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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY CHACON, Defendant and Appellant.	B269955 (Los Angeles County Super. Ct. No. NA099223)

APPEAL from the judgment of the Superior Court of Los Angeles County, Jesus I. Rodriguez, Judge. Reversed and remanded.

Jasmine Patel, under appointment by the Court of Appeal, and Roberta Simon, 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, Assistant Attorney General, Steven D. Matthews and Robert C. Schneider,

Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Gregory Chacon (defendant) of one count of infliction of corporal injury resulting in traumatic injury upon his children's mother, Cynthia G., (Pen. Code, § 273.5, subd. (a)),[1] one count of assault with a deadly weapon, an automobile, on Cynthia G. (§ 245, subd. (a)(1)), and one count of leaving the scene of an automobile accident involving an injury (Veh. Code, § 20001, subd. (a)). The jury found true the allegations that defendant inflicted great bodily injury on Cynthia G. in the commission of the corporal injury and assault offenses (§ 12022.7, subd. (e)). Defendant admitted he had suffered two prior serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12). The trial court sentenced defendant to a total term of 30 years to life in prison, consisting of a term of 25 years to life for the corporal injury conviction pursuant to the Three Strikes law plus a five-year enhancement term for the great bodily injury finding. Defendant filed a timely notice of appeal.

Two of defendant's claims on appeal relate to an emergency protective order (EPO) that law enforcement officials obtained on Cynthia G.'s behalf on the same day defendant ran over Cynthia G. with his car. The EPO restrained defendant from contacting Cynthia G. or their children and was served on defendant the next day while he was in custody on the charges in this case. Defendant contends the trial court erred in admitting two statements he made to a detective after the detective read him the EPO in a jailhouse interview room and then questioned him about his gang ties.

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[1] Further undesignated statutory references are to the Penal Code.

Defendant also contends the trial court erred in precluding defense counsel from offering the contents of the EPO to rebut the prosecutor's arguments about inferences to be drawn from defendant's statements.

We hold the trial court erred in admitting one of defendant's two statements to the detective while in custody and in excluding the contents of the EPO. The prosecutor highlighted defendant's erroneously admitted statement in closing argument, and defendant was prevented from rebutting that argument by the trial court's erroneous exclusion of the contents of the EPO. Respondent has not shown beyond a reasonable doubt that these two related errors did not contribute to the verdict. (See *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.)

We reverse the judgment of conviction and remand for further proceedings. In light of this reversal, we do not reach defendant's contentions that the prosecutor committed misconduct in arguing about defendant's statements, the trial court erred in precluding the testimony of a late disclosed witness, or that the trial court made sentencing-related errors.[2]

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[2] By separate order, we dismiss as moot defendant's petition for writ of habeas corpus in case No. B279148, to be considered concurrently with this appeal. The petition raises a claim of ineffective assistance of counsel in connection with defendant's motion to strike one of his prior convictions under the Three Strikes law.

FACTUAL AND PROCEDURAL SUMMARY

1. Background facts: the incident, EPO and in-custody statements

The parties' respective arguments regarding the EPO and defendant's in-custody statements are interrelated. Because the facts related to defendant's claims of error occurred at different temporal junctures, we organize our factual presentation by first setting forth the background facts, and then the evidence adduced during the 402 hearing and trial. Finally, we describe the parties' closing arguments.

On May 22, 2014, about 5:30 p.m., Cynthia G. and defendant spoke in the alley behind her apartment building. Defendant was the father of Cynthia G.'s two children but was not currently living with her. At the end of their conversation, Cynthia G.'s sweater became caught in the door of defendant's car. When defendant drove off, his car dragged Cynthia G., and then ran over her. Defendant drove away from the scene.

In the immediate aftermath of being injured by defendant's car, Cynthia G. was a relatively cooperative witness. Long Beach Police Department Domestic Violence Detective Daniel Mendoza visited Cynthia G. in the hospital on May 22 at about 7:00 p.m., only hours after she was injured. Cynthia G. provided him with a fairly detailed account of the circumstances leading up to her being run over by defendant's car—facts indicating that defendant was aware she was caught by his car but continued to drive as his car dragged and then ran over her. Two neutral witnesses, Maria Guzman and Luis Juarez, provided details of the incident to Long Beach Police Department Officer Ernesto Olmos that were consistent with Cynthia G.'s initial account. Neither witness, however, observed the entire incident.

Officer Olmos arrested defendant the day after the incident. Hours after the arrest, Detective Mendoza visited defendant in jail. Detective Mendoza did not inform defendant of his *Miranda*[3] rights. Defendant made two statements to Detective Mendoza: one after the detective informed him about the EPO and another after Detective Mendoza questioned defendant about his gang ties.

Later that day, defendant called Cynthia G. from jail. She was still in the hospital. Defendant was upset. Cynthia G. told defendant she had informed the police she was not going to press charges. In a second phone call, Cynthia G. said to defendant, "[Y]ou know whatever the case is, you know they're not going to believe it. It was an accident. . . . We're telling—it's coming from my own mouth."

In response to Cynthia G.'s expected change in her account of the incident, the prosecutor sought to introduce two statements defendant made after Detective Mendoza read the EPO to defendant. As set forth below, the trial ruled that both statements were admissible. Ultimately, the prosecutor used defendant's statements to Detective Mendoza to argue that defendant was aware Cynthia G. was caught on his car and that continuing to drive was likely to, and then did, injure Cynthia G.

Defendant's awareness and willfulness were essential elements of the charges against him. The assault charge required proof that defendant was "aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone." (CALCRIM No. 875.) The corporal injury charge required proof that defendant "willfully inflicted a physical injury" on Cynthia G. The jury was instructed that a person "commits an act willfully

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

when he does it willingly or on purpose." (CALCRIM No. 840.) The Vehicle Code charge required proof that defendant "knew that he had been involved in an accident that injured another person or knew from the nature of the accident that it was probable another person had been injured." (CALCRIM No. 2140.)

2. Section 402 hearing

On August 11, 2015, shortly before trial began, the trial court held an Evidence Code section 402 hearing to determine the admissibility of defendant's in-custody statements.

It was undisputed that defendant was in jail when he made the statements, and that Detective Mendoza did not inform defendant of his *Miranda* rights before reading defendant the EPO and then questioning defendant about his gang ties.

The only witness at the hearing was Detective Mendoza. The detective testified he contacted defendant at his jail cell, and defendant stated, "he had nothing fucking to say to me." Detective Mendoza escorted defendant from his jail cell down the hall to an interview room where the detective "read" him the EPO. Detective Mendoza testified defendant stated that "his girlfriend was going to bail him out. That I was a fucking asshole, and that he would be home and gone before I got done with my paperwork" (first statement). The detective testified he did not ask defendant any direct questions before defendant made this statement. Detective Mendoza also denied asking defendant about the charged incident during the encounter.

Detective Mendoza then had a "conversation with the defendant regarding his gang ties." The detective conceded he started to ask defendant "about gangs and such" and about "monikers or nicknames." Detective Mendoza told defendant he knew of defendant when defendant hung out with "Latin Thugs."

Detective Mendoza testified that "after that conversation," defendant stated, " 'I beat a 664/187 charge. This isn't shit. My girl won't say anything. She loves me' " (second statement).

On cross-examination, Detective Mendoza explained that once an EPO is issued, "it is our obligation as law enforcement officers to let the individual who is restrained to be made aware of the court requirements." Detective Mendoza read the EPO to defendant because "I had to make sure that he understood it. I explained it to him and handed it to him so he did have a copy to read on his own."

Detective Mendoza did not have a copy of the EPO at the hearing. The court asked the detective if he remembered what the EPO said. The detective replied, "It is a standard form issued by the County of Los Angeles. There is a website we pull [it] down from. I don't remember it verbatim. Then we take instruction from the magistrate who is issuing it."

After Detective Mendoza finished testifying, the trial court heard argument. Defense counsel maintained the statements were inadmissible because Detective Mendoza did not read defendant his *Miranda* rights before informing defendant about the EPO. He also argued, "this has nothing to do with whether this was a deliberate act, your Honor, and that's what we're talking about here. The People have to prove that [defendant] intentionally ran her over and dragged her and took off. None of this is relevant to those issues."

The prosecutor argued the statements were relevant because they "[go] to the credibility of Miss [Cynthia G.] because she is going to recant in a way when she testifies. She makes a statement to the police that there was an intentional act by the defendant and statements which would indicate to an objective person that this is

an intentional act. However, when she comes in on the witness stand, she is going to say that this was an accident."

The trial court excluded defendant's reference to "beat[ing] a section 664/187" charge, but otherwise admitted defendant's two statements.

3. Trial testimony

Trial began immediately after the section 402 hearing. Following brief testimony from a doctor detailing Cynthia G.'s injuries, the prosecution called Cynthia G. as a witness. As expected, Cynthia G.'s testimony differed markedly from the statement she had given Detective Mendoza while in the hospital. In court, Cynthia G. described details of the incident that suggested defendant did not realize he had injured her with his car.

Cynthia G. testified that on May 22, 2014, at about 5:38 p.m., she went to the alley behind her apartment building on Pine Avenue to speak with defendant. Defendant had been working on his car, a black Dodge Charger. As Cynthia G. approached, defendant got into the driver's seat of the car. Cynthia G. testified that defendant was getting ready to go to work. She leaned in the driver's side door, which was slightly open. She and defendant said goodbye to each other. She stepped back and closed the door, inadvertently catching her sweater in the door. The window was closed. According to Cynthia G., defendant had a special sound system in the car and always had music playing on the radio.

Cynthia G. testified that the car started moving and she was dragged by her sweater. She ran alongside the car for about two seconds until her sweater ripped. She fell and hit the left rear tire. The tire ran over her chest. She got up, took a few steps and sat back down. Cynthia G. testified that she did not say anything to

defendant or scream when her sweater was caught in the car door. The alley was bumpy and full of potholes.

Cynthia G. testified that no one else was in the alley when defendant's car ran over her. After about five minutes, someone came and helped her call 911. Paramedics and police soon arrived. The paramedics took her to the hospital.

Cynthia G. testified that Detective Mendoza did not ask her any questions about the case when he visited her in the hospital. She testified that "throughout the whole time he threatened me about my kids. He never asked me anything regarding the case." Cynthia G. flatly denied speaking to Detective Mendoza: "Not once did I speak with him because he was harassing me, threatening me throughout the whole time. So I did not have a conversation with [Detective] Mendoza."

Cynthia G. also testified she did not remember a 2011 incident in which defendant "head[-]butted" and forcibly grabbed her cellular phone and threw it in a fish tank. When shown photographs of herself taken at the time by police, she acknowledged she was the person in the photographs.

After this testimony, the prosecutor asked Cynthia G. a series of questions about her reluctance to appear in court on this matter. Cynthia G. then acknowledged that at some point in the proceedings she was ordered to return to court but did not show up. As she acknowledged, a warrant was then issued and she was arrested in September 2014. Cynthia G. posted a bail bond and she was released. The terms of the bond required her to appear in court. Cynthia G. acknowledged she did not want to be in court.

Following Cynthia G.'s testimony, the prosecutor called Maria Guzman as a witness. Guzman testified that on May 22, 2014, about 5:38 p.m., she was walking down the alley behind Pine

Avenue and was almost hit by a black Dodge Charger, which was traveling very fast. She recognized defendant as the driver; she had seen him in the alley before. There was a second person in the Black Charger. The car drove out of the alley. Guzman continued walking in the alley and saw Cynthia G. on her knees in the alley. Cynthia G. was yelling, "I'll call the cops. Tell them that he ran me over." She kept repeating this. She also said she was in a lot of pain. Cynthia G. said the name of the man who hit her, but Guzman could not remember it.

At about 5:38 p.m., Cynthia G. dialed 911 on her cellular phone and Guzman acted as an intermediary between Cynthia G. and the 911 operator. Guzman asked Cynthia G. why this had happened and Cynthia G. replied, "because he's fuckin' stupid. He was mad."

Officer Olmos came to the alley. He testified that he found Cynthia G. on the ground. She was not cooperative. Paramedics soon transported Cynthia G. to the hospital.

Officer Olmos testified that he spoke with Guzman, and with Luis Juarez who was also present in the alley during the incident. Officer Olmos testified that Juarez stated that as he was working on his truck he saw Cynthia G. walk into the alley, approach the driver's side of a parked black Dodge Charger, and speak with the driver. Juarez focused on his work, but soon heard an engine "rev" and tires squealing. He looked up and saw the Charger moving at a high rate of speed through the alley. Cynthia G. was on the ground and screaming.

Officer Olmos then went to the hospital to speak with Cynthia G. He testified that she was not cooperative but provided some information. According to Officer Olmos, Cynthia G. stated that she went to the alley to speak with defendant, who was her

boyfriend. Cynthia G. told Officer Olmos that defendant shut the car door and then sped away. Cynthia G. was dragged down the alley. A medical examination showed Cynthia G. had fractured ribs on her left side, a partial collapsed lung, a bruise on her lung, and abrasions.

Officer Olmos testified that Cynthia G. indicated she was afraid defendant would return and hurt her. Officer Olmos obtained an EPO for her.

Detective Mendoza also visited Cynthia G. in the hospital on May 22 at about 7:00 p.m. Detective Mendoza took multiple photographs of Cynthia G.'s injuries. When he attempted to question her, she was evasive initially. Detective Mendoza testified that Cynthia G. told him she had been run over but did not want his help. According to the detective, Cynthia G. eventually told him she would talk to him if he promised not to take away her kids. He agreed.

Detective Mendoza testified that Cynthia G. gave him the following account of the May 22 incident: When Cynthia G. met defendant in the alley, defendant accused her of cheating on him and they got into an argument. No one else was in the car with defendant, but one of defendant's friends was in a car parked behind the Charger. The car radio was off because they were having a conversation. At some point, defendant closed the car door and started the engine. Cynthia G.'s sweater was caught in the door. Defendant then accelerated down the alley and Cynthia G. was dragged alongside the car. She was screaming for him to stop. The car window was open. According to Detective Mendoza, when he asked Cynthia G. if she believed defendant could hear her, she replied, " 'What do you think; he was right next to me; other people came out to help me.' " Cynthia G.'s shirt tore, she fell at

least partially under the car and the car drove across her chest. She tried to get up but could not. She continued to scream.

The next day, May 23, about 3:49 p.m., Officer Olmos located defendant inside his black Charger, parked along Pacific Coast Highway (PCH). The officer testified he arrested defendant and took defendant to the Long Beach jail. The prosecutor asked Officer Olmos, "During the entire time in which you had contact with the defendant to when he was transported, did you say anything to him in regard[] to the factual allegations of this case?' The officer replied, "No." The prosecutor next asked, "And did you hear any other officers say anything to him in regard[] to the factual allegations in this case?" Officer Olmos replied, "No."

Detective Mendoza testified he went to the Long Beach jail shortly after defendant was arrested to serve the EPO on defendant. The prosecutor asked, "So after you read the defendant the [EPO], without asking him any questions about this case or the allegations, did he say something to you?" Detective Mendoza responded, "He basically called me a fucking asshole. Told me that he would be out before my paperwork would be done. And that his girl wouldn't say anything and that he would be out." The detective then refreshed his recollection with his report and clarified that defendant stated, "I'll bail out of here before you know it. My girlfriend will bail me out. I'll be gone before the paperwork is done. You're a fucking asshole. She loves me."

The prosecutor next asked Detective Mendoza, "After that statement, did he make another statement to you without you asking him any questions regarding this case?" The detective replied, "Yes, sir." The prosecutor asked, "And the substance of that statement—was it 'You're stupid. This isn't shit. My girl won't say anything. She loves me'?" The detective replied, "Yes, sir."

Detective Mendoza testified that he then gave defendant a copy of the EPO.

The prosecutor then asked the detective, "Now, during your conversation with the defendant on that date, did you tell him anything in regard[] to the allegations of this case?' Detective Mendoza replied, "No, sir. I simply explained to him the EPO." The prosecutor asked, "Did you give him any information that the reason why he was arrested was possibly something to do with [Cynthia G.]?" The detective replied, "No, sir, I did not." The prosecutor concluded this line of questioning by asking, "Therefore, you did not give him any information which would have led him to believe he was in there in custody because of something that happened with [Cynthia G.]?" Detective Mendoza replied, "Yes."

On cross-examination, defense counsel asked Detective Mendoza, "And when you say you read it to him, do you mean you read it to him word-for-word?" Detective Mendoza replied, "I don't recall if I read it word-for-word. I did tell him the gist of the order." Although defense counsel asked the detective to "tell me what is the gist of what you told him," the detective replied only in generalities.

After serving the EPO on defendant, Detective Mendoza returned to the hospital to check on Cynthia G. The detective testified that Cynthia G. was upset because she had learned defendant had been arrested. She initially denied to Detective Mendoza that she had spoken to defendant, but ultimately admitted she had spoken with him on her cellular phone. Recordings of two phone calls between Cynthia G. and defendant were played for the jury.

The first call took place the day defendant was arrested. Cynthia G. was still in the hospital. Cynthia G. told defendant she had nothing to say to the police. Defendant said the police had all

the information. Cynthia G. stated she told the police she was not going to press charges. Defendant replied, "The state picks it up. How many times do I got to tell you this?" In the second undated phone call, Cynthia G. and defendant discussed the possible outcome of the case. Cynthia G. said, "[Y]ou know whatever the case is, you know they're not going to believe it. It was an accident. . . . We're telling—it's coming from my own mouth."

Cynthia G. also testified briefly for the defense. She stated she told Officer Olmos and Detective Mendoza she did not want to press charges against defendant. She believed the car incident was an accident. She did not tell Officer Olmos she was afraid of defendant and did not request a protective order.

4. Closing argument

In his closing statement, the prosecutor argued, "The defendant then tells Detective Mendoza 'I'll bail out of here before you know it, and you won't see me again. I'll be gone before you're done with your paperwork. My girl is going to bail me out. You're a fucking asshole. She loves me.' He also tells Detective Mendoza[,] 'You're stupid. This isn't shit. My girl won't say anything. She loves me.' Both Detective Mendoza and Officer Olmos—neither of them had told anything to the defendant regarding the incident or the allegations to make him believe that this was a domestic violence arrest or make him think that he was arrested because of something to do with [Cynthia G.]."

The prosecutor then discussed Cynthia G.'s phone calls with defendant while he was in jail, arguing that "instead of being concerned for [Cynthia G.'s] well-being, the defendant was only concerned with how the police knew what had happened." The prosecutor argued that after this phone call, Cynthia G. changed her account of events in this case, and "collude[d]" with defendant

about what she would say in court, which included Cynthia G. claiming the incident was an accident.

In his closing statement, defense counsel stated, "Let's talk about this accident, and it was an accident." He argued, "And I submit to you, since I'm on this subject right now, that [defendant] had no way of knowing that he had run over her. And think about this. A tire ran over her, and the only thing she had was a fractured rib. I would think that the reason that she was not hurt more is because she was probably in a pothole when the car ran over her. That doesn't mean he's going to know he ran over her. [¶] She said the minute she went down under the tire, she popped up. There is no disputing that. The witnesses only saw her when she was sitting up in the alley. She said I took a couple of steps. I sat down because I wasn't feeling well. . . . But I submit that if [defendant] looked in the rear view mirror—and there is no reason for him to look in the rear view mirror—he would have seen her standing up.

Later in his closing statement, defense counsel said, "Okay. Let me just get to this EPO thing because I started to mention that a couple of times." Defense counsel apparently misunderstood the prosecutor's argument about the EPO. Counsel argued, "Officer Olmos said I arrested him. Didn't tell him why I arrested him. Sergeant Maddox[4] said I didn't really talk about the charges. Then they said, well, when this phone call was made a couple hours later, they knew about it. [Defendant] knew about it without being told. Well, except Sergeant Maddox said at 4:00 or 5 o'clock when he talked to [defendant] three hours before this phone call, I gave him the EPO. . . . It was signed by a judge. It protected Miss [Cynthia

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[4] Defense counsel appears to have misstated Sergeant Mendoza's name.

G.] supposedly having any contact—or [defendant] having any contact with her. Of course, he knew why he was arrested because it said that. And it was given to him by Sergeant Mendoza, and Sergeant Mendoza said I read it to him. I asked him about it. You read it to him? You didn't just give it to him? No. I'm required to read it to him. That's what an EPO is. This is no big secret. This is not rocket science. Sergeant Mendoza supplied the document that gave [defendant] the information."

In his rebuttal closing argument, the prosecutor responded somewhat obliquely to defense counsel's argument about the EPO and the jailhouse calls. The prosecutor stated, "Now, how did [defendant] know that he was arrested for something regarding Miss [Cynthia G.]? Both Officer Olmos and Detective Mendoza did not tell him why he was arrested. Now, [defense] counsel wants you to believe that the defendant made the statements he made regarding . . . [Cynthia G.] because of the [EPO], but Detective Mendoza does not give him that [EPO] until after he's already made his statements. So the statements that he knew that this had something to do with . . . [Cynthia G.] shows that he knew that he had [run] her over the day before."

DISCUSSION

Defendant contends the detective's act of moving him from a jail cell to an interview room and then reading the EPO were reasonably likely to elicit an incriminating response and thus were the functional equivalent of interrogation. He further contends that even if Detective Mendoza's reading of the EPO was not the functional equivalent of interrogation, the detective's explicit questioning of defendant about his gang ties was unmistakably interrogation. Defendant contends those statements were obtained

in violation of his Fifth Amendment right against self-incrimination as set forth in *Miranda*, and the trial court erred in admitting them.

We conclude that defendant's first statement was not the product of a custodial interrogation and was properly admitted. His second statement was the product of a custodial interrogation and its admission was prejudicial.

I. Reading or Describing the EPO to Defendant was Not a Custodial Interrogation, but Admission of Defendant's In-Custody Statement After Being Asked About His Gang Ties Violated His *Miranda* Rights

A. *Evidence Code Section 402 Hearing Ruling*

At the conclusion of the section 402 hearing, the trial court explained its reasons for admitting both of defendant's statements. The trial court found: "1. The defendant is in custody, period. 2. This is an issue of credibility at the end of the day." "[H]aving heard the testimony of the detective, having observed him, the court comes to the conclusion as to the issue of credibility, the court does believe the officer that . . . he did ask [defendant] questions about gang ties after the first spontaneous statement by the defendant; . . . that he did not question the defendant regarding this case or any other crime for which he may have beaten a rap of [sections] 664/187."

The court concluded that it "believes that the officer did not question him regarding what occurred the day before. Therefore, the court finds . . . that even though the defendant was in custody, this was not a custodial interrogation vis-a-vis the charges in this case." The court excluded defendant's reference to beating "a rap for [sections] 664/187."

B. *Applicable Law*

"In reviewing the trial court's ruling on a claimed *Miranda* violation, ' "we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from [those facts] whether the challenged statement was illegally obtained." ' " (*People v. Elizalde* (2015) 61 Cal.4th 523, 530 (*Elizalde*.)

"A defendant who is in custody, as here, must be given *Miranda* warnings before police officers may interrogate him. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 297 . . . (*Innis*).) In *Innis,* the high court defined the term 'interrogation,' stating that 'the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were

reasonably likely to elicit an incriminating response.' (*Innis,* 446 U.S. at pp. 300-302, fns. omitted.)" (*People v. Haley* (2004) 34 Cal.4th 283, 300.)

"The prosecution has the burden of proving that a custodial interrogation did not take place." (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 953.)

C. *Analysis*

Defendant's two statements to Detective Mendoza were made under quite different circumstances, and so we analyze each statement separately.

1. *First statement after the officer read the EPO to defendant*

Detective Mendoza testified that after he read the EPO to defendant, defendant stated that "his girlfriend was going to bail him out. That I was a fucking asshole, and that he would be home and gone before I got done with my paperwork"

Although the EPO was not before the trial court at the time of the 402 hearing, it was marked as defense exhibit B at trial and is part of the record on appeal. The EPO states Cynthia G. provided the information in sections 1 through 5. Section 3 of the EPO form contains the following preprinted language: "The events that cause the protected person to fear immediate and present danger of domestic violence, child abuse, child abduction, elder or dependent adult abuse (other than solely financial abuse), or stalking are[:]" This was followed by hand-written language: "Victim and defendant have been in dating relationship for [six] years and have [two] children in common. On May 22, 2014, defendant was driver of vehicle that struck victim causing great bodily injury."

As a general rule, "[a] brief statement informing an in-custody defendant about the evidence that is against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response." (*People v. Haley*, *supra*, 34 Cal.4th 283, 302 [statement by detective to defendant " 'that he knew he did it because his fingerprint was found at the scene' " was not a question and "did not call for an incriminating response"].) Further, "[f]ar more is required to constitute 'the functional equivalent of questioning' than merely advising a person he is under arrest for a specific offense." (*People v. Celestine* (1992) 9 Cal.App.4th 1370, 1374.)

The handwritten statement in the EPO is similar to advising a defendant of the charges against him. The trial court found Detective Mendoza did not ask defendant any questions about the charges in this case, and we defer to that finding, which is supported by substantial evidence in the form of Detective Mendoza's testimony. Simply reading defendant the EPO was not reasonably likely to elicit an incriminating response and so did not constitute interrogation.[5]

Defendant relies on *People v. Davis* (2005) 36 Cal.4th 510 (*Davis*); *People v. Sims* (1993) 5 Cal.4th 405 (*Sims*); and *People v. Boyer* (1989) 48 Cal.3d 247 (*Boyer*)[6] to support his claim that reading the EPO was reasonably likely to elicit an incriminating response.[7] These cases are inapposite.

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[5] We express no opinion on whether, upon retrial, the first statement would be inadmissible on other grounds.

[6] Disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal.4th 824.

[7] Defendant also cites several federal cases and two Court of Appeal decisions. He summarizes the factual situation in

In *Davis*, the officer asked defendant if he remembered a piece of evidence, then made a statement implying defendant's fingerprint was found on the evidence. (*Davis, supra*, 36 Cal.4th at p. 555.) Here, Detective Mendoza did not question defendant before reading the EPO statement. In *Sims*, the officer made a statement "describing the motel-room crime scene, and asserting that defendant had occupied that motel room and that the victim had delivered a pizza to the room before his death." (*Sims, supra,* 5 Cal.4th at p. 442.) In *Boyer*, the officer gave a "monologue on the status of the investigation" in which he told the defendant a new witness disputed defendant's account of events and "advised, in effect, that defendant was still under suspicion and that investigation of his involvement would continue." (*Boyer, supra,* 48 Cal.3d at p. 274.) The officers' statements in these cases are far more extensive and accusatory than Detective Mendoza's mere reading of the EPO to ensure defendant understood that document.

Defendant also contends Detective Mendoza's conduct in taking him out of his jail cell and moving him to an interview room to read the EPO "placed [defendant] in an environment in which he could reasonably believe he was to be interrogated." Defendant was already in custody; there were limited places for an officer to speak with an inmate for any purpose. A jail cell has the potential for a "coercive atmosphere of custodial interrogation" when an officer enters to speak to an inmate. (*Davis, supra*, 36 Cal.4th at p. 555.) An interview room offers more privacy than a jail cell and has uses apart from interrogating persons already in custody. Something more than the mere use of an interview room is required to make

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less than a dozen words for each case, and does not explain why those apparently different fact patterns are pertinent to the facts in this case. Accordingly, we do not consider those cases further.

the reading of an EPO reasonably likely to produce an incriminating response.

2. *Second statement after Detective Mendoza inquired into defendant's gang ties*

As noted earlier, Detective Mendoza testified at the 402 hearing that after he read the EPO to defendant and defendant made his statement about bail, Detective Mendoza had a "conversation" with defendant about his gang ties. Defendant stated, " 'I beat a 664/187 charge. This isn't shit. My girl won't say anything. She loves me.' "

The trial court recognized Detective Mendoza questioned defendant about his gang ties, but found defendant's second statement was admissible because "this was not a custodial interrogation vis-a-vis the charges in this case." The trial court took too narrow a view of the questioning. Gang affiliation questions "must be measured under the general *Innis* test, which defines as 'interrogation' questions the police should know are 'reasonably likely to elicit an incriminating response.' " (*People v. Elizalde*, *supra*, 61 Cal.4th at p. 538.)

In light of California's "comprehensive scheme of penal statutes aimed at eradicating criminal activity by street gangs," even routine questions about gang affiliation may be reasonably likely to produce an incriminating response. (*Elizalde, supra*, 61 Cal.4th at p. 538.) Even when there are no gang-related enhancements or charges in a case, "an admission of gang membership always carries with it the incriminatory prospect of future enhanced punishment." (*People v. Roberts* (2017) 13 Cal.App.5th 565, 576.)

Questions about defendant's gang ties had the potential to reveal a gang related motive in this case. Defendant had

previously admitted to engaging in criminal conduct for the benefit of a gang and was on probation for violating a gang injunction when he committed the crimes in this case. Guzman placed a second man in the car with defendant, while Cynthia G. placed a friend of defendant in a car behind the Charger. Even a "personal" crime can be gang-related under some circumstances. (See *People v. Albillar* (2010) 51 Cal.4th 47, 50-51 [defendants' forcible rape of a woman they met at a party was gang-related where defendants committed crimes with other gang members].)

The record also suggests defendant's second statement could have been prompted by the questions about his gang ties. Although it was ultimately excluded by the trial court, the first sentence of that statement was: "I beat a 664/187." While there is no indication Cynthia G. was the alleged victim of that attempted murder offense, as the Supreme Court noted in *Elizalde*, murder is "a crime frequently committed for the benefit of criminal street gangs." (*Elizalde*, *supra*, 61 Cal.4th at p. 540.) We conclude the prosecution did not meet its burden to prove defendant's statement was not the product of a custodial interrogation.

During closing argument, the prosecutor treated both of defendant's statements as demonstrating his knowledge that Cynthia G. was the victim of a crime committed by defendant. The prosecutor referred to "the statements [defendant] made regarding . . . [Cynthia G.]" and "the statements that [defendant] knew that this had something to do with . . . [Cynthia G.]." In the first statement, defendant simply said that Cynthia G. would bail him out. That statement did not reveal any knowledge that Cynthia G. was alleged to have been the victim of a crime committed by defendant. It simply indicated that defendant believed Cynthia G. would help him get out of custody.

In contrast, the second statement was potentially inculpatory. In that second statement, defendant asserted, "My girl won't say anything." This remark reflected defendant's conviction that Cynthia G. would not say anything helpful to the detective or harmful to defendant. In context, this statement could reasonably have been understood to prove defendant's underlying knowledge that Cynthia G. was the victim of a crime and that her testimony would be probative of the charges against defendant. It was this sentence that permitted the prosecutor to argue that "the statements that he knew that this had something to do with . . . [Cynthia G.] shows that he knew that he had [run] her over the day before."

We need not decide whether the erroneous admission of defendant's second in-custody statement was prejudicial by itself. As set forth below, the trial court also erred in excluding the EPO. In light of the symbiotic relevance of defendant's in-custody statement and the EPO, the cumulative effect of these two errors was prejudicial. We consider the trial court's exclusion of the EPO in section II below and the cumulative prejudicial effect of the trial court's errors in section III below.

II. Exclusion of the Contents of the EPO Was Error Because it Was Relevant Given the Closing Arguments and Was Being Proffered for a Nonhearsay Purpose

At the pretrial section 402 hearing, the prosecutor stated his intent to use defendant's statements to Detective Mendoza to impeach Cynthia G.'s credibility. As the trial progressed, however, the prosecutor's intended use of the statements appeared to expand. The prosecutor offered evidence that law enforcement officers had not informed defendant of the factual allegations of his arrest before Detective Mendoza read the EPO to defendant. In closing, the prosecutor argued, "Both Officer Olmos and Detective Mendoza did

not tell [defendant] why he was arrested. . . . Detective Mendoza does not give him that [EPO] until after he's already made his statements. So the statements that he knew that this had something to do with . . . [Cynthia G.] shows that he knew that he had [run] her over the day before."

The EPO states in pertinent part, "On May 22, 2014, defendant was driver of vehicle that struck victim causing great bodily injury." Defendant sought to introduce the EPO on three different occasions during trial: (1) during cross-examination of Detective Mendoza about the EPO; (2) at the close of the defense case; and (3) after the prosecutor's initial closing statement. Defendant explained he wanted to show the EPO contained the reasons for his arrest and was the source of any knowledge he had of those reasons.

Each time defense counsel raised the issue, the trial court ruled the statements in the EPO were hearsay. Defendant contends the trial court erred in finding the EPO contained hearsay and excluding the EPO from evidence. We agree the trial court erred in concluding the EPO was hearsay and therefore inadmissible.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Here, defendant clearly did not intend to offer the above-referenced statement in the EPO to prove the truth of the matter stated, specifically to prove that defendant struck Cynthia G. with a car. Defendant sought to offer the statement to give context to the statements he made to Detective Mendoza. Thus, it was not being proffered for a hearsay purpose. (*People v. Montes* (2014) 58 Cal.4th 809, 863 [out-of-court statement is admissible for

nonhearsay purpose of showing it imparted certain information to the hearer, and that the hearer, believing such information to be true, acted in conformity with such belief].)

III. Given the Prosecution's Reliance on Defendant's Inadmissible In-Custody Statement to Demonstrate Defendant's Knowledge, Exclusion of the EPO Prejudicially Disabled Defendant From Rebutting that Evidence.

Defendant's second statement to Detective Mendoza was obtained in violation of the Fifth Amendment and so is reviewed for prejudice under the *Chapman* standard.[8] (*Arizona v. Fulimante* (1991) 499 U.S. 279, 309-312; *People v. Sims, supra*, 5 Cal.4th at p. 447.) Under *Chapman*, a conviction must be reversed unless the People show beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 326.) The error must be "unimportant in relation to everything else the jury considered on the issue." (*Yates v. Evatt* (1991) 500 U.S. 391, 403; *People v. Johnson* (1993) 6 Cal.4th 1, 33.)

The crux of defendant's defense was that running over Cynthia G. was an accident. Defense counsel maintained that defendant was not aware that Cynthia G. was caught in his car door or that he had dragged her under the car and run over her. Defendant did not testify at trial; the prosecutor sought to prove defendant's knowledge of Cynthia G.'s entanglement with the car and the related issues of his awareness and willfulness through circumstantial evidence.

There were only three witnesses who could offer details of the car incident that bore on defendant's knowledge that he was likely to and then did injure Cynthia G. Two of these witnesses, Guzman

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[8] *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*).

and Juarez, were neutral witnesses, but they did not see the actual contact between defendant's car and Cynthia G. Juarez heard the incident and Guzman saw the immediate aftermath.

The only witness who observed the entire incident was Cynthia G. herself, and she was a reluctant witness. She gave both exculpatory and inculpatory accounts of facts relevant to defendant's awareness that he was likely to and had injured her. For example, before trial Cynthia G. stated defendant's car window was rolled down and his radio was turned off, which would have made her screams audible. At trial, she testified defendant's window was rolled up, his sound system was playing and she did not scream.

Given this paucity of consistent evidence of the details of the contact between defendant's car and Cynthia G., the prosecutor relied heavily on defendant's statements made in response to the EPO as circumstantial evidence of defendant's awareness that he was likely to and had injured Cynthia G. For example, in his rebuttal closing statement, which was the last thing the jury heard, the prosecutor argued, "Both Officer Olmos and Detective Mendoza did not tell [defendant] why he was arrested. . . . Detective Mendoza does not give [defendant] that [EPO] until after he's already made his statements. So the statements that he knew that this had something to do with . . . [Cynthia G.] shows that he knew that he had [run] her over the day before."

Defendant wanted to rebut the prosecutor's argument by demonstrating that defendant's awareness of Cynthia G.'s being a victim of a crime came from the contents of the EPO, which Detective Mendoza read to him. Although the EPO did not state the reason for defendant's arrest or even refer to defendant's arrest, it did state that the event that caused Cynthia G. to be in fear was

that "[o]n May 22, 2014[,] defendant was driver of vehicle that struck victim causing great bodily injury." The document recited that it had been completed by Officer Olmos. At a minimum, the statement told defendant that Cynthia G. had been struck by a car the day before defendant was arrested, and law enforcement officials believed he was the car's driver. Further, the EPO referred to him as "defendant" which defendant could easily have interpreted as an indication that he had been charged for the incident described in the EPO.

Because the trial court excluded the EPO's contents, defendant was disabled from arguing that the knowledge he had been arrested for a crime against Cynthia G. came from the date of the incident in the EPO and the use of the word "defendant" therein, and not from any guilty conscience or the like. Thus, he was unable to rebut one of the prosecutor's key arguments.

In sum, the only contested issue at trial was whether defendant knew his actions in driving away from Cynthia G. were likely to injure her and then did injure her. The prosecutor relied heavily on defendant's knowledge of the reason for his arrest to show defendant's awareness of the consequences of his driving, to wit, seriously injuring Cynthia G. when he ran over her. Key evidence of defendant's awareness came from his statement to Detective Mendoza. Given the prosecutor's closing arguments and the trial court's erroneous exclusion of the EPO, we cannot conclude that the admission of defendant's second in-custody statement was "unimportant in relation to everything else the jury considered on the issue." (See *Yates v. Evatt*, *supra*, 500 U.S. at p. 403; *People v. Johnson, supra,* 6 Cal.4th at p. 33.) Thus, we cannot conclude that respondent has proven beyond a reasonable doubt that the trial court's errors did not contribute to the verdict. (See

Yates v. Evatt, *supra*, 500 U.S. at p. 403; *People v. Johnson, supra,* 6 Cal.4th at p. 33.)

DISPOSITION

The judgment is reversed and this matter is remanded for further proceedings.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur.

ROTHSCHILD, P. J.

JOHNSON, J.

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