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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>YANILL AGUILAR,<br><br>Defendant and Appellant. | B267955<br><br>(Los Angeles County Super. Ct. No. BA394340) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Judgment of conviction affirmed; remanded for further proceedings.

Rodger P. Curnow, 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 Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Yanill Aguilar guilty of first degree murder, with firearm and gang enhancements. He challenges his conviction, arguing: (1) the trial court erred by denying his motion to suppress his confession, which he contends was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) his confession should have been excluded because it was involuntary; (3) the trial court erred by excluding expert testimony on the subject of false confessions; (4) evidence of two cellular telephone text message conversations should have been excluded; (5) the prosecutor committed misconduct during argument; and (6) the cumulative effect of the purported errors requires reversal. In supplemental briefing, the parties agree that remand is necessary to permit a hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*), and to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to recently amended Penal Code section 12022.53, subdivision (h).[1] We affirm appellant's conviction, but remand the matter for a *Franklin* hearing and to allow the trial court to determine whether to strike or dismiss the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

a. *People's evidence*

(i) *The shooting*

Aguilar and Alejandro Salto were both members of the Rockwood criminal street gang. Aguilar went by the moniker "Drowzy" and Salto was known as "Menace." Aguilar wore

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

glasses and was approximately 5 feet 5 inches tall. Salto was taller and larger than Aguilar.

On January 24, 2012, at approximately 3:00 p.m., the victim, Douglas Centeno, was walking in the area of Beverly Boulevard and Council Street, en route to see his mother. Aguilar and Salto were walking nearby. Salto rapidly approached Centeno and began arguing with him. Meanwhile, Aguilar hid behind a parked car. Salto began punching Centeno. Centeno punched back, but Salto got the upper hand in the fight. Aguilar emerged from behind the car, approached Centeno from behind, and fired a single shot at the left side of Centeno's shoulder. Centeno fell to the ground. Aguilar and Salto fled, running down a nearby alley.

Two people, Oscar Reyes and Michael Yoo, witnessed the shooting and attempted to aid Centeno, who appeared to be mortally wounded. Yoo called 911. A third witness, Francisco Gonzalez, saw the assailants run away.

(ii) *The investigation*

Centeno died of a single gunshot to the upper left chest. The bullet that killed him was likely fired from a nine-millimeter, semiautomatic Smith and Wesson gun.

A. *Identification evidence*

Reyes, Gonzalez, and Yoo all described the assailants as Hispanic. Reyes and Yoo said the shooter was thin and short and his companion (referred to at trial as "the puncher") was taller, heavier, and bald.[2] According to Reyes, the shooter had a round face and wore glasses.

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[2] Gonzalez thought both men were approximately the same height.

On February 21, 2012, Reyes identified a photo of Aguilar in a 12-photo array as looking "a little bit" like the shooter; he was, however, unsure of the identification. On the same date, Yoo identified a photograph of Aguilar in a photo array as looking "most similar" to the puncher, but he was likewise unsure about the identification. On February 23, 2012, Reyes identified a photo of Salto as "look[ing] like" the puncher. Yoo did not identify Salto in a photographic array. Reyes and Yoo did not identify Aguilar as one of the assailants in court. Gonzalez did not get a good look at the assailants' faces.

B. *Aguilar's statements to officers*

After the shooting, detectives and patrol officers canvassed the neighborhood in an effort to find witnesses to, and information about, the shooting. Based on the information obtained, on the morning of February 2, 2012, police searched the homes of six Rockwood gang members, including Aguilar's and Salto's.

*February 2, 2012 statements*

Officer Shane Bua and one of the investigating officers, Detective Timo Illig, spoke with Aguilar at his apartment at approximately 6:00 a.m. on February 2, 2012. When Bua arrived, Aguilar stated, " 'I know why you're here,' " and " 'I know this is about the shooting.' " Aguilar said "Crimes" was involved in the shooting. He agreed to go to the police station to speak with detectives.

Aguilar arrived at the police station of his own volition later that morning, and Detective Illig, Detective Keyzer, and Officer Bua conducted a videotaped interview with him lasting approximately three and a half hours. Aguilar confirmed he had been a Rockwood gang member for four years. He claimed that a

high school girl named Stephanie, later identified as Stephanie Bonilla, told him about the shooting. Stephanie said the victim — who was "an enemy" and was tall, had a shaved head, and was " 'banged out' "[3] — had been walking down Beverly from the metro station; "Little Listo" punched the victim; and Francisco, known as "Timer," "popped out," came up from the side, surprising the victim, and shot him. The assailants then ran to an alley and were picked up by a car. Timer was not a Rockwood gang member and Little Listo was from a different Rockwood clique. Aguilar gave inconsistent descriptions of Little Listo and neither matched the only Little Listo known to Detective Illig. Illig was unaware of any gang member with the moniker "Timer." Eventually Aguilar changed his story and said Stephanie told him Crimes, rather than Timer, was one of the assailants.

Aguilar provided several inconsistent alibis and admitted he had asked his mother to lie and say he had been in La Puente when the shooting occurred. Eventually he admitted he had been in the neighborhood, but at a different location. He denied any involvement in the crime.

Detective Illig spoke with Bonilla. She "had no idea about any of the details" that Aguilar had provided and, in fact, had thought the crime involved "body parts that were chopped up."

*February 3, 2012 statements*

The next day, February 3, 2012, Detective Illig phoned Aguilar and arranged for another interview. He picked Aguilar up at Aguilar's apartment and drove him to the police station. In the interview on the preceding day, Aguilar had explained that

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[3] "Banged out" is slang for wearing clothing, or adopting a demeanor, indicative of gang membership.

cuts on his hand were the result of his punching a stucco wall near his house in frustration after a discussion with his mother. As a ruse geared to test Aguilar's alibis, the detectives stopped at the wall and Illig made it appear he intended to take DNA samples from the wall. Illig also drove Aguilar past the crime scene, and Aguilar spontaneously pointed out the spot where the victim had fallen. The conversations during the drive were not recorded.

Illig then transported Aguilar to the police station.[4] Illig collected a DNA swab from Aguilar's mouth in an attempt to "call his bluff" about his alibi. Aguilar stated his source of information about the shooting was not Bonilla after all. Instead, he had learned the details of the shooting from his mother, who heard about it from a "guy" at a carwash. Aguilar gave yet another inconsistent account of his whereabouts during the crime, and continued to deny being present at the crime scene. Using a ruse, Detective Illig presented Aguilar with a mock six-pack photographic lineup, in which a witness purportedly identified him as being at the crime scene. Aguilar continued to deny being present at the scene.

*February 22, 2012 custodial statements*

In a six-hour custodial interview, and after being given *Miranda* advisements, Aguilar confessed to shooting Centeno. We discuss the interrogation in detail where relevant, *post*.

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[4] Portions of the interview were conducted at the police station, and another portion was conducted on the station's patio. The former were videotaped; the latter, audiotaped.

C. *Text messages*

Aguilar made statements admitting he was the shooter in three text message conversations, while using his mother's cellular telephone. One conversation was between him and Bonilla. The other two were between him and unidentified persons.[5]

The conversation with Bonilla transpired on the afternoon of January 25, 2012. Aguilar asked if Bonilla had heard anything in school, and she replied she had heard the police were in the Westmoreland area because someone's arms and legs had been cut off. Aguilar replied that nothing like that happened, but some fool got smoked. Bonilla replied, "Damn who shot him." Aguilar told her not to "trip," and then said, "It was da one txtin u [*sic*]." Bonilla replied, "Yhew [*sic*] . . . ?" Aguilar said, "U never heard nada tho [*sic*]" and stated that he trusted her.

Approximately an hour earlier, Aguilar and an unidentified person discussed the police canvassing of the neighborhood. Aguilar asked whether police had "knokd [*sic*] in every pad or wh[a]t" and opined, "so no evidence at all clean." Aguilar asked if the message recipient "kn[e]w who got him." The recipient stated he or she had an idea. Aguilar replied, "yea alrwite [*sic*] is da foo[l] txtin you lol [*sic*]"[6]

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[5] Because on appeal we view the evidence in the light most favorable to the prosecution (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1013; *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303–1304), we infer the messages from the mother's phone were sent to and from Aguilar.

[6] "Lol" means "laugh out loud."

In a text conversation between Aguilar and a third phone number late that night, Aguilar asked if the text recipient had seen the news about a shooting near Council, Virgil, and Westmoreland. Aguilar referenced "something serious involvin [*sic*] me." The text recipient asked what he had done. He responded, "Yea by westmoreland it happn mija [*sic*] . . . sum enemiga[7] got smokd n i [*sic*] had to leave. . . ." The text recipient asked, "Who Did[] Thaa Move? [*sic*]" and whether the victim was a "Faketeen."[8] The recipient stated he or she could not believe it, asked why Aguilar would "Fuhkk Up[] Like Thaat? [*sic*]" and said he should have thought twice. Aguilar responded, "Its true mija [*sic*] I wood int [*sic*] lie to u." Aguilar stated there were "[t]wo other homies" involved. He asked if the recipient was mad at him. The recipient expressed surprise because he or she never thought Aguilar was like that. Aguilar asked whether the recipient had thought he was "lame or wh[a]t."

(iii) *Gang evidence*

Officer Bua testified as the People's gang expert. After detailing his experience and qualifications, he described the Rockwood gang's primary activities; hierarchy; territory; use of monikers; lingo; various subgroups, or "cliques," and the alliances and association between them; the gang's colors, attire, symbols, and graffiti; predicate offenses; the process for joining the gang; the necessity for gang members to commit crimes for the gang;

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7 "Enemiga" is slang for "enemy."

8 "Faketeen" is a derogatory epithet for a member of the 18th Street gang.

and the paramount importance of "respect" in gang culture.[9] The Rockwood gang's major rivals were the Temple Street and the 18th Street gangs. The area where the shooting occurred was claimed as the territory of the Rockwood gang and its Westmoreland clique. When a rival gang member enters another gang's territory, even for an innocent purpose, he risks a gang confrontation.

Based on his personal contacts with Aguilar and Salto, Bua opined that both were active Rockwood gang members in the Westmoreland clique on the date of the shooting. Among other things, Aguilar had admitted his gang membership to Bua in 2010 and both Aguilar and Salto had Rockwood-related tattoos. After the shooting Aguilar got an additional gang related tattoo or tattoos which, in Bua's opinion, were equivalent to a trophy. The alleyway where the assailants fled after the shooting was tagged with Rockwood gang graffiti, including the names "Drowzy" and "Menace." The victim, Centeno, was not a documented gang member.

When given a hypothetical based on the evidence in the case, Bua opined that such a shooting would be committed for the benefit of, at the direction of, and in association with, the gang. The crime would benefit the gang by creating fear in the community and making it less likely gang crimes would be reported to police, and would put rivals on notice that the gang was armed and unafraid to use weapons.

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[9] Because Aguilar does not challenge the sufficiency of the evidence to prove the gang enhancement, or Bua's qualifications to serve as an expert, we do not further detail this evidence here.

(iv) *Evidence of a prior shooting*

On the evening of April 13, 2011, Aguilar fired shots at a car being driven by Pedro Moreno, who was looking for a church in the area. Shots hit the car, but did not hit Moreno or his passenger. Moreno was not in a gang and had never seen Aguilar before. After learning Aguilar might be responsible, police officers went to his apartment, where they found ammunition on a balcony. After receiving *Miranda* advisements, Aguilar gave a written statement in which he admitted shooting at Moreno's car after being told by female friends that men in the car had threatened to kill them. Aguilar was arrested. In a recorded interview the next day, Aguilar told a detective that he shot at a car containing Temple Street gang members after they fired at him. In another recorded interview the following day, Aguilar said the Rockwood gang intended to go after the 18th Street gang, but not the Temple Street gang.

b. *Defense evidence*

Dr. Ricardo Winkel, a clinical and forensic psychologist, tested and evaluated Aguilar in the spring of 2015. Based on the test results, Dr. Winkel opined that Aguilar had a low intelligence quotient, in the mild mentally retarded range, indicative of brain damage or dysfunction. Dr. Winkel opined that Aguilar would find it difficult to follow a conversation of normal speed and complexity. Personality testing revealed that Aguilar was meek, nonassertive, and submissive. He fell within the highest 25th percentile of suggestible persons. He also had high scores for anxiety and depression. Dr. Winkel believed Aguilar had a learning disability. Dr. Winkel summed up: "Looking at the entirety of the scores of the test results that I obtained, it is my opinion that Mr. Aguilar is a person of very low

intellectual capacity, very meek, very non-dominant, very non-assertive, and very highly susceptible to external feedback," that is, expressions of approval or disapproval. He was easy to manipulate and very suggestible.

In Dr. Winkel's opinion, Aguilar was not malingering, based on testing designed to reveal feigning cognitive difficulties. Dr. Winkel acknowledged that Aguilar had been evaluated in 2013 by a different psychologist, who concluded Aguilar was possibly overreporting and exaggerating. The first psychologist concluded Aguilar's I.Q. was at the borderline range, slightly higher than Dr. Winkel's conclusion.

2. *Procedure*

Trial was by jury.[10] Aguilar was convicted of first degree murder (§ 187, subd. (a)). The jury found Aguilar personally and intentionally used and discharged a firearm, causing Centeno's death (§ 12022.53, subds. (b), (c), (d)) and committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)). The trial court sentenced Aguilar to 25 years to life on the murder charge, plus 25 years to life on the section 12022.53, subdivision (d) enhancement, for a total of 50 years to life in prison. It imposed a restitution fine, a suspended parole revocation restitution fine, a court security fee, and a criminal conviction assessment. Aguilar appeals.

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[10] Salto's case was resolved prior to trial, and he is not a party to this appeal.

## DISCUSSION

1. *Denial of Aguilar's motion to suppress his February 22, 2012 confession*

As noted, Aguilar spoke with detectives about the Centeno murder four times: at his apartment on the morning of February 2, 2012; in a noncustodial interview at the police station later that day; in another noncustodial interview at the police station the next day, February 3, 2012; and in a custodial interrogation at the police station on February 22, 2012, that lasted approximately six hours.

Prior to trial, Aguilar moved to suppress all statements made during the February 22 interrogation, averring that they were obtained in violation of *Miranda*, and were involuntary.[11] Aguilar argued that he did not expressly waive his *Miranda* rights; the detectives ignored invocations of his right to counsel; he impliedly invoked his right to silence; and a readvisement of his rights was ineffective. At the hearing on the motion, Dr. Winkel testified consistently with his trial testimony, described above.

After reviewing both the transcript and the videotape of the entire interrogation and considering Dr. Winkel's testimony, the trial court denied the suppression motion. It concluded that there was no *Miranda* violation and, based on the totality of the circumstances, Aguilar's statements were knowingly and voluntarily given. The court explained: "I discounted Dr. Winkel's testimony substantially. The testimony was

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[11] Aguilar does not challenge admission of evidence of the other interviews.

inconsistent with what I observed in [the videotaped interrogation] and what I read in [the transcript]. . . ."

a. *The February 22, 2012 interrogation*

To consider Aguilar's contentions, we describe the February 22, 2012 interrogation in some detail. After advising Aguilar of his *Miranda* rights and discussing Aguilar's job, school, family, and similar matters, Detective Illig asked what happened "over there at Beverly and Council." When Aguilar said he did not know, Illig contradicted him. Illig stated that the detectives had done "an extensive investigation" and "I have witnesses, I have video, I have photographs, I have DNA evidence. I got all kinds of stuff so you got to tell us how this went down." Aguilar replied that there could be no DNA evidence because he "was never even there." Aguilar repeated the account of the crime he had previously given. He expressed concern that he would be late for work, asked how long the conversation would take, and said "I think . . . I got to go now."

After a long silence, Illig adopted a confrontational tone, raising his voice, and admonishing Aguilar to stop lying. Illig stated that Aguilar knew "exactly how this murder went down," and needed to stop playing games. Aguilar repeatedly denied involvement, and asked, "How am I lying?" Illig said Aguilar was only partially telling the truth. He reiterated that this was Aguilar's opportunity to tell his side of the story, "[b]ecause a ton of bricks is about ready to fall on your head and you're the only one that can help lessen that blow." Aguilar continued to deny involvement, and Illig repeatedly stated he knew differently. Aguilar asked several times whether he was being arrested, and said he wanted to go to work. Illig showed Aguilar the photo identifications made by Yoo and Reyes. Aguilar continued to

deny involvement. Illig queried how Aguilar hoped to explain the identifications at trial, because a denial "isn't going to work." Aguilar replied, "Well then let it go to court."

Illig continued to confront Aguilar with the photo identification evidence and Aguilar steadfastly denied being present. Illig advised that Aguilar was the prime suspect, and he did not want to hear any more denials. Aguilar again asked if he was being arrested, and said, apparently in regard to the earlier, noncustodial interviews, "You said I could walk out whenever I want because . . . [¶] . . . [¶] I have the right to remain silent." Illig told Aguilar he had cell phone records, knew Bonilla had not provided Aguilar with the information about the murder, and knew Aguilar was lying.

After about ten minutes Illig changed his tone and opined that Aguilar was a good person who wanted to take care of his family; elicited that his mother had raised him to tell the truth; and encouraged him to "do the right thing." They continued to discuss the photo identifications and Aguilar continued to deny involvement. Illig emphasized that detectives had analyzed cell phone records and had interviewed "many, many" people. Aguilar asked whether his phone had been tracked to the murder site. Illig said yes, but immediately moved to discussion of the photo identifications. Illig said it was important to hear Aguilar's side of the story.

Aguilar responded by asking, "And when is court?" Illig replied it would be soon. Aguilar said, "Well then, . . . you guys say I got the right to remain silent? Well like if people are saying that it's me then obviously, I got to get a lawyer, so I can't answer that. [¶] . . . [¶] . . . Because . . . I'm going to keep telling you guys . . . I was never there because I wasn't. I . . . have no other story

[than] that, you know? I guess I just got to get a lawyer and see well why are people like you know?" Illig replied that the detectives had been "up front" and wished to give Aguilar the opportunity to tell his side of the story. He opined that considering the evidence, including the photo identification, the cell phone records, "the cameras," and the DNA, Aguilar's account would not be believed in court. Aguilar asked, "What DNA records are there?" Illig did not answer, but Detective Small encouraged Aguilar to think of his own interests. He said officers knew more than one person was involved, and the "weight could fall on you." He encouraged Aguilar it would be "smart" to "get out in front."

After exhorting Aguilar to be an honest man, Small asked, "Are you the guy that . . . shot him or are you the guy that just hit him?" Aguilar replied, "I'm the guy that was never [even] there." Small stated that "people" were "painting [Aguilar] into the box as being the worst one." Aguilar replied, "Well that's why like now then I, like yeah, I . . . guess I need to get a lawyer or something. Like you guys trying to like, you know like I don't want to be alone in this either." Small replied that he was "not trying to put anything on you. You have that absolute right. That is your absolute right and . . . you're only getting . . . one opportunity really to talk to us so it's completely up to you what you want to do." Aguilar replied, "Alright. I was never there. . . . I would have told you guys like if you said like that my picture is already there, you guys say it's more than two people then why not just like . . . come clean then?" Small replied that Aguilar had to be honest, someone who had not been present at the crime would not know the details Aguilar knew, and witnesses were "picking you man. So, but it's completely up to you what you

want to do. Alright? If you wish to sit here and . . . finish off with us what happened out there for real." Aguilar said, "I can't because I don't know" and stated, "Usually like you know guys get mad because I say I wasn't there." Small assured Aguilar he was not mad, reiterated that this was Aguilar's chance to "step up" and be truthful, which was the "honorable" and "manly" thing to do. Small pointed out that Aguilar's fellow gang members were not there looking out for him. Aguilar said "that's why . . . I will just come clean . . . . But I don't know . . . ." Small replied that he should. Aguilar said, "[I]f anything I'm not, it's like, it's like, it just . . . like tripping because like I didn't want, I guess like now I got to get a lawyer and I got to find a way to, you know[.]" Small replied, "It's completely up to you and that, it is your right. If that's what you want to do that's what's going to happen. If you would like to . . . take the opportunity now that's up to you too. I put it in your hands. What do you want to do?" Aguilar replied that he was "never there."

Illig chimed in that Crimes was gone, and Aguilar would be left "holding the bag." Small stated they knew "there were two guys there," and pointed out that the crime happened in broad daylight, they had talked to lots of witnesses, and had "video, all kinds of stuff." Small again pointed to the fact Aguilar had been identified as one of the two perpetrators. Aguilar responded that he "wasn't there." The following transpired:

"[Small]: And that's what you're going to stay with?

[Aguilar]: Yeah and then I can I get a lawyer still and talk to my brother.

[Small]: OK. Do you . . . are you asking for a lawyer or are you just thinking that you need one?

[Aguilar]: Well . . . I think like I'm going to talk to my brother . . . because like why are people saying it's me, like I don't know.

[Small]: Well you can talk to your brother all you want . . . when we're done here you can talk to your brother all you want.

[Aguilar]: But I mean I'm, I need to talk to a lawyer or something.

[Small]: Is that what you're asking right now? Are you asking to talk to a lawyer are you gonna, do you want to finish this conversation with us? It's up to you.

[Aguilar]: I need to find a lawyer.

[Illig]: OK. Well if you want to find one that's different than wanting to talk to a lawyer. I mean do you want to tell us your side of the story? I mean do you want to tell us what happened?

[Aguilar]: I was never there. Like that's just what I'm gonna keep saying. I wasn't there."

The detectives then addressed Aguilar's concern that he would be late for work and offered to call Aguilar's boss with an innocuous excuse for him. After another exchange in which Small referenced the evidence and Aguilar denied involvement, the following transpired:

"[Aguilar]: I mean like I guess I'm going to have to like get a lawyer and like try to help me out.

[Small]: OK. Do you want a lawyer?

[Aguilar]: Yeah.

[Small]: Is that what you want?

[Aguilar]: Yeah.

[Small]: You want a lawyer?

[Aguilar]: Yeah.

[Small]: OK. You'll get a lawyer."

Detective Illig then ordered Aguilar to stand up and handcuffed him. Aguilar protested, rather frantically, that he "wasn't there," and began to cry. He asked Illig, "Can I talk to you?" and asked to talk to his mother. He repeatedly asked what would happen if he continued to talk to the detectives, and protested that he was not involved in the crime. The detectives explained he was being arrested for murder; he had invoked his right to an attorney and they would not violate that right; and if he wanted to continue to talk to them he had to decide if he wanted a lawyer or not. They advised they would leave him alone so he could decide what to do. As the detectives were leaving, Aguilar said, "Please, please, Small, Small. Can I talk to you alone?" Small replied that he would be back in a few minutes.

After a break, Aguilar called loudly from the interview room, "Small! Small! Small! Small! Detective Small, please can we talk. Detective Small! Detective Small! Small!" Detective Small returned. Aguilar asked where his mom was; Small stated Detective Illig was speaking with her. Small stated, "If you want to tell me what happened out there I can't ask you any questions until you tell me that you want to talk to me . . . without your attorney. If you want to have your attorney that is your perfect right. I will honor that. That's not a problem." Aguilar said something unintelligible. Small said, "But then I . . . don't get to have the opportunity to . . . get your side of it. So that's the deal. What would you like to do Yanill?" Aguilar asked, "Either way I'm going to still go to jail?" Small responded, "What do you want to do?" After Aguilar queried whether he would go to jail "even if I say the truth," Small replied that he very much wanted to learn

the truth, but could not ask any further questions without clarifying if Aguilar wished to talk without his attorney. When Aguilar said he wanted to talk "man to man," Small readvised Aguilar of his *Miranda* rights and Aguilar confirmed he understood them. Aguilar kept asking about the possibility of him not going to jail; Small replied that he would go to jail whether or not he talked to the detectives without an attorney. After several more attempts by Aguilar to engage in conversation without committing one way or the other, during which Small confirmed Aguilar was under no obligation to talk to him, Aguilar said, "I'll talk to you without an attorney."

During the ensuing conversation, Small pointed out that the crime was serious; that Aguilar had been identified as the shooter; and Aguilar should not let the "other guy get away [scot] free." He queried whether the shooting had been an accident, a mistake, or a "personal thing"; suggested that perhaps Aguilar had not intended to kill the victim; and stated there was a "big difference between a guy that just punches a guy and another guy[ ] that caps him." Aguilar asked whether he was "on video" and whether "they checked me on the phone?" Small did not answer either question but asked about the whereabouts of the gun and the identity of the other perpetrator. Aguilar steadfastly denied being involved, and opined, "They're not going to be able to prove it."

Eventually, Aguilar stated he was with Menace and Crimes when Tiny called Menace and alerted him that there was "a banged out guy" walking towards Beverly. Crimes, Menace, and Aguilar went to see what was going on, Menace and the victim had a brief encounter, Menace socked him, and Crimes popped out and shot him in the chest with a black nine-millimeter gun.

Aguilar took off running and tried to get away from the other two. He had not known Crimes had a gun or intended to shoot the victim.

After going over Aguilar's story in more detail, Detective Illig expressed doubt that it was the whole truth. The witnesses had said the shooter wore glasses, and Aguilar was the only one who fit that description. Illig stated, truthfully, that one of the witnesses had drawn a picture of the glasses. Aguilar continued to deny being the shooter or having a gun. Illig asked whether Aguilar felt remorse, and suggested that if Aguilar had information that could help himself, he had the opportunity to "get that out." Aguilar replied, "There's nothing that's going to help me because the witness." He said, "The judge is still going to give me . . . life" and "This is going to kill my mom." When Aguilar again denied killing Centeno, Illig began to terminate the interrogation. Aguilar, crying, begged the detective not to leave. He then broke down and called for the detective and asked to be allowed to see his mother. Detective Illig then had Aguilar identify some items of clothing. Aguilar continued to deny being the shooter.

Illig then introduced Aguilar to Detective Shafia, and Illig left the room. Shafia forthrightly told Aguilar he was in a "tight spot" and that, "It's really terrible right now." Shafia urged Aguilar to tell the whole truth and ask God for forgiveness. He pointed out that the victim could never go home to his family. Aguilar continued to deny shooting, and Shafia emphasized that witnesses had identified him. Shafia told Aguilar that the fact he did not know a co-perpetrator had the gun would not make his responsibility less, but that if there was an explanation for the shooting "it's not a life thing." Aguilar claimed he had been told

if he had not known the shooter had the gun, he would not go to jail. Shafia said Aguilar could go in front of the jury with a lie or with the truth. When Aguilar said he would get life in prison, Shafia said that if he told his side of the story maybe the jury would be more lenient. Aguilar asked to see his mother.

Detective Shafia left and Detective Small returned to the room. He, like Shafia, focused primarily on the fact that a witness had identified the assailant with the glasses as the shooter. Small said people had told the police that the shooter looked surprised after he shot. Small said the victim was not from a gang and had simply been on the way to his mother's house; and Aguilar should make his conscience right by telling the truth. Aguilar said, "I will still go in for life." Small replied, "I don't pass judgment on people." He stated he could tell the judge and the district attorney that Aguilar was remorseful. Aguilar continued to deny shooting, and stated, "I will still get years" regardless of what he said. Small encouraged Aguilar to unburden himself. Aguilar questioned whether there was actually a witness. Small replied that he would not lie to a judge and Aguilar would have the right to confront the witness at trial. Small suggested perhaps the shot was an accident, but only Aguilar would know. Small reiterated that a witness had said the shooter looked shocked, and if Aguilar had "surprised [himself]" when he pulled the trigger, it would make a difference to him later on. Aguilar asked to see his mother again. He inquired how long the court process would take, suggesting it would be "years." Small encouraged Aguilar to get it over with and admit the shooting, suggesting it would be "to [his] benefit to own up to it because if you dismiss it . . . the court's not going to

look at that very friendly because that means you're bullshitting the court."

Aguilar then opined that he no longer had a life ahead of him. Breaking down in tears, he said he was sorry for everything; he shot the victim because he was scared when the victim turned around; he thought maybe the victim was going to come at him or Menace; and he had not wanted to kill him.

b. *There was no* Miranda *violation*

The parties do not dispute that the February 22, 2012 interview at the police station constituted a custodial interrogation. A custodial interrogation must be preceded by the familiar *Miranda* warnings and by the suspect's knowing and intelligent waiver of them. (*People v. Elizalde* (2015) 61 Cal.4th 523, 530–531; *People v. Dykes* (2009) 46 Cal.4th 731, 751.) The prosecution has the burden to prove, by a preponderance of the evidence, that the accused's rights under *Miranda* were not violated. (*People v. Dykes*, at p. 751; *People v. Villasenor* (2015) 242 Cal.App.4th 42, 59.)

When reviewing a trial court's ruling on a claimed *Miranda* violation, we accept the trial court's resolution of disputed facts and inferences and its credibility evaluations if supported by substantial evidence. We independently determine from those facts whether the challenged statements were illegally obtained. (*People v. Elizalde*, *supra*, 61 Cal.4th at p. 530; *People v. Dykes*, *supra*, 46 Cal.4th at p. 751.)

(i) *Aguilar was properly advised of, and initially waived*, *his* Miranda *rights*

At the start of the February 22, 2012 interrogation, Detective Illig advised Aguilar of his *Miranda* rights. Aguilar stated he understood each one. The detectives then began

questioning Aguilar, and Aguilar answered the questions. To the extent Aguilar intends to assert suppression was required because he did not expressly waive his *Miranda* rights at that point, his contention fails. An express waiver is not required. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384–385.) Our Supreme Court has explained: " 'No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. . . .' This court has long recognized that a defendant's decision to answer questions after indicating that he or she understands the *Miranda* rights may support a finding of implied waiver, under the totality of the circumstances. [Citations.]" (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1269; *People v. Whitson* (1998) 17 Cal.4th 229, 247–248.) Such was the case here.

(ii) *Questioning ceased when Aguilar made an unequivocal request for counsel*

Aguilar contends that detectives improperly continued to question him after he invoked his right to counsel. We disagree.

"If a defendant waives his right to counsel after receiving *Miranda* warnings, police officers are free to question him. [Citation.] If, postwaiver, a defendant requests counsel, the officers must cease further questioning until a lawyer has been made available or the defendant reinitiates. [Citation.] However, the request for counsel must be articulated 'unambiguously' and 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.' [Citation.] If a defendant's reference to an attorney is ambiguous or equivocal in that 'a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to

counsel, [precedent does] not require the cessation of questioning.' [Citation.]" (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 19, italics in original; *Davis v. United States* (1994) 512 U.S. 452, 459; *People v. Cunningham* (2015) 61 Cal.4th 609, 646; *People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) "There is no requirement law enforcement officers interrupt an interrogation to ask clarifying questions following a suspect's ambiguous or equivocal responses that might or might not be construed as an invocation of the right to an attorney." (*People v. Cunningham*, at p. 646; *People v. Williams* (2010) 49 Cal.4th 405, 427.)

"Courts have found references to requests for attorneys to be objectively equivocal where a defendant uses conditional language or ambiguities." (*People v. Shamblin*, *supra*, 236 Cal.App.4th at p. 19.) Among the statements courts have found too equivocal to constitute an unambiguous request for counsel are the following: " 'If you can bring me a lawyer, that way. . . I can tell you everything that I know and everything that I need to tell you and someone to represent me.' " (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 216, 219.) " 'I think I probably should change my mind about the lawyer now. I, I need advice here. Don't you guys think I need some advice here? I think I need advice here.' " (*People v. Shamblin*, at pp. 18, 20.) " 'I think it'd probably be a good idea for me to get an attorney.' " (*People v. Bacon*, *supra*, 50 Cal.4th at p. 1105.) " 'Should I have somebody here talking for me, is this the way it's supposed to be done?' " (*People v. Cunningham*, *supra*, 61 Cal.4th at pp. 646–647.) " 'Maybe I should talk to a lawyer.' " (*Davis v. United States*, *supra*, 512 U.S. at p. 462.)

Aguilar's statements were similarly ambiguous. Aguilar's first mention of counsel was equivocal: it appeared he was referencing the need for an attorney at trial, and his statement, "*I guess* I just got to get a lawyer" employed conditional language. (Italics added.) As in the foregoing authorities, these statements did not qualify as unequivocal invocations of the right to counsel.

Shortly thereafter, Aguilar equivocally referenced a need to get an attorney three times. In the first two instances, Small immediately informed Aguilar that such was his right, and the decision to request counsel was Aguilar's. Each time, Aguilar did not confirm he wanted counsel but instead responded with an assertion that he had not been at the crime scene. In the third instance, Small repeatedly attempted to clarify whether Aguilar was asking for an attorney, or wanted to keep talking. Again, Aguilar did not confirm a desire for counsel but instead repeated his assertion that he "was never there." In context, Aguilar's references to a lawyer, followed by Small's confirmation of his right to counsel and Aguilar's continuation of the interrogation, were not unequivocal requests. A reasonable police officer would have understood Aguilar's choice to continue talking with detectives as an indication he was not invoking his right to counsel. When Aguilar eventually confirmed he did "want a lawyer," questioning about the crime ceased. In light of Aguilar's immediate query thereafter — "Can I talk to you?" — the detectives briefly attempted to ascertain Aguilar's wishes, but this was a proper response to his contradictory requests.

Aguilar points to earlier California authorities holding that ambiguous statements must be construed as invocations of the right to counsel. (*People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 735–736; *People v. Hinds* (1984) 154 Cal.App.3d

222, 235; *People v. Russo* (1983) 148 Cal.App.3d 1172, 1177; *People v. Munoz* (1978) 83 Cal.App.3d 993, 995.) But as explained by *People v. Crittenden* (1994) 9 Cal.4th 83, 129–130, these authorities are no longer good law on this point in light of the "truth-in-evidence" amendment to the California Constitution (see *People v. Lazarus* (2015) 238 Cal.App.4th 734, 755–756) and the United States Supreme Court's decision in *Davis v. United States*, *supra*, 512 U.S. 452. Nor does his citation to *Garcia v. Long* (9th Cir. 2015) 808 F.3d 771, assist him. In *Garcia*, the suspect unequivocally answered "no," when asked whether he wished to talk to an officer. (*Id.* at pp. 778, 781.) Here, when detectives finally got a straight answer to the question of whether Aguilar wanted an attorney — after repeatedly attempting to clarify his equivocal statements — they ceased questioning.

(iii) *Admission of the statements made after Aguilar reinitiated the conversation did not violate* Miranda

Aguilar contends that the "re-admonishment of *Miranda* rights was ineffective to purge the taint of the original *Miranda* violations," and therefore his confession must be suppressed. (Original capitalization omitted.) Not so.

" 'After a suspect has invoked the right to counsel, police officers may nonetheless resume their interrogation if "the suspect '(a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.' " [Citations.] The waiver must be " 'knowing and intelligent . . . under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.' " [Citation.]' " (*People v. Enraca* (2012) 53 Cal.4th 735, 752; *People v. Jackson* (2016) 1 Cal.5th 269, 339.)

Here, as we have described, the detectives acceded to Aguilar's request to stop talking. The detectives left Aguilar alone for a time and he reinitiated the interview by repeatedly calling out to Detective Small. It is undisputed that Small re-read Aguilar his *Miranda* rights before questioning him, and that Aguilar stated he understood those rights. Exercising our independent judgment, we conclude the People met their burden to demonstrate the waiver was knowing, intelligent, and voluntary under the totality of the circumstances. (See *People v. McCurdy* (2014) 59 Cal.4th 1063, 1089; *People v. Jackson*, *supra*, 1 Cal.5th at p. 339; *People v. Hensley* (2014) 59 Cal.4th 788, 810–811 [fact suspect initiated conversation is strong evidence of a knowing and intelligent waiver].) Indeed, Aguilar does not contest the fact that he reinitiated the interrogation. His contention that the purported earlier *Miranda* violations invalidated his second *Miranda* waiver necessarily fails in light of our conclusion that no earlier *Miranda* violation occurred.

(iv) *Aguilar's conduct did not constitute an implied assertion of the right to silence*

Aguilar argues that he impliedly invoked his right to silence by (1) referencing the right; (2) asking to speak to his mother and brother; and (3) crying and displaying a distraught demeanor.

Aguilar is incorrect. Unlike in *People v. Carey* (1986) 183 Cal.App.3d 99, which Aguilar cites, he never used words indicating he did not wish to talk, such as the " 'I ain't got nothin' to say' " phrase repeatedly uttered by the defendant in *Carey*. (*Id.* at pp. 103-104.) Instead, Aguilar appeared ready and willing to talk at length; nothing about his statements or demeanor suggested otherwise. Indeed, when questioning ceased after his

invocation of the right to counsel, and later when detectives began to terminate the interrogation, Aguilar became distraught and begged to continue to talk to the detectives. At another point, Aguilar stated he wanted to keep talking to Detective Small, did not want him to leave, and suggested "we could take our time." At another point Aguilar stated, "I want to talk but like you're saying that you don't have time."

Aguilar's two references to the right to silence were, at best, ambiguous. The requirement of an unambiguous and unequivocal assertion applies to a suspect's invocation of the right to silence. (*People v. Nelson* (2012) 53 Cal.4th 367, 377; *People v. Martinez* (2010) 47 Cal.4th 911, 947–948 [officers need not clarify whether defendant is invoking right to silence].) When the detectives told Aguilar court would be coming up soon, Aguilar stated, "you guys say I got the right to remain silent? Well like if people are saying that it's me then obviously I got to get a lawyer, so I can't answer that" because "I'm going to keep telling you guys . . . I was never there because I wasn't . . . I have no other story . . . ." This statement was equivocal and ambiguous, in that it was unclear whether Aguilar meant he needed an attorney for trial. Aguilar also expressed a desire to leave to go to work because he was concerned about being late, and said, in reference to the detectives' comments in the preceding interviews, "You said I could walk out whenever I want because . . . [¶] . . . [¶] I have the right to remain silent." But reasonable officers would not have interpreted this to mean he no longer wished to talk to them, especially in light of the exchanges that followed, and Aguilar's voluntary appearances that day and on two prior occasions. (See *People v. Shamblin*, *supra*, 236 Cal.App.4th at p. 20.)

Contrary to argument that his "general demeanor" and crying indicated an "obvious desire to stop the interrogation," our review of the videotaped interrogation suggests otherwise. The videotape shows a young man persistently attempting to persuade detectives, via one story after another, that he was not significantly involved in the crime. At times, Aguilar was indeed upset, but his emotional outbursts appear tied directly to his realization that the officers were not believing him and he was going to be held accountable for the murder, not because he wished to end the interrogation. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 753.)

Aguilar's request to speak to his mother or brother was not an implied invocation of his right to silence. A "juvenile's request to speak with a parent is neither a per se nor a presumptive invocation of Fifth Amendment rights." (*People v. Nelson*, *supra*, 53 Cal.4th at p. 381; *People v. Lessie* (2010) 47 Cal.4th 1152, 1156.) Even in the case of a juvenile, "a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking—the right to counsel or silence." (*People v. Nelson*, at p. 381.) And even where a juvenile requests to call a parent to ask "what he should do because he was being accused of murder," our Supreme Court has concluded a reasonable officer would not have viewed the request as a "clear and unequivocal invocation of the *Miranda* rights." (*Id.* at p. 382.) Here, Aguilar was 18 years old and an adult. Nothing in the record suggests reasonable officers would have had any basis to construe his requests to talk to his mother or brother as requests to terminate the interrogation. Viewing the totality of the circumstances,

Aguilar's requests to speak to his mother and brother were not an invocation of his right to remain silent.

In support of his argument, Aguilar relies on *People v. Soto* (1984) 157 Cal.App.3d 694. There, the 19-year-old defendant was suspected of murder. During a custodial interrogation, he repeatedly asked to call his mother. The officers accused him of "covering up" for his brother, and suggested the brother would be booked for the crime. (*Id.* at pp. 700–703.) The defendant subsequently confessed. *Soto* concluded that in the totality of the circumstances, the defendant's requests for his mother amounted to an invocation of the right to silence. (*Id.* at p. 705.) The court reasoned, "[t]here are certain words and conduct that are inconsistent per se with a present willingness to discuss one's case freely and completely with the police." (*Ibid.*) The requests had been repeated and insistent; defendant's choice of words indicated a present unwillingness to answer questions; the officers' responses suggested defendant had irrevocably waived his right to silence; no *Miranda* warnings were given after the call requests; officers "parried defendant's requests with the accusation that the requests were simply an attempt to suppress evidence against his brother"; defendant was "inexperienced with police" and somewhat unsophisticated, having never before been arrested or exposed to custodial interrogation; and the questioning was lengthy and involved deceit. (*Id.* at pp. 707–709.)

Since *People v. Soto* was decided, the United States Supreme Court has held that the right to silence cannot be ambiguous or equivocal. (*Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 381; *People v. Nelson*, *supra*, 53 Cal.4th at pp. 377–378, 383 [setting forth the "important practical and policy reasons

supporting this rule" and concluding defendant's request to call his mother was not an unambiguous and unequivocal invocation of his rights].) Assuming *People v. Soto* remains good law, it is distinguishable. Aguilar was far more sophisticated than the *Soto* defendant: he was on probation for the earlier Moreno shooting; he had undergone two custodial interrogations in connection with that case; and he had voluntarily participated in two noncustodial interviews with police regarding the Centeno murder. The officers did not threaten to charge Aguilar's family members with the crime if he did not confess. Aguilar did not begin asking for his mother until questioning ceased; he was thereafter readvised of his rights. His single reference to talking to his brother was not insistent and appears to have been a reference to a future conversation. The detectives did not give the impression that he had permanently given up his right to silence or counsel; he was repeatedly told that it was his choice whether to talk with them.

c. *Voluntariness*

Aguilar next argues that his confession was involuntary under the totality of the circumstances, and the trial court erred by concluding otherwise. We disagree.

The federal and state Constitutions bar the use of an involuntary confession at trial. (*People v. Smith* (2007) 40 Cal.4th 483, 501.) A confession is involuntary if it is not the product of a rational intellect and a free will, such that the defendant's will was overborne when he confessed. (*Id.* at p. 501; *People v. McWhorter* (2009) 47 Cal.4th 318, 346–347.)

To determine voluntariness, we apply a totality of the circumstances test, looking at the nature of the interrogation and the circumstances relating to the particular defendant. (*People v.*

*Dykes*, *supra*, 46 Cal.4th at p. 752.) The relevant factors include the "crucial element" of police coercion; the length of the interrogation; its location; its continuity; and the defendant's maturity, experience, education, physical condition, and mental health. (*Ibid.*; *People v. Lessie*, *supra*, 47 Cal.4th at p. 1169.) No single factor is dispositive. (*People v. Williams*, *supra*, 49 Cal.4th at p. 436.) " 'Coercive police activity is a necessary predicate but does not itself compel a finding that a resulting confession is involuntary. [Citation.] . . . The Fifth Amendment is not "concerned with moral and psychological pressures to confess emanating from sources other than official coercion." ' " (*People v. Hensley*, *supra*, 59 Cal.4th at p. 812; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 347.) The People have the burden to demonstrate the voluntariness of a confession by a preponderance of the evidence. (*People v. Hensley*, *supra*, 59 Cal.4th at p. 812.) We accept the trial court's resolution of disputed facts and inferences, its evaluation of credibility, and its conclusions about the surrounding circumstances if supported by substantial evidence. We independently review the trial court's legal conclusion as to the confession's voluntariness. (*People v. Dykes*, at p. 752.)

Aguilar contends his confession was induced by promises of leniency because the detectives told him to "get 'everything off his chest,' implying that he would be treated more leniently if he confessed." "A confession elicited by any promise of benefit or leniency, whether express or implied, is involuntary and therefore inadmissible, but merely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 600; *People v.*

*Tully* (2012) 54 Cal.4th 952, 993; *People v. Holloway* (2004) 33 Cal.4th 96, 115.) Here, the detectives exhorted Aguilar to tell the truth because it was honorable, manly, and the right thing to do; they also implied it was in his best interests to do so. This was not improper. (*People v. Carrington* (2009) 47 Cal.4th 145, 174 [statements that full cooperation might be beneficial in some unspecified way were not coercive]; *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1250 [officers may freely encourage honesty]; *People v. Vasila* (1995) 38 Cal.App.4th 865, 874.) The detectives implied Aguilar's culpability might be less depending on his role in the crime, but even assuming this was improper, these suggestions fell short of a promise of lenience. (*People v. Holloway*, at p. 116 [suggestion that, if killings were accidental, this circumstance could make a lot of difference, fell short of a promise of lenient treatment].) Moreover, there is no showing such comments induced Aguilar's confession. To the contrary, the record strongly suggests his decision was motivated by the knowledge that a witness had identified him as the shooter, the evidence the detectives repeatedly stressed. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176 [coercive police activity does not establish confession was involuntary unless the promise and the inducement are causally linked].) Nor did detectives engage in coercive behavior by suggesting they would tell the district attorney that Aguilar had been cooperative. (*People v. Falaniko*, at pp. 1250–1251; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203–1204.) The detectives did not suggest or imply that they could influence the district attorney or the court. To the contrary, at various times detectives emphasized that Aguilar was facing serious charges. Among other things, they stated that Aguilar was not going to talk his way out of jail; that he was

going to jail whether or not he talked to them; and that they could not make him promises. In short, there were no promises of leniency.

In support of his argument that the detectives made improper promises to him, Aguilar cites *People v. McClary* (1977) 20 Cal.3d 218, disapproved on a different ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17); *People v. Johnson* (1969) 70 Cal.2d 469; *People v. Jimenez* (1978) 21 Cal.3d 595, disapproved on a different ground in *People v. Cahill*, at pp. 509–510, fn. 17); *People v. Hogan* (1982) 31 Cal.3d 815, disapproved on a different ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836; *In re Shawn D.* (1993) 20 Cal.App.4th 200; and *People v. Neal* (2003) 31 Cal.4th 63. But these authorities are distinguishable factually as explained in *People v. Holloway*, *supra*, 33 Cal.4th at p. 117 and *People v. Ramos*, *supra*, 121 Cal.App.4th at p. 1203. Contrary to the officers' false representations and promises of leniency in those cases, we do not find that the officers in this case expressly or impliedly promised Aguilar leniency in exchange for a confession.

Aguilar also contends his confession was involuntary because the detectives "badgered" and "threatened" him. We see no evidence detectives threatened Aguilar, and he fails to identify any specific threat. By "badgering," Aguilar apparently means that, at one point in the interrogation, Detective Illig raised his voice, and adopted a confrontational posture. But " '[o]nce a suspect has been properly advised of his rights, he may be questioned freely so long as the questioner does not threaten harm or falsely promise benefits. Questioning may include exchanges of information, summaries of evidence, [an] outline of theories of events, confrontation with contradictory facts, even

debate between police and [the] suspect. . . .' " (*People v. Holloway*, *supra*, 33 Cal.4th at p. 115.) " ' "[C]ourts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." ' [Citations.]" (*People v. Cunningham*, *supra*, 61 Cal.4th at p. 643.) Further, a "confession is involuntary only if the coercive police conduct at issue and the defendant's statement are causally related." (*Ibid.*; *Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2.) Here, Detective Illig's raised voice was not the cause of Aguilar's eventual confession, which occurred hours later.

The detectives did falsely tell Aguilar they had DNA, video, and phone tracking evidence, but this did not render the confession involuntary.[12] "Even if deceptive comments are made, their use 'does not necessarily render a statement involuntary. Deception does not undermine the voluntariness of a defendant's statements to the authorities unless the deception is " ' "of a type reasonably likely to procure an untrue statement." ' " ' " (*People v. Hensley*, *supra*, 59 Cal.4th at p. 813.) In *People v. Smith*, *supra*, 40 Cal.4th 483, for example, the court found officers' use of a ruse, in which they told defendant a sham test had proved he had fired a gun recently, was not so coercive as to produce an involuntary or unreliable statement. (*Id.* at p. 505.) *Smith* observed that courts have "repeatedly found proper interrogation tactics far more intimidating and deceptive than" the sham test employed in that case. (*Ibid.* and cases cited therein; see also *People v. Jones* (1998) 17 Cal.4th 279, 299 [deceptive statements

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[12] As noted, the detectives used a ruse during the February 3, 2012 interview as well. Aguilar does not contend the events at the February 3 interview impacted the February 22 interview.

that a detective "knew more than he did or could prove more than he could" are permissible].) Here, Aguilar expressed skepticism about the possibility DNA evidence existed or that his phone could have been tracked. As noted, the primary impetus for his confession appears to have been the fact a witness identified him as the shooter due to his glasses. Indeed, he stated at one point, "There's nothing that's going to help me because the witness. You know."

Other factors support the trial court's finding of voluntariness. While lengthy, the interrogation transpired during regular daytime hours; Aguilar was provided with restroom breaks and water, and given food when he stated he was hungry. (See *People v. Hensley*, *supra*, 59 Cal.4th at p. 816; *People v. Hill* (1992) 3 Cal.4th 959, 981 [there is no bright line time limit for interrogations], overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Aguilar came to the interrogation voluntarily, and had prior experience with the criminal justice system, including custodial interrogations and noncustodial interviews. While relatively young, Aguilar was an adult. The interrogation was conducted in a regular interview room, used for witnesses and victims as well as suspects.

Aguilar points to Dr. Winkel's testimony that he was immature, nonassertive, and suggestible as further evidence of coercion. But this contention fails for at least two reasons. First, " '[i]Insofar as a defendant's claims of involuntariness emphasize that defendant's particular psychological state rendered him open to coercion, [our Supreme Court] has noted that "[t]he Fifth Amendment is not 'concerned with moral and psychological pressures to confess emanating from sources other than official

coercion.' " ' " (*People v. Linton*, *supra*, 56 Cal.4th at p. 1179; *People v. Smith*, *supra*, 40 Cal.4th at p. 502; *People v. Hensley*, *supra*, 59 Cal.4th at p. 814.) In *People v. Linton*, for example, the defendant claimed his confession was involuntary, emphasizing that his personal characteristics — including, inter alia, his learning disabilities, past enrollment in special education classes, depression, anxiety, attention deficit disorder, history of drug use, and lack of experience with the criminal justice system — rendered him especially vulnerable. (*People v. Linton*, at pp. 1178–1179.) *Linton* found the trial court properly concluded defendant's confession and admissions were voluntary; there was no indication the interviewers exploited his personal characteristics. (*Id.* at p. 1179; see also *People v. Smith*, *supra*, at p. 502 [allegations defendant suffered from brain damage and had previously been committed to a mental hospital did not demonstrate involuntariness where interrogating officers did not know of, or exploit, such vulnerabilities]; *People v. Dykes*, *supra*, 46 Cal.4th at p. 753.) Here, as in these cases, there is no evidence the detectives were aware of, and exploited, any particular vulnerability.

In any event, on appeal we defer to the trial court's credibility determinations if supported by substantial evidence. (*People v. Dykes*, *supra*, 46 Cal.4th at p. 752.) The trial court did not credit Dr. Winkel's testimony because it was "absolutely" contradicted by the evidence that the court saw in the video. Ample evidence supports this finding. Dr. Winkel's characterization of Aguilar as a suggestible, meek individual who could be easily manipulated cannot be reconciled with the evidence in the videotape. Aguilar steadfastly and repeatedly denied any involvement in the crime despite the detectives'

exhortations. For example, when told — falsely — that the detectives had obtained DNA evidence, Aguilar challenged this assertion, stating, "What DNA evidence? Like I never touched the guy and I've never even seen the guy and I've never, I was never even there." When asked whether he was "the guy that . . . shot him or are you the guy that just hit him," Aguilar replied, "I'm the guy that was never [even] there." Aguilar came up with a coherent account of the crime that lessened or eliminated his culpability, exhibiting resourcefulness, rather than succumbing to pressure. Aguilar resisted all attempts to get him to confess during the two prior interviews as well, demonstrating a lack of suggestibility and the ability to stand his ground. Additionally, there was evidence that a different psychologist had concluded Aguilar was malingering to some extent. Thus, Dr. Winkel's testimony does not compel a finding the confession was involuntary.

2. *Exclusion of expert testimony regarding false confessions*

During trial, defense counsel moved to admit the testimony of an expert on false confessions, Dr. Richard Leo. The defense proposed that Dr. Leo would testify about general psychological factors and interrogation techniques that might lead to an unreliable confession, the type of persons who are susceptible to such techniques, and the difficulties experienced by lay people and criminal justice professionals in determining whether a

statement is accurate.[13] Such information was not within jurors' common knowledge, the defense asserted, and was necessary to demonstrate that Aguilar's confession was "false and involuntary." The People opposed the motion.

Based on *People v. Linton*, *supra*, 56 Cal.4th 1146 and *People v. Ramos*, *supra*, 121 Cal.App.4th 1194, the trial court ruled that it would disallow Dr. Leo's general testimony about interrogation techniques, but would allow him to testify to any tests he had administered to Aguilar.[14]

Aguilar insists the trial court erred by excluding the proffered testimony, a misstep which violated his constitutional right to present a defense. We disagree.

"A trial court has broad discretion to exclude relevant evidence under Evidence Code section 352 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citations.] Such 'discretion extends to the admission or exclusion of expert testimony.' [Citations.] We review rulings regarding relevancy and Evidence Code section 352 under an abuse of discretion standard." (*People v. Linton*, *supra*, 56 Cal.4th at p. 1181.)

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[13] Aguilar's written motion proposed that Dr. Leo would testify regarding specific evidence in Aguilar's confession indicating such factors were present, but at the hearing on the motion counsel clarified she did not intend to ask Dr. Leo about the effect of interrogation techniques as specifically applied to Aguilar.

[14] Defense counsel stated Dr. Leo had not administered any tests.

*People v. Linton* compels rejection of Aguilar's argument. There, the 20-year-old defendant was convicted of murdering a 12-year-old neighbor. His defense was that he killed the victim during a panic attack and had been coerced into making a false confession by his interrogators. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1154.) At trial, a psychologist opined that the defendant's mental characteristics may have lowered his ability to withstand the pressures of interrogation and increased his suggestibility. (*Id.* at p. 1161.) The defense sought to introduce the expert testimony of Dr. Leo or another social psychologist regarding police interrogation techniques and false confessions. (*Id.* at p. 1179.) Dr. Leo would have testified that police interrogations can and do elicit false confessions in response to common interrogation methods; research showed certain police techniques correlate with the likelihood of a false confession; and such research findings were beyond a lay person's common understanding. (*Id.* at p. 1180.) The trial court excluded Dr. Leo's testimony under Evidence Code section 352, concluding it was extremely speculative and any probative value was outweighed by the undue consumption of time. (*People v. Linton*, at pp. 1180–1181.)

Our Supreme Court concluded this ruling was not an abuse of discretion. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1181.) As was his right, the defendant did not testify and thus did not deny the truth of his interview statements, and no other evidence logically called into question their veracity. (*Ibid.*) Not only was there "a dearth of evidence" indicating a false confession, but much corroborative evidence suggested the confession was true. (*Id.* at p. 1182.) "Under these facts, it fell within the trial court's broad discretion to determine that Dr. Leo's proffered testimony

had, at most, minimal probative value, which was substantially outweighed by its likely undue consumption of time." (*Ibid.*; see also *People v. Ramos*, *supra*, 121 Cal.App.4th at pp. 1204–1207.)

Moreover, the trial court's exclusion of Dr. Leo's testimony did not violate defendant's right to present a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 688–691.) A state court's application of ordinary rules of evidence generally does not infringe upon this right. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1183.) "The ruling excluding the testimony of Dr. Leo under Evidence Code section 352 did not result in the blanket exclusion of evidence concerning the circumstances of defendant's admissions and confession, which would have been necessary in order for defendant to claim undue influence." (*Ibid.*) The jury listened to tape recordings of the police interviews, heard testimony about the circumstances of the interrogation from detectives, a district attorney, and a psychologist who had evaluated the defendant for the prosecution, and heard the defense psychologist's testimony about the defendant's particular personality traits that may have lowered his ability to withstand the pressures of interrogation and increased his susceptibility. (*Id.* at pp. 1160, 1183.) The defendant was able to, and did, argue this evidence showed his confession was false. (*Id.* at pp. 1183–1184.)

The instant matter is on all fours with *People v. Linton*. There was no evidence Aguilar had ever recanted his confession and no evidence called its veracity into question. Other evidence — the text messages, the tentative identifications, the eyewitnesses' descriptions of the crime, and Aguilar's knowledge of the location of the victim's gunshot wound and the type of gun — strongly corroborated the confession's veracity. Given this

state of affairs, the trial court had discretion to exclude the evidence on the ground it had minimal probative value. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1182.)

Nor did the trial court's exclusion of Dr. Leo's testimony infringe upon Aguilar's right to present a defense. (*People v. Linton*, *supra*, 56 Cal.4th at p. 1183.) Contrary to Aguilar's assertion, the court's ruling did not result in a blanket exclusion of evidence on the issue. As in *People v. Linton*, the jury viewed the videotape of the interrogation, Detective Illig was cross-examined regarding it, and Dr. Winkel testified to personality characteristics and cognitive issues that purportedly made Aguilar susceptible to pressure. The defense was able to, and did, argue that the confession was false. There was no error.

3. *The text messages were properly admitted*

As discussed *ante*, the prosecutor introduced three text message conversations at trial: a January 25, 2012 text conversation between Aguilar (using his mother's, Maria Lopez's, cell phone) and Bonilla, and two conversations occurring that same day between Aguilar's mother's cell phone and other, unidentified persons. Bonilla testified to the authenticity of her conversation with Aguilar, and the defense did not object to its admission. However, the defense sought to exclude the other two conversations on lack of foundation and hearsay grounds. The defense averred that someone other than Aguilar might have been using Lopez's phone. The trial court overruled the objection. It found a sufficient foundation had been laid, and the question of whether "it may be someone else" went to the weight, not the admissibility, of the evidence.

Aguilar contends the two text message conversations with the unidentified persons were admitted in error. We disagree.

All writings must be authenticated before they may be received into evidence. (Evid. Code, § 1401.) Authentication of a writing means, inter alia, the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is. (Evid. Code, § 1400.) Like any other material fact, a document's authenticity may be established by circumstantial evidence. (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1435.) The author's testimony is not required; authenticity may be established by the contents of the writing or by other means. (*Id.* at p. 1435; *In re K.B.* (2015) 238 Cal.App.4th 989, 995; Evid. Code, §§ 1411, 1421 [a writing may be authenticated by evidence that it refers to or states matters unlikely to be known to anyone other than the person who is claimed to be the author].) The " 'fact that the judge permits [a] writing to be admitted in evidence does not necessarily establish the authenticity of the writing; all that the judge has determined is that there has been a sufficient showing of the authenticity of the writing to permit the trier of fact to find that it is authentic.' [Citation.]" (*People v. Valdez*, at pp. 1434–1435.) " 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 267.) We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Thomas* (2011) 51 Cal.4th 449, 485; *People v. Perez* (2017) 18 Cal.App.5th 598, 620.)

Here, the text messages were sufficiently authenticated. They were obtained from Metro PCS pursuant to a search warrant. A Metro PCS custodian of records testified that

incoming and outgoing text messages are instantly recorded by the company; he also testified as to the accuracy of Metro PCS's recordkeeping. He explained that the texts the People contended were Aguilar's were from a phone registered to Aguilar's mother, Lopez. Bonilla testified to her text conversation with Aguilar on Lopez's phone number. Aguilar was listed in Bonilla's contacts under the number associated with Lopez's phone. Detective Illig successfully contacted Aguilar multiple times at that number. Photos on the phone depicted Aguilar throwing gang signs, and he admittedly used it. Moreover, even a cursory examination of the text message conversations produced pursuant to the warrant strongly suggest that Aguilar, rather than his mother, was using the phone.

Aguilar's hearsay challenge fares no better. Hearsay is an out-of-court statement offered for the truth of its content, and is inadmissible under state law unless each level of hearsay falls under an exception to the hearsay rule. (*People v. Sanchez* (2016) 63 Cal.4th 665, 674–675; Evid. Code, § 1200, subds. (a), (b).) The Sixth Amendment generally bars admission at trial of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 68.) An improperly admitted hearsay statement ordinarily constitutes statutory error under the Evidence Code. (*People v. Sanchez*, at p. 685; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1246–1247.) Where the hearsay is testimonial and is admitted in violation of *Crawford*, the error is one of federal constitutional magnitude. (*People v. Sanchez*, at p. 685.)

Despite Aguilar's reference to his confrontation rights, no federal constitutional issue arises because the text messages were not testimonial. They were not made to law enforcement officers or under circumstances suggesting their primary purpose was to create evidence for a future prosecution. (See *People v. Rangel* (2016) 62 Cal.4th 1192, 1217; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173–174.)

Nor did their admission violate state law. The text messages comprised two levels of hearsay, both of which fell within a hearsay exception. The text messages were authenticated by the Metro PCS custodian of records and were properly admitted as business records under Evidence Code section 1271. (See *People v. Zavala* (2013) 216 Cal.App.4th 242, 248 [a printed compilation of call data produced by human query falls under the business records exception where the underlying data is automatically recorded and stored by a reliable computer program in the regular course of business]; *People v. Vu*, *supra*, 143 Cal.App.4th at p. 1023.) Aguilar does not argue otherwise.

Aguilar's statements were admissible as party admissions. (Evid. Code, § 1220; *People v. Brown* (2014) 59 Cal.4th 86, 103 [a defendant's own hearsay statements are admissible against him as long as they satisfy the test of relevance]; *People v. Jennings* (2010) 50 Cal.4th 616, 660 [defendant's own statements are admissible as admissions of a party]; *People v. Horning* (2004) 34 Cal.4th 871, 898.) They were also admissible as statements against penal interest. (Evid. Code, § 1230; see generally *People v. McCurdy*, *supra*, 59 Cal.4th at pp. 1108–1109.) The statements that he was the shooter were obviously against Aguilar's interest, as he was admitting to a murder that exposed him to criminal prosecution. They were sufficiently reliable

because they were made to a friend, Bonilla, and other persons in a casual, noncustodial setting. While Aguilar may have been trying to impress Bonilla and the other persons, gang expert Bua testified that in the gang culture, falsely taking credit for another gang member's crime would have negative repercussions. (See *People v. Cervantes*, *supra*, 118 Cal.App.4th at pp. 174–175.) The text messages were properly admitted.

4. *Prosecutorial misconduct during argument*

During closing, the prosecutor suggested that defense counsel had argued reasonable doubt was an insurmountable standard. In rebutting this assertion, the prosecutor argued: "But reasonable doubt isn't some insurmountable standard. . . . [¶] Because it's not this standard that you can't reach . . . . You look at the globe. Right? Do you have any reasonable doubt that this is a world globe? You can only see the front from this angle. You can't see the back. Right? But even though you can't see the other side, you know that's a world globe."

Defense counsel objected that the argument misstated the law. At a sidebar, the trial court referred the parties to *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*) and *People v. Otero* (2012) 210 Cal.App.4th 865 (*Otero*), both of which had held a prosecutor's use of visual aids to illustrate the reasonable doubt standard was harmless error. The trial court found the prosecutor's comment was distinguishable from the improper arguments in those cases, but pointed out *Katzenberger*'s warning that using such visual aids was dangerous and unwise. The trial court ruled, "The People are not to use diagrams to illustrate reasonable doubt." Defense counsel did not request the jury be admonished regarding the prosecutor's comment. Thereafter, the prosecutor did not again

reference the globe but argued the evidence showed guilt beyond a reasonable doubt.

Aguilar contends the prosecutor's argument constituted prejudicial misconduct under *People v. Centeno* (2014) 60 Cal.4th 659 (*Centeno*). We agree the argument was improper, but conclude it was harmless beyond a reasonable doubt.

"In California, the law regarding prosecutorial misconduct is settled: 'When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.' [Citation.]" (*People v. Masters* (2016) 62 Cal.4th 1019, 1052.)

It is improper for a prosecutor to misstate the law during argument, and particularly to attempt to absolve the prosecution of its burden to overcome reasonable doubt on all elements of the offense. (*Centeno*, *supra*, 60 Cal.4th at p. 666.) When a claim of misconduct is based on the prosecutor's comments before the jury, the defendant must show that in the context of the whole argument and the instructions given, there was a reasonable likelihood the jury understood or applied the complained of remarks in an improper or erroneous manner. (*Id.* at p. 667.) We do not lightly infer that the jury drew the most, rather than the least, damaging meaning from them. (*Ibid.*; *People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

In *Katzenberger*, the prosecutor's PowerPoint presentation sequentially displayed six puzzle pieces, which were immediately

recognizable as the Statue of Liberty, leaving two pieces missing. (*Katzenberger*, *supra*, 178 Cal.App.4th at p. 1262.) Over a defense objection, the prosecutor argued, " '[w]e know [what] this picture is beyond a reasonable doubt without looking at all the pieces of that picture . . . . we don't need all the pieces . . . ." (*Id.* at p. 1265.) *Katzenberger* concluded the presentation misrepresented the reasonable doubt standard. (*Id.* at p. 1266.) Jurors would have recognized the image even before the initial six pieces were in place. The presentation suggested the reasonable doubt standard could be met by a few pieces of evidence, and invited jurors to guess or jump to a conclusion, an approach "completely at odds with the jury's serious task of assessing whether the prosecution has submitted proof beyond a reasonable doubt." (*Id.* at p. 1267.) The puzzle analogy also "inappropriately suggest[ed] a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Id.* at p. 1268.) The "use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt," and constituted prosecutorial misconduct. (*Ibid.*) The error was harmless beyond a reasonable doubt, however, because defense counsel had argued vigorously against the prosecutor's analogy; the trial court reread the reasonable doubt instruction; and the evidence of guilt was strong. (*Id.* at pp. 1268–1269.) *Katzenberger* "caution[ed] prosecutors who are tempted to enliven closing argument with visual aids that using such aids to illustrate the 'beyond a reasonable doubt' standard is dangerous and unwise." (*Id.* at p. 1269.)

In *Otero*, the prosecutor used a diagram showing the outlines of California and Nevada, with some correct information but showing some cities in the wrong locations. Text on the diagram said, " 'Even with incomplete and incorrect information, no reasonable doubt that this is California,' " and the prosecutor's argument echoed this theme. (*Otero*, *supra*, 210 Cal.App.4th at pp. 869–870.) The trial court sustained a defense objection, admonished the jury to disregard the diagram, and referred it to the definition of reasonable doubt in the instructions. (*Id.* at p. 870.) *Otero* concluded the argument constituted misconduct. (*Id.* at p. 867.) The outline of California was immediately recognizable, the argument and diagram encouraged jurors to jump to a conclusion, and the diagram was not an accurate analogy to the reasonable doubt standard. (*Id.* at pp. 872–873.) The diagram and argument suggested the standard could be met even when some of the evidence was demonstrably false. (*Ibid.*) The error was harmless because the argument was brief, corrected by the trial court, and the evidence of guilt was strong. (*Id.* at pp. 867, 873–874.)

In *Centeno*, the prosecutor used a diagram like that employed in *Otero*, showing the outline of California along with a combination of " 'incomplete information, accurate information, wrong information.' " (*Centeno*, *supra*, 60 Cal.4th at p. 665.) The prosecutor argued there was no reasonable doubt the diagram depicted California: " 'You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt. What you are looking at when you are looking at reasonable doubt is . . . a world of possibilities. There is the impossible, which you must reject, the impossible [*sic*] but unreasonable, which you must also

reject, and the reasonable possibilities, and your decision has to be in the middle. It has to be based on reason. . . . [Y]ou need to look at the entire picture, not one piece of evidence, not one witness . . . to determine if the case has been proven beyond a reasonable doubt.' " (*Id.* at pp. 665–666.) *Centeno* concluded the argument was prejudicial error. (*Id.* at pp. 662, 676.) The diagram was misleading because it did not reflect the evidence in the case; the prosecutor erroneously suggested the jury could find defendant guilty based on a "reasonable" account of the evidence, diluting the People's burden; the trial court took no corrective action; and the evidence was "very close." (*Id.* at pp. 670, 672–673, 676–677.)

Aguilar urges that the prosecutor's "globe" argument similarly trivialized and misstated the reasonable doubt standard, suggested proof beyond a reasonable doubt existed even if evidence was missing, and impermissibly quantified the reasonable doubt standard. We agree that use of the globe analogy was prosecutorial error under *Centeno*, *Katzenberger*, and *Otero*. "The use of an iconic image like the shape of California or the Statue of Liberty, unrelated to the facts of the case, is a flawed way to demonstrate the process of proving guilt beyond a reasonable doubt. These types of images necessarily draw on the jurors' own knowledge rather than evidence presented at trial. They are immediately recognizable and irrefutable. Additionally, such demonstrations trivialize the deliberative process, essentially turning it into a game that encourages the juror to guess or jump to a conclusion." (*Centeno*, *supra*, 60 Cal.4th at p. 669.) A globe, like the Statue of Liberty or the outline of California, is a readily recognizable, iconic image and the prosecutor's reference to it was improper.

Nevertheless, as in *Katzenberger* and *Otero*, and unlike in *Centeno*, the error was harmless beyond a reasonable doubt, for several reasons. First, the argument was brief and truncated thanks to counsel's objection and the trial court's ruling. It was a miniscule part of a lengthy argument, comprising a few lines in approximately 93 pages of transcript. The prosecutor immediately followed the improper remarks by an exhortation to consider the evidence. Second, the evidence in the case was strong, not "very close" as in *Centeno*. There was overwhelming evidence Aguilar was a Rockwood gang member, knew information about the crime he was not likely to know if he were not there, matched the descriptions given by eyewitnesses, was tentatively identified, confessed to the crime and admitted to it in text messages.

Third, the substance of the prosecutor's argument was far less egregious than that in the foregoing authorities. The prosecutor did not argue, as in *Centeno*, that jurors could find Aguilar guilty "based on a 'reasonable' account of the evidence." (*Centeno*, *supra*, 60 Cal.4th at p. 673.) Unlike in *Otero* and *Centeno*, the globe did not contain inaccuracies. (See *Centeno*, at p. 664; *Otero*, *supra*, 210 Cal.App.4th at pp. 869–870.) Nor do we think jurors would have understood the globe reference to suggest the reasonable doubt standard could be quantified. In *Katzenberger* and *Otero* the prosecutor's visual aids contained a quantitative component. (See *Katzenberger*, 178 Cal.App.4th at p. 1268; *Otero*, at pp. 872–873 [diagram contained eight components; by arguing jurors could identify California based on the outline alone, prosecutor essentially argued only one-eighth of the information was necessary].) Here, the globe reference was far less direct. To the extent the prosecutor's brief comment

suggested the jury could render a guilty verdict even if it did not know everything about the offense — i.e., even if it could not see the entire globe — such an argument was not objectionable: "It is permissible to urge that the jury may be convinced beyond a reasonable doubt even in the face of conflicting, *incomplete*, or partially inaccurate accounts." (*Centeno*, at p. 672, italics added.)

Jurors were properly instructed on the reasonable doubt standard after argument concluded, and were told to follow the instructions in case of a conflict between them and the attorneys' statements. We presume jurors understood and followed the court's instructions. (*People v. Cortez* (2016) 63 Cal.4th 101, 131; *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083.) "[A]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.' " (*People v. Mendoza* (2007) 42 Cal.4th 686, 703; *Katzenberger*, 178 Cal.App.4th at p. 1268.) Given the brevity of the argument, its content, and the proper instruction given, we do not think there was a risk the jury was misled or that the prosecutor's misstep prejudiced Aguilar.

5. *Cumulative error*

Appellant contends that the cumulative effect of the purported errors violated his federal constitutional rights. As we have rejected all but one of defendant's claims of error on the merits, and have found the sole error nonprejudicial, we necessarily reject Aguilar's claim of cumulative error. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235–1236; *People v. Henriquez* (2017) 4 Cal.5th 1, 48.)

6. *Sentencing issues*

a. Franklin *hearing*

The parties agree that Aguilar is entitled to a limited remand to allow him to make a record relevant to his eventual youth offender parole hearing. (*Franklin*, *supra*, 63 Cal.4th at p. 284.) They are correct.[15]

Over the last decade, courts have recognized that youthful offenders have diminished culpability and greater prospects for reform, and therefore are "constitutionally different from adults" for sentencing purposes. (*Miller v. Alabama* (2012) 567 U.S. 460, 471; see *Graham v. Florida* (2010) 560 U.S. 48; *Roper v. Simmons* (2005) 543 U.S. 551; *People v. Caballero* (2012) 55 Cal.4th 262.) In line with these principles, section 3051 provides, subject to exceptions not relevant here, that a defendant who was 25 years of age or younger when he committed a controlling offense that is punishable by a term of 25 years to life is entitled to a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3); *Franklin*, *supra*, 63 Cal.4th at p. 278.) The statute originally applied only to offenders under the age of 18. (Stats. 2013, ch. 312, § 4.) Effective January 1, 2016, the Legislature amended section 3051 to encompass an offender, like

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[15] The parties originally agreed that the judgment should be modified to reflect a reduction in Aguilar's minimum prison term. However, this remedy is incorrect in light of *Franklin*, as appellant acknowledges in supplemental briefing. (*Franklin*, *supra*, 63 Cal.4th at pp. 278–279, 284.)

Aguilar, who was under 23 years of age when he committed the controlling offense. (Stats. 2015, ch. 471, § 1.)[16]

The hearing mandated by section 3051 must "provide for a meaningful opportunity to obtain release." (§ 3051, subd. (e).) The Board of Parole Hearings (Board) must " 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity.' " (*Franklin*, *supra*, 63 Cal.4th at p. 283; § 4801, subd. (c).) The relevant statutes contemplate that the Board's decision at the eventual parole hearing will be informed by youth-related factors such as the defendant's cognitive ability, character, and social and family background at the time of the offense, including information from family members, friends, school personnel, faith leaders, and community organization representatives who knew the defendant before the crime, or are aware of his growth and maturity thereafter. (§ 3051, subd. (f)(2); *Franklin*, at pp. 269, 283–284.) Assembling such information is typically "more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Franklin*, at pp. 283–284.) Therefore, a juvenile offender must be given an opportunity, at the time of sentencing, to "put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.)

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[16] Section 3051 was amended again in 2017 to include offenders who were 25 years of age or younger at the time of the controlling offense. (Stats. 2017, ch. 675, § 1.)

Aguilar was 18 years old when he murdered Centeno, and will be entitled to a youth offender parole hearing during his 25th year of incarceration. (§ 3051, subd. (b)(3).) Aguilar did not have a sufficient opportunity to put the relevant information on the record at the time of sentencing. At that point, section 3051 only applied to persons who were *under* 18 when they committed the controlling offense, and *Franklin* had not yet been decided. (See *People v. Tran* (2018) 20 Cal.App.5th 561, 570 [because sentencing preceded *Franklin*, "it is doubtful [appellant] would have been permitted to present evidence bearing on his future suitability for parole"]; *People v. Jones* (2017) 7 Cal.App.5th 787, 819.) Accordingly, we remand for a hearing pursuant to *Franklin*. (See *Franklin*, *supra*, 63 Cal.4th at p. 284 [describing submissions and testimony that may be received at such a hearing]; *People v. Tran*, at p. 570; *People v. Jones*, at pp. 818–820; *People v. Perez* (2016) 3 Cal.App.5th 612, 618–619.)

b. *The matter must be remanded to allow the trial court the opportunity to exercise its discretion pursuant to amended section 12022.53*

When Aguilar was sentenced in 2015, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *Franklin*, *supra*, 63 Cal.4th at p. 273; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363.) Consequently, the trial court sentenced Aguilar to a consecutive 25-years-to-life term for his use of a firearm. (§ 12022.53, subd. (d).) Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike firearm enhancements in the

interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.)[17]

In supplemental briefing requested by this court, Aguilar contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, and the People agree. The parties are correct. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court's discretion should be exercised.

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[17] As amended, section 12022.53, subdivision (h) 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."

## DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the purpose of affording both parties the opportunity to make a record of information that will be relevant to Aguilar's future parole hearings before the parole board and for the court to exercise its sentencing discretion under section 12022.53, subdivision (h).

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, 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.