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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICARDO MARTINEZ, Defendant and Appellant.	B272441 (Los Angeles County Super. Ct. No. NA088173)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed in part, vacated in part, and remanded with directions.

Mark L. Christiansen, 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, Scott A. Taryle and Gregory B. Wagner, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ricardo Martinez appeals from the judgment entered following his convictions of, inter alia, first degree murder and attempted murder with true findings on gun and gang allegations. He claims that the judgment must be reversed because the trial court's failure to continue the trial deprived him of the opportunity to put on an important alibi witness. He further claims that there was instructional error and that the court erroneously admitted character evidence, gang expert testimony, and the prior testimony of an unavailable witness. We affirm the judgment, but we remand for the trial court to correct sentencing errors and to consider newly enacted Senate Bill No. 620.

FACTUAL SUMMARY

1. The Murder of Robert Walker, Jr. and the Attempted Murder of Tyrone Jackson.

On July 19, 2004, defendant, shooting multiple times, killed Robert Walker, Jr. (count 2) as Walker sat in his wheelchair. The shooting was witnessed by two bystanders, one of whom, Jackson (count 3), was sitting near Walker. Both identified defendant.

2. The Murder of Vanessa Rios.

a. *People's Evidence.*

On October 6, 2004, Vanessa Rios lived with Eleazar Perez and Boris Atanacio. Rios, born a male, lived as a female. That evening, an 18- or 19-year-old Hispanic man knocked on the door and Rios answered. The man asked Rios to help him buy beer and Rios agreed. About 10 minutes later, Perez told Atanacio that Rios had been shot. Long Beach Police Officer Abel Morales showed a photographic lineup to Atanacio, who identified defendant and one other person in a photographic lineup,

indicating they both "look like" the man who spoke to Rios at the door.

Perez[1] was in the shower when he heard someone knock on the door. Perez heard Rios and a male talking. Rios told Perez she was going to the store, then left. Later, Perez heard a gunshot and Rios screaming. Rios yelled, "Ricardo shot me." Perez thought Ricardo was jealous of Perez and Rios, though Perez denied having a relationship with Rios. Perez identified Ricardo as defendant in a photo lineup. Perez believed defendant to be Rios's boyfriend and a gangster.

Artemia Rios (Artemia), a neighbor, was asleep when someone screamed her name and said Rios had been shot. Artemia went outside and saw Rios on the ground with Norby Acevedo. Artemia heard Rios tell another neighbor that "Martin's friend" shot her. Two days after the shooting, defendant, whom Artemia identified as Swifty; Juan Martin Luna, whom she identified as Martin; and two other people threatened her in an apparent attempt to dissuade her from becoming a witness.

Three days after the murder, Acevedo told Artemia he and his daughter had also been threatened so he did not go to the police with what he knew. Additionally, Acevedo's tire shop was

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[1] References to Perez's testimony are to his testimony during an April 29, 2013 conditional examination, the videotape and transcript of which were admitted into evidence at trial.

set on fire. Acevedo later told Artemia the person who killed Rios was Swifty and that Martin was the other person in the alley.[2]

Alfred Brackett was at a nearby gas station during the shooting. He heard two gunshots and saw a Hispanic woman staggering away. A male Hispanic who looked like defendant ran past him.

Rios died from a gunshot wound (count 1).

b. *Defense Evidence.*

Defendant's mother (Gloria Martinez), father (Martin Martinez), and brother (Jaudiel Martinez) testified that defendant was at work when Rios was murdered. Defendant's father and brother testified that defendant was not a gang member.

3. Gang Evidence.

Long Beach Police Detective Sean Magee testified as a gang expert. Detective Magee had discussed gangs with officers from other agencies throughout the state. He was familiar with the East Side Longos (ESL) gang and had more contact with ESL members in Long Beach than with members of any other gang. Walker was killed in ESL territory. Detective Magee opined that defendant was an ESL member with the moniker, Swifty. Detective Magee was also familiar with Luna whom he knew as an ESL member with the moniker, Martin.

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[2] At trial, Acevedo said he was asleep when the October 6, 2004 shooting occurred. He denied remembering hearing gunshots, denied knowing who killed Rios, denied remembering telling Artemia that Swifty killed Rios, and denied seeing Swifty in the courtroom. Long Beach Police Officer Song Cheak Ier testified that Acevedo told her that, about 10:30 p.m., Acevedo heard a gunshot. He saw a vehicle drive by and saw an Hispanic male holding his stomach, crying.

In 2004, there was a race war between ESL members and African-Americans. ESL members would frequently attack African-Americans without confirming their gang involvement. In response to a hypothetical question based on evidence relating to the Walker and Jackson shootings, Detective Magee opined the shootings were for the benefit of, in association with, and at the direction of, ESL.

Detective Magee also testified that homosexuality was unacceptable within ESL, a Surenos gang. Homosexuality among members made the gang look weak, adversely affecting the gang's reputation and ability to commit crime, so a Surenos gang member engaged in homosexual activity could be assaulted or killed. In response to a hypothetical question based upon the facts of the Rios shooting, Detective Magee opined the shooting would be for the benefit of, and in association with, the gang.

Detective Brad Scavone also testified. He had been a sworn peace officer for 23 years and a detective in the Long Beach Police Department gang unit since 2003. He had training and experience with criminal street gangs, and had investigated hundreds of gang-related crimes. The detective investigated the Rios shooting to determine if it was gang-related. He was familiar with the area of the shooting as an area claimed by ESL. He was also familiar with the people living in the area, including Rios. Based on his prior investigations, Detective Scavone knew defendant and Luna to be ESL members and close associates.

Long Beach Police Detective Todd Johnson also testified he was familiar with Luna, and that defendant's former wife and Luna's wife were sisters. Officer Morales testified he knew defendant by the gang moniker, Swifty.

4. Procedural history.

On February 3, 2016, a jury found defendant guilty on two counts of first degree murder (Pen. Code, § 187, subd. (a);[3] counts 1 & 2), each with a finding he personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)) and with, as to count 2, a multiple-murder special circumstance finding. The jury also found him guilty on count 3, attempted willful, deliberate, and premeditated murder (§§ 664, 187) with a finding he personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). The jury found true as to all counts that defendant committed the offenses for the benefit of, at the direction of, and/or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

On May 19, 2016, the trial court sentenced defendant on count 1, to life without the possibility of parole (LWOP) with a consecutive term of 25 years to life (§ 12022.53, subd. (d)). His sentence on count 2 was LWOP (concurrent to count 1) with a consecutive term of 25 years to life (§ 12022.53, subd. (d)). His sentence on count 3 was a consecutive term of 15 years to life, with an additional consecutive term of 20 years to life (§ 12022.53, subd. (c)).

ISSUES

Defendant claims (1) the court erroneously refused to continue the trial, (2) the court erroneously failed to give CALCRIM No. 3575 to the jury, (3) the court erroneously admitted character evidence to prove conduct, (4) Detective Magee presented expert opinion testimony based on inadmissible

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[3] Unless otherwise indicated, subsequent section references are to the Penal Code.

testimonial hearsay, (5) Perez's conditional examination was hearsay violative of the confrontation clause because the People did not exercise due diligence to secure Perez's attendance at trial, and (6) his sentence must be corrected.

DISCUSSION

1. The Court Did Not Err By Refusing To Continue the Trial.

Defendant contends that the trial court deprived him of an opportunity to present an alibi witness by failing to continue trial to give the witness time to arrive at court. As we explain, the contention is meritless.

After the People rested, defense counsel told the court that a witness, defendant's ex-wife, who was coming from Las Vegas, had car trouble but would arrive at 11:30 a.m. Noting that the witness was supposed to be in court at 8:30 a.m., the court nonetheless agreed to handle other matters and to call another defense witness and then to check the witness's status. Later that morning, however, the witness informed defense counsel that she had not yet left Las Vegas and could not be in court until 1:30 p.m. The court stated, "basically we are getting variations of a story. She said definitely she would be here today, that was part of the reason we anticipated the evidence would be done today. Then this morning you indicated she was on her way but she was having problems and she would be here at 1:30. Now she's saying she hasn't left Las Vegas. Based upon that, I will not continue it."

Based on these events, defendant suggests that the trial court's "preemptive denial of a continuance was the same as precluding the opportunity to present a crucial witness for the defense." There is at least one initial problem with this suggestion: to the extent defendant argues that the trial court should have continued the trial, he never asked for a continuance. Hence, we fail to see how the court could have erred by failing to grant a motion that was never actually made.

Even if we assume that counsel requested a continuance, we do not find that the trial court abused its discretion by denying the motion. (See *People v. Howard* (1992) 1 Cal.4th 1132, 1171 (*Howard*) [whether to deny continuance during trial rests in trial court's sound discretion]; see also *People v. Seaton* (2001) 26 Cal.4th 598, 660 [appellate challenges to trial court's decision on continuance motion rarely successful].) Rather, to obtain a continuance, counsel must establish good cause. To "establish good cause for a continuance, defendant had the burden of showing that he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven." (*Howard*, at p. 1171; see *People v. Collins* (1925) 195 Cal. 325, 333 [due diligence usually requires party to use proper legal means to compel attendance of witness].)

Defendant made no such showing. His counsel did not explain what efforts he had made to secure the witness's attendance, or address why the witness had not made the journey from Las Vegas the night before she was to testify. There was no showing that counsel had issued a subpoena for her attendance

or otherwise had utilized the provisions of the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. (§ 1334 et seq.; see *Vannier v. Superior Court* (1982) 32 Cal.3d 163, 169; *Wilson v. State* (2005) 121 Nev. 345, 366.) Nor did he explain why the ex-wife's testimony was material and why, if she was going to offer an alibi, it would not have been cumulative of other witness's testimony that defendant was at work when Rios was murdered. Finally, counsel offered no assurance that the witness, who had yet to depart from Las Vegas, would get to court at any particular time.

Given the inadequacy of defendant's showing and failure to explain the material nature of the witness's testimony, denying a continuance did not amount to an abuse of discretion, much less a violation of defendant's right to due process. (Cf. *People v. Jeffers* (1987) 188 Cal.App.3d 840, 849–851.)

2. The Court Did Not Err By Failing to Give CALCRIM No. 3575.

Approximately one hour after the jury retired to deliberate, the trial court excused a juror. When this occurs and a juror is substituted after final submission of the matter to the jury, section 1089[4] requires the trial court to "instruct the jury to set aside and disregard all past deliberations and begin deliberating anew. The jury should be further advised that one of its

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[4] Section 1089 states, in relevant part, "If at any time, whether before or after the final submission of the case to the jury, a juror . . . upon . . . good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors."

members has been discharged and replaced with an alternate juror as provided by law; that the law grants to the People and to the defendant the right to a verdict reached only after full participation of the 12 jurors who ultimately return a verdict; that this right may only be assured if the jury begins deliberations *again* from the beginning; and that each remaining original juror must set aside and disregard *the earlier deliberations as if they had not been had.*" (*People v. Collins* (1976) 17 Cal.3d. 687, 694 (*Collins*), italics added; see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 446.) CALCRIM No. 3575[5] encapsulates these instructions. However, the court did not give it here.[6]

Even so, no error occurred. The jury had left the courtroom for only an hour before a juror had to be replaced with an alternate. After calling the jury into the courtroom, the foreperson identified herself and the following occurred: "The

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[5] Although the trial court used CALJIC instructions, we use CALCRIM No. 3575, which is sufficiently analogous to its counterpart, CALJIC No. 17.51.

[6] CALCRIM No. 3575 states, "One of your fellow jurors has been excused and an alternate juror has been selected to join the jury. [¶] Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now, please return to the jury room and start your deliberations from the beginning."

Court: . . . you have not started deliberations yet, correct? [¶] The Foreperson: Correct, yes. [¶] The Court: Because if you had, now that we have [a] new juror, you are to start deliberation all over again. [¶] All right. If I could have 12 jurors go back to the jury assembly room and start deliberation."

This colloquy establishes two things. First, although the jury had retired, it had not started to deliberate, an unsurprising state of affairs given that only about an hour had passed before the jury returned to the courtroom.[7] Under *Collins*, CALCRIM No. 3575 should be given if "[a]fter the jury had begun its deliberations an alternate juror was substituted for one of the original jurors." (*Collins*, *supra,* 17 Cal.3d at p. 690.) CALCRIM No. 3575 is similarly based on the premise that some deliberations have occurred before the substitution. It is only when deliberations have begun and are not commenced anew after a juror substitution that a defendant's right to a jury trial is violated. (*Collins,* at pp. 690, 692, fn. 3.) Here, the jury foreperson said that the jurors had not started deliberating, and none of the other jurors disputed the foreperson's reply.[8] Therefore, the premise on which giving CALCRIM No. 3575 is based was absent.

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[7] Apparently the jury did not go to an adjacent jury room. Before the jury retired to deliberate, the court told the jury that, after it left, a clerk would meet the jury and it would be given further instructions. The court then told the jury to "go into the jury assembly room."

[8] The parties and defendant were not present, having waived their appearance.

Second, the trial court did tell the jury that if it had started deliberating, "now that we have [a] new juror, you are to start deliberation all over again." The jury was thus instructed with the essence of CALCRIM No. 3575 and there is no reasonable possibility that any error in not giving the full instruction affected the jury's verdict. (See *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 58–60.)

3. Character Evidence.

Defendant contends that the trial court improperly admitted evidence of (a) the victim Rios's good character and of (b) defendant's bad character. We disagree.

a. *Evidence of Rios's Character to Prove Conduct.*

In the People's case, Acevedo denied knowing Rios. However, Artemia testified subsequently that Acevedo did know Rios, "[b]ecause everybody knew [Rios]. She would go talk to everybody on the block. She will help people. If they need food, she will buy food for them." The trial court sustained defense counsel's objection—"[l]ack of foundation as to why"—and granted counsel's motion to strike. Although the court sustained the objection and struck the testimony, defendant now contends that evidence of Rios's good character was inadmissible under Evidence Code section 1101, subdivision (a). Given that the evidence was not admitted and that the court instructed the jury not to "consider for any purpose any offer of evidence that is rejected, or any evidence that is stricken by the court; treat it as though you had never heard of it," we reject the contention. We presume the jury followed that instruction. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 152.)

b. Evidence of Defendant's Character to Prove Conduct.

(1) Pertinent facts.

In the defense case, defendant's mother and father testified that defendant was a working, responsible and honest man. Defendant's brother, Jaudiel, thereafter testified during redirect examination, that defendant had once been arrested while at work, three to four months after Rios's death, but defendant was released the same day. Defense counsel asked, "It's just that one time you saw him arrested and released?" Jaudiel replied yes. Defendant's counsel asked virtually no further questions on redirect examination. The court found that Jaudiel's testimony regarding defendant's lack of a significant arrest history as well as defendant's parents' testimony that defendant was a working, responsible and honest man constituted evidence of defendant's good character.

On recross-examination, Jaudiel acknowledged that defendant previously had been arrested but denied knowing how many times or for what. The prosecutor asked, "Would you like to know?" The court overruled defendant's relevance objection, reasoning that the door to questions about defendant's prior criminal conduct had been opened by the defense. The prosecution then asked Jaudiel if he was aware of defendant's prior convictions for assault with a deadly weapon in 2004, unlawful taking of a vehicle in 2006, and possession of a firearm by a felon and witness intimidation in 2009. Jaudiel denied having such knowledge.

(2) Analysis.

Defendant claims that admitting evidence of his three prior convictions violated Evidence Code section 1102 and his due process right to a fair trial. He argues this was inadmissible propensity evidence and evidence of defendant's bad character and acts. We reject the claim.

First, the court properly permitted the prosecution to ask Jaudiel about the prior convictions under Evidence Code section 1101 subdivision (c), which indicates, "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." A witness who makes a sweeping statement on direct examination may open the door to otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony. (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946; accord, *Leader v. California* (1986) 182 Cal.App.3d 1079, 1089–1091, and cases cited therein.) We review a trial court's ruling on admissibility of evidence for abuse of discretion. (*People v. Rowland* (1992) 4 Cal.4th 238, 264.) Here, the court reasonably concluded that Jaudiel's testimony implying the absence of defendant's criminal history as well as defendant's parents' testimony about defendant being a working, responsible, and honest man, constituted evidence of defendant's character. As such, the prosecution was permitted to impeach that testimony by asking about defendant's prior convictions.

Second, though questions were asked, no evidence of defendant's prior convictions was actually admitted. Jaudiel's negative answers to the prosecutor's questions left the record devoid of any evidence concerning defendant's prior convictions. The jury was later given CALJIC No. 1.02 which provides,

"Do not assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it helps you to understand the answer." Therefore, any question regarding the admissibility of defendant's prior convictions is moot.

4. No Prejudicial Hearsay or Confrontation Clause Error Occurred.

a. *Pertinent Facts.*

Detective Magee testified that, in his opinion, defendant was an ESL gang member. He based his opinion in part on conversations with veteran detectives Jerry Poole, Brad Scavone, and Hugo Cortez, and with Officer Morales, all of whom knew defendant to be an ESL gang member (hereafter, the first statement). The court overruled defendant's later foundation objection.

Detective Magee also based his opinion on the large ESL tattoo on defendant's abdomen and Aztec tattoos, which were consistent with Surenos art and Surenos gang members. "Surenos" could mean southern Mexican. Surenos were soldiers directed by the Mexican Mafia, and they are the most dominant group in the California prison system.

Detective Magee continued that Juan Martin Luna knew defendant. When asked how the detective knew that, Magee replied, "I know that because there [*sic*] were often contacted together, documented contacts [hereafter, the second statement]. In conversations with Hugo Cortez. We talked about the arrest listed in the predicate crimes in which they were together there as well [hereafter, the third statement]." Defendant's counsel stated, "Same objection, lack of foundation, personal knowledge as phrased." The court overruled the objection.

Still later, the prosecutor asked whether anything happened in June and October 2004, that caused ESL members to want to kill African-Americans. Magee testified, "Santos Mejia [, an ESL gang member,] was shot and killed after that confrontation with a group of three male Blacks [hereafter, the fourth statement]." The prosecutor asked, "Anything else?" Detective Magee replied that "[Luna] and defendant drove [Mejia] to the hospital [hereafter, the fifth statement] where [Mejia] – ." Defendant's counsel interposed the objection, "lack of foundation. Again, personal knowledge." The court overruled the objection. Magee continued, "where [Mejia] succumbed to his injuries" [hereafter, the sixth statement]. Magee opined at trial that, in 2004, ESL members were "trying to kill Black individuals in retaliation for those murders that [Magee] just described."

b. Analysis.

Defendant, citing *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), claims the challenged testimony was expert opinion testimony based on inadmissible testimonial hearsay.

(1) Applicable law.

In *Crawford v. Washington* (2004) 541 U.S. 36, the high court "held that the Sixth Amendment bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.' " (*People v. Hopson* (2017) 3 Cal.5th 424, 431.) *Sanchez* considered the degree to which the rule in *Crawford* "limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion." (*Sanchez, supra,* 63 Cal.4th at p. 670.) On the state law hearsay issue*, Sanchez* concluded, "When any expert relates to the jury case-specific out-of-court statements, and treats the

content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) "Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684, fn. omitted.) We evaluate violations of state hearsay law under the standard of prejudice enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Ochoa* (2017) 7 Cal.App.5th 575, 589 (*Ochoa*).)

Sanchez, discussing whether statements were "testimonial" under *Crawford*, stated, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra,* 63 Cal.4th at p. 689; see *Ohio v. Clark* (2015) ___ U.S. ___ [192 L.Ed.2d 306, 315] ["a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial."].) The admission of evidence in violation of *Crawford* is error of federal constitutional magnitude. (*Sanchez,* at p. 685.)

Sanchez adopted this rule: "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. . . . If the case is one in

which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez, supra,* 63 Cal.4th at p. 686.) Applying this rule, *Sanchez* concluded a STEP[9] notice, police reports, and a field identification card in that case were hearsay (*id.* at pp. 670–671, 685), the STEP notice and police reports were testimonial (*id.* at pp. 694–697), the field identification card might have been testimonial (*id.* at p. 697) and prejudicial federal constitutional error occurred, requiring reversal of gang enhancements. (*Id.* at pp. 699–700.)

Concerning the field identification card in *Sanchez*, our Supreme Court observed, "[the detective's] testimony regarding the origins of the FI card here was confusing. . . . [¶] If the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial. Because the parties did not focus on this issue, the point was not properly clarified, leaving the circumstances surrounding the preparation of the FI card unclear. We need not decide here whether the content of this FI card was testimonial." (*Sanchez, supra,* 63 Cal.4th at p. 697.)

Ochoa discussed who has the burden to demonstrate statements are testimonial hearsay. The defendant in *Ochoa* claimed expert testimony violated his federal constitutional right to confrontation because the expert relied on testimonial hearsay to support the prosecution's showing concerning a gang

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[9] This refers to the California Street Terrorism Enforcement and Prevention Act. (*Sanchez*, *supra*, 63 Cal.4th at p. 672, fn. 3.)

enhancement requirement. The defendant, however, failed to pose hearsay and confrontation clause objections at trial. (*Ochoa*, *supra,* 7 Cal.App.5th at pp. 584–586.) Absent a contemporaneous objection, *Ochoa* refused to assume that the admissions of gang membership related by a Corporal Kindorf were testimonial hearsay. "To the extent the admissions related by Kindorf were made in the course of informal interactions between the individuals and Kindorf or other officers, the admissions were not *testimonial* hearsay." (*Id.* at p. 585.)

Ochoa agreed with the reasoning in *People v. Valadez* (2013) 220 Cal.App.4th 16. *Valadez* reasoned that an expert's interactions with gang members and other officers did not objectively indicate the primary purpose of the expert's questioning was to target the defendants or any other individuals or crimes for investigation or to establish past facts for a later criminal prosecution. Instead, the expert merely educated himself about the history of gangs in an area in which he was assigned as a gang officer to help him better understand and more effectively investigate gang activity. (*Ochoa*, *supra,* 7 Cal.App.5th at pp. 585–586.)

" 'Like the mixed motives of officers and witnesses during ongoing emergencies, that he used this general information to testify as a gang expert at trial does not mean his *primary purpose* in obtaining this information was to use it against [the defendants] in a later criminal prosecution. Day in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution.' " (*Ochoa*, *supra,* 7 Cal.App.5th at pp. 585–586, quoting *Valadez*, *supra*, 220 Cal.App.4th at p. 36; see *Sanchez*, *supra,* 63 Cal.4th at p. 694

[statements to persons other than law enforcement officers are much less likely to be testimonial than statements to law enforcement officers].)

"To summarize, it is possible the admissions of gang membership related to the jury by Corporal Kindorf came from police reports or other records and, thus, may have been testimonial hearsay under *Sanchez*. However, due to defendant's failure to object, the record is not clear enough for this court to conclude which portions of the expert's testimony involved testimonial hearsay. Accordingly, defendant has not demonstrated a violation of the confrontation clause." (*Ochoa*, *supra,* 7 Cal.App.5th at p. 586.) The burden is on defendant to demonstrate error; it will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.)

(2) Application of the law to this case.

Defendant maintains that the six statements were inadmissible testimonial hearsay. We need not decide whether defendant, by failing to object to the challenged testimony on those grounds, forfeited those issues.[10] We treat all six

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[10] Defendant posed foundation and personal knowledge objections, not hearsay and confrontation clause objections. "The general rule . . . precludes review of questions on admissibility of evidence absent a timely and specific objection in the trial court on the ground urged on appeal." (*People v. Dennis* (1998) 17 Cal.4th 468, 530.) More particularly, "the general rule [is] that where the objection is lack of proper foundation, counsel must point out specifically in what respect the foundation is deficient." (*People v. Moore* (1970) 13 Cal.App.3d 424, 434, fn. 8.) A foundation objection does not preserve for appellate review a hearsay issue. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 408; compare, *People v. Cowan* (2010) 50 Cal.4th 401, 502, fn. 36 [foundation objection preserved hearsay issue where, inter alia, trial

statements as bases for opinions. Respondent concedes the first five statements are hearsay.[11] We accept the concession.

However, Detective Magee opined defendant was an ESL member, and Magee's first statement reflected a basis for that opinion. That basis included the fact Officer Morales told Magee that Morales knew defendant was an ESL member. Nonetheless, Officer Morales himself testified at trial that defendant's gang moniker was Swifty. Thus, to the extent Detective Magee's opinion was based on what Officer Morales told him, Morales's testimony independently established defendant's gang membership apart from any inadmissible hearsay and Magee's opinion was properly supported. (*Sanchez, supra*, 63 Cal.4th at p. 684.) Moreover, another basis for Magee's opinion was defendant's ESL, and related, tattoos. Defendant concedes tattoos could be indicative of his gang membership. Detective Magee's opinion was therefore properly supported apart from any hearsay.

Detective Magee opined Luna knew defendant, and Magee's second and third statements reflected bases for that opinion. However, after Rios was shot, she told her neighbor that she was shot by Martin's friend. There was ample evidence Martin was Luna. Artemia testified that two days after the shooting, Luna and defendant threatened her. Artemia also testified she had seen Luna and defendant together almost every

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court's question indicated it apparently understood objection as encompassing a hearsay objection].)

[11] What we treat separately as Detective Magee's fourth and fifth statements, respondent treats collectively as the detective's fourth statement.

day. She testified to the effect everybody in the neighborhood knew each other. Detective Magee testified Luna and defendant were both ESL members.

Detective Scavone believed Luna was an ESL member and a close associate of Luna. The trial court reasonably could have concluded Scavone's testimony was based on his personal knowledge and investigations. Defendant's former wife and Luna's wife were sisters. In sum, there was strong evidence Luna knew defendant, independent of Detective Magee's opinion (and its bases), therefore, any error in the admission of Magee's opinion that Luna knew defendant was harmless. (Cf. *Watson, supra*, 46 Cal.2d at p. 836.) Finally, as to all of the challenged testimony, there was strong evidence of defendant's guilt, therefore, any hearsay error in the admission into evidence of the opinions (for which the challenged testimony served as bases) was not prejudicial. (Cf. *ibid.*)

Whether the challenged testimony was also testimonial remains. Like the case as to the field identification card in *Sanchez*, defendant did not, as to the challenged testimony in this case, focus on the testimonial issue and the point was not properly clarified, leaving the surrounding circumstances of the challenged testimony unclear.

As in *Ochoa*, the jury in the present case announced its verdicts in February 2016, i.e., prior to the June 2016 *Sanchez* decision. Like the case in *Ochoa,* defendant failed to make a confrontation objection, so the record is insufficient for this court to conclude which, if any, portions of the challenged testimony were testimonial for purposes of the confrontation clause. Even if defendant did not forfeit the issues of whether the challenged testimony was hearsay and testimonial, we agree with

respondent that defendant failed to develop the record regarding his confrontation argument and therefore failed to meet *his* burden of demonstrating the challenged testimony was testimonial or that a violation of the confrontation clause occurred. (*In re Kathy P., supra,* 25 Cal.3d at p. 102; *Ochoa*, *supra,* 7 Cal.App.5th at pp. 585-586.)

5. Perez's Conditional Examination Testimony Was Admissible.

a. *Pertinent Facts.*

Perez, who had been Rios's roommate and heard her dying declaration that "Ricardo shot me," was unavailable to testify at trial. The People therefore sought to introduce Perez's testimony from a conditional examination conducted in 2013. At an Evidence Code section 402 hearing on whether the People exercised due diligence to secure Perez's attendance at trial, Detective Johnson testified. He attended Perez's conditional examination, which was conducted because Perez was in the custody of United States Immigration and Customs Enforcement (ICE) and subject to deportation. Defendant was represented by counsel at that hearing. Perez told Johnson that Perez was not returning. Johnson gave his contact information (name, police department and its phone number) to Perez. Perez left the United States within days after the examination, and Johnson had no contact with Perez thereafter.

Johnson also testified about his efforts to secure Perez's attendance at trial. From 2013 to the date of the admissibility hearing, Johnson had contact with the Department of Corrections and Rehabilitation, but the department had not had contact with Perez. Johnson, to no avail, ran Perez's criminal identification and information (CII) number and checked with the county jail to

see if he was an inmate. The FBI had no contacts concerning Perez.

On January 14, 2016, Perez's aunt and cousin told Johnson that they saw Perez in Mexico. But they refused to tell Johnson what city in Mexico Perez was living in, to give Johnson Perez's phone number, or otherwise to disclose how to locate Perez. Perez had not contacted Johnson. Based on Johnson's use of different databases, he concluded Perez had not returned to the United States.

During cross-examination, defendant's counsel asked Johnson if he took any steps to get contact information from Perez. Johnson testified, "[Perez might have said] what city he would probably be in, but I couldn't tell you what it is now." Perez did not have a phone number or email address at the time of the conditional examination.

Following Johnson's testimony at the hearing, the court asked defendant's counsel, "Are you objecting to former testimony?" Defendant's counsel replied, "No." The court stated, "No? All right. Former testimony will come in. Court will find that he is not available, that due diligence has been exhausted." Perez's conditional examination included the playing of a recording of an interview of Perez that occurred prior to the conditional examination. The conditional examination was videotaped and the videotape was played to the jury and admitted into evidence.

b. *Analysis.*

Defendant claims that Perez's conditional examination was hearsay and that admitting it violated his right to confrontation because the People failed to exercise due diligence in securing Perez's attendance at trial. The claim fails. Defense counsel

expressly chose not to object to the "former testimony" even after being specifically prompted by the court. Defendant has therefore waived this contention, including those based on constitutional grounds. (Cf. *People v. Abel* (2012) 53 Cal.4th 891, 924; *People v. Jones* (2003) 29 Cal.4th 1229, 1255; Evid. Code, § 353, subd. (a).)

Even if defendant did not forfeit the hearsay and confrontation issues, there is no merit to them. "Evidence Code section 1291 allows the use of former testimony if the witness is unavailable and the party against whom the former testimony is offered was a party to the proceeding in which the former testimony was given and had the right to confront and cross-examine the witness." (*People v. Sandoval* (2001) 87 Cal.App.4th 1425, 1433–1434 (*Sandoval*); Evid. Code, § 1291, subd. (a)(2).) There is no dispute Perez's testimony was presented during a conditional examination in which defendant was represented and had the opportunity to, and did in fact, cross-examine him. (Cf. *Sandoval*, at p. 1434.)

"Unavailable as a witness" means the declarant is absent from the hearing and the court is unable to compel his or her attendance by its process. (Evid. Code, § 240, subd. (a)(4).) Perez was absent from trial and the trial court had no power to compel his attendance at trial because he had been deported, apparently to Mexico. (Cf. *People v. Herrera* (2010) 49 Cal.4th 613, 626; *Sandoval*, *supra,* 87 Cal.App.4th at pp. 1428, 1432–1433 [witness deported to his native Mexico unavailable under Evid. Code, § 240, subd. (a)(4)].) "If the requirements of [Evidence Code sections 1291 and 240] are met, then the former testimony was admissible whether or not it was elicited in a conditional examination." (*People v. Ware* (1978) 78 Cal.App.3d 822, 828,

fn. 4.) Admission of the conditional examination did not constitute hearsay error.

Thus, the remaining issue is whether admitting the conditional examination violated defendant's right to confrontation. "A criminal defendant has a state and federal constitutional right to confront witnesses, but the right is not absolute. If a witness is unavailable at trial and has given testimony at a previous court proceeding against the same defendant at which the defendant had the opportunity to cross-examine the witness, the previous testimony may be admitted at trial. In a criminal case, the prosecution bears the burden of showing that the witness is unavailable and, additionally, that it made a " 'good-faith effort' " [citation] or, equivalently, exercised reasonable or due diligence to obtain the witness's presence at trial." (*People v. Sanchez* (2016) 63 Cal.4th 411, 440.)[12] California law and federal constitutional requirements are the same in this regard. (*Ibid.*) "The reviewing court defers to the trial court's determination of the historical facts if supported by substantial evidence, but it reviews the trial court's ultimate finding of due diligence independently, not deferentially." (*Ibid.*)

The facts in *People v. Sanchez* are similar to the ones before us. Several months before trial, witness Rivera, who had implicated the defendant in the crimes, told people Rivera was going to Mexico and would not return. Around April 1994, the prosecutor's office unsuccessfully tried to locate Rivera. Everyone told investigators Rivera had left and was no longer at his former

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12 We refer to this case as *People v. Sanchez*, to distinguish it from the earlier referenced *Sanchez* case (*Sanchez, supra*, 63 Cal.4th 665) which dealt with testimonial hearsay as a basis for expert opinion testimony.

address, employment, or phone numbers. (*People v. Sanchez*, *supra,* 63 Cal.4th at p 441.) The prosecutor located Rivera's brother, who confirmed Rivera had returned to Mexico with no plans to return. Rivera had no telephone. The brother had tried to contact Rivera, to no avail. (*Ibid*.)

On appeal, the defendant argued the prosecution should have sent an investigator to Mexico to find Rivera and should have used provisions in a 1991 treaty between Mexico and the United States to secure Rivera's attendance at trial. (*People v. Sanchez*, *supra,* 63 Cal.4th at p. 411.) The court rejected this argument and admitted Rivera's preliminary hearing testimony at trial, finding the prosecution had exercised due diligence to secure Rivera's attendance at trial. (*Id.* at pp. 440–442.)

We too find that the prosecution exercised due diligence to secure Perez's attendance at trial. We assume that the treaty referred to in *Sandoval*, *supra*, 87 Cal.App.5th at pp. 1439–1440, existed from the time of the conditional examination to the time of the admissibility hearing in this case. However, the record fails to demonstrate that during that period, or during the admissibility hearing, anyone suggested the prosecution should have used the treaty.

Perez also told Johnson that Perez was not returning to the United States, so Johnson gave his contact information to Perez. (Compare *People v. Roldan* (2012) 205 Cal.App.4th 969, 984 (*Roldan*) [concluding no due diligence, in part because prosecution failed to give contact information to the witness so he could stay in touch with authorities].) Perez was deported within days after the examination. Still, Johnson contacted the prison system, county jail and the FBI and ran Perez's CII number in unsuccessful efforts to locate Perez.

More than a week before the admissibility hearing, Johnson also contacted Perez's aunt and cousin, but they declined to tell Johnson what Perez's phone number was or in what city Perez was living.[13] Perez had not contacted Johnson, and databases reflected Perez had not returned to the United States. Johnson tentatively testified Perez told Johnson what city Perez "probably" would be in, but no evidence was presented he in fact was in that city after his deportation. Johnson had no email address for Perez. The conditional examination was videotaped. (Compare *Roldan, supra,* 205 Cal.App.4th at pp. 980–981 ["one of the things the prosecution could have done to protect [the defendant's] right of confrontation was to videotape [the witness's] preliminary hearing testimony."].)

We conclude Johnson exercised due diligence to secure Perez's attendance at trial and admission of his conditional examination did not violate defendant's right to confrontation. (Cf. *People v. Sanchez*, *supra,* 63 Cal.4th at pp. 440–442; see *People v. Diaz* (2002) 95 Cal.App.4th 695, 706 [the law requires only reasonable efforts, not prescient perfection].)

6. Sentencing errors.

Remand is necessary for the trial court to reconsider the sentence and to correct various errors. First, the court sentenced defendant to prison on count 1 to LWOP, plus 25 years to life under section 12022.53, subdivision (d). The court also sentenced him on count 2 to LWOP, concurrent to count 1. Although the

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[13] Defendant asserts, "the detective los[t] the telephone number of Perez's mother, despite Perez telling him that he would go back to where his mother lived and telling him the area." Johnson never testified at the admissibility hearing that he had Perez's mother's phone number, much less that Johnson lost it.

court ran count 2 concurrent to count 1, the court imposed on that count a *consecutive* 25 years to life under section 12022.53, subdivision (d).[14] However, personal gun-use enhancements are not separate crimes and cannot stand alone. (*People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) Each enhancement is dependent on and necessarily attached to its underlying felony. (*Ibid.*) Separating the felony and its attendant enhancement by imposing a concurrent term for the felony conviction and a consecutive term for the enhancement results in an unauthorized sentence. (*Ibid.*) Therefore, the court here could not impose, on count 2, a concurrent LWOP term for the offense *and* impose count 2's gun enhancement consecutively. The sentence on count 2 was unauthorized.

Second, when defendant was sentenced in 2016, the trial court lacked discretion to strike the firearm enhancements found true under section 12022.53. However, he is now entitled to the benefit of amendments to those sections giving trial courts discretion to strike such enhancements. (§ 12022.53, subd. (h); see *People v. Arredondo* (2018) 21 Cal.App.5th 493; *People v. Woods* (2018) 19 Cal.App.5th 1080.)

Finally, defendant was arrested on March 3, 2011, and he remained in custody until the court sentenced him on May 19, 2016, a total of 1,905 days. However, the court awarded him only 1,898 days of section 2900.5, subdivision (a) custody credit. The court also did not impose a section 1202.45 parole revocation fine, but the abstract of judgment reflects the court imposed a $10,000 fine under that section. Respondent concedes that the trial court should have awarded defendant 1,905 days of custody credit and

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[14] The court stayed sentences on the gang enhancements.

that the abstract of judgment must be corrected by deleting the reference to the section 1202.45 parole revocation fine. We accept the concession and direct the trial court to correct these matters.[15]

We remand for resentencing. We express no opinion as to which alternative, concurrent or consecutive sentences, the court should choose as to the substantive offenses in counts 1 and 2, or as to how the trial court should exercise its discretion under section 12022.53, subdivision (h).

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[15] We are confident the trial court will consider *People v. Buckhalter* (2001) 26 Cal.4th 20, which states, "When . . . an appellate remand results in modification of a felony sentence during the term of imprisonment, the trial court must calculate the *actual time* the defendant has already served and credit that time against the 'subsequent sentence.' " (*Id.* at p. 23.)

DISPOSITION

Defendant's sentence is vacated and the matter is remanded for resentencing and with directions to the trial court to exercise its discretion as to whether to strike one or more of the section 12022.53 enhancements. The court shall correct defendant's custody credits. The clerk of the superior court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment which, inter alia, shall not refer to a section 1202.45 parole revocation fine. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

DHANIDINA, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, 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.