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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TWO

THE PEOPLE, Plaintiff and Respondent, v. ANGEL ANTHONY MENDOZA, Defendant and Appellant.	B281584 (Los Angeles County Super. Ct. No. VA140805)

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed.

Gail Harper, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Angel Anthony Mendoza (defendant) appeals from his first degree murder conviction. He contends that the admission of his statements to an undercover informant violated his constitutional right to due process, and that certified court documents were admitted in violation of the confrontation clause of the Sixth Amendment to the United States Constitution. Defendant also contends that his trial counsel's failure to preserve these issues for review resulted in a denial of effective assistance of counsel as guaranteed by the Sixth Amendment. As defendant's contentions are without merit, we affirm the judgment.

BACKGROUND

Defendant was charged with the murder of Eugenio Palomares (Palomares), in violation of Penal Code section 187,[1] subdivision (a) (count 1); possession of a firearm by a felon in violation of section 29800, subdivision (a)(1) (count 2); and discharging a firearm into an occupied motor vehicle, in violation of section 246 (count 3). The information further alleged that defendant personally and intentionally discharged a firearm resulting in great bodily injury and death, within the meaning of section 12022.53, subdivisions (b), (c), and (d), and pursuant to section 186.22, subdivisions (b)(4) and (b)(1)(c), that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist criminal conduct by gang members.

A jury convicted defendant of all three counts and found true all the special allegations. On March 17, 2017, the trial court sentenced defendant to a total term of 50 years to life, comprised of 25 years to life on count 1, enhanced by 25 years to

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

life pursuant to section 12022.53, subdivision (d). As to each of counts 2 and 3, the trial court imposed the low term of 16 months, and stayed the terms under section 654. The court imposed mandatory fines and fees, and ordered defendant to pay $5,000 to the Victim Compensation Board and $5,137 in direct victim restitution. Defendant was awarded 485 actual days of presentence custody credit, with no conduct credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting

On the morning of August 2, 2015, Palomares left home in his green Toyota Camry to see about a construction job in Artesia. On the way, Palomares stopped to pick up a helper he often hired, Oscar Murillo (Murrillo), who lived in Hawaiian Gardens, where the Varrio Hawaiian Gardens (VHG) gang was active. At about 9:15 a.m., Murrillo heard a couple of horn honks, went outside and heard three rapid-fire gunshots. He then found Palomares sitting in his car, having been shot four times. Bullet fragments removed from Palomares's body during autopsy were tested and determined to be .22-caliber.

Witness accounts of aftermath

Soon after the shooting, more than a half dozen residents of Murrillo's neighborhood observed or came into contact with a man later identified as defendant. Several neighbors testified that defendant approached them asking for a ride, explaining that he had been assaulted and needed to get away from his assailants. All refused, and when some neighbors offered to call the police, defendant walked away. Defendant was shirtless when he approached the witnesses, and his tattoos were visible. Some observed that defendant was sweaty and seemed out of breath.

One neighbor, Vijutha Small (Small), testified that around 9:30 a.m. on the morning of the shooting she was cleaning in her front yard. She went into her house in search of a tool, leaving the door slightly ajar and her black purse on the kitchen counter. When she returned to the yard she found her purse on front lawn, minus her car keys which had been inside the purse, and her car was gone. It was 9:37 a.m. when she called the police to report the theft of her car. Another neighbor, Jacquelin Carbajal (Carbajal) testified that at about that time, she saw a man who she later identified as defendant, run toward a nearby house, go inside, and come out in less than a minute with a black bag, which he dropped. She then saw defendant get into Small's car and drive off.

Conversation with drug dealer

Admitted drug dealer Jesus Manuel Nunez (Nunez) testified to a conversation he had with defendant in August or September 2015. Nunez had been acquainted with defendant, who he knew as "Lefty," for about six months prior to the conversation. Nunez also knew defendant to then be a member of the VHG gang. The two had used drugs together before, and on the date of the conversation defendant was in a state of stress and arrived at Nunez's residence wanting to get high. After ingesting methamphetamine, defendant began telling Nunez about an incident in the news about a man who had been shot. Defendant told Nunez that he had been up for three days, walking down the street early in the morning, when an older man drove up and down the street before stopping in front of a house. When defendant saw the man reach down for something inside his car, defendant shot him with a .22-calibur revolver, and then fled the scene. Defendant explained to Nunez that the man was wearing an Angels baseball cap, so defendant thought he was a rival gang member from the Artesia gang, an enemy of his gang,

VHG. When he saw the man apparently reaching for something, defendant panicked and shot him. Defendant claimed that he had fired in fear. He said, "I thought it was either him or me." Defendant explained that he got away when he found a vehicle and jumped into it.

When Nunez was first detained for possession of methamphetamine, the police thought he was Lefty. He testified that he served his full sentence on the drug charge and received no benefit for talking to the police or testifying in this trial. Nunez claimed that when he testified at the preliminary hearing in this case, "they" had already been threatening his family, and that he was considered a "rat."

Jailhouse conversation

On November 20, 2015, after defendant was taken into custody, investigating detective, Steve Rubino equipped an inmate informant with a recording device and placed him in a cell with defendant. The informant engaged defendant in a conversation for about an hour and a quarter, and a recording of their conversation was played for the jury.

Defendant told the informant that two or three months earlier he shot an unknown man he had "caught slipping" on a little street of houses in his neighborhood. Defendant said the victim was alone. Defendant said he fired the gun four times at close range using a .22-calibur revolver, which he hid in the ground after taking off his tank top and wiping down the gun. Defendant was not caught at the scene, although he stayed in the neighborhood after the shooting. He explained that he stayed because to "take off" would make him appear to be hiding something. Defendant reported having seen two or three other people in the neighborhood after hiding the gun, and said to them something like, "Hey, can you help me? Like some *cholos* are chasing me. They just -- dude, like they jumped me." And the

neighbors replied, "Nah. . . . No, no, we can't help you." Defendant thought he still had his tank top with him at that time, but was not wearing it. Defendant said he really had been jumped earlier that day, but the shooting was unrelated.

Defendant told the informant that later he got rid of his cell phone because he knew it could establish his whereabouts at the time of the shooting. Now only two of his "homeboys" knew what had happened. Defendant said his father was a VHG member known as "Big Lefty," and defendant was known as "Little Lefty." Defendant claimed to belong to the VHG's Malditos clique. Defendant identified VHG's rivals as the Chivas gang and the Artesia gang, which had combined to form the Chivas Barrio Artesia gang. Defendant admitted that he "banged on" the victim, but suggested that his motive for the shooting was something other than gang related.[2]

Defendant indicated that although he intended to deny all involvement, in the crime, he would take 10 or 15 years if offered. He knew that the police had included his photograph in a group of six, and he surmised that that someone had already identified his picture as being the person seen running. The informant suggested that if someone picked defendant as the person seen shooting into the victim's car, defendant was "fucked" unless they did not find the gun. In that case they would offer a deal, something like 18, which would be better than life. Defendant agreed. Defendant wished he could make bail, and said that if he could, he would be gone.

Gang evidence

LASD gang unit Detective Mark Perez testified that he came into contact with defendant in November 2013, and

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[2] Detective Rubio testified that to "bang on" someone means to ask the name of the person's gang.

documented his conversation and observations on a field identification card or "F.I. card." He testified that defendant admitted to him that defendant was a member of the VHG gang. The detective noted defendant's moniker, Little Lefty,[3] and described the tattoos he observed on defendant, including "Hawaiian Gardens" spelled out on his neck and on the back of his head.

LASD Detective Jeffrey Doke testified that he came into contact with defendant in June 2008 and documented that contact on an F.I. card. At that time, defendant stated he was an associate of the VHG gang, but did not admit to being a member of the gang. The contact took place in a gang area where there was much graffiti, and defendant was wearing gang-style clothing.

Other sheriff deputies also testified regarding their contact with defendant. Lieutenant Ernest Bille documented his January 2009 contact on an F.I. card, noting that defendant was 17 years old and a known member of the VHG gang with the moniker Little Lefty and "Lefty 2." Deputy Hector Vasquez testified that defendant admitted his VHG gang membership to him in June 2015. Deputy Vasquez wrote on an F.I. card that defendant's moniker was Little Lefty, and noted the tattoos he observed on defendant, including "Hawaiian Gardens" on his neck and arm, and a Hawaiian "Punchie" logo on his left wrist. Sergeant Terrence Bell testified that he documented his April 2008 contact with defendant in Hawaiian Gardens, noting that defendant was a member of the Hawaiian Gardens gang or some other gang that used the initials HG.

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[3] Detective Perez explained that a moniker was a nickname given to gang members, usually by other gang members or by family.

Gang detective Shawn Dumser testified as the prosecution's gang expert. The detective was acquainted with defendant, who had previously admitted to Detective Dumser that he was a member of the VHG gang. Detective Dumser identified photographs of defendant's tattoos and explained the significance of each and how they were related to the VHG gang and the Malditos clique to which defendant belonged.

Detective Dumser testified that the neighborhood of the shooting was within the VHG gang's territory. He described gang territory as an area over which a particular gang maintains control either by threatening or challenging anyone believed to be from a rival gang or otherwise prohibited from being in its territory. When gang members enter the territory of another gang, they are usually armed, and confrontations are often violent. Detective Dumser explained that in gang jargon, a person who is "caught slipping" is one who was not paying attention and let someone "roll up" on him.

The VHG gang's main enemy was the Arta 13 gang, an Artesia gang which commonly used an A as its sign or symbol. Detective Dumser explained that the Arta gang was considered an enemy because it also tried to control areas in which to conduct its business. It was important for the VHG gang to maintain control of its territory in order to conduct its business of gaining money through the sale of narcotics and illegal firearms, as well as burglaries or robberies. Thus any Arta member found in VHG territory would likely be confronted and challenged, usually resulting in assault, mutual combat, robbery, stabbing, shooting, or even murder. An Artesia member would also expect to be assaulted if he were found in VHG territory, and both gangs regularly committed shootings against each other. A VHG member who allowed a rival gang member to pass through the area without a confrontation could be viewed as being weak or

unable to protect the gang or its territory. It was important to the gang member not to appear weak to others who might then take advantage of him on the street, in jail, or in prison.

Detective Dumser testified that there were about 400 active VHG members. The gang's primary activities were narcotics and illegal gun sales, as well as robberies and burglaries. As additional evidence that the VHG gang was a criminal street gang, Detective Dumser presented certified records of conviction for three VHG gang members as predicate offenses. The first was for Benito Acuna, who committed murder in February 2008. Detective Dumser knew that Acuna was a VHG gang member due to the detective's involvement in the investigation of the murder. The second was for Miguel Gomez, a VHG gang member who committed attempted murder and robbery against a rival Artesia gang member in January 2008. Detective Dumser testified that the third was for Jesse Razo, who was convicted of the offense of felon in possession of a firearm, committed in March 2013. Razo admitted to Detective Dumser that he was a member of the VHG gang at the time.

In response to a question based upon a summary of hypothetical facts that mirrored the facts in evidence in this case, Detective Dumser opined that the gang member committing the crime would benefit from his actions by raising his stature within the gang, because other gang members would know that he could be trusted to commit crimes for the gang when called on to do so, and that he was willing to protect the neighborhood and his gang's territory. If instead the gang member had done nothing, other gang members would disrespect him. He would be reprimanded and have to regain the gang's trust by committing some other crime. The crime would benefit the gang by bolstering its reputation, thereby making rival gang members afraid to come into the VHG gang's territory.

DISCUSSION

I. Jailhouse confession

Defendant contends that the recorded jailhouse conversation with an informant was obtained in violation of his right to due process and should have been excluded. Defendant acknowledges that he did not object on this precise ground in the trial court, although his trial counsel had the opportunity to do so at the time the court ruled that the conversation was admissible. Defendant asks that we not deem the issue forfeited, arguing that his trial counsel's failure to properly object to the evidence constituted ineffective assistance of counsel in violation of his Sixth Amendment right to counsel. We will address defendant's due process contention "'on the merits to the extent necessary to decide the ineffective assistance claim.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 431.)

Prior to trial, the defense filed a motion to exclude defendant's conversation with the informant, alleging violation of the Fifth and Sixth Amendment under the rule of *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*). Under *Massiah*, once an adversarial criminal proceeding has been initiated against an accused, the Sixth Amendment right to counsel attaches, and from that time on, any incriminating statement that the government deliberately elicits from the accused in the absence of counsel is inadmissible at trial against that defendant. (*Id*. at pp. 205-207.)

The prosecutor sought to admit the evidence, arguing that there was no *Massiah* violation and no requirement to give defendant the warnings required under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), prior to placing the informant in the cell. Under *Miranda*, a defendant's statements made during custodial interrogation are made inadmissible by the Fifth and Sixth Amendments unless prior to any questioning, the

defendant was "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id.* at p. 444.)

Defendant does not directly challenge the trial court's finding that his conversation with the informant took place before the adversarial criminal proceeding had been initiated in this case; nor does he challenge the trial court's ruling that there was no *Miranda* or *Messiah* violation requiring exclusion of the evidence. Instead, defendant relies on a concurring opinion by Justice Brennan in *Illinois v. Perkins* (1990) 496 U.S. 292 (*Perkins*), to argue that his due process rights were violated.

In *Perkins*, after the defendant was placed in a cell with an undercover government agent while in custody on charges unrelated to the tried offense, the agent proposed a sham escape plot and elicited statements from the defendant implicating himself in the crime with which he was later charged. (*Perkins*, *supra*, 496 U.S. at pp. 294-295.) The United States Supreme Court held that "[c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*." (*Perkins*, at p. 296.) "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner." (*Perkins*, at p. 297.) The court confirmed that under *Massiah* and its progeny, "the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime." (*Perkins*, at p. 299.) However, as no charges had been filed in *Perkins*, the court held that the Sixth Amendment did not require exclusion of the confession. (*Ibid.*)

While Justice Brennan agreed with the majority's Fifth Amendment holding that *Miranda* was inapplicable, he

expressed a belief that "the deception and manipulation practiced on [Perkins] raise a substantial claim that the confession was obtained in violation of the Due Process Clause." (*Perkins*, *supra*, 496 U.S. at p. 301, conc. opn., Brennan, J.) He argued that "the pressures of custody make a suspect more likely to confide in others and to engage in 'jailhouse bravado' . . . [and that] [t]he State is in a unique position to exploit this vulnerability because it has virtually complete control over the suspect's environment. Thus, the State can ensure that a suspect is barraged with questions from an undercover agent until the suspect confesses. [Citations.]" (*Id.* at pp. 302-303.) Justice Brennan concluded that the undercover police agent in that case had tricked the defendant into confessing. (*Ibid.*)

Defendant cites no authority following the views Justice Brennan expressed in *Perkins*. As respondent notes, "dicta by a concurring justice . . . is not binding and does not constitute the holding of the court. [Citation.]" (*Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 211; see also *Maryland v. Wilson* (1997) 519 U.S. 408, 412-413.) As further noted by respondent, no federal or California case has ever followed Justice Brennan's opinion to find that an undercover operation such that as conducted in *Perkins* violated due process.

Moreover, Justice Brennan did not opine that all such undercover operations violated the Due Process Clause, but rather suggested that the appropriate approach would be to consider the totality of the circumstances. (*Perkins, supra*, 496 U.S. at pp. 302-303.) Here, other than the basic operation of the kind approved in *Perkins*, the only circumstance cited by defendant is his assertion of "what *appears* to be a *deliberate* delay in filing a murder charge," in order to circumvent the rules of *Massiah* and *Miranda*. A pre-accusation delay will violate a defendant's right to due process if it "was an intentional device to

gain tactical advantage over the accused. [Citations.]" (*United States v. Marion* (1971) 404 U.S. 307, 324.) However, it is the defendant's burden to show that a delay was intentional, that it was intended to gain a tactical advantage, and that it was prejudicial. (*Id*. at pp. 325-326.)[4]

The only evidence cited by defendant to show that any delay in charging him was deliberate, consists of the date of his arrest on unrelated charges one day before the undercover operation, along with defendant's assertion that the detectives had enough evidence to charge him, because they had already spoken to residents of the neighborhood and to Nunez. Defendant's proof falls short of meeting his burden. Ordinarily, "'[p]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt.'" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1256.) Not only does defendant fail to point out evidence of the prosecution's satisfaction or dissatisfaction with the state of the investigation, defendant *acknowledges* that the "full timeline [and] details of the investigation were not fully revealed at trial." Such due process claims are forfeited on appeal in the absence of an objection below, "because the omission deprived the prosecution of the opportunity to justify any delay. [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 446.) We conclude that defendant has not met his burden to show a violation of due

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[4] *Missouri v. Seibert* (2004) 542 U.S. 600 and other cases cited by defendant to suggest otherwise arose from the deliberate delaying of giving *Miranda* advisements during police interrogations. Such cases are inapplicable here as there was no police interrogation and *Miranda* warnings were not required. (See *Perkins*, *supra*, 496 U.S. at p. 296.)

process, and as he did not object on this ground, he has forfeited the issue on appeal.

Defendant suggests that a due process claim cannot be deemed forfeited because he has asserted a violation of his Sixth Amendment right to counsel due to ineffective assistance of trial counsel. He contends that in such a circumstance, respondent bears the burden to show that the claimed due process violation was harmless beyond a reasonable doubt, under the test of *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). Defendant's argument appears to be that merely raising an issue of ineffective assistance of counsel will excuse a failure to object and will preserve a due process claim for review. If so, he has cited no authority for such an argument, and we disagree. As the issue has been forfeited, we do not consider whether the claimed due process violation was harmless, but instead turn to defendant's claim of ineffective assistance of counsel.

It is defendant's burden to show not only that counsel rendered inadequate assistance, but also that prejudice resulted; and we need not reach any claim of counsel error until defendant demonstrates prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) To meet his burden to demonstrate prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, at p. 694.) We agree with respondent that defendant cannot meet this burden, as much of the jailhouse conversation was merely cumulative of what defendant had already told Nunez. Defendant confessed his crime to Nunez before the undercover operation, and then to the informant, and he had given Nunez most of the same details that he gave the informant. Defendant told both Nunez and the informant that he was a member of the Hawaiian Gardens gang,

and that he shot a man in his neighborhood within a time frame consistent with the shooting of Palomares. He told both men that the weapon he used was a .22-caliber revolver.

In any event, if we had found a due process violation, we would find any such error harmless beyond a reasonable doubt, under the test of *Chapman*. Defendant suggests that the evidence of guilt would be weak without the jailhouse conversation because Nunez's credibility was "suspect," and because "the prosecution had no eyewitnesses to the shooting itself, only evidence that [defendant] had fled the scene, and the forensic evidence which lacked the murder weapon." In making this argument, defendant disregards the other overwhelming evidence of guilt, much of it corroborative of Nunez's testimony.

Although there were no eyewitnesses to the shooting itself, it was just minutes after Murillo heard gunfire and found Palomares shot to death in his car, that defendant was seen by numerous residents running through the neighborhood. Defendant approached at least four residents claiming to have been attacked and asking for help. Four of the witnesses selected defendant's photograph from a photographic lineup as the person they saw in the neighborhood at that time, and three of them also identified defendant in court and at the preliminary hearing. One of the neighbors identified defendant as the person who took Small's purse from the house, dropped it on the lawn, and drove off in Small's car.

In addition, defendant's guilt may be inferred from motive (see *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1193), and motive "may be material where the evidence as to the identity of the criminal is circumstantial." (*People v. Gonzales* (1948) 87 Cal.App.2d 867, 877.) Here, it was undisputed that defendant was an admitted member of the VHG gang. He admitted it to Detective Perez in 2013, to Deputy Vasquez in 2015, and to gang

expert Detective Dumser at sometime in the past. Defendant had multiple tattoos identifying him as a member of the VHG gang and the Malditos clique of the gang. Detective Dumser testified that the shooting took place in a neighborhood within the territory claimed by the VHG gang, that the gang's main enemy was the Arta 13 gang, an Artesia gang which commonly used an A as its sign or symbol, and that any Arta member found in VHG territory would be confronted and challenged by a member of the VHG gang. The challenge usually resulted in assault, a shooting, and even murder. Detective Dumser explained that if a VHG member failed to challenge the enemy gang member, he and the gang could appear to be weak and unable to maintain control of the gang's territory. Nunez testified that defendant told him the victim was wearing an Angels baseball cap,[5] which caused defendant to believe that the victim was a rival gang member. In sum, compelling evidence established that defendant harbored a motive to benefit his gang and to maintain his status in the gang.

We conclude beyond a reasonable doubt that the evidence summarized demonstrates that if there had been a due process violation or inadequate assistance of counsel, any such error would have been harmless.

II. Predicate offenses

Defendant contends that certified conviction records presented by Detective Dumser to prove that the VHG gang was a criminal street gang violated his rights under the confrontation clause of the Sixth Amendment to the United States

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[5] The exhibits were not made part of the record on appeal. We thus assume that the photograph of the victim, admitted as People's exhibit 9, depicted him wearing an Angels baseball cap with the letter A on it. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [matters as to which the record is silent are presumed to support the judgment].)

Constitution. The confrontation clause bars the use of testimonial hearsay unless the declarant is unavailable to testify and defendant was afforded a prior opportunity to cross-examine him. (*Crawford v. Washington* (2004) 541 U.S. 36, 62, 68 (*Crawford*).)

In order to establish the gang enhancement pursuant to section 186.22, the prosecution must prove, among other things, that the gang's "members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) A "'pattern of criminal gang activity' means the commission [or] attempted commission of . . . two or more [enumerated] offenses, [the last of which occurred] within three years after a prior offense, and . . . were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).) The offenses need not be gang related, and may be proven with official court records establishing the convictions of two or more predicate offenses by members of the gang. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1460-1462; see Evid. Code, §§ 452.5, subd. (b), 1280; Pen. Code, § 1207; *People v. Gardeley* (1996) 14 Cal.4th 605, 624-625, disapproved on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

Defendant acknowledges that he did not object to the evidence on confrontation grounds at trial, and that his only objection was that the admission of four predicate offenses would be more prejudicial than probative under Evidence Code section 352. Defendant has thus forfeited review of the issue except to the extent "that the erroneous overruling of the objection actually made also had the consequence of violating his federal confrontation rights. [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 66, fn. omitted; see also *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) However, as defendant does not claim that the trial

court erroneously overruled his objection under Evidence Code section 352, there can be no *additional* consequence to review.[6]

Defendant contends that he has not forfeited the issue because any failure of his trial counsel to object to the evidence on this ground constituted ineffective assistance of counsel in violation of his Sixth Amendment right to counsel. We disagree, as the failure to make an unmeritorious objection is not ineffective assistance (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 463), and as we explain, there is no merit to defendant's assertion that admission of the evidence violated the confrontation clause.

Only *testimonial* hearsay is barred by the confrontation clause. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1270; see *Michigan v. Bryant* (2011) 562 U.S. 344, 353-355; *Davis v. Washington* (2006) 547 U.S. 813, 821.) Certified court minutes showing the conviction of predicate gang offenses are not testimonial. (See *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1176, fn.10, review granted Mar. 22, 2017 (S239442).) In an analogous case for example, it was held that "acts and events relating to convictions and imprisonments" such as records produced under section 969b to prove a defendant's prior convictions, are not testimonial. (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225; see also *People v. Moreno* (2011) 192

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6 The trial court did not rule on the Evidence Code section 352 objection. In a pretrial hearing, defense counsel objected to the admission of four predicate offenses, and asked that the prosecution be limited to two. Although the trial court stated that defense counsel "[made] a point," it accepted the prosecutor's offer to narrow the number to two or three, and did not rule on the objection. As defendant did not renew the Evidence Code section 352 objection when the prosecutor introduced evidence of a third predicate offense at trial, defendant also failed to preserve that issue for review. (See *People v. Murtishaw* (1989) 48 Cal.3d 1001, 1037.)

Cal.App.4th 692, 709 [same]; *People v. Morris* (2008) 166 Cal.App.4th 363, 373 [California Law Enforcement Telecommunications Systems "rap sheet" not testimonial].)

Defendant appears to assert that it is the *use* of a court document as evidence which determines whether it is testimonial. It is not the use of the records of conviction which makes them testimonial; it is the *purpose* for which the documents were *created*. Thus, to determine whether an out-of-court statement is testimonial, "we ask whether a statement was given with the 'primary purpose of *creating* an out-of-court substitute for trial testimony.' [Citation.]" (*Ohio v. Clark* (2015) 576 U.S. ___, [135 S.Ct. 2173, 2183], quoting *Michigan v. Bryant*, *supra*, at p. 358, italics added.)

Certified conviction records are also admissible as exceptions to the hearsay rule. (See Evid. Code, §§ 452.5, subd. (b)(1), 1280.) However, "public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because -- having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial -- they are not testimonial." (*Melendez-Diaz* v. *Massachusetts* (2009) 557 U.S. 305, 324.) As respondent notes, court clerks have a statutory duty to accurately record the judgment in the minutes (§ 1207), and the purpose of doing so "in a criminal case is to furnish a concise record showing the crime of which the defendant has been convicted and the punishment imposed, which will protect him against a subsequent prosecution for the same offense. [Citations.]" (*People v. Blackman* (1963) 223 Cal.App.2d 303, 307.) Thus, as minutes are prepared for the administration of the court's business, not as evidence to be presented at trial, they are not testimonial.

To support his arguments, defendant relies primarily on *Kirby v. United States* (1899) 174 U.S. 47 (*Kirby*), where the Supreme Court reversed the defendant's conviction for receiving stolen property, because the *only* evidence that the property had been stolen consisted of the conviction records of the three thieves, two of whom had pled guilty to the theft. (*Id*. at pp. 53-54, 60.) The court found a violation of the confrontation clause, reasoning that "a fact which can be primarily established only by witnesses cannot be proved against an accused . . . except by witnesses who confront him at the trial, . . . whom he is entitled to cross-examine, and whose testimony he may impeach in every mode authorized by the established rules governing the trial or conduct of criminal cases." (*Id*. at p. 55.) Thus, the court concluded, "one accused of having received stolen goods . . . , knowing at the time that they were stolen, is not within the meaning of the Constitution confronted with the witnesses against him when the fact that the goods were stolen is established simply by the record of another criminal case with which the accused had no connection and in which he was not entitled to be represented by counsel." (*Id*. at p. 60.)

The facts here are different from those in *Kirby*. The records of conviction were not used in this case, as they were in *Kirby*, to prove defendant's underlying conduct or as a substitute for proving an element of the offense, nor were they the only evidence of the factual issue to be proved. Other evidence of the pattern of criminal behavior by the VHG gang included Detective Dumser's testimony that there were about 400 active members of the gang, that its primary activities were narcotics sales, illegal gun sales, robberies, and burglaries, and that VHG members regularly committed assaults and shootings against enemy gang members. In addition, defendant's current charge provided evidence of a predicate offense. (See *People v. Tran* (2011) 51

Cal.4th 1040, 1046.) Finally, *Kirby* did not turn on whether the conviction records were testimonial, as it does here. *Kirby* simply provides no apt analogy.

As the conviction records were not testimonial and were admissible as exceptions to the hearsay rule, defendant has not met his burden to show that counsel erred in failing to object on the ground that the records violated the confrontation clause. His claim of ineffective assistance of counsel must therefore be rejected.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT