promised him leniency.

b. *Additional facts*

(i) *The August 27, 2014 statement*

While being driven from Mexico to Los Angeles, Rojas spoke with Detectives Davis and Rodriguez. Much of the recorded conversation is unintelligible, and Detective Davis prepared a supplemental report summarizing it. The majority of the discussion pertained to matters unrelated to the charged crimes, such as Rojas's family and job; his arrest for selling "dope" in Tijuana; acquaintances and fellow gang members whom Rojas had known in Los Angeles; whether Rojas had used drugs or marijuana while living in Compton; and whether he had suffered any "strike" convictions.

Some aspects of the conversation touched on matters related to the charged crimes and Rojas's gang membership. The transcript starts with defendant asking about the charges against him. Detective Davis then asked Rojas why he was in trouble and Rojas stated he did not remember. Rojas asked what

he was being arrested for, and Davis told him to think about what he had done eight years before. Rojas responded that he did not remember because he had been drunk. Davis said Rojas would be charged with attempted murder, but stated that he did not know Rojas's case. Davis asked, "The kid from the shootout, he was from the hood, right?" Rojas replied, "Which one of them" and then answered affirmatively.

Detective Davis asked whether Out for Action was CD 155 (*sic*). Rojas explained that that Out for Action had merged with the Compton Varrio 155 gang. Detective Davis asked how old Rojas had been when he was "jumped in." Rojas replied that he had been 16 or 17 years old. The Compton Varrio 155's territory had been surrounded by Black gangs, with whom the gang had feuded. Davis asked, "Everyone said you were like the big gang banger, huh? In Compton. You. That you were crazy, that you were crazy in Compton. Then you shut it down when you went out." Rojas replied, "Huh?" Davis continued, "You shut it down when you went out there?" and Rojas replied "Yeah." Davis asked how he had gotten to the border. Rojas answered that an individual named Leroy had transported him to Mexico, and Rojas had not returned because he did not wish to be arrested. Davis asked whether Rojas had thought "this day would ever come;" Rojas said he had known it would. Rojas stated he had no idea how much time he would be facing, but asked, "I'm not facing life, am I?" Davis replied, "I can't tell you that. I mean attempted murder is kind of a serious charge, right?"

(ii) *The August 28, 2014 statement*

The following day Detectives Herrera and Hernandez interviewed Rojas. Before being advised of his *Miranda* rights, and in response to the detectives' questions, Rojas stated he belonged to the "Tiny Loques" clique of the Compton Varrio 155 gang, and was known as "Little Man." He had been a member of the gang for approximately 12 years, since he was 16 years old. Rojas removed his shirt at the detectives' request, and they made note of his tattoos, which included "Compton" on his chest; "YFA" on his stomach; "South" on his right forearm and "Side" on the left; "155" on his wrist; "155" on his back; "T Loques" on his back; and "LA" on his arm.

Detective Herrera then advised Rojas of his *Miranda* rights and confirmed that Rojas understood them. Rojas completed a form waiving his rights.

In response to the detectives' questions, Rojas stated that he had left Los Angeles after the police search of his house. At the time of the shootings he had been driving an Aviator SUV for approximately a year. When asked what happened, Rojas stated he had been drinking and did not remember. He did recall, however, that on September 17, 2007, he had driven two or three youths around and he thought they "shot at somebody." When Rojas stated he could not remember anything else, the following colloquy transpired:

"[Herrera]: You can't remember right now? . . . You don't remember shooting at anybody? . . . Listen, this is your opportunity to come clean. Remember the question you asked me yesterday, if you were going to be able to get out to see your

kids?[6] Right? Okay. This is the opportunities [*sic*] for me to . . . take your statement down and then I talk, present it to the District Attorney and say, you know what? He felt remorse, he told me everything, this is what happened. So . . . you know, he's not . . . being evasive, he's not doing none of this other stuff, uh, what can you do for him? Okay? This is your opportunity. So . . . I mean, if you don't remember specifics, that's fine. . . . [B]ut if you remember the incident I would like you to . . . just let me know." Rojas then asked for clarification about the charges and Herrera informed him that he was being charged with more than one attempted murder stemming from three incidents. Herrera also informed Rojas that he had been identified and the gun had been found in his house, and showed him the photographic six-pack identifications. Rojas confirmed his family had already told him about the discovery of the gun. Rojas then asked, "[h]ow much time" was involved. Herrera stated Rojas was looking at "a good amount of time" but it was not for him to decide; instead that decision was for the court and the district attorney. "[W]hat we're doing here is trying to get your side, and like I said . . . I could go over there and then talk . . . to the District Attorney and say, you know what? He was cooperative. You know? Is there anything that they can do for you?" Rojas expressed his wish to be segregated from the general population in prison because he was concerned about endangering his children. Herrera stated: "We might be able to do something" and then confirmed he could segregate Rojas. Herrera then asked what Rojas's actions were during the incidents. The following exchange then transpired:

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6 Detective Herrera appears to be referring to his conversation with Rojas at booking.

"[Rojas]: I can get a lawyer so he, so he can explain me and everything.

"[Herrera]: Yeah, that's . . . it's your right, that's one of the rights that you have there. But what we're trying to do is . . . get your side of the story. Once . . . attorneys get involved, you know --

"[Rojas]: "Mm-hmm.

"[Herrera]: -- it is, but it's your right, I mean, all you have to do is just tell me. [¶] . . . [¶]

"[Rojas]: 'Cause I don't know this [unintelligible] I never really got in trouble, that's why I don't know nothing.

"[Herrera]: You've been arrested before.

"[Rojas]: Yeah, for nothing serious.

"[Herrera]: . . . It works exactly the same way. So, it's your right, if you want to talk to us, we'll go into it. If you don't want to go, if you don't want it, you know, you just say the magic words and that's it.

"[Hernandez]: We had this conversation but if you don't want it, you want to continue talking to us, then, like[] Herrera said, he can help you out. The other way, if this stops and now it's up to you and your public defender to take on your case and help you out, all right? So, that's on him, that's on you. But if you want to . . . sit here and talk right now, we're just talking. All right, you sit here, you explain to us the situation, how, what happened. If he goes over to the DA and talk[s] to them a little bit, it might be able to sway them, uh, sway from . . .

"[Herrera]: This carries, this carries a life sentence.

"[Rojas]: It does?

"[Herrera]: Mm-hmm.

'[Hernandez]: That's life. And it's up to them –

"[Herrera]: Yeah, we don't[] –

"[Hernandez]: But at least you have a chance.

"[Herrera]: And . . . they, you see that I'm not . . . . What does that say? I'm showing you the charges here. Right? What does that say?

"[Rojas]: Life.

"[Herrera]: Okay, so I'm not, I'm not telling you m--, anything that's not on record, okay? . . . [A]ll we're trying to do, like I said, is . . . like I told you yesterday, I was going to talk to you today, give you the opportunity and it . . . depends on you . . . on how difficult you want to make it."

"[Rojas]: Mm-hmm, I [unintelligible].

"[Herrera]: On how hard? Uh –

"[Rojas]: I want to see my kids.

"[Herrera]: And, uh, and that's what it is.

"[Rojas]: [laughs]

"[Herrera]: It's either us and we go talk to the, like I said, the DA says, you know what? He feels remorse, he told us exactly what happened. And this is what it is.

"[Hernandez]: It's the [unintelligible] starts the [unintelligible].

"[Herrera]: . . . [L]ike I said, I know you have problems with the snitching, you know, because of this other family and all this other stuff. That's why you've been brought it back [*sic*], let's talk about you, what your actions were and then this way it's only you."

Rojas then told detectives that he had been drinking and drove his Aviator into "neighborhoods I shouldn't," at night with two skinny bald youths named Ant and Momia. Ant and Momia, who were cousins, wanted to commit the shootings because a

Black person had killed their cousin Taz a year before. Rojas admitted committing one of the shootings and said the other two youths committed the others. He shot only once or twice to scare the victim(s). The group carried out the shootings in the area near the park, close in time. He thought the victims were all Black, and he assumed they were Blood gang members from Campanella. He owned the gun used in all three shootings; he had purchased it on the street, and hid it in his bedroom after the shooting. He believed it was a nine-millimeter. He fled to Mexico because the car was his and he worried "everything would fall on" him as a result.

After confessing, Rojas asked, "I'm never going to get out?" Detective Herrera replied that he could not say that; they would talk to the district attorney, who would be interested in discussing whether Rojas would testify against his accomplices. Later in the conversation Herrera stated Rojas would be going to court the next day, and could "see if they . . . give you something if you want to plead." Rojas stated, "Mm, if I can get a lawyer to help me out." Rojas confirmed that a lawyer would be knowledgeable about a plea deal, and that Rojas would have an attorney assigned to him.

(iii) *Trial court's ruling on Rojas's motion to exclude*

Before trial, Rojas moved in limine to exclude his August 27 and August 28 statements on a variety of grounds. As relevant here, Rojas urged that (1) the entire August 27 conversation, and a portion of the August 28 interrogation, should be excluded because the detectives' questioning was not preceded by *Miranda* warnings; (2) all statements made during the remainder of the August 28 interrogation should be excluded because detectives engaged in the impermissible two-step interrogation process

condemned in *Seibert*, *supra*, 542 U.S. 600; (3) detectives continued questioning Rojas after he invoked his right to counsel; and (4) his August 28 statement was involuntary because it was induced by promises of leniency. The People opposed the motion.

The trial court ruled that the August 27 statement was inadmissible because the detectives' questions constituted custodial interrogation and no *Miranda* advisements had been given. However, the statement was otherwise voluntary. The court found the August 28 interrogation admissible in its entirety. *Siebert* was factually distinguishable, as approximately 16 hours elapsed between the August 27 and 28 interactions, Rojas had slept in the interim, and the second interview was voluntary. Based on the court's review of the audio tape and the totality of the circumstances, any purported request for counsel was ambiguous. Finally, the August 28 statement was voluntary because no promises were made to Rojas.

c. *Miranda and the standard of review*

A custodial interrogation must be preceded by the familiar *Miranda* warnings and by the suspect's waiver of them.[7] (*Elizalde*, *supra*, 61 Cal.4th at pp. 527, 530-531.) The prosecution has the burden to prove, by a preponderance of the evidence, that the accused's rights under *Miranda* were not violated. (*People v. Villasenor* (2015) 242 Cal.App.4th 42, 59; *People v. Dykes* (2009) 46 Cal.4th 731, 751 [prosecution has the burden to prove the validity of defendant's waiver of his rights].)

When reviewing a trial court's ruling on a claimed *Miranda* violation, we accept the trial court's resolution of disputed facts

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[7] Rojas also argued that the *Miranda* advisements provided were deficient. He does not renew this argument on appeal, and we do not address it.

and inferences and its credibility determinations if supported by substantial evidence. We independently determine from those facts whether the challenged statements were illegally obtained. (*Elizalde*, *supra*, 61 Cal.4th at p. 530.)

d. *There was no violation of Seibert*

In *Oregon v. Elstad* (1985) 470 U.S. 298 (*Elstad*), the high court "rejected the notion that a subsequent confession must necessarily be excluded because it followed an otherwise voluntary statement that was given without *Miranda* warnings." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 638-639.) " 'Even when a first statement is taken in the absence of proper advisements and is *incriminating*, so long as the first statement was voluntary a subsequent voluntary confession ordinarily is not tainted simply because it was procured after a *Miranda* violation. Absent "any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," a *Miranda* violation–even one resulting in the defendant's letting "the cat out of the bag"–does not "so taint[] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 477.) "[A]bsent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement." (*Elstad*, at p. 314; *San Nicolas,* at p. 639.)

In *Seibert*, the court concluded the *Elstad* rule was inapplicable when an officer intentionally uses a two-step

interrogation process in order to circumvent *Miranda*. (*Seibert*, *supra*, 542 U.S. at p. 604 [plur. opn. of Souter, J.].) Five justices, in three opinions, held the postwarning statements were inadmissible. (*Id.* at pp. 617, 618, 622; *People v. Rios* (2009) 179 Cal.App.4th 491, 500.) Because Justice Kennedy concurred in the judgment on the narrowest grounds, his concurring opinion provides the controlling constitutional rule. (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1370; *People v. Rios*, at pp. 495, 504 [when a fragmented Supreme Court issues an opinion that does not command a majority, generally the controlling holding is that of those who concurred on the narrowest grounds].)

Justice Kennedy rejected as overbroad the plurality's proposed test, which "envision[ed] an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations." (*Seibert*, *supra*, 542 U.S. at pp. 621-622.) Instead, he concluded: "I would apply a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." (*Id.* at p. 622.) "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning

statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. [Citations.] Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." (*Seibert*, at p. 622.)

Here, to the extent the trial court concluded the detectives did not deliberately use a two-step interrogation process akin to that in *Seibert*, its conclusion was supported by substantial evidence.[8] (See *People v. Scott*, *supra*, 52 Cal.4th at p. 478.) In considering this question, courts may consider, inter alia, the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel, and the overlapping content of the pre- and postwarning statements. (*People v. Camino*, *supra*, 188 Cal.App.4th at p. 1370; *U.S. v. Williams* (9th Cir. 2006) 435 F.3d 1148, 1158-1159.) Here, these factors all support the conclusion that the detectives did not intentionally attempt to undercut *Miranda.* There was little continuity between the August 27 conversation and the August 28 interrogation. Different officers were involved. Detectives Davis and Rodriguez spoke with Rojas while he was being transported to Los Angeles, but Detectives Herrera and Hernandez conducted the interrogation the next day. As our recitation of the topics discussed during the August 27 and August 28 interactions demonstrates, except for questions regarding Rojas's gang affiliation, there was little overlap

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[8] The trial court did not expressly find that the officers here did not intentionally engage in a *Siebert*-style interrogation technique to circumvent *Miranda,* but its discussion distinguishing *Siebert* implies it made such a finding.

between the two. During the ride to Los Angeles, detectives did not question Rojas about the specifics of the crimes to the extent the detectives did the following day. Some of the detectives' questions touched on the shootings, but Rojas did not make clear admissions or discuss the details of the crimes. The next day, Detectives Herrera and Hernandez did not confront Rojas with statements he had made in the car or refer to the prior discussion with Davis and Rodriguez at all. Unlike in *Seibert*, where the first, unwarned interrogation left "little, if anything, of incriminating potential left unsaid," (*Seibert*, *supra*, 542 U.S. at p. 616), here the bulk of the incriminating statements were elicited during the August 28 interrogation. And, approximately 16 hours elapsed between the conversation and the interrogation, during which time Rojas slept. (See *Bobby v. Dixon* (2011) 565 U.S. 23, 31-32 [2011 U.S. LEXIS 7926] [four hours was a "significant break in time" for *Seibert* purposes].) Under these circumstances, *Siebert* does not come into play.[9] (See *Camino*, at pp. 1370, 1376; *U.S. v. Williams, supra,* 435 F.3d at p. 1161.)[10]

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[9] Rojas attaches significance to the facts that Detective Herrera sent Detectives Davis and Rodriguez to transport Rojas; all four detectives were from the same agency; and Herrera was one of the booking officers once Rojas arrived at the jail. These facts do not demonstrate either a continuity of purpose or the intentional use of a two-step interrogation within the meaning of *Seibert*.

[10] *Reyes v. Lewis* (9th Cir. 2016) 833 F.3d 1001 [2016 U.S. App. LEXIS 15146], cited by Rojas, is distinguishable. The officers' conduct in that case bears little resemblance to that at issue here. Among other things, the defendant in *Reyes* admitted essentially the same information during the warned and unwarned interrogations, the same officer was present at both,

For the same reasons, even assuming arguendo that the detectives consciously employed an impermissible two-step interview process, the trial court correctly found the gap between the police car conversation and the interrogation, as well as the foregoing circumstances, cured any harm and allowed Rojas to distinguish the two contexts. (*Seibert*, *supra*, 542 U.S. at p. 622; see *U.S. v. Williams*, *supra*, 435 F.3d at p. 1160-1161.)

Thus, under *Elstad*, the question is whether both the August 27 and 28 statements were voluntary. (See *People v. Camino*, *supra*, 188 Cal.App.4th at p. 1368 [if the unwarned statement was voluntary, the relevant inquiry is whether the second statement was also voluntary].) Whether a confession was voluntary depends upon the totality of the circumstances; no single factor is dispositive. (*People v. Williams* (2010) 49 Cal.4th 405, 436; *People v. Williams* (1997) 16 Cal.4th 635, 660; *U.S. v. Williams*, *supra*, 435 F.3d at p. 1153.) The question is whether the defendant's choice to confess was not essentially free because his will was overborne. (49 Cal.4th at p. 436.) Relevant considerations are the existence of police coercion; the length of the interrogation; its location; its continuity; and the defendant's maturity, education, physical condition, and mental health. (16 Cal.4th at p. 660.) We accept a trial court's factual findings on the question if they are supported by substantial evidence, but we independently review the ultimate legal question. (*People v. Scott*, *supra*, 52 Cal.4th at p. 480.)

The trial court's conclusions that both the car conversation and the interrogation were voluntary are supported by the

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and the officer referenced the unwarned admissions during the later interrogation. (*Id.* at pp. 1031-1033.)

evidence. Neither conversation was protracted. Rojas was allowed a good night's sleep after the first conversation. Rojas was an adult. Nothing in the record suggests he lacked sufficient education or maturity to understand events, nor is there evidence he suffered from a physical or mental disability. And, during the August 28 interrogation, Rojas was advised of his rights and waived them early in the interview. (See *People v. Rios*, *supra*, 179 Cal.App.4th at p. 507.) Because the unwarned custodial statements on August 27 were voluntary, and the later statements followed *Miranda* advisements and Rojas's waiver,[11] the evidence was admissible.

e. *Rojas's pre-warning admissions during the interrogation were inadmissible, but the error was harmless*

The People concede that Rojas's unwarned admissions of gang membership at the beginning of the August 28 interrogation were inadmissible under *Elizalde*, which was decided after trial in the instant matter. Under the "booking exception," responses to routine questions regarding biographical data posed to a defendant during booking fall outside *Miranda*'s scope. Answers given without an admonition to questions an officer should know are reasonably likely to elicit an incriminating response may not be admitted in the prosecution's case-in-chief. (*Elizalde*, *supra*, 61 Cal.4th at pp. 530-532.) Questions about gang affiliation fall outside the booking exception if they are likely to elicit incriminating responses. (*Id.* at pp. 535-536.) As in *Elizalde, t*he gang affiliation questions asked here were likely to elicit an incriminating response because Rojas had been charged with

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11 As we discuss below, admission of Rojas's prewarning statements at the August 28 interrogation was harmless error.

committing six gang-related attempted murders.[12] (See *Elizalde,* at p. 540.)

However, there was no prejudice. There was overwhelming evidence that Rojas was a member of the Compton Varrio 155 gang. Detective Herrera testified that he had met Rojas at least twice before the September 2007 shootings, and Rojas identified himself as a member of the gang with the moniker "Lil Man." Rojas also sported gang-related tattoos, including "Lil One," "South Side," "T Locs" (representing a Compton Varrio 155 clique), "155," and "PK," indicating "Pyros Killer." Photographs of Rojas's tattoos were admitted into evidence. Where the defendant's gang affiliation is "amply established by independent and uncontradicted evidence, the erroneous admission of his challenged statements was harmless beyond a reasonable doubt." (*Elizalde*, *supra*, 61 Cal.4th at p. 542.)

f. *Rojas did not unambiguously request counsel during the second interview*

Rojas contends his August 28 statement must be excluded because the detectives failed to honor his request for counsel. He argues that his single statement, "I can get a lawyer so he, so he can explain me and everything"[13] amounted to an unambiguous request for an attorney. We disagree.

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[12] It is not clear the booking exception would apply in any event; Rojas had already been booked the previous day. But whether considered to have been made during booking or during an interrogation, the statements were inadmissible.

[13] Rojas asserted, in his briefing below, that he said, " '[C]an I get a lawyer.' " The trial court, which listened to the audio recording, believed the statement was " 'Can get a lawyer.' " The court found that either way, the statement was somewhat

"If a defendant waives his right to counsel after receiving *Miranda* warnings, police officers are free to question him. [Citation.] If, postwaiver, a defendant requests counsel, the officers must cease further questioning until a lawyer has been made available or the defendant reinitiates. [Citation.] However, the request for counsel must be articulated 'unambiguously' and 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation.] If a defendant's reference to an attorney is ambiguous or equivocal in that 'a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [precedent does] not require the cessation of questioning.' [Citation.]" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 19, italics in original; *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485; *People v. Cunningham* (2015) 61 Cal.4th 609, 646; *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) "There is no requirement law enforcement officers interrupt an interrogation to ask clarifying questions following a suspect's ambiguous or equivocal responses that might or might not be construed as an invocation of the right to an attorney." (*Cunningham*, at p. 646; *People v. Williams, supra,* 49 Cal.4th at p. 427.)

Viewed in context, Rojas's words–"I can get a lawyer so he . . . can explain me and everything"–was not an unequivocal and unambiguous request for an attorney but a request for

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ambiguous. But regardless of whether Rojas said "Can I get a lawyer," "Can get a lawyer," or "I can get a lawyer," his statement was not an unequivocal and unambiguous request for counsel.

confirmation that an attorney was available if he so chose. Detective Herrera immediately informed Rojas that it was his right to have an attorney, and that all Rojas had to do was ask. Rojas did *not* then ask to speak to an attorney. "Courts have found references to requests for attorneys to be objectively equivocal where a defendant uses conditional language or ambiguities." (*People v. Shamblin*, *supra*, 236 Cal.App.4th at p. 19.) In *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, immediately after being advised of his *Miranda* rights, the defendant said, " 'If you can bring me a lawyer, that way I[,] I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.' " (*Id.* at p. 216.) The officer then asked whether the defendant was willing to speak to a detective " 'right now without a lawyer present.' " (*Ibid.*) The defendant stated that he was. *Sauceda-Contreras* held that the defendant's question had been ambiguous, conditional, and equivocal, and justified the officer's question seeking clarification. (*Id.* at p. 219.) Similarly, here, Rojas's words regarding a lawyer, followed by Herrera's confirmation that that was his right, was not an unequivocal request for counsel. Rojas was not asking for an attorney, but was confirming that counsel was an option for him. (See also *Shamblin*, at pp. 18-20 [defendant's statements–" 'I think I probably should change my mind about the lawyer now. I, I need advice here. Don't you guys think I need some advice here? I think I need advice here' "–was equivocal because it contained conditional and equivocal language]; *People v. Bacon*, *supra*, 50 Cal.4th at p. 1105 [" 'I think it'd probably be a good idea for me to get an attorney' " was equivocal because it contained several ambiguous qualifying words, such as "I think," "probably," and

"it'd"]; *People v. Cunningham*, *supra*, 61 Cal.4th at pp. 645-646 [defendant's question, " 'Should I have somebody here talking for me, is this the way it's supposed to be done?' " did not qualify as an unequivocal invocation of the right to counsel].) Here, a reasonable police officer would have understood Rojas's statement as nothing more than confirmation of his rights, which he was mulling over, not a request for counsel.[14]

Rojas argues these authorities are distinguishable because his statement was not conditional; he did not use the words "probably," "I think," "maybe," or the like. That may be true, but in light of the discussion following Rojas's query, it is clear he was not actually demanding counsel. In context, Rojas's reference to an attorney would not have indicated to a reasonable officer that Rojas was invoking his right to counsel.

g. *Rojas has not demonstrated his statements during the interrogation were involuntary*

Rojas argues that his confession was involuntary because the detectives promised him leniency, thereby inducing him to confess. Again, we disagree.

An involuntary confession may not be introduced into evidence at trial. (*People v. Carrington* (2009) 47 Cal.4th 145, 169; *People v. Williams, supra,* 49 Cal.4th at p. 436.) The prosecution has the burden of establishing by a preponderance of the evidence that a confession was voluntarily made. (*Carrington*, at p. 169; *People v. Scott, supra,* 52 Cal.4th at p. 480.) " 'It is well settled that a confession is involuntary and

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[14] Rojas does not contend that his subsequent discussion with Detective Herrera–in which he essentially asked whether an attorney could assist him with a plea deal–constituted a request for counsel.

therefore inadmissible if it was elicited by any promise of benefit or leniency whether express or implied. [Citations.] However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, "[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.] On the other hand, "if . . . the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible . . . ." ' " (*People v. Holloway* (2004) 33 Cal.4th 96, 115; *People v. Gonzalez* (2012) 210 Cal.App.4th 875, 882.) "The statement and the inducement must be causally linked." (*People v. McWhorter* (2009) 47 Cal.4th 318, 347.)

The statements Rojas contends promised leniency in fact amounted to permissible advice that it would be better for Rojas to tell the truth. (Cf. *People v. Williams*, *supra*, 49 Cal.4th at p. 444 [there is nothing improper in pointing out that a jury probably will be more favorably impressed by a confession and a show of remorse than by demonstrably false denials].) The detectives did not state that the prosecutor or the court would grant any particular benefit if Rojas spoke with the detectives in the absence of counsel. Instead Herrera stated that he would inform the district attorney that Rojas felt remorse, had not been evasive, had cooperated, and then would ask "what can you do for him?" Herrera made clear that he had no control over the

sentence that would be sought, stating, "that's not for me." Detective Hernandez did state that if Rojas continued talking to the detectives, "then, like, Herrera said, he can help you out." But in context, this statement clearly referred to Herrera's offer to inform the district attorney that Rojas had cooperated, a statement untethered to any promise of a particular benefit.

Contrary to Rojas's argument, the detectives did not state that they would see if they could sway the prosecutor away from seeking a life sentence.[15] Detective Herrera informed Rojas that he faced a life sentence, but that was not impermissible. (See *People v. Holloway, supra,* 33 Cal.4th at pp. 115-116.) Moreover, Rojas's statements later in the interrogation indicate he did not understand the detectives to have promised him a lesser sentence.

Carrington is instructive. There, a sergeant told the defendant during an interrogation "that he wanted to present a package to the district attorney in which he would be able to say 'that in all cases that you . . . helped and assisted the police in their investigation.' " (*People v. Carrington*, *supra*, 47 Cal.4th at p. 173.) These statements "did not imply that by cooperating and relating what actually happened, defendant might not be charged with, prosecuted for, or convicted of the murder of [the victim.] The interviewing officers did not suggest they could influence the decisions of the district attorney, but simply informed defendant

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[15] The People do not appear to dispute Rojas's characterization of the detectives' statements. Based on our review of the record, Hernandez stated Herrera might be able to "sway" the district attorney. Herrera informed Rojas that he was facing a life sentence. Although Herrera's statement followed Hernandez's, in context the detectives were not promising to attempt to avert a life sentence for Rojas.

that full cooperation might be beneficial in an unspecified way. Indeed, defendant understood that punishment decisions were not within the control of the police officers. . . . Under these circumstances, [the sergeant's] statement that he would inform the district attorney that defendant fully cooperated with the police investigation did not constitute a promise of leniency and should not be viewed as a motivating factor in defendant's decision to confess." (*Id.* at p. 174.)

The facts here are closer to those in *Carrington* than to *Gonzalez*, cited by Rojas. In *Gonzalez*, the defendant's parole officer, Agent Lum, told the defendant, Christopher, that unless Christopher cooperated with police, Lum would be forced to write a parole report recommending the maximum in-custody time. Lum also implied that if Christopher talked to police without counsel, Lum would recommend a shorter sentence. (*People v. Gonzalez*, *supra*, 210 Cal.App.4th at p. 883.) Lum thus promised Christopher "a benefit and/or leniency." (*Id.* at p. 884.) Here, in contrast, the detectives did not threaten that Rojas would face more time if he failed to talk to them, nor did they promise a favorable sentencing recommendation or any specific benefit if he waived his right to counsel. Instead, Herrera only vaguely indicated he could ask the district attorney whether there was "anything that they can do for" Rojas.

As *Holloway* noted, there is a fine line between "urging a suspect to tell the truth by factually outlining the benefits that may flow from confessing, which is permissible, and impliedly promising lenient treatment in exchange for a confession, which is not." (*People v. Holloway*, *supra*, 33 Cal.4th at p. 117.) Here the detectives may have approached that line, but they did not

cross it. There was no constitutional error in admission of Rojas's August 28 statements.

h. *Prejudice*

Even assuming arguendo that the August 28 interrogation should have been excluded, any error was harmless. The erroneous admission of statements obtained in violation of the Fifth Amendment is reviewed for prejudice under the standard articulated in *Chapman v. California* (1967) 386 U.S. 18. (*Elizalde*, *supra*, 61 Cal.4th at p. 542.) That test requires the People to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. (*Ibid.*)

Here, Williams, Jones, and Glass identified Rojas as the shooter in pretrial photographic lineups and at trial. The gun that fired the shots at Glass's house was found in Rojas's bedroom. The three incidents occurred within a half-hour period in the same area, strongly suggesting they were all carried out by the same persons. There was a similar modus operandi: in each incident a white SUV with a driver and passengers slowly approached the victim or victims and the driver shot from inside the vehicle. Before the driver shot at Glass and Jones, he issued a gang challenge and made derogatory remarks aimed at a rival gang. There was overwhelming evidence Rojas was a member of a gang that was hostile to the local Black gangs. Alvaro stated the shooter's vehicle was a Lincoln Aviator, and both she and her husband remembered the television screens inside. It was undisputed Rojas owned such a car when the shootings occurred. Although there were inconsistencies between the other witnesses' testimony regarding the car, and Williams testified Rojas's Aviator was not the car used in the shooting, all the witnesses agreed that the vehicle was a white SUV similar to Rojas's. And

Rojas fled immediately after his house was searched, four days after the shootings, suggesting consciousness of guilt. In short, even had the August 28 statement been excluded, it is clear beyond a reasonable doubt that the jury would not have rendered a more favorable verdict for Rojas.

2. *Admission of gang evidence*

Prior to trial, Rojas moved in limine to exclude testimony by the prosecution's gang expert on the ground it constituted testimonial hearsay in violation of the confrontation clause. Rojas also urged that before any gang testimony could be admitted, the trial court was required to determine admissibility under Evidence Code section 352. The trial court denied the motion, finding, in accordance with the law in effect at the time, that an expert could testify regarding the basis for his or her opinions, because such "basis testimony" was not offered for its truth; officers' contacts with gang members are generally nontestimonial; and the jury could be instructed the basis testimony was not offered for its truth. Rojas contends the trial court erred, and admission of "hearsay basis testimony regarding the CV-155 gang and his gang membership" violated the confrontation clause.

a. *Additional facts*

Detective Herrera testified that Rojas was a gang member. Prior to September 2007, Detective Herrera had met Rojas at least twice. One of those contacts occurred 17 days before the shootings, when Rojas had been driving a white Aviator. During one or both of the contacts, Rojas identified himself as belonging to the Compton Varrio 155 gang, and gave his moniker as "Lil" or "Lil Man." Herrera photographed Rojas's tattoos after Rojas was

arrested. Among others, Rojas had tattoos reading "T Locs," "South Side," "Lil One," "X13," "155," and "PK."

Detective Richard Sanchez, a gang investigator with the Los Angeles County Sheriff's Department, testified as the People's gang expert, as follows.[16] The Compton Varrio 155, or "CV-155," gang is a very violent, racist gang with approximately 160 documented, active members, a hand sign, and a distinctive graffiti symbol. In 2007, the gang was even larger and more violent. The gang's primary activities are vandalism, robbery, narcotics, weapons charges, assaults, and murders. Most of the gang's crimes are "geared toward[]" its hatred of African-Americans. The gang's chief rival was the Campanella Park "Pyros," a Black gang. There was a history of violence between the two gangs. "Slob" is a derogatory epithet for the "Pyros." The Compton Varrio 155 gang claims territory bordered by Alondra, Compton, Wilmington, and Central. The gang's territory borders that claimed by the Campanella Park "Pyros." "Out for Action," or "O.F.A.," was a tagging crew that was absorbed into the Compton Varrio gang in the mid-2000's. A person joins a gang by being "jumped in," associating with the gang, committing crimes for the gang, or being related to an original gangster. Gang members feel more loyalty to the gang than to their own families, and abide by a code of silence that prohibits them from "snitching" on each other. A gang member who attempts to leave the gang will likely face repercussions. The more violent the crime a gang member commits, the higher his reputation. The

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[16] Detective Sanchez also testified regarding his background and qualifications. We do not understand Rojas to challenge his qualifications to act as an expert, and therefore we do not detail that testimony here.

commission of violent crimes benefits the individual gang member and the gang by building the gang's reputation for violence, which in turn discourages victims from reporting crimes, hindering law enforcement in the gang's territory. Sanchez also testified regarding four "predicate" offenses committed by Compton Varrio 155 members.

Detective Sanchez opined that Rojas was a Compton Varrio 155 gang member. His opinion was based on his previous contact with Rojas, previous contacts between Rojas and Sanchez's office, Sanchez's communication with the investigators in the case, and Rojas's tattoos. Sanchez had met Rojas in the early 2000's, in the Compton Varrio 155 gang's territory. He did not recall whether Rojas admitted gang membership to him at that time. Sanchez reviewed photographs of Rojas's tattoos and opined that they indicated gang membership. "PK," for "Pyro Killer," indicated hatred of the "Pyro" gang; "South Side" indicated a Hispanic gang; "155" stood for the Compton Varrio 155 gang; and "T Locos" represented a Compton Varrio 155 clique.

When given a hypothetical based on the evidence in the case, Sanchez opined that the crimes were committed for the benefit of and in association with the gang. The attack on persons believed to be members of a Black gang would boost the Compton Varrio 155's reputation. The more violent the crime, the more other gangs will be intimidated.

b. *Applicable legal principles*

The Sixth Amendment bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S.

36, 68; *Sanchez*, 63 Cal.4th at p. 680.) While the Supreme Court has not clearly defined "testimonial," prior testimony, police interrogations, and statements made primarily to memorialize facts relating to past criminal activity which can be used like trial testimony, fall within the definition. (*Sanchez*, at pp. 687, 689; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1246.) Under state law, hearsay–that is, an out-of-court statement offered for the truth of its content–is admissible only if each level of hearsay falls within an exception to the hearsay rule. (*Sanchez*, at pp. 674-675.)

Overruling prior precedent relating to expert testimony, *Sanchez* held that "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless [*Crawford*'s requirements are satisfied]." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. omitted, italics in original.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) An expert is generally not permitted to supply case-specific facts about which he has no personal knowledge. (*Ibid.*) However, evidence with which the expert is not personally familiar "can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684.)

Sanchez did not cast doubt on all gang expert testimony. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," that is, he or she may "relate generally" the "kind and source of the 'matter' upon which his opinion rests." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id.* at p. 685.)

c. *There was no Sanchez/Crawford error*

Applying the "two-step analysis" mandated by *Sanchez*, we discern no error. We first ask whether the challenged statement constitutes hearsay. If so, and the *Crawford* requirements of unavailability, cross-examination, and forfeiture are not satisfied, we examine whether the challenged evidence constituted testimonial hearsay. (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

The bulk of gang expert Sanchez's testimony, including that regarding the Compton Varrio 155's territory, hand signs, culture, and primary activities, the requirements to join the gang, the identification of tattoos as gang-related, and similar matters, was permissible as expert background testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 685; *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1247; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, [2016 Cal. App. LEXIS 1115], review granted Mar. 22, 2017, No. S239442, opn. ordered to remain precedential; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411-412.) For

example, *Sanchez* explained that an expert's opinion that a particular tattoo indicated gang membership was background information. (*Sanchez*, at p. 677.) Here, the evidence does not suggest the gang expert's knowledge of background facts was based on testimonial hearsay. (See *Meraz*, at pp. 1175-1176.) In keeping with *Sanchez*, the expert simply relied on hearsay in forming his opinion and told the jury in general terms that he had done so. Of course, the expert's personal observation of Rojas's tattoos was not hearsay.[17]

Rojas also contends the expert testified to testimonial hearsay when he opined that Rojas was a member of the Compton Varrio 155 gang. Not so. Sanchez testified that his opinion was based on (1) his own contacts with Rojas, (2) previous contacts between Rojas and Sanchez's office, (3) Sanchez's communication with the investigators on the case, and (4) Rojas's tattoos. Sanchez's personal observations of Rojas during his own contacts with him were not hearsay. Sanchez did not testify to the details of his office's previous contacts with Rojas. His reliance on such information was not error; *Sanchez* holds that an expert may still rely on hearsay in forming an opinion and tell the jury in general terms that he did so. (*Sanchez*, *supra*, 63

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[17] Rojas argues that his tattoos are hearsay because they are "written expressions of his gang membership and hatred of [B]lack gangs such as the Campanella Pyros." Rojas offers no authority for this somewhat novel proposition, and has therefore waived it. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Camel* (2017) 8 Cal.App.5th 989, 999 [failure to cite authority forfeits appellate review of issue].) In any case, these tattoos were admissible against Rojas as party admissions. (Evid. Code, § 1220.)

Cal.4th at pp. 685-686.) Nor did the expert run afoul of *Sanchez* by stating he relied on his communications with other investigators. Under *Sanchez*, an expert "can give an opinion based on a hypothetical including case-specific facts that are properly proven." (*Id*. at p. 685.) "[T]he evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question . . . ." (*Id.* at p. 684.) Indeed, Detective Herrera, the investigating officer, testified that he had personally met Rojas and Rojas admitted his gang membership to him. The expert could properly rely on this evidence, which was independently proven by competent evidence. (See *Sanchez*, at p. 684.) As we have discussed, the expert could properly rely on his own observations of Rojas's tattoos. (See *People v. Cooper* (2007) 148 Cal.App.4th 731, 746 [photographs and videotapes are not hearsay and are not testimonial].)[18] In sum, the gang evidence was not admitted in error.

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[18] Scattered throughout Rojas's discussion of the confrontation clause issue are assertions that the gang evidence should have been excluded under Evidence Code section 352. Rojas has waived these contentions on appeal because this distinct argument is not set forth under a separate heading, and he does not offer meaningful analysis on the point. (See *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4; *People v. Evans* (2011) 200 Cal.App.4th 735, 756, fn. 12; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396-1397.) In any event, given that the People's theory was that the crimes were gang-related, the evidence was highly probative and exclusion under Evidence Code section 352 was not required. "Prejudicial" is not synonymous with "damaging." (*People v. Scott, supra,* 52 Cal.4th at p. 491.) " ' " 'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent." ' " (*Scott,* at p. 490.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.