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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. SOSAIA KANANDALE SEKONA, Defendant and Appellant.	B272444 (Los Angeles County Super. Ct. No. YA091546)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Remanded for a new trial on an enhancement and for resentencing.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Nicholas J. Webster, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Sekona of first degree premeditated murder following a shooting outside a restaurant in Inglewood. The jury also found true the allegations Sekona committed the crime to benefit a criminal street gang and personally and intentionally discharged a firearm causing death. Sekona argues the trial court violated his rights under the confrontation clause of the Sixth Amendment by admitting case-specific testimonial hearsay statements by the prosecution's gang expert, the People may not retry the gang allegation under the double jeopardy clause because there was no substantial evidence to support the jury's true finding on the gang allegation, and the trial court erroneously instructed the jury on the expert witness testimony in connection with the gang allegation. In a supplemental brief, Sekona argues recently enacted Senate Bill No. 620 requires remand for sentencing.

We conclude that the trial court prejudicially erred by admitting the gang expert's testimony and that the true finding on the gang allegation must be reversed and remanded for a new trial. We also conclude substantial evidence supports Sekona's conviction for first degree murder. Finally, we remand for a sentencing hearing under Senate Bill No. 620.

FACTUAL AND PROCEDURAL HISTORY

A. *The Tongan Crips*

The Tongan Crips Gang, also known as TCG, was a criminal street gang in Inglewood whose members were primarily of Tongan heritage. Members of TCG committed various crimes, including assault with a deadly weapon, vehicle theft, attempted

murder, robbery, kidnapping, and firearm possession by felons. TCG adopted the Crips criminal street gang heritage. TCG members used the same signs and symbols, and engaged in similar activities, as members of other Crips gangs. TCG members generally wore blue clothing and viewed members of the Blood gangs, who wore red clothing, as rivals. TCG's primary enemies were Samoan Blood gangs.

B. *Wrong Place, Wrong Color*

In the early morning hours of November 9, 2014, Shuichi Sugimoto and his friend Eleaser Diaz drove to a fast food restaurant on Hawthorne Boulevard in an area TCG claimed as its territory. Diaz entered the restaurant while Sugimoto got out of the car in the parking lot, walked to the back of the car, and began to urinate. Sugimoto was wearing bright red pants and, because he was of Japanese heritage, resembled a person from the Pacific Islands.

Sekona had arrived in the same parking lot moments before Diaz and Sugimoto. He got out of his car, stood next to Sugimoto, and without saying anything shot him at "point blank range." Sugimoto died from a gunshot wound to the head.

C. *Identification*

Immediately after shooting Sugimoto, Sekona fled in a black car driven by Christopher Taumalolo. Deputy Sheriff Ludy Orellana was a block away and heard the gunshot. When he saw the black car drive out of the driveway of the fast food restaurant, he began to pursue it. Sergeant Hugo Reynaga took over the pursuit, first in his car, then on foot. Although Sekona managed to escape by jumping a fence, Sergeant Reynaga saw Sekona's profile and observed him take off his sweatshirt and slippers before he jumped the fence. DNA from the slippers and

sweatshirt matched Sekona's DNA. Taumalolo surrendered later that day.

Diaz identified Sekona as the person who shot Sugimoto. Miguel Arrredondo, an employee of the fast food restaurant, also saw Sekona shoot Sugimoto. Arredondo was certain of his identification because Sekona was a regular customer at the fast food restaurant and Arredondo had spoken to Sekona earlier in the evening at a liquor store.

D. *The Charges*

The People charged Sekona with first degree premeditated murder. The People alleged Sekona committed the offense for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of Penal Code section 186.22, subdivision (b)(1).[1] The People also alleged Sekona personally and intentionally discharged a firearm, within the meaning of section 12022.53, subdivision (d).

E. *Gang Expert Testimony*

Detective Jonathan Calvert testified about the general culture of gangs, the history of TCG, the background facts establishing TCG was a criminal street gang, and documentation showing Sekona was a member of TCG. Based on a hypothetical mirroring the facts of this case, Detective Calvert testified Sekona committed the shooting for the benefit of, at the direction of, and in furtherance of the TCG criminal street gang.

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[1] Undesignated statutory references are to the Penal Code.

F. *Conviction and Sentence*

The jury convicted Sekona of first degree murder and found true the gang and firearm allegations. In a bifurcated proceeding, the trial court found Sekona had suffered a prior serious or violent felony conviction.

The trial court sentenced Sekona to 25 years to life, doubled under the three strikes law, plus 25 years to life for the firearm enhancement under section 12022.53, subdivision (d), for a total prison term of 75 years to life. The trial court, citing *People v. Lopez* (2005) 34 Cal.4th 1002, "stayed" the sentence under section 186.22, subdivision (b)(1)(C). The court acknowledged that section 186.22, subdivision (b)(5), applied, but the court stated it would not impose a sentence for that enhancement because it had already sentenced Sekona to 75 years to life. Sekona timely appealed.

DISCUSSION

A. *Some of the Gang Expert's Testimony Violated Sekona's Rights under the Confrontation Clause*

Sekona contends Detective Calvert violated his rights under the confrontation clause of the Sixth Amendment by relating case-specific hearsay when he testified about (1) TCG's primary activities, (2) the fact TCG used the fast food restaurant as a gang hangout, and (3) the contents of seven field interview cards (FI cards). Sekona argues the erroneous admission of this evidence compels reversal under *People v. Sanchez* (2016) 63 Cal.4th 665, 684-685 (*Sanchez*). We conclude that the trial court erred by overruling Sekona's objections to the detective's testimony about the contents of six of the seven FI cards, as well as by receiving those cards into evidence, and that, in light of the

prosecutor's reliance on the FI cards to prove the gang enhancement, the errors were not harmless.

1. *Detective Calvert's Testimony*

Sekona filed a motion pursuant to Evidence Code section 403 for a hearing to determine the admissibility of the FI cards, arguing their admission violated the confrontation clause of the Sixth Amendment. At the hearing, counsel for Sekona argued Detective Calvert was not competent to testify at trial about TCG because at the preliminary hearing the detective stated he had relied on police reports and FI cards prepared by other officers. The prosecutor argued that under *People v. Gardeley* (1996) 14 Cal.4th 605 the gang expert could testify about the FI cards, but the prosecutor did not make any argument or introduce any evidence on the issue whether the FI Cards were testimonial hearsay. The trial court ruled that under *Crawford v. Washington* (2004) 541 U.S. 36 the expert could testify about the FI cards as the basis of his opinion, the prosecutor could use the FI cards to show the basis of the expert's opinion, but the prosecutor could not offer the FI cards for the truth of their contents.

At trial Detective Calvert testified he had served as a police officer for over 12 years, including nine years investigating Pacific Islander criminal street gangs in Long Beach. When Detective Calvert began testifying about the history of TCG, counsel for Sekona objected that the detective's testimony was not based on personal knowledge. Counsel for Sekona asked for a limiting instruction, stating: "He's getting otherwise inadmissible evidence in for the truth. It's not necessarily the truth." The trial court overruled the objection and stated the expert could testify about "what his opinion is based on." The court also ruled that, when the prosecutor questioned the

detective about the FI cards, the court would instruct the jury the cards "are not offered for the truth of the matter asserted but simply for the officer's opinion . . . ."

Detective Calvert proceeded to testify that TCG originated in Inglewood but also operated in Hawthorne and Long Beach. TCG's main rivals were the Blood gangs, which identified with the color red, and the Piru gangs, which identified with the color burgundy. If a person wore red in TCG territory, TCG members would target the person for harm because red was "their enemy's chosen color." TCG graffiti depicted the letters "BK" and "PK," abbreviations for Blood Killer and Piru Killer, with the letters BK and PK crossed out to indicate disrespect to the rival gangs.

Detective Calvert explained a gang had to control its territory because, to sell drugs or run prostitution, the gang needed to control an area without interference. Detective Calvert stated that "respect within the gang community is huge. It's your reputation. But what it really means is that someone is feared." Witnesses to a gang crime often recant or refuse to testify because of fear of retaliation from the gang.

Detective Calvert also testified, based on his conversations with members of the Inglewood Police Department and employees of the fast food restaurant on Hawthorne Boulevard, the restaurant was a "known hangout" for members of TCG. The detective confirmed this information by going to the restaurant, asking the cashier for a meal TCG members typically ordered, and learning the cashier knew exactly what meal to serve. A photograph of three documented TCG members posing in front of the fast food restaurant and flashing gang signs provided further confirmation the restaurant was a gang hangout.

Detective Calvert had never met Sekona, but to prepare for his testimony he reviewed seven FI cards and two police reports.[2] He said the FI cards were "multipurpose." The detective explained that officers use an FI card to document "having stopped and contacted somebody, having chosen not to take enforcement action," and "to document gang members whenever possible."[3]

Detective Calvert testified that FI Card Nos. 1 and 3 documented police encounters with Sekona in 2000, when Sekona admitted he was a member of TCG with the moniker Mr. Kovi and the letters "TCG" were tattooed on his left middle finger; FI Card No. 2, also from 2000, noted the "TCG" tattoo; FI Card No. 4, undated, noted Sekona's gang affiliation and the "TCG" tattoo; and FI Card Nos. 5 and 6 documented encounters with the police in 2010 and contained the same information noted in the previous FI cards. Finally, FI Card No. 7 documented that on June 18, 2013, Sekona admitted to Detective Derek Limbacher, who testified at trial, that he was a member of TCG with the moniker Mr. Kovi, and the detective noted Sekona had three tattoos: "Tonga" across his chest, the name "Sekona" on his back, and the word "Sipa" on his wrist.

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[2] Prior to Detective Calvert's testimony about the FI cards, the court instructed the jury: "Just so we are clear also with regards to these FI cards, these FI cards are not offered for the truth of the matter asserted, but offered again as a basis of this officer's opinion." At the conclusion of the People's case, the trial court received all seven FI cards into evidence.

[3] Another police detective testified he used FI cards to document "victims of crimes" to put in a report, to find out if a person he stops on the street is on parole or probation or affiliated with a gang, and to document incidents of "loitering," "prowling," and "gang activity."

Detective Calvert explained that Sekona's tattoos indicated he was a member of TCG because the word "Tonga," tattooed from Sekona's throat down to his navel with the "T" clearly visible even if Sekona were wearing a collared shirt, represented his gang affiliation because TCG was also known as the "T-gang." The tattoo of "Sekona" across his back also signified affiliation with TCG because "Sekona" was one of the most "prevalent" names within the gang. Detective Calvert also testified that, if an individual wanted to leave a gang, he would need to move away from the gang, sever all ties, and stop associating with members of the gang, and, in some cases, remove gang-related tattoos. Detective Calvert visually inspected Sekona's left middle finger at trial and, although he could not discern any letters or symbols, he could see "remnants" of what appeared to be a tattoo.

Although law enforcement did not have any documentation on Taumalolo's gang affiliation, Detective Calvert concluded Taumalolo was an associate of TCG. Detective Calvert based his opinion on photographs found on Taumalolo's cell phone, which included the picture of three TCG gang members flashing gang signs in front of the fast food restaurant. The phone also contained several pictures of TCG graffiti.

Detective Calvert testified that a hypothetical crime based on the facts of this case was committed for the benefit of, at the direction of, and in the furtherance of TCG. The detective explained the location was a known TCG area because it had been documented as such and there was a picture of TCG members posing and flashing gang signs in front of the restaurant. In addition, the victim had been wearing red and urinating in front of the restaurant, which TCG gang members could believe was a "slur" on TCG by someone who appeared to be a member of the Bloods or Pirus, TCG's primary enemies. The shooting also benefited TCG because the gang relied on fear and

intimidation, and killing a Blood or Piru who disrespects the gang would help reclaim the gang's honor.

Detective Calvert also testified the crime was committed with the specific intent to promote, further, or assist in the gang's criminal activity because the shooter showed an associate how to "do the job" and allowed the perpetrators to brag about the crime, which helps recruit new members and enables other gang members to commit similar crimes. That the shooting occurred in a well-lit area further benefited the gang because it made the crime "more brazen" and allowed members of the public to witness an "execution."

2. *Applicable Law*

Section 186.22, subdivision (b)(1), imposes additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." The enhancement "applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 68; see *People v. Garcia* (2017) 9 Cal.App.5th 364, 379.)

To establish that a group is a criminal street gang within the meaning of section 186.22, subdivision (b)(1), the People must prove that the gang "'(1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in "a pattern of criminal gang activity."'" (*Sanchez*, *supra*, 63 Cal.4th at p. 698; see *People v. Ochoa* (2017) 7 Cal.App.5th 575, 581.) "[A] 'pattern of criminal activity' means

the commission of, attempted commission of, conspiracy to commit, or solicitation of, . . . or conviction of two or more of . . . [the enumerated] offenses . . . and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e); see *Sanchez*, at p. 698.)

"'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1) gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513 [an expert may testify about the """motivation for a particular crime, generally retaliation or intimidation""" and """whether and how a crime was committed to benefit or promote a gang"""].) An expert may also provide testimony that a gang "engage[s] in various criminal practices" to establish the "primary activities" element of section 186.22, subdivision (f). (*People v. Prunty* (2015) 62 Cal.4th 59, 82; see *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.)

"The admission of expert testimony is governed not only by state evidence law, but also by the *Sixth Amendment's confrontation clause*, which provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) "When 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." (*Id.* at p. 686.) "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.) If the hearsay is testimonial, "there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id.* at p.

686; see *Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54 [court may not admit "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination"].)[4]

"Gang experts, like all other[ ] [experts], 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." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) Background information includes "general gang behavior," "descriptions of the . . . gang's conduct and its territory" (*id.* at p. 698), the gang's "'primary activities,'" and its "'rivalry with [another gang].'" (*People v. Vega-Robles, supra,* 9 Cal.App.5th at p. 411; see *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1247.)

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[4] Prior to the California Supreme Court's 2016 decision in *Sanchez*, courts often "attempted to avoid hearsay issues by concluding that statements related by experts are not hearsay because they 'go only to the basis of [the expert's] opinion and should not be considered for their truth.'" (*Sanchez*, *supra*, 63 Cal.4th at pp. 680-681; see, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 619 [expert testimony not admitted for truth does not violate confrontation clause].) The Supreme Court in *Sanchez*, decided after the trial in this case, disapproved of *Gardeley*'s approach to address "hearsay and confrontation concerns." (*Sanchez*, at p. 686, fn. 13.) The Supreme Court explained, "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth." (*Id.* at p. 684.)

"What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term." (*Id.* at p. 680.) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Id.* at p. 694.)

"We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the evidence was constitutional de novo." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553; see *People v. Seijas* (2005) 36 Cal.4th 291, 304 [we review a constitutional challenge, such as whether the admission of extrajudicial statements violated the confrontation clause, de novo]; *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 22-23 ["[w]e generally review the trial court's evidentiary rulings for abuse of discretion, though when the issue is whether admission of evidence violated the federal Constitution, we review the

matter de novo"]; see also *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964 ["[w]e review de novo a claim under the confrontation clause that involves mixed questions of law and fact"]; accord *People v. Arredondo* (2017) 13 Cal.App.5th 950, 968, review granted Nov. 15, 2017, S244166.)

Finally, the erroneous admission of nontestimonial hearsay is a violation of state statutory law (*Sanchez*, *supra*, 63 Cal.4th at p. 685) and is subject to the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (See *People v. Stamps* (2016) 3 Cal.App.5th 988, 997.) Under this standard, reversal is required only if it is reasonably probable that the defendant would have achieved a more favorable result if not for the error. (*People v. Wall* (2017) 3 Cal.5th 1048, 1060.) The erroneous admission of testimonial hearsay in violation of a defendant's right to confront witnesses against him is "an error of federal constitutional magnitude" and requires reversal unless the error is "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (See *Sanchez*, at pp. 685, 698.)

3. *The Admission of Some of the Gang Expert's Testimony Was Prejudicial Error*

a. *The Trial Court Did Not Err in Admitting Testimony About the Gang's Primary Activities*

The trial court did not err in admitting Detective Calvert's testimony about TCG's primary activities. (See *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 411.) Even if the detective had based his testimony entirely on hearsay, the information he conveyed was general in nature and did not relate any information specific to "the particular events and participants of

this case." (*Sanchez*, *supra*, 63 Cal.4th at p. 676; see *id.* at p. 675 ["experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc."].) Nor did Detective Calvert, in this portion of his testimony, relate any information that officers gathered "'primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony.'" (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175, review granted Mar. 22, 2017, S239442; see *ibid.* [testimony about a gang's primary activities was proper background information and was not testimonial].) Detective Calvert's testimony about TCG's primary activities did not violate Sekona's right to confrontation.

b. *Any Error in the Admission of Testimony About the Restaurant as a Gang Hangout Was Harmless*

Detective Calvert's testimony that the fast food restaurant on Hawthorne Boulevard was a TCG "hangout" had some characteristics of background information about which an expert may testify. (See *Sanchez*, *supra*, 63 Cal.4th at p. 698 [testimony about gang territory admissible as background information]; accord *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 411.) The detective testified about the gang's territory and that the fast food restaurant was located within that territory. Yet, Detective Calvert's testimony that TCG treated the fast food restaurant as a gang hangout was a fact specific to this case because it related to the "particular events" (*Sanchez*, at p. 676) of the case. Detective Calvert relied in part on this fact to conclude the victim's act of urinating in front of the restaurant was an act of disrespect to the gang.

Any error in admitting this testimony, however, was harmless because there was other evidence the restaurant was a TCG hangout. The jury saw a photograph of three known TCG gang members flashing gang signs in front of the restaurant. There was also evidence the restaurant was in TCG territory and Sugimoto looked like a Pacific Islander Blood gang member, so that TCG gang members would view Sugimoto's act of urinating in the parking lot while wearing red as disrespectful, regardless of whether the restaurant was a gang hangout. There is no reasonable probability that, absent any erroneously admitted testimony about the restaurant, the jury would have found the shooting was not gang-related. (See *People v. Wall*, *supra*, 3 Cal.5th at p. 1060.)

c. *The Trial Court Erred in Admitting Evidence About the Content of Six of the FI Cards*

Detective Calvert's identification of Sekona as a gang member based on his review of seven FI cards was hearsay about a case-specific fact. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 589.) Because Detective Derek Limbacher testified, based on personal knowledge, that Sekona was a member of TCG in 2013, Detective Calvert's testimony about the contents of that card did not violate Sekona's confrontation clause rights. (See *Sanchez*, *supra*, 63 Cal.4th at p. 686 [expert may relate case-specific facts if independently proven by competent evidence]; *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1248 [personal observations by testifying officers on gang member's tattoos, attire, companions, and location were admissible gang expert testimony].) Detective Calvert's testimony about the other six FI cards, however, was hearsay because none of the officers who

authored those cards testified at trial, and Detective Calvert was not present during the officers' encounters with Sekona.

The critical question for Sekona's confrontation clause argument is whether the information on the cards was testimonial. (See *Sanchez*, *supra*, 63 Cal.4th at p. 680.) The record does not conclusively establish whether the various officers completed the six FI cards in the course of an ongoing investigation. (See *id.* at p. 697 [an FI card would be "akin" to a police report and thus testimonial "[i]f the card was produced in the course of an ongoing criminal investigation"].) Instead, the record contains evidence the FI cards served multiple purposes. Detective Limbacher testified he sometimes used FI cards to write down information on victims of crimes for use in a report, suggesting that officers used the FI cards to document the investigation of a crime. Detective Calvert testified officers used the cards to document gang members whenever possible (suggesting a community policing function) or to document a decision not to take enforcement action (suggesting an investigative function). Because the record on whether the FI cards were testimonial is inconclusive, the issue becomes which side has the burden of proof on this issue.

Of course, Sekona generally has the burden on appeal to demonstrate error. (See *People v. Ochoa*, *supra*, 7 Cal.App.5th at p. 585 [""""error must be affirmatively shown""""].) As the proponent of the evidence, however, the People had the burden at trial to show the challenged testimony did not relate to testimonial hearsay. (See *Idaho v. Wright* (1990) 497 U.S. 805, 816; *People v. Ochoa*, *supra*, at p. 584; cf. *People v. Zapien* (1993) 4 Cal.4th 929, 957 [the People have the burden of establishing the reliability of evidence where the declarant was unavailable and the defendant did not have a prior opportunity to cross-examine the declarant]; *People v. Stamps*, *supra*, 3 Cal.App.5th at

p. 997 [the People have the burden to propose a hearsay exception that applies to the contents of a website].) For example, in *Ochoa*, the court held the defendant responsible for an "undeveloped record" because he failed to object to the FI cards on the ground their admission violated his right to confrontation. (*People v. Ochoa*, at p. 585.) Sekona, however, objected repeatedly to the admissibility of the FI cards and to Detective Calvert's testimony about the contents of the cards. Sekona objected that the expert's testimony about the FI cards violated his right to confrontation, the prosecutor did not attempt to show the cards were not testimonial, and the trial court overruled Sekona's objection each time based on *People v. Gardeley*, *supra*, 14 Cal.4th at p. 620, which the Supreme Court in *Sanchez* disapproved. (See *Sanchez*, *supra*, 63 Cal.4th at p. 683.)

There is evidence in the record the officers used the FI cards for investigative purposes. Once Sekona objected to the FI cards on the ground they violated his constitutional rights under the Sixth Amendment, the People had the burden to introduce evidence that the FI cards were not testimonial. Because the People did not introduce such evidence, they failed to meet their burden. (See *People v. Meraz*, *supra*, 6 Cal.App.5th at p. 1176 [FI cards fell "close to [the] line" of testimonial because an officer testified the FI cards were created for any future investigative use]; see also *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 414 [record did not indicate whether information about gang affiliation was testimonial even after a *Crawford* objection, but the court assumed the information was testimonial to assess whether any error was harmless].) Nor did the People show that the officers who authored the FI cards were unavailable and that Sekona had a prior opportunity to cross-examine them. (See

Sanchez, *supra*, 63 Cal.4th at p. 686.) The trial court's admission of the FI cards violated Sekona's right to confrontation.

d. *The Erroneous Admission of Evidence about the FI Cards Was Not Harmless*

We evaluate evidence admitted in violation of the confrontation clause under the harmless error standard of *Chapman*, *supra*, 386 U.S. at page 24. (*People v. Capistrano* (2014) 59 Cal.4th 830, 873.) Under that standard, the People must show that "any confrontation error was harmless beyond a reasonable doubt." (*Sanchez*, *supra*, 63 Cal.4th at p. 698.) "'The beyond-a-reasonable-doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [Citation.] "To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." [Citation.] Thus, the focus is on what the jury actually decided and whether the error might have tainted its decision. That is to say, the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error."'" (*People v. Pearson* (2013) 56 Cal.4th 393, 463.)

Sekona testified that, although he joined TCG when he was 13 years old, he left the gang in 2004 and no longer associated with it. The prosecutor argued Sekona never left the gang and emphasized his longstanding membership in TCG as evidence of his gang membership at the time of the shooting. The prosecutor pointed to the seven FI cards that documented Sekona's association with TCG and to "all these officers" who (through the

hearsay testimony of Detective Calvert) "say he's self-admitted."[5] The prosecutor also relied on the FI cards and their extensive documentation of Sekona's "TCG" tattoo to undermine Sekona's testimony that he no longer associated with the gang.[6] While a finding under section 186.22, subdivision (b)(1), does not require proof of Sekona's gang membership, the prosecutor relied on that fact to prove Sekona committed the shooting to benefit his gang. (See *Sanchez*, *supra*, 63 Cal.4th at p. 698 [evidence of the defendant's gang membership bolstered prosecution's theory that he acted with intent to benefit his gang]; *People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1252 [prosecutor focused on gang membership to establish motive].) Contrary to the trial court's admonition to the jury not to consider evidence from the FI cards for its truth, the prosecutor argued just that: Sekona was a gang member by virtue of his admission and "TCG" tattoo, as noted on the FI cards. (See *People v. Fletcher* (1996) 13 Cal.4th 451, 471 ["[t]he prejudicial effect of the error was compounded by the prosecutor's argument to the jury"].)

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[5] The prosecutor argued: "The defendant is a self-admitted Tongan Crip gangster. His moniker is Mr. Kovi. He can sit on the stand all day long and tell you, I got out of it. I'm not a gang member anymore. He did not get out of it. . . . He has seven field interview cards, *seven* of them. They are documented—these are just the ones that are documented, going from 2000 to 2013*, all these officers* say he's self-admitted."

[6] The prosecutor argued, "As far as leaving the gang, . . . we talk about the finger tattoo. We don't know when he got it removed. We know it was on these field interview cards *forever*."

The People have failed to meet their burden of showing Detective Calvert's testimony about the six FI cards was "harmless beyond a reasonable doubt." (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699; see *People v. Pettie* (2017) 16 Cal.App.5th 23, 69-70 [even though expert had personal knowledge of one of several contacts with the defendant, it was likely that hearsay information from contacts by other officers contributed to the jury's findings on the gang enhancements]; *People v. Iraheta, supra,*14 Cal.App.5th at p. 1255 [confrontation clause errors were not harmless beyond a reasonable doubt because the expert's reliance on FI cards was "compelling evidence"]; cf. *People v. Vega-Robles*, *supra*, 9 Cal.App.5th at p. 414 [gang expert's testimonial hearsay was harmless beyond a reasonable doubt where the prosecutor relied on testimony of other witnesses for the case-specific fact of gang affiliation].) Sekona's admission he was a member of TCG over the course of 10 years (2000-2010) was "compelling evidence" (*People v. Iraheta*, *supra*, 14 Cal.App.5th at p. 1255) he committed the shooting to benefit the gang. We cannot say on this record that the true finding on the gang allegation was "surely unattributable" to the erroneously admitted gang evidence. Therefore, the jury's true finding on the gang allegation must be reversed.

4. *The People Are Entitled to a New Trial on the Gang Enhancement*

Sekona argues the double jeopardy clause bars retrial on the gang enhancement because, absent the erroneously admitted evidence, there was no substantial evidence to support the jury's true finding. (See *People v. Garcia* (2014) 224 Cal.App.4th 519, 526 [People may not retry gang enhancement if there is insufficient evidence to support the enhancement]; see also *People v. Seel* (2004) 34 Cal.4th 535, 544 ["the double jeopardy

clause precludes a second trial after a conviction is reversed based solely on insufficient evidence"].)

Double jeopardy does not apply here. "[I]n 'reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, [we] must consider *all* of the evidence presented at trial, including evidence that should not have been admitted.'" (*People v. Lara* (2017) 9 Cal.App.5th 296, 328, fn. 17; see *id.* at p. 335 [even though trial court improperly admitted testimonial hearsay, "the totality of the evidence admitted against defendants on the gang issues amounted to sufficient substantial evidence to support their gang crime convictions and enhancement findings"].) "'[W]here the evidence offered by the State and admitted by the trial court—whether erroneously or not—would have been sufficient to sustain a guilty verdict, the Double Jeopardy Clause does not preclude retrial.'" (*People v. Story* (2009) 45 Cal.4th 1282, 1296-1297; see *People v. Jackson* (2009) 178 Cal.App.4th 590, 600 ["[w]hen reviewing the evidence for purposes of deciding whether retrial is permissible, we consider all of the evidence presented at trial"].)

"'In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] "A reviewing court neither reweighs evidence nor reevaluates a

witness's credibility.'"'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1170.)

Here, substantial evidence supports the gang enhancement. As discussed, section 186.22, subdivision (b)(1), requires the People to prove Sekona shot Sugimoto for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, or assist in criminal conduct by gang members. (*People v. Weddington* (2016) 246 Cal.App.4th 468, 484.) Detective Calvert testified about several enumerated offenses TCG members committed in the past decade as their "primary activities" to establish TCG was a criminal street gang. (See § 186.22, subd. (f).) To show TCG members engaged in a pattern of criminal activity, the People introduced certified records of conviction for two criminal offenses committed by a member of TCG. (See § 186.22, subd. (e).)

Detective Calvert testified that a shooting based on hypothetical facts similar to those in this case would have benefitted TCG. Detective Calvert explained that the victim, who looked like a Blood gang member, had "dissed" TCG by urinating in the parking lot. This act was an "overt slam or slur" on the gang, and the shooter reclaimed the gang's honor by executing him. Because TCG was a violent criminal street gang that relied on fear and intimidation, the shooting furthered that reputation and provided an opportunity for a gang member to demonstrate to an associate how to dispose of enemies. (See *People v. Albillar*, *supra*, 51 Cal.4th at p. 63 ["[e]xpert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[ ] criminal street gang' within the meaning of section 186.22(b)(1)"]; *People v. Garcia*, *supra*, 9 Cal.App.5th at p. 380 [gang expert's opinion on the importance of respect to gangs and the need to protect gang

territory was substantial evidence the offenses were gang-related].)

There was also substantial evidence Sekona had the specific intent to promote, further, or assist in "criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "There is no statutory requirement that this 'criminal conduct by gang members' be distinct from the charged offense . . . ." (*People v. Albillar, supra*, 51 Cal.4th at p. 66.) "'Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances of the offense.'" (*People v. Rios* (2013) 222 Cal.App.4th 542, 567-568.) "[I]f substantial evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang, the jury may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members." (*Albillar*, at p. 68.) Here, the evidence, albeit erroneously admitted, showed Sekona was a member of the gang and Taumalolo was an associate of the gang. Sugimoto was wearing red and relieving himself in TCG territory. And Detective Calvert explained the shooting would deter witnesses from testifying and enable gang members to commit further criminal acts.

B. *The Confrontation Clause Violation Does Not Require Reversal of Sekona's Murder Conviction*

Sekona, without challenging the sufficiency of the evidence to support his conviction for murder, argues the trial court's error in admitting Detective Calvert's hearsay testimony in violation of the confrontation clause mandates reversal of the murder conviction. Sekona, however, cites no authority for the proposition that an error in admitting gang expert testimony compels reversal of an otherwise unchallenged murder conviction. (See *People v. Redd* (2010) 48 Cal.4th 691, 744

["because defendant 'fails to offer any authority or argument in support of [his] claim . . . it is not considered here'"].)

In any event, the evidence in support of Sekona's murder conviction was overwhelming. Diaz identified Sekona as the person who shot Sugimoto, and Arredondo (who recognized Sekona as a regular patron of the fast food restaurant and saw Sekona the evening prior to the shooting) saw Sekona shoot Sugimoto. Deputy Reynaga matched the profile of Sekona's face with the profile of the person he chased after the shooting, and DNA analysis linked Sekona to the slippers and sweatshirt discarded by the person who fled the crime scene. The six FI cards admitted in error were """unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record""" (*People v. Pearson*, *supra*, 56 Cal.4th at p. 463), and we are confident the error was "harmless beyond a reasonable doubt." (See *People v. Bryant* (2014) 60 Cal.4th 335, 395.) The reversal of the gang enhancement does not require reversal of Sekona's murder conviction. (See *People v. Pettie*, *supra*, 16 Cal.App.5th at pp. 74-75 [even though confrontation clause error required reversal of gang enhancement, overwhelming evidence on defendant's convictions on the substantive offenses rendered error harmless with respect to those convictions].)

C. *Resentencing Is Required*

1. *Sekona is Entitled to a New Sentencing Hearing Under Senate Bill No. 620*

Senate Bill No. 620, which went into effect on January 1, 2018, allows "the court, in the interest of justice and at the time of sentencing, to strike a firearm enhancement." (Sen. Com. On Public Safety on Sen. Bill No. 620 (2017-2018 Reg. Sess.) Apr. 25,

2017.) The new law deleted the prohibition in former section 12022.53, subdivision (h), on striking a firearm allegation or finding. As amended, section 12022.53, subdivision (h), now provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)

Sekona contends, the People concede, and we agree that Senate Bill No. 620 applies. (See *People v. Conley* (2016) 63 Cal.4th 646, 656 [where a statutory amendment reduces punishment, in absence of any textual indication of Legislature's intent, "we infer[ ] that the Legislature must have intended for the new penalties, rather than the old, to apply"]; Couzens & Bigelow, Striking Firearms Enhancements Under Penal Code Sections 12022.5 and 12022.53 (Barrister Press Dec. 2017) p. 4 [there is no indication in Senate Bill No. 620 or its legislative history that it applies only prospectively, and there is indication it applies to some crimes committed prior to its effective date].)

The People, however, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, argue that "[r]emand is not appropriate" in this case because "there is no basis on which to conclude the court would reverse course and exercise its newfound discretion under SB 620 to strike the firearm enhancement." The People argue the trial court's denial of Sekona's motion to dismiss Sekona's prior serious or violent felony conviction indicates the court essentially found the sentence it imposed was the "appropriate length."

People v. Gutierrez is distinguishable. In that case the trial court "did not indicate that it had discretion to strike" a serious or violent felony conviction under the three strikes law (§ 667, subds. (b)-(i)). (*People v. Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.) While the appeal was pending, the Supreme Court held in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 that trial courts have the discretion to strike a serious or violent felony conviction.[7] (*Id.* at pp. 529-530.) Nevertheless, the court in *People v. Gutierrez* decided "no purpose would be served" in remanding that case for resentencing because the trial court had "stated that imposing the maximum sentence was appropriate" and that "'this is the kind of individual the law was intended to keep off the street as long as possible.'" (*People v. Gutierrez*, 48 Cal.App.4th at p. 1896.)

Here, although the trial court noted the "extremely egregious" nature of the crime, denied probation, and declined to strike Sekona's prior felony conviction, the court did not express a desire to impose the maximum possible sentence. That the court did not exercise its discretion to strike Sekona's prior conviction does not mean the court will necessarily decline to exercise discretion to strike the firearm enhancement. (See Couzens & Bigelow, Striking Firearms Enhancements Under Penal Code Sections 12022.5 and 12022.53, *supra*, p. 9 [appellate court should remand for resentencing under Senate Bill No. 620 where the trial court indicates it had no discretion to strike firearm enhancement or where the record is silent]; see also *People v. Deloza* (1998) 18 Cal.4th 585, 600 [even though the trial court did

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[7] Prior to *Romero*, whether the trial court could strike prior convictions under section 1385 "had been a very unsettled area of the law." (Couzens & Bigelow, California Three Strikes Sentencing (The Rutter Group 2017) ch. 10, p. 10-2.)

not strike the defendant's prior felony conviction, the Court of Appeal remanded the case for the trial court to exercise its discretion in deciding whether to impose concurrent sentences for defendant's current convictions].)

Moreover, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.'" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *id.* at pp. 1391-1392 [remand was appropriate because the record did not clearly indicate the trial courts would have imposed the same sentence had they been aware of full scope of their discretion after change in law].) Senate Bill No. 620 changed the law to give trial courts discretion to strike the firearm enhancement in the interest of justice. Because the trial court sentenced Sekona without the benefit of this discretion, remand for resentencing is appropriate.

2. *The Trial Court Erred in Staying the Gang Enhancement*

As noted, the trial court, citing *People v. Lopez*, *supra*, 34 Cal.4th 1002, "stayed" the sentence under section 186.22, subdivision (b)(1)(C). This was error.

In *People v. Lopez* the Supreme Court held that when a trial court sentences a defendant convicted of first degree murder, section 186.22, subdivision (b)(5), not subdivision (b)(1)(C), applies. (*People v. Lopez, supra,* 34 Cal.4th at pp. 1006, 1101.) Section 186.22, subdivision (b)(5), provides that the court "shall" impose a minimum prison confinement of 15 years before

a defendant is eligible for parole (see *People v. Francis* (2017) 16 Cal.App.5th 876, 883 [each penalty provision under section 186.22, subdivision (b), "is mandatory"]; *People v. Harper* (2003) 109 Cal.App.4th 520, 527 [court must impose the alternate punishment under section 186.22, subdivision (b)(5), even though the penalty "has little effect since it is subsumed in the 25-year minimum parole eligibility imposed for the underlying murder conviction"]), unless the court exercises its discretion under section 1385 to strike the gang enhancement (see *People v. Fuentes* (2016) 1 Cal.5th 218, 231 ["trial courts possess the section 1385 discretion to strike a gang-related enhancement alleged under section 186.22(b)"]) or strike the punishment for the enhancement under section 186.22, subdivision (g) (see *id.* at p. 224 [section 186.22, subdivision (g), gives trial court discretion to "'strike the additional punishment for the enhancements provided in' section 186.22"]). The record does not indicate the trial court intended to or did strike the gang enhancement or punishment in the interest of justice. Therefore, if the People decide to retry the gang allegation against Sekona, and the jury finds the allegation true, then at resentencing the court will have to impose or strike the penalty provision of section 186.22, subdivision (b)(5).

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated. The true finding on the gang allegation is reversed and remanded with directions for a new trial on that allegation. If the jury finds the gang allegation true, the trial court is to impose the enhancement under section 186.22, subdivision (b)(5), unless it exercises its discretion to strike the enhancement under section

1385 or strike the punishment under section 186.22, subdivision (g). The case is also remanded for the trial court to resentence Sekona on the firearm enhancement pursuant to Senate Bill No. 620.

SEGAL, J.

We concur:

ZELON, Acting P. J.

BENSINGER, J.*

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