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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN DIAZ, Defendant and Appellant.	B266326 (Los Angeles County Super. Ct. No. NA094121)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

Law Offices of Stanley L. Friedman, Stanley L. Friedman; The Hartmann Law Firm and Robert Hartmann for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christian Diaz was charged with one count of assault with a firearm upon a peace officer (Pen. Code, § 245, subd. (d)(1)),[1] two counts of resisting an executive officer (§ 69), and one count of possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a)). A jury convicted appellant of the two counts of resisting an executive officer and possession of a controlled substance with a firearm but was unable to reach a verdict on the assault count. Upon retrial, appellant was convicted of the assault count. Appellant challenges three evidentiary rulings of the trial court: the admission of videotaped conditional testimony at the retrial, the admission of alleged hearsay testimony by police officers, and the exclusion of evidence of an internal police investigation. We find no error or abuse of discretion and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Prosecution Evidence*

Around 12:55 a.m. on November 30, 2012, appellant's mother, Blanca Reyes, called 911 asking for the police because her son was acting strangely. She told the 911 dispatcher that her son had locked himself in the bedroom and that there was a weapon in the house.

Several Los Angeles Police Department officers, including Andrew Kang, Jorge Noriega and Jacob Maynard, arrived at appellant's home shortly after 1:00 a.m. Reyes told the officers appellant was probably under the influence of narcotics and initially denied that he had a gun, but subsequently said that he might have one.

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

After the officers told Reyes they wanted to remove everyone from the home, Reyes began running upstairs to appellant's bedroom. The officers followed her up the stairs, trying to stop her from entering a potentially dangerous situation. Reyes, appellant and appellant's sister Brenda Diaz (Diaz) were in the bedroom.

When Officer Noriega reached the bedroom, he saw appellant facing away from him, holding a long rectangular styrofoam box that his mother was trying to take from him. The officers later learned that the box contained a shotgun.

Officer Noriega asked appellant to put his hands up, but he did not comply, saying "Get the fuck away from me." Reyes took the box away from appellant, who then tried to punch Officer Noriega in the face. Officers Noriega and Maynard grabbed appellant and brought him to the ground in order to handcuff him, but he continued to resist them.

As the two officers struggled with appellant on the ground, Officer Kang used a taser gun on appellant. Officer Kang shot appellant with the taser gun four to five times, but it had no effect on appellant. Appellant pulled a revolver from his waist area and pointed it at Officer Maynard's face. The gun was loaded and was a few inches from Officer Maynard's face. Officer Maynard saw appellant's finger on the trigger. Officer Noriega saw the gun pointed at Officer Maynard's face but did not see appellant place his finger on the trigger.

Officer Maynard yelled, "Gun, gun, gun," and appellant said, "Yeah, I got a gun, motherfucker." Officer Maynard grabbed the gun and pushed it toward the wall. The officers eventually were able to handcuff appellant. Officer Noriega found baggies of a substance later determined to be methamphetamine and extra shotgun rounds in appellant's pocket. The

officers searched the bedroom and found the gun in the styrofoam box and a rifle behind the dresser.

Officer Jesse Martinez accompanied appellant to the hospital. Five to six hospital staff were required to restrain appellant, who was very aggressive. They used a restraint to keep him in the bed and gave him a sedative.

Dr. Yelena Gelman, an emergency room physician, treated appellant at the hospital. Appellant was uncooperative and agitated, and his pulse was 180, a number Dr. Gelman described as "double normal." Dr. Gelman believed that appellant exhibited signs of being under the influence of methamphetamine, and his toxicology result confirmed that he was. Appellant admitted to Dr. Gelman that he had ingested methamphetamine.

Officer Noriega had seen numerous people who were under the influence of methamphetamine and seen them exhibit great strength, making them difficult to control. Although he and Officer Maynard were larger than appellant at the time of the incident, they still had difficulty getting him under control. Officer Maynard testified that appellant exhibited signs of methamphetamine use, including profuse sweating and unusual strength for his stature.

II. *Defense Evidence*

Appellant's sister, Diaz, testified that close to midnight on November 29, 2012, her mother asked her to pick up her brother and bring him home. Appellant was upset about something, so after they came home their mother asked Diaz to check on him. Diaz went upstairs to appellant's bedroom and saw him playing with a shotgun. Appellant explained to Diaz that he was trying to fix the shotgun. At some point, appellant placed the gun in a box.

Their mother entered the bedroom, followed by five to seven police officers. Diaz grabbed the box containing the gun from appellant and threw it across the room. Reyes stood between the officers and appellant.

Diaz testified that when Officer Kang entered the room, he taunted appellant for standing behind his mother. The officers then "dropped [appellant] to the floor." One of the officers yelled, "gun, gun," and then they tasered appellant. Diaz did not hear appellant swear at the officers and did not see him pull a gun on them.

III. *Rebuttal*

Los Angeles Police Department Officer Jose Contreras testified that he spoke with Diaz shortly after the incident. Diaz told Officer Contreras that her brother had been behaving erratically, so she went to his room to try to calm him down. She took the box containing the gun away from appellant when the officers arrived and started giving him commands. When appellant did not comply with the officers' commands, the officers "became aggressive" and threw him to the ground. She did not state that an officer was verbally abusive.

IV. *Procedural Background*

Appellant was convicted of two counts of resisting an executive officer (§ 69), one count of possession of a controlled substance with a firearm (Health & Saf. Code, § 11370.1, subd. (a)), and, after retrial, one count of assault with a firearm on a peace officer (§ 245, subd. (d)(1)). The trial court sentenced appellant to a total term of 20 years 4 months. Appellant timely appealed.

DISCUSSION

I. *Admission of Dr. Gelman's Videotaped Testimony*

Appellant challenges the trial court's admission of Dr. Gelman's videotaped conditional examination during the retrial. The trial court did not abuse its discretion in admitting the testimony.

A. *Relevant Proceedings*

After appellant's first trial resulted in a mistrial on count 1, respondent moved to conduct a videotaped conditional examination of Dr. Gelman pursuant to section 1336, subdivision (a). Respondent stated that the trial was set for March 17, 2015, and Dr. Gelman was expecting a baby in April 2015, rendering her "so sick or infirm as to afford reasonable grounds for apprehension that . . . she will be unable to attend the trial." (§ 1336, subd. (a).) Appellant objected, arguing that many people work up to a few days before giving birth, and there was no indication of Dr. Gelman's due date or of whether she had a medical problem with her pregnancy. Appellant stated that he would be willing to waive time in order to continue the trial to allow Dr. Gelman to testify in person.

On March 2, 2015, the trial court conducted a hearing on the motion and stated that it would not be willing to continue the trial, citing the right to "a speedy trial." The prosecutor argued that Dr. Gelman was scheduled to go on maternity leave on March 15, prior to the start of trial, and that the conditional examination would not be used at trial if it turned out that she could testify. The trial court granted the motion for a conditional examination.

The conditional examination was conducted on March 9, 2015. Prior to starting the examination, the court stated, "Just to indicate for the record

that the witness that we are about to call will be legally unavailable and therefore we need to go with these proceedings." Although the court stated that Dr. Gelman would be unavailable, the court then held a hearing to determine her availability for trial.

Dr. Gelman testified that she was eight-and-a-half months pregnant and that her pregnancy was a high risk pregnancy due to gestational diabetes and low fluid. She had been forced to stop working earlier than planned, and she was restricted to light physical activity because her fluid had dropped. She testified that, based on her physical state, she probably would be unavailable to testify on March 19 or 20. The People submitted a letter from her doctor stating that Dr. Gelman had "been advised not to attend court during the end of March" "due to her high-risk pregnancy and anticipated date of delivery," and that she had been advised to avoid stressful activities. The court asked defense counsel if he had any questions, and after defense counsel replied that he did not, the court ordered a recess before beginning the conditional examination. Dr. Gelman testified to the facts set forth above.

On March 18, 2015, the trial court heard the parties' objections under Evidence Code section 402. When defense counsel stated that he had objections to portions of Dr. Gelman's testimony, the court asked, "You're not contesting the 240's unavailability?"[2] Defense counsel replied, "No," and the court stated, "She has got a doctor's note and she is a high risk pregnancy." Defense counsel then raised objections only to certain portions of Dr. Gelman's conditional examination. Appellant's retrial began the following

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[2] The court was referring to Evidence Code section 240, under which Dr. Gelman was found to be unavailable.

day. Dr. Gelman's videotaped testimony was played for the jury at the retrial.

B. *Analysis*

1. *Evidence Code Section 240*

Respondent contends that appellant waived his objection to Dr. Gelman's testimony. We agree.

Appellant argues that defense counsel's response of "no" to the trial court's question, "You're not contesting the 240's unavailability" indicates that he actually was contesting Dr. Gelman's unavailability, calling it a "double negative." This argument is specious. Clearly, defense counsel's response meant, "No, I am not contesting the unavailability." In common parlance, defense counsel's response would not generally be understood as meaning, "I am not not contesting the unavailability."

Appellant further contends that the rest of the conversation between defense counsel and the court supports his argument that he did not waive the issue. Contrary to appellant's contention, the transcript shows that defense counsel did not object to the finding that Dr. Gelman was unavailable. Instead, he objected to "the rebuttal portion and unavailability portion" of Dr. Gelman's testimony, asking the court to examine certain pages and lines in the transcript. In response to defense counsel's objection to the "unavailability portion" of the testimony, the court replied that it would admit only the conditional examination, not the testimony about Dr. Gelman's pregnancy. Defense counsel then objected to "another section called rebuttal," which the court stated would be admitted only if the mother or sister testified to certain issues.

The record shows that defense counsel's objection to the "unavailability portion" of Dr. Gelman's testimony was not an objection to the trial court's finding of her unavailability but to the portion of her testimony regarding her pregnancy, as the trial court indicated. Appellant therefore waived his challenge to the court's finding that Dr. Gelman was unavailable for trial.

Even if not waived, appellant's challenge fails. Section 1336 provides in pertinent part: "When a material witness for the defendant, or for the people . . . is so sick or infirm as to afford reasonable grounds for apprehension that he or she will be unable to attend the trial, . . . the defendant or the people may apply for an order that the witness be examined conditionally." (§ 1336, subd. (a).) "'The defendant has the right to be present in person and with counsel at [such] examination . . . .' (§ 1340, subd. (a).)" (*People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1509.) "At the conditional examination, '[t]he testimony given by the witness shall be reduced to writing and authenticated in the same manner as the testimony of a witness taken in support of an information. Additionally, the testimony may be video-recorded.' (§ 1343.) '[I]f the examination was video-recorded, that video-recording may be shown by either party at the trial if the court finds that the witness is unavailable as a witness within the meaning of Section 240 of the Evidence Code. The same objections may be taken to a question or answer contained in the . . . video-recording as if the witness had been examined orally in court.' (§ 1345.) Among other statutory conditions, a witness is 'unavailable as a witness' if he or she is 'unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity.' (Evid. Code, § 240, subd. (a)(3).)" (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1520 (*McCoy*).) Dr. Gelman was found unavailable under Evidence Code section 240, subdivision (a)(3).

"[T]he showing required to establish unavailability based on illness or infirmity [under Evid. Code, § 240, subd. (a)(3)] must be left to the trial court's discretion. [Citation.]" (*People v. Alcala* (1992) 4 Cal.4th 742, 779; but see *People v. Mays* (2009) 174 Cal.App.4th 156, 172 ["The trial court has discretion whether to grant a conditional examination. [Citation.] However, the determination whether a witness is unavailable to testify at trial due to mental illness or infirmity that would cause substantial trauma, is a mixed question of law and fact, with factual findings subject to a deferential standard of substantial evidence, and findings of law subject to independent review. [Citation.]"].)

The trial court did not abuse its discretion in allowing Dr. Gelman's videotaped testimony to be shown to the jury. At the time of the March 9, 2015 hearing on her availability, Dr. Gelman was eight-and-a-half months pregnant, and her doctor had deemed hers a high-risk pregnancy because of gestational diabetes and low fluid. Her doctor had ordered her to be on "light activity." Moreover, although she had planned to stop working around March 15, she had been forced to stop working on March 7 because of a drop in her fluid. Trial was scheduled to begin on March 17, and there was no way for the court or Dr. Gelman to know exactly when she would give birth.

Appellant relies on the standard set forth in *People v. Gomez* (1972) 26 Cal.App.3d 225 to argue that the illness must be so severe as to render the witness's attendance relatively impossible. "Later cases, however, have refined the concept of relative impossibility as expressed in *People v. Gomez*, *supra*, 26 Cal.App.3d 225. . . . 'In the context of mental illness or infirmity, the phrase "relatively impossible" to testify does not mean it is impossible to elicit the testimony due to insanity or coma or other total inability to communicate. Rather, the phrase includes the relative impossibility of

eliciting testimony *without risk of inflicting substantial trauma on the witness*.' [Citations.]" (*People v. Christensen* (2014) 229 Cal.App.4th 781, 791.) The uncertainties surrounding Dr. Gelman's condition support the conclusion that requiring her to attend trial placed her at risk of substantial trauma.

Appellant's contention that expert medical testimony is required to establish unavailability is incorrect. The reference to expert testimony in Evidence Code section 240 applies to "physical or mental trauma resulting from an alleged crime . . . ." (Evid. Code, § 240, subd. (c); see *People v. Winslow* (2004) 123 Cal.App.4th 464, 473 ["Twelve years after the decision in *People v. Gomez*, the Legislature amended Evidence Code section 240 to add crime-induced physical and mental trauma under the new subdivision (c) as a reason why a declarant may be unavailable as a witness."].) Dr. Gelman's unavailability was not based on crime-induced physical trauma.

Appellant further argues that although Dr. Gelman's doctor advised her not to attend court at the end of March, Dr. Gelman was scheduled to testify not at the end of March, but March 19 and 20. The "end of March" can include March 19 and 20, and at any rate, the doctor's advice cannot be read to mean that Dr. Gelman could testify safely on March 19 and 20. Moreover, as discussed above, Dr. Gelman's condition had forced her to stop working unexpectedly, and with any pregnancy, especially a high-risk pregnancy, it is not possible to accurately predict how healthy the woman will be at any certain date.

Appellant's contention that Dr. Gelman could have testified shortly after giving birth if the trial court had granted his request to continue the trial is speculative. There was no way for the trial court to know when Dr.

Gelman would give birth, what her condition would be after giving birth, or whether she would be too infirm to attend the trial at that time.

The decision to grant a continuance is within the trial court's discretion and requires a showing of good cause. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118 (*Mungia*) ["A continuance in a criminal trial may only be granted for good cause. (§ 1050, subd. (e).) 'The trial court's denial of a motion for continuance is reviewed for abuse of discretion.' [Citation.]"].) Appellant argues that he showed good cause for a continuance because his confrontation rights were at stake, but the decision to continue a trial remains within the court's discretion when a criminal defendant's constitutional rights are at stake. For example, in *People v. Verdugo* (2010) 50 Cal.4th 263, the court explained that a defendant's constitutional right to counsel of his choice is not absolute but is within the discretion of the trial court. (*Id.* at p. 311.) Thus, the trial court may deny a motion to discharge retained counsel "'if it will result in "disruption of the orderly processes of justice" [citations].' [Citations.]" (*Ibid.*; see also *People v. Ortiz* (1990) 51 Cal.3d 975, 982-983 [discussing the trial court's need to balance a defendant's constitutional right to counsel of his choice with "'effective judicial administration'" and the potential "'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citation.]"].) In light of the uncertainty regarding the circumstances surrounding Dr. Gelman's condition and whether she would be able to testify even if the trial were continued, the trial court did not abuse its discretion in denying appellant's request for a continuance to allow Dr. Gelman to testify. (See *Mungia*, *supra*, 44 Cal.4th at p. 1118 ["In reviewing the decision to deny a continuance, '[o]ne factor to consider is whether a continuance would be useful. [Citation.]' [Citation.]"].)

2. *Confrontation Clause*

"'A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. [Citations.] The right of confrontation is not absolute, however, and may "in appropriate cases" bow to other legitimate interests in the criminal trial process. [Citations.] An exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. [Citations.] Further, the federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. [Citation.]' [Citation.]" (*McCoy*, *supra*, 215 Cal.App.4th at pp. 1527-1528; *People v. Herrera* (2010) 49 Cal.4th 613, 620-621.) Courts therefore have held that the admission of a conditional examination at trial does not necessarily violate a defendant's constitutional right to confrontation.

For example, in *People v. Jurado* (2006) 38 Cal.4th 72, the trial court admitted into evidence at trial the videotaped conditional examination of a witness that had been taken under sections 1335 and 1336. The defendant argued that the admission "denied him his rights under the federal Constitution to due process, confrontation of adverse witnesses, and reliable guilt and penalty determinations in a capital case." (*Id.* at p. 115.) The California Supreme Court rejected his argument, reasoning that the witness "testified under oath at the conditional examination, and defendant had a full and fair opportunity to cross-examine him at that time. For purposes of due process, confrontation, and reliability, the situation is no different than if [the witness] or any other witness had testified at the preliminary hearing or at an earlier trial and then, because he had become unavailable, his prior

testimony was admitted at trial. When a defendant has had an adequate opportunity for cross-examination and the witness is unavailable at trial, use of prior testimony does not violate the defendant's rights under the federal Constitution. [Citations.]" (*Ibid.*; see also *People v. Zapien* (1993) 4 Cal.4th 929, 975 ["Admission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions—not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right to effective cross-examination against the public's interest in effective prosecution. [Citations.]"].[3])

Similarly, in *McCoy*, the trial court permitted the prosecution to conduct a conditional examination via a two-way video conference system of a witness at the preliminary hearing. On appeal, the court rejected the defendant's claim that the trial court violated his confrontation clause rights by allowing the conditional examination to be played for the jury at trial. (*McCoy*, *supra*, 215 Cal.App.4th at p. 1530.)

As in *McCoy* and *Jurado*, Dr. Gelman testified under oath at the conditional examination and appellant had a full and fair opportunity to cross-examine her. Appellant's confrontation rights were not violated by the admission of Dr. Gelman's testimony.

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[3] "Evidence Code section 1291, subdivision (a)(2), provides that former testimony is not rendered inadmissible as hearsay if the declarant is 'unavailable as a witness,' and '[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 341.)

Even if the admission were erroneous, we disagree with appellant's contention that Dr. Gelman's testimony was so important to the prosecution's case that the admission of the testimony was not harmless. Officer Noriega testified that he found baggies of methamphetamine in appellant's pocket. Officers Noriega and Maynard testified that appellant exhibited signs of someone under the influence of methamphetamine. Officer Martinez testified that numerous hospital staff members were required to restrain appellant because he was aggressive, and that appellant calmed down only after the doctor administered medication to him.

Further, the only evidence at the retrial that appellant did not draw a gun was Diaz's testimony. But that testimony differed from the first trial, at which the jury could not reach a verdict on the assault count. At the first trial, Diaz testified that appellant already was handcuffed when he was on the floor being tasered, evidence that if believed would mean appellant could not have drawn a weapon. But in the retrial, she did not testify that appellant was handcuffed at the time he was tasered. Thus, the only evidence in the second trial that appellant did not draw a weapon was Diaz's statement that he did not.

For all these reasons, even if appellant's confrontation rights were violated (and we do not believe they were), any alleged error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Crawford*); see *People v. Foy* (2016) 245 Cal.App.4th 328, 351 ["To determine whether a confrontation clause violation is harmless beyond a reasonable doubt, courts consider 'the importance of the witness'[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise

permitted, and, of course, the overall strength of the prosecution's case.' [Citation.]"].)

II. *Admission of Testimony Regarding Methamphetamine Users*

Appellant contends the trial court erred in allowing the police officers to testify about conversations with various methamphetamine users that helped form their conclusions about methamphetamine use, citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). The testimony that appellant challenges is of a different nature than that found inadmissible in *Sanchez*. The officers did not testify about the content of conversations with methamphetamine users but about their observations of the conduct of people who were under the influence of methamphetamine. It was defense counsel who attempted to get the officers to testify about alleged conversations with methamphetamine users. *Sanchez* does not apply. The trial court did not err in admitting the testimony.

A. *Relevant Proceedings*

1. *Appellant's Objections*

During an evidentiary hearing held prior to appellant's retrial, defense counsel asked the court to preclude any police officer from testifying about conversations with methamphetamine users. The court stated that it was not improper for the officers to testify that they had observed behavior similar to appellant's in other methamphetamine users. The court denied appellant's request, explaining, "The law enforcement officer may describe behavior as seen of other people on meth if that officer was also observing [appellant]. He may be able to express an opinion whether it is lay or expert

or mix of lay and expert opinion. How meth users behave that's for the jury to decide if that's credible."

2. *Officer Testimony About Methamphetamine Users*

Officer Noriega testified that he had seen people under the influence of methamphetamine at least one hundred times. During those encounters he had seen them exhibit great strength. He explained that he had been required to use force to "get them under control" because they are very strong and do not feel pain. He had observed people under the influence of methamphetamine break handcuffs, chew off leather hospital gurney restraints, and kick the windows of patrol cars.

On cross-examination, defense counsel asked Officer Noriega if one of the ways he knew those people were under the influence of methamphetamine was from conversations with them. The following exchange occurred between defense counsel and Officer Noriega:

"Q Your opinion that these over hundred people were on methamphetamine is based [on] your conversations with them, correct?

"A Not necessarily.

"Q Observations and talk, correct?

"A Not necessarily.

"Q What else would it have been?

"A Sometimes if it's something that goes to trial then we get the evidence with an expert verifying that indeed it was some type of narcotic.

"Q Let me reword my question. . . . When you are out on the street, I think you have testified, you have seen in the neighborhood over a hundred people under the influence of methamphetamine?

"A Yeah, that's correct.

"Q At the time you felt that way, that was based on your conversations with them?

"A Based on a combination of things, how they are acting, their behavior, training and experience, conversation with them, I mean, yeah."

Officer Maynard also testified that he had seen people under the influence of methamphetamine over one hundred times in his career. He believed that appellant was under the influence of methamphetamine during the encounter because of appellant's profuse sweating and extreme strength for his size. He testified that appellant's ability to draw a large handgun while two officers much larger than him were attempting to control him was "very consistent with somebody under the influence." On cross-examination, defense counsel asked if his knowledge that others were under the influence of methamphetamine was based on his conversations with them, but he replied that it was based not only on conversations but also on his training and experience.

B. *Analysis*

"In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held . . . that the admission of testimonial hearsay against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses." (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) Appellant attempts to characterize the officers' testimony as inadmissible testimonial hearsay within the meaning of *Sanchez*. However, unlike the testimony in *Sanchez*, the testimony challenged here was not expert testimony offered by the prosecution, testimonial hearsay, or case-specific.

In *Sanchez*, a gang expert testified about general gang culture and also about the defendant's contacts with police and statements to police.

However, the expert had never met the defendant; his testimony was based on police reports detailing specific statements the defendant made to other officers and gang-related conduct by the defendant. The expert relied on those police reports of the defendant's conduct and statements to opine that the defendant was a gang member and committed the offense for the benefit of the gang. The hearsay statements thus were admitted to prove the truth of the matter asserted – that the defendant was in a gang and engaged in conduct on behalf of the gang. Our Supreme Court adopted the rule that "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) The court further concluded that the statements were testimonial hearsay because they were formal statements gathered during official police investigations of completed crimes, made primarily to memorialize facts relating to past criminal activity that could be used like trial testimony. (*Id.* at pp. 687-694, discussing various tests set forth by the United States Supreme Court.) Because the main evidence of the defendant's intent to benefit the gang was the expert's testimonial hearsay relating case-specific statements about the defendant's gang affiliation, the court held the confrontation clause violation was not harmless beyond a reasonable doubt. (*Id.* at p. 699.) *Sanchez* is distinguishable on a number of grounds.

First, the prosecution here did not offer the testimony about the officers' conversations with other methamphetamine users. It was defense counsel who repeatedly attempted to elicit the testimony from Officers Noriega and Maynard that their knowledge that people they encountered were under the influence of methamphetamine was based on conversations

with them. Both officers rebuffed defense counsel's attempts by replying that their conclusions were based on numerous factors.

Even if the conversations with other methamphetamine users could be construed as hearsay, they did not relate any case-specific facts. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) The gang expert in *Sanchez* related not only facts about general gang culture, but specific facts about the defendant's contacts with police and his gang-related conduct. Here, by contrast, the officers' alleged conversations with other methamphetamine users did not relate to "the particular events and participants" at issue. (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) Their prior contacts with other methamphetamine users did not relate to appellant or to any of the events at issue in appellant's case.

"'[T]he confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.' [Citation.] Thus, only when a prosecution expert relies upon, and relates as true, a *testimonial* statement would the fact asserted as true have to be independently proven to satisfy the Sixth Amendment." (*Sanchez*, *supra*, 63 Cal.4th at p. 685; see also *Crawford*, *supra*, 541 U.S. at p. 59, fn. 9 [noting that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."].) To the extent the officers testified about conversations with other methamphetamine users, the statements were not out-of-court analogs of the officers' testimony regarding their observations and conclusions regarding appellant. The testimony regarding alleged conversations with other

methamphetamine users, such as it was, did not violate appellant's confrontation clause rights.

III. *Cross Examination of Officers*

Appellant contends the trial court abused its discretion by not allowing him to cross examine Officers Kang and Maynard about an internal affairs investigation to show their alleged bias. The evidence was properly excluded as substantially more prejudicial than probative.

A. *Relevant Proceedings*

At the preliminary hearing, Officer Maynard testified that the initial police report did not indicate appellant had his finger on the trigger when he pointed the gun at Officer Maynard. After Officer Maynard read the report, he told Officer Kang the report was missing that fact, and the report was changed. Defense counsel attempted to question Officer Maynard about an internal investigation of the use of force in the incident, but the court sustained an objection to the evidence.

Prior to the first trial, defense counsel sought to introduce evidence that the officers were aware of the internal investigation at the time they wrote the report; however, defense counsel also wanted to exclude evidence of the results of the investigation. The court replied, "you want the good part for you not the bad part?" After hearing argument on the issue, the court excluded the evidence of the internal investigation, finding the probative value minimal and the unfair prejudice substantial.

B. *Analysis*

"Evidence Code section 352 accords the trial court broad discretion to exclude even relevant evidence 'if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' 'Evidence is substantially more prejudicial than probative [citation] if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome" [citation].' [Citation.] We review a trial court's ruling under Evidence Code section 352 for an abuse of discretion. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 893 (*Clark*).)

The trial court did not abuse its discretion in excluding the evidence of the internal investigation. We agree with the trial court that the evidence of the internal investigation would have been more prejudicial than probative, in particular because defense counsel sought to introduce evidence that the officers were investigated for their use of force but to exclude evidence of the result of the investigation. Allowing evidence that the officers were investigated for their use of force during the incident would have unfairly characterized the officers as having acted improperly throughout, casting doubt on all their testimony and thus creating a """substantial likelihood""" the jury would have relied on the evidence for an illegitimate purpose. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) The evidence of the internal investigation thus posed a risk to the fairness of the proceedings and the reliability of the outcome. (*Clark*, *supra*, 52 Cal.4th at p. 893.) The trial court did not abuse its discretion in excluding the evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

COLLINS, J.