Filed 8/2/17 P v. Akuna CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. NOAH KEONI AKUNA and FRANK NATHAN ESCALANTE, Defendants and Appellants.	B264806 (Los Angeles County Super. Ct. No. KA102293)

APPEAL from judgments of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed as Modified.

Law Offices of Allen G. Weinberg and Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Noah Keoni Akuna.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant Frank Nathan Escalante.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants Noah Keoni Akuna and Frank Nathan Escalante of the first degree murder of German Palacious (Pen. Code, § 187, subd. (a))[1] and of conspiracy to commit that murder (§ 182, subd. (a)(1)), with true findings in both counts that each defendant personally discharged a firearm causing death (§ 12022.53, subd. (d)), that a principal discharged a firearm causing death (§ 12022.53, subds. (d) & (e)(1)), and that the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)).[2] The jury also convicted each defendant of one count of being a felon in possession of a firearm. (§ 29800, subd. (a)(1).) Defendant Escalante admitted a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and was sentenced to an aggregate term of 80 years to life in state prison. Defendant Akuna was sentenced to an aggregate term of 50 years to life in state prison.

On appeal, defendants contend that the trial court erred in admitting statements Akuna made to two paid police informants, because the statements were involuntary. Escalante additionally contends that admission of Akuna's statements against him violated his Sixth Amendment right to confrontation and the *Aranda/Bruton* rule, and that the court erred in concluding that the statements constituted declarations against Akuna's penal interest that could be considered

---

1 All undesignated section references are to the Penal Code.

2 Defendants Michael Anthony Dominguez and Richard Michael Sanchez were also charged with these crimes. During jury selection, they accepted plea offers. The record does not reflect the terms.

against Escalante. Escalante also contends that Akuna's statements implicating him required corroboration, because Akuna was an accomplice as a matter of law; therefore the trial court erred in denying his motion for judgment of acquittal (there purportedly being insufficient corroboration) and in not instructing on the corroboration requirement. We find no error and affirm the judgment as to both defendants, with the exception of ordering that Akuna's abstract of judgment be amended to reflect fees orally imposed by the trial court.

BACKGROUND

In 2008, Jack Hicks ("Sugar Bear"), a member of the El Monte Hays (EMH) gang, was murdered. Around the neighborhood, it was rumored that a fellow EMH gang member, German Palacios ("Triste"), killed Hicks. Approximately four years later, on June 14, 2012, around 9:30 p.m., Palacios was gunned down outside Daisy's Meat Market at 11532 Medina Court, the heart of EMS territory. Defendants Akuna ("Shadow") and Escalante ("Smokey"), both EMS members, were convicted of planning and committing the murder. They were assisted by Michael Dominguez ("Pitbull") and Richard Sanchez ("Shark"), who were charged but accepted plea agreements. The key evidence in the case was Akuna's recorded confession to two paid informants while in custody on an unrelated case, which implicated himself and Escalante (as well as Dominguez and Sanchez).

On the night of the killing, Juan Ignacio Ruiz Sanchez, who was with some friends on the patio of a house on Medina Court, heard two or three people arguing in front of Daisy's Meat Market, followed by

four or five gunshots. At trial, he testified that he saw one muzzle flash and heard gunfire from a single gun. He had earlier told a sheriff's detective that he saw two separate muzzle flashes and, based on the sound, thought there were two different guns. He saw two silhouettes run through a gate next door to the right of the market, but was unable to identify anyone.

At around 9:38 p.m., El Monte Police Sergeant Doug Knight responded to the scene, and found Palacios lying partly in the street outside the market. He had been shot multiple times and was unresponsive. He was transported to County USC Hospital, were he died after surgery. An autopsy later confirmed that he had been shot 16 times, with fatal wounds to the neck, abdomen and other areas, piercing internal organs and causing massive bleeding. Approximately thirteen projectiles were recovered from his body during the autopsy.

Los Angeles County Sheriff's Detective Steven Blagg arrived at the scene at around 12:15 a.m. the next morning, and supervised the collection of twelve .40 caliber Smith and Wesson shell casings from the area where Palacios was found. He also went to County USC Hospital and received a projectile that had been removed from Palacios during surgery.

Sheriff's firearm examiner Marco Iezza examined the 12 casings recovered at the scene and determined that they were all fired from a single Glock firearm. He also examined the projectiles and fragments recovered from Palacios. All but one were consistent with being Winchester .40-caliber Smith and Wesson projectiles fired from a Glock firearm. A fully loaded .40-caliber Glock would have a total of 16

rounds—15 in the clip and one in the chamber (although in California, the legal magazine limit is 10 or less). One projectile removed from Palacios body was consistent with being fired from either a .38- or .357-caliber revolver.

On July 18, 2012, Sheriff's Deputies and El Monte Police Officers executed a search warrant at Akuna's residence on Currier Street in Pomona. They found a newspaper article identifying German Palacios as a suspect in the shooting death of Jack Hicks, and a printout from the Los Angeles Times Homicide Report website (a service that chronicles Los Angeles County murders) reporting the death of Jack Hicks. They also found items (including clothing and photographs) associated with the EMH gang. A search of Escalante's residence turned up no evidence. On the date of the searches, Acuna and Escalante were arrested, but were later released pending further investigation.

On March 20, 2013, Acuna was arrested on an unrelated burglary charge, and booked at the Norwalk Sheriff's Station. About a week before the arrest, Detective Blagg met with two informants (Hispanic gang members who had prior records and were paid $1,500 plus $50 for food for participating) and provided them with information relating to the Palacios' murder, including the gang monikers of suspects and the area where the shooting took place. After Acuna's arrest on the unrelated burglary, Detective Blagg transported the informants to the Norwalk station, activated recording devices they were wearing, and had them brought into the booking area. While Acuna was being booked and in the presence of the informants, Detective Bragg told him

that the Palacios murder investigation was still ongoing and that his DNA was found on a shell casing. Acuna was placed in a cell with the two informants, and their conversation was recorded. At trial, the recording was played for the jury and a transcript was provided.

The transcript of Akuna's conversation with the informants is approximately 73 pages long. The conversation began with Akuna denying involvement in the murder of Palacios. He said that he wanted to "see what they're booking [him] on" because it had been a "DA reject" but now "they're gonna take it to the DA and the DA's probably going to file. . . . He said my DNA . . . came back on a casing, which is bullshit. . . . Impossible. I wasn't even there. It was one of my homeboys that got shot." Akuna told the informants that he was at a banquet and had witnesses.

The informants talked with Akuna as if they knew vague details of the murder—that a gang member (who at one point Akuna volunteered might have been Palacios) was collecting rent when he should not have, and there was "supposed to be a hit on [Akuna's] neighborhood." Akuna said that the last time he was arrested for the Palacios murder, the police said witnesses had identified him, Sanchez, and Escalante as being involved, but later released them. The informants said that Sanchez was in county jail, and asked about Escalante. Akuna said that Escalante was currently out of custody. The informants then prodded Akuna, saying that the police must have something on him and Sanchez. They urged him to think about whether, if he was involved, the others might say something to the police. They asked if he had a phone when the crime occurred, because

the police could track his whereabouts. They also urged him to come up with an explanation for his DNA being on a shell casing. The informants then talked about knowing some other details of the killing, and Akuna talked about his earlier arrest for the crime with Sanchez and Escalante. The informants suggested that it was illegal to record them speaking in the cell.

At one point, Akuna was removed from the cell for eight minutes, then returned and said he had been told they were adding a murder charge to his arrest. The informants returned to the subject of Akuna's phone and asked if he knew where it was. Akuna said that the police had it. The informants reiterated that a witness must have put Akuna at the scene and the police could use the phone to "seal the deal."

At that point, Akuna asked them what they thought was the best thing to do. They said it depended on how his DNA got on a shell casing and urged him to be smart and come up with an explanation. After some additional conversation, Akuna asked, "What if I touched the bullets?" He suggested "I sold the gun or what you're saying like." The informants urged him to rehearse his story. They said that they were all "homies," that they wanted to help him, and that he should not be afraid to ask.

After additional conversation, the informants again asked about Akuna's phone. Akuna said that he had not received his phone back, and that "it'll probably show" that he was in the area of the killing. He said that a Glock and a revolver had been used in the murder. He said that he had loaded the revolver but had not loaded Glock, and

suggested that maybe his DNA got on the expended shell casings from perspiration through his shirt.

The informants pressed him to tell what happened, saying that otherwise they could not help him. Subsequently, over the next 19 pages of transcript, Akuna confessed to the murder and implicated Escalante, Dominguez, and Sanchez. According to Akuna, Dominguez set up Palacios to be at Daisy's Meat Market on the pretense of talking with him, apparently about gang business. Akuna was at a banquet and received a call from Dominguez that the "fool [Palacios] was there." Akuna said "they came and picked us [Akuna and Escalante] up." Akuna had a revolver ("like a .38 or something"), which he gave to Escalante. Dominguez had a "[G]lock 40" which he gave to Akuna. They intended to kill Palacios, because he had "smoked" Akuna's "homey" Jack Hicks over gang politics.

Akuna and Escalante "rolled over there" to the market. Akuna explained: "[S]o like I . . . just walked up to him [Palacios] and [Escalante] like came out from behind me and tried to like dump. . . . But the gun [the revolver] that fool had just went click. Like the hammer just dropped and that was it. Nothin' happened. So . . . that's when I just unloaded on the fool [Palacios]." Palacios fell, and Akuna approached him as he lay on the ground and "started pumpin' that shit. . . . All 16 shots" from the "[Glock] 40." Escalante eventually was able to fire a couple of times at Palacios. After the shooting, Akuna returned the Glock to Dominguez.

After the conversation, Detective Blagg obtained a search warrant for Akuna's cell phone data. The data showed that on June 14, 2012,

from 8:53 p.m. to 9:46 p.m., several calls were made and received by that phone from cell towers in and around the area of the murder, including a call to Escalante's phone.

El Monte Police Detective Ralph Batres testified as the prosecution's gang expert. The parties stipulated that El Monte Hayes (EMH) was a criminal street gang within the meaning of section 186.22. According to Detective Batres, it was a small gang, that claimed a four block area around Medina Court. Photographs seized from Akuna's residence showed Akuna, Escalante, and other EMH gang members throwing gang signs. Akuna, Escalante, Sanchez, and Dominguez were all EMH members. At the time of the shooting, Akuna and Escalante were both 25 years old, Dominguez was 52, and Sanchez was 60.

Based on a hypothetical question similar to the facts of this case, Batres opined that the murder was committed for the benefit of, at the direction of, and in association with the EMH gang because senior members of EMH ordered younger members to kill another member, which would cause their gang and other gangs to be fearful and respect them.

DISCUSSION

I. *Voluntariness*

Defendants contend that Akuna's confession was not voluntary. We conclude that they have forfeited the issue, and that, in any event, it lacks merit.

Before the preliminary hearing, Akuna's attorney filed a written motion to suppress Akuna's confession on the grounds that his rights

under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*) were violated. The preliminary hearing court held an evidentiary hearing at which Detective Blagg testified that Akuna was arrested in connection with the murder of Palacios on July 18, 2012. Akuna later invoked his right to counsel under *Miranda*, and was released on July 20, 2012, pending further investigation. On March 20, 2013, Detective Blagg learned that Akuna had been arrested by Los Angeles County Sheriff's deputies for a burglary charge unrelated to the Palacios killing. At the Norwalk station, where Akuna was being booked, Detective Blagg arranged to have Akuna placed in a cell with two informants. In order to stimulate conversation among them, he told Akuna that he was still investigating him for the Palacios murder and would be presenting the case to the District Attorney's Office for filing. Akuna's conversation with the informants was recorded.

The preliminary hearing court took the motion under submission to read the transcript of Akuna's conversation with the informants. The court noted that although Detective Blagg's tactics did not violate *Miranda* or *Massiah* (the only issues raised in Akuna's motion), the court, "in an abundance of caution," wished to determine whether the circumstances of Akuna's case were "distinguishable" in the sense that they were "coercive to such an extent that . . . the right to counsel should be invoked." The prosecutor observed that he had not responded to any issues related to "coercion or duress or anything like that." The court stated that if, after reviewing the transcript, the court believed the cases applying *Miranda* and *Massiah* were distinguishable, it would

give the prosecutor a chance to respond and hold another hearing. On March 18, 2014, having read the transcript of Akuna's conversation with the informants, the court denied the motion without further argument. Thereafter, at the preliminary hearing, Akuna was held to answer, along with his codefendants.

On March 19, 2015, prior to trial and before the trial court (a different judge), Akuna's attorney renewed the motion to suppress Akuna's confession. Escalante's attorney (as well as counsel representing Sanchez and Dominguez, who at that point had not yet pled guilty) purported to join in the motion. As described by the trial court, and not contradicted by Akuna's attorney, the motion was "to suppress [Akuna's] statement that was made in the jail cell under both *Miranda* and *Massiah*." Akuna's attorney conceded that the motion had earlier been denied by a prior judge. After reviewing the recording of Akuna's conversation with the informants and hearing further argument (none of which referred to whether Akuna's statements were involuntary), the trial court denied the motion on the ground that *Miranda* and *Massiah* did not apply. The court stated that it was denying the motion "anew to whatever extent you could have raised it at trial. However, that is not meant to be a substitution or an affirmation [of the prior judge's ruling, which] still stands."

As we have noted, on appeal, Akuna and Escalante argue that Akuna's confession, in which he implicated Escalante, was involuntary. However, the record reflects that in the pretrial motion made to the trial court, Akuna moved to suppress his statements solely on the ground that they were obtained in violation of *Miranda* and *Massiah*.

Neither he nor Escalante moved to suppress on the ground that his statements were involuntary, and nothing suggests that the trial judge considered that issue. That the preliminary hearing court appeared to consider the issue of voluntariness on its own motion is of no moment. We review the record of the motion as made and ruled upon in the trial court, not the record as made and ruled on before the preliminary hearing. Because the issue of voluntariness was not raised in the trial court, it is forfeited on appeal. (See *People v. Hawkins* (2012) 211 Cal.App.4th 194, 203.)

Even if the issue were not forfeited, it is clear that Akuna's statements were not involuntary. "'"The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. [Citations.] In determining whether a confession was voluntary, "'[t]he question is whether defendant's choice to confess was not "essentially free" because his [or her] will was overborne.'" [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.] "'On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review.'" [Citation.]' [Citation.] [¶] In evaluating the voluntariness of a statement, no single factor is dispositive. [Citation.] The question is whether the statement is the product of an "'essentially free and unconstrained choice'" or whether the defendant's "'will has been overborne and his capacity for self-determination critically impaired'" by coercion. [Citation.] Relevant considerations are "'the

crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health.'" [Citation.] [¶] 'In assessing allegedly coercive police tactics, "[t]he courts 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." [Citation.]' [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 436.)

In the instant case, defendants argue, in substance, that the informants used deception to befriend Akuna, and "coerced" him into telling them the facts surrounding the killing by convincing him that without their help in manufacturing a defense he would be convicted of murder. But nothing in the tactics employed by Detective Blagg and the informants suggested that Akuna's choice to confess was not free and voluntary within the meaning of the law. Before placing Akuna in a cell with the informants, Detective Blagg falsely told him that his DNA had been found in a shell casing at the scene. This falsehood, intended to spark a conversation about the murder with the informants and not suggesting any particular details of the killing itself, was not of a type likely to induce a false confession. (*People v. Carrington* (2009) 47 Cal.4th 145, 172.) Similarly, the tactics used by the informants—befriending Akuna, saying that they wanted to help him, urging him to tell them the details of the killing so they could help manufacture a defense in order to avoid a murder conviction—were not the type of tactics likely to overbear Akuna's free will. Akuna believed he was

talking to fellow gang members and talked freely. The informants used no threats, and nothing suggests that Akuna's level of maturity, education, or physical or mental condition made him susceptible to being coaxed into confessing to a killing he did not commit or inventing details that did not occur. To the contrary, """his capacity for self-determination""" (*Williams, supra,* 49 Cal.4th at p. 436) was fully intact. The entirety of the conversations leaves no doubt that he explained the killing to the informants willingly as a means of trying to manufacture a defense to fit the facts of the crime he committed. In short, substantial evidence supports a finding that Akuna's confession was free and voluntary.

II. *Right of Confrontation*

Escalante contends that Akuna's confession was testimonial as to him, and violated his Sixth Amendment right to confrontation. He is mistaken.

Lower federal courts have consistently held that a defendant's statements made unwittingly to a government informant are not testimonial within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and its progeny. (See *United States v. Smalls* (10th Cir. 2010) 605 F.3d 765, 778 [recorded statement to a confidential informant, known to declarant "only as a fellow inmate, is unquestionably nontestimonial"]; *United States v. Saget* (2d Cir. 2004) 377 F.3d 223, 229 ["a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*"] (Sotomayor, J.);

see also *United States v. Johnson* (6th Cir. 2009) 581 F.3d 320, 325; *United States v. Watson* (7th Cir. 2008) 525 F.3d 583, 589; *United States v. Udeozor* (4th Cir. 2008) 515 F.3d 260, 270; *United States v. Underwood* (11th Cir. 2006) 446 F.3d 1340, 1347.) In *People v. Arauz* (2012) 210 Cal.App.4th 1394 (*Arauz*), the California Court of Appeal agreed with the analysis of the lower federal courts and held that under the primary purpose test of testimonial statements propounded in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), statements unwittingly made to an informant are not testimonial, because the defendant does not expect his statements to be used in court. (*Arauz, supra*, 210 Cal.App.4th at p. 1402.)[3] The court quoted the post-*Davis* decision in *Michigan v. Bryant* (2011) 562 U.S. 344, 367, footnote 11 (*Bryant*): "'"[I]t is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." [Citation.] . . . An interrogator's questions, unlike a

[3] In *Davis, supra*, 547 U.S. 813, 822, in holding that statements made by a victim of domestic violence in a 911 call were not testimonial, the court articulated a "primary purpose test." The court held: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." In the course of its discussion, the court cited with approval *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184 as an example of statements that "were clearly nontestimonial," and described *Bourjaily* as involving "statements made unwittingly to a Government informant." (547 U.S. at p. 825.)

declarant's answers, do not assert the truth of any matter.'" (*Arauz, supra,* 210 Cal.App.4th at p. 1402.)

Escalante argues that the lower federal court authorities decided after *Davis* and pre-*Bryant* are no longer good authority, and that *Arauz* (decided post-*Bryant*) was incorrectly decided, because *Bryant* clarified that the primary purpose test requires an analysis of the motivations of both the defendant and the questioner. Thus, that a declarant does not intend statements unwittingly made to an informant to be used in court is not controlling. Rather, *Bryant* reasoned that under the primary purpose test, among the relevant factors to be objectively assessed to determine whether a statement is testimonial is a "combined inquiry that accounts for both the declarant and the interrogator." (*Bryant, supra*, 562 U.S. at p. 367.)

We have found no decision, and Escalante has cited us to none, in which a court has held that under the reasoning of *Bryant,* a declarant's statement made unwittingly to a police informant is testimonial. Further, while we agree that *Bryant* requires consideration of the nature of the questioning from the perspective of both the questioner and the declarant, we do not agree that *Bryant,* or the later decision in *Ohio v. Clark* (2015) 576 U.S. __, 135 S.Ct. 2173, 2180 (*Clark*), which also discussed the primary purpose test, suggests that use of a police informant, to whom the declarant unknowingly makes statements that will be used in court, transforms the declarant's statements into testimonial hearsay.

Building on *Davis, Bryant* held that the confrontation clause is not triggered when an interrogation's primary purpose is in response to an ongoing emergency. In that situation, the purpose is not to create a record for trial. (*Bryant, supra*, 562 U. S. at p. 358.) However, *Bryant* noted other circumstances could exist "when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony." (*Ibid*.) Whether an ongoing emergency exists is one factor. (*Id*. at p. 366.) Another factor is "the informality of the situation and the interrogation." (*Id*. at p. 377.) Also relevant are the standard rules of hearsay, which are designed to identify some statements as reliable. (*Id*. at pp. 358-359.) Applying these principles, the *Bryant* court held "that the statements made by a dying victim about his assailant were not testimonial because the circumstances objectively indicated that the conversation was primarily aimed at quelling an ongoing emergency, not establishing evidence for the prosecution." (*Clark, supra,* 576 U.S. at p. __, 135 S.Ct. at p. 2180.)

In *Clark*, the high court again refined the primary purpose test, finding that statements made by a three-year-old to teachers who suspected he had been abused were not testimonial. (*Clark, supra*, 576 U.S. at p. ___, 135 S.Ct. at p. 2181.) *Clark* held that the boy's statements "clearly were not made with the primary purpose of creating evidence" for the defendant's prosecution so "their introduction at trial did not violate the Confrontation Clause." (*Ibid*.) In doing so, the court noted that the boy's "statements occurred in the context of an ongoing emergency involving suspected child abuse." (*Clark, supra*, 576 U.S. at

p. ___, 135 S.Ct. at p. 2181.) The teachers' immediate concern was protecting a vulnerable child, and the teachers needed to know whether it was safe to release the boy to his guardian. Moreover, both the teachers' questions and the boy's answers "were primarily aimed at identifying and ending the threat." (*Ibid.*) The high court found "no indication that the primary purpose of the conversation was to gather evidence" for the defendant's prosecution. (*Ibid.*) The teachers never informed the boy "that his answers would be used to arrest or punish his abuser. [The boy] never hinted that he intended his statements to be used by the police or prosecutors." (*Ibid.*) The conversation "was informal and spontaneous" (*ibid.*), and a young child in these circumstances "would [not] intend his statements to be a substitute for trial testimony," but rather "would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all." (*Id.* at p. 2182.)

Clark also noted it was "highly relevant" that the boy was speaking to his teachers. (*Clark, supra*, 576 U.S.___, 135 S.Ct. at p. 2182.) "Courts must evaluate challenged statements in context, and part of that context is the questioner's identity. [Citation.] Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers. [Citation.] It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police." (*Ibid.*) *Clark* concluded that "[b]ecause neither the child nor his

teachers had the primary purpose of assisting in [the defendant's] prosecution, the child's statements do not implicate the Confrontation Clause and therefore were admissible at trial." (*Id.* at p. ___ ,135 S.Ct. at p. 2177.)

Davis, *Bryan*t and *Clark* all involve ongoing emergency situations, which are markedly different from the situation here, in which gang members acting as police informants secretly recorded their conversation with Akuna, a fellow gang member, while in a jail cell. It is not at all apparent that the primary purpose analysis of these opinions, made in the context of emergencies, suggests that the Supreme Court would find statements made unknowingly to a government informant under the circumstances here to be testimonial. And, as we have noted, no case has so held. That said, assuming the primary purpose test as developed in these decisions fully applies to the situation here, it does not require a focus solely on the questioner's motives, nor does it compel the conclusion that the questioner's motives take precedence over the declarant's motives. Further, *Davis*, *Bryant* and *Clark* do not suggest that to make a declarant's statements nontestimonial, both the questioner and declarant must lack any purpose of preserving evidence for future prosecution. Thus, in the instant case, even though the informants recorded Akuna's statements for the primary purpose of creating evidence for a future prosecution, that is not determinative. Rather, the high court has made it clear we must objectively view the totality of the circumstances. (*Bryant, supra*, 562 U.S. at p. 359.)

Here, it is true that informants did not record Akuna during an ongoing emergency. However, *Bryant* noted that other circumstances can produce nontestimonial statements. (*Bryant, supra*, 562 U.S. at p. 358.) The rules of hearsay and the "informality" of the situation are factors to consider. (*Id.* at pp. 358-359, 366, 377.) *Clark* noted the young boy in that case made his statements in a conversation that "was informal and spontaneous." (*Clark, supra*, 576 U.S. at p. ___, 135 S.Ct. at p. 2181.) As such, to the extent Escalante suggests that because the informants acted for the police, it is irrelevant that the conversation lacked solemnity or formality, he is mistaken. Akuna spoke in a relaxed setting with fellow gang members, and his statements were not made under circumstances that imparted the formality and solemnity characteristic of testimony. The circumstances also were conducive to the reliability of his statements. Indeed, although the informants were acting for the police, the conversation, viewed objectively, did not proceed in any manner as would a police interrogation.

Clark also noted the statements must be examined in context, a consideration that includes the interviewer's identity. *Clark* found it "highly relevant" that the boy spoke to his teachers. (*Clark, supra*, 576 U.S. at p. ___ ,135 S.Ct. at p. 2182.) Here, it is highly relevant that the questioners were gang members, albeit (unknown to Akuna) they were paid informants. Certainly the dynamic between gang members is not at all analogous to the dynamic between a citizen and the police.

Finally, *Clark* emphasized that the boy's age fortified the conclusion the statements were not testimonial. (*Clark, supra*, 576 U.S.

at p. ___ [135 S.Ct. at pp. 2181-2182].) Clark determined it was "extremely unlikely" a three-year-old child in this situation would intend his statements to be a substitute for trial testimony. (*Id*. at p. 2182.) Likewise, it is extremely unlikely that a gang member in Akuna's position would intend his statements to be a substitute for trial testimony.

Assuming the primary purpose test as currently articulated applies with full force to the present case, we conclude that the totality of the circumstances demonstrates Akuna's statements were not testimonial. Thus, admission of the statements into evidence did not violate Escalante's Sixth Amendment right to confrontation.

III. *Aranda/Bruton*

Escalante contends that introduction of Akuna's confession violated the *Aranda/Bruton* rule. However, our conclusion that Akuna's statements are nontestimonial vitiates the contention. Under the *Aranda/Bruton* rule, a """"nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given."""" (*People v. Capistrano* (2014) 59 Cal.4th 830, 869.) *Crawford, supra,* 541 U.S. 36, did not expressly overrule *Aranda* or *Bruton*. Nonetheless, following *Crawford*, several California appellate courts and federal courts have concluded the Sixth Amendment prohibits only the admission of *testimonial* statements

from an absent witness, even if the statement is a confession of a codefendant. (*People v. Arauz, supra*, 210 Cal.App.4th at pp. 1401-1402; *People v. Arceo* (2011) 195 Cal.App.4th 556, 576; *United States v. Johnson, supra,* 581 F.3d at p. 326; *United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85.) Although the California Supreme Court has yet to decide the issue, it has recognized that "[o]nly the admission of testimonial hearsay statements violates the confrontation clause." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 812.) We decline Escalante's request that we deviate from these established authorities, and conclude that because Akuna's statements were nontestimonial, their introduction against Escalante did not violate the *Aranda/Bruton* rule.

IV. *Declarations Against Penal Interest*

Over the objection of Escalante (as well as Sanchez and Dominguez, who had not yet accepted plea bargains), the trial court ruled Akuna's statements admissible as declarations against penal interest under Evidence Code section 1230, finding them sufficiently trustworthy to be admissible against his codefendants. On appeal, Escalante contends that although Akuna was unavailable at trial and his statements were against Akuna's penal interest, the trial court erred in finding them sufficiently reliable to be considered against Escalante. We disagree, and find the decision in *Arauz* controlling.

In *Arauz*, the two defendants were charged with two counts of attempted murder in a gang-related shooting. (210 Cal.App.4th at pp.

1397, 1398, 1400.) After their accomplice was arrested on an unrelated charge, he was placed in a cell next to a paid informant and their conversation was surreptitiously recorded. The informant told the accomplice that "he was associated with the Mexican Mafia and that [the accomplice] had been 'greenlighted' because he and his 'homies' committed a driveby shooting in violation of Mexican Mafia rules. [The informant] asked [the accomplice] about the shootings and said he would 'run court' on him and advise other gang associates of his findings." (*Id.* at p. 1399, fn. omitted.) The accomplice then told the informant that he had driven the defendants to the shooting, described their pistols, and said the defendants had gotten out of the car and shot two "homies." (*Ibid.)*

On appeal from their attempted murder convictions, the defendants contended that the trial court erred in admitting the accomplice's statements against them as being sufficiently trustworthy. The appellate court rejected the contention:

"To be admissible [as a declaration against penal interest], the out-of-court statement must be trustworthy and against the declarant's penal interest. [Citation.] '[A] hearsay statement "which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." [Citations.]' [Citation.] [¶] Appellants argue that [the accomplices's] statements were not trustworthy because [he] was told that he had been 'greenlighted' by the Mexican Mafia for committing a driveby shooting. 'There is no litmus test for the determination of whether a statement is

trustworthy and falls within the declaration against interest exception. The trial court must look to the totality of the circumstances in which the statement was made, whether the declarant spoke from personal knowledge, the possible motivation of the declarant, what was actually said by the declarant and anything else relevant to the inquiry. [Citations.]' [Citing *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.]

"In *People v. Duarte* [(2000)] 24 Cal.4th 603, Morris and the defendant committed a driveby shooting. After arrest, Morris told the police that he did not want to kill anybody and 'shot high' to avoid harming anyone. (*Id.* at p. 613.) The Supreme Court concluded that the statement lacked trustworthiness and was not 'specifically disserving' of Morris's penal interest. (*Ibid.*) Unlike the defendant in *Duarte*, [the accomplice in the present case] did not speak to a police officer or try to shift the blame to appellants. [He] thought he was answering to an inquiry from the Mexican Mafia. This 'context' (*id.* at p. 613) is particularly compelling and augers in favor of admissibility. [The accomplice] said that he drove appellants to El Rio and they shot the two victims. He was candid about his role in the shooting and bragged that it was a 'legit shooting.' The statement was '"so far contrary to [Velasquez's] interests 'that a reasonable man in his position would not have [said it] unless he believed it to be true.'" [Citations.]' [Citation.]

"[The accomplice's] 'facially incriminating comments [implicating himself and identifying appellants by their gang monikers] were in no way exculpatory . . . .' [Citation.] His detailed statements were part of

his explanation to someone he thought was 'running court' for the Mexican Mafia. Although the conversation was a question and answer session, [his] statements were 'inextricably tied to and part of a specific statement against penal interest. [Citation.]' [Citation.] Such specificity, including naming both appellants as the actual shooters, shows 'trustworthiness.' The trial court did not err in finding that the statements implicating himself and appellants were 'specifically disserving,' and thus admissible as a declaration against penal interest." (*Arauz, supra*, 210 Cal.App.4th at pp. 1400-1401, fn. omitted.)

The analysis of *Arauz* is directly applicable here. Akuna did not speak to the police and did not try to shift the blame for the killing to Escalante. Rather, he confessed to shooting at Palacios 16 times. He said he gave a gun to Escalante to use, said the gun malfunctioned when Escalante tried to use it, and said Escalante was able to fire only a couple of shots. Moreover, Akuna believed that he was talking with fellow gang members in an effort to manufacture a defense to fit the facts of the killing he committed. No reasonable person in that situation would have made the statements unless he believed them to be true. Further, Akuna's statements implicating himself and Escalante were in no way exculpatory; they were detailed and part of his explanation to persons he believed to be fellow gang members who would help him. His description of Escalante's criminal conduct was inextricably part of his statement against penal interest. In short, given all these indicia of trustworthiness, the trial court did not err in admitting Akuna's statements against Escalante.

V. *Accomplice Corroboration*

Escalante contends that Akuna's statements implicating him required corroboration, because Akuna was an accomplice as a matter of law; therefore the trial court erred in denying his motion for judgment of acquittal (there purportedly being insufficient corroboration) and in not instructing on the corroboration requirement. However, our conclusion that Akuna's statements were properly admitted as declarations against penal interest defeats these contentions. "'The usual problem with accomplice testimony—that it is consciously self-interested and calculated—is not present in an out-of-court statement that is itself sufficiently reliable [as a declaration against penal interest] to be allowed in evidence.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 555-556 (*Brown*).) Thus, no corroboration is required for an accomplice's declarations against penal interest. (*Id.* at p. 556 [accomplice's "statements . . . were themselves made under conditions sufficiently trustworthy to permit their admission into evidence despite the hearsay rule; namely, they were declarations against his penal interest. Therefore, no corroboration was necessary, and the court was not required to instruct the jury to view [the] statements with caution and to require corroboration."].)

In any event, there was clearly adequate corroboration. "'"Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" . . . The evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the

jury that the accomplice is telling the truth." [Citation.]'" (*Brown, supra*, 31 Cal.4th at p. 556.)

Here, Akuna told the informants that the motive for the killing of Palacios, an EMH gang member, was his having previously killed Jack Hicks, also an EMH member, over gang business. That motive was corroborated by evidence found in the search of Akuna's residence: a newspaper article identifying German Palacios as a suspect in the shooting death of Jack Hicks, a crime which had occurred four years earlier, and a printout from the Los Angeles Times Homicide Report website (a service that chronicles Los Angeles County murders) reporting the death of Jack Hicks.

Both Akuna and Escalante were EMH gang members. Cell phone records showed that Akuna was in the area of the killing around the time of the murder, and included a call to Escalante's phone. There was no dispute that two separate firearms were used in the killing, suggesting that two people were involved. Akuna told the informants that he fired 16 shots from a .40 caliber Glock pistol. A fully loaded .40-caliber Glock has a total of 16 rounds. The twelve .40 caliber shell casings recovered at the scene were all fired from a single Glock firearm, and all but one of the thirteen projectiles and fragments recovered from Palacios' body were consistent with having been fired from a .40 caliber Glock firearm. Akuna told the informants that he gave Escalante a .38 caliber pistol to use, that the gun malfunctioned, and that Escalante was able to fire only a couple of times. One projectile removed from Palacios' body was consistent with being fired from either a .38- or .357-caliber revolver. On this record, there was

ample independent evidence tending to connect Escalante to the crime in such a way as to demonstrate that Akuna was telling the truth. Therefore, even if Akuna's statements required corroboration, the trial court did not err in denying Akuna's motion for judgment of acquittal, and any error in failing to instruct on accomplice corroboration was harmless. (*Brown, supra,* 31 Cal.4th at p. 556 ["'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record.'"].)

VI. *Abstract of Judgment*

Akuna notes that his abstract of judgment for the indeterminate counts (counts 1 and 2) must be corrected to conform to the court's oral pronouncement imposing a criminal conviction assessment of $30 per count (Gov. Code, § 70373) and court security fee of $40 per count (§ 1465.8). Respondent agrees, as do we. The indeterminate abstract of judgment incorrectly reflects that the court imposed a total criminal conviction assessment of $90 and a total court security fee of $120 on counts 1 and 2. The error must be corrected. Thus, as to counts 1 and 2, the indeterminate abstract of judgment must be amended to reflect the assessments actually imposed: a total criminal conviction assessment of $60 ($30 per count) and a total court security fee of $80 ($40 per count). (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 [when there is a discrepancy between the oral pronouncement of a sentence and the minute order or the abstract of judgment, the oral pronouncement controls].)

DISPOSITION

As to Escalante, the judgment is affirmed. As to Akuna, the clerk is directed to amend the indeterminate abstract of judgment as to counts 1 and 2 to reflect a total criminal conviction assessment (Gov. Code, § 70373) of $60 and total court security fee (§ 1465.8) of $80. The clerk shall send the amended abstract to the Department of Corrections and Rehabilitation. As so modified, the judgment as to Akuna is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.