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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GILBERT HENRY ANCHONDO, Defendant and Appellant.	B283015 (Los Angeles County Super. Ct. No. BA426662)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed in part and reversed in part with directions.

Janyce Keiko Imata Blair, 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 Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Gilbert Henry Anchondo (Anchondo) shot and killed two men in a parking lot behind an apartment building, hours after arguing with one of the victims. The next day, police officers observed Anchondo driving an SUV that belonged to one of the victims. Anchondo sped away from the officers and crashed into a school bus and other vehicles, causing the SUV to catch fire. Investigators found a charred gun grip in the burned vehicle. Cell site location data and eyewitness accounts also connected Anchondo to the murders. Anchondo now appeals from his first degree murder convictions as well as his conviction for evading a peace officer, causing serious bodily injury. Anchondo contends that the trial court erred in admitting testimony from a medical examiner not present at the victims' autopsies. He also contends that reversal is warranted because the jury was administered the wrong oath of service. However, the reporter's transcript has now been corrected, thus mooting that particular claim. Finally, Anchondo contends, his case must be remanded so that the trial court can exercise its discretion to strike the firearm enhancements imposed here. We agree and remand so that the trial court can exercise its newly ripe discretion under Penal Code[1] section 12022.53, subdivision (h), and decide whether any of Anchondo's firearm enhancements should be stricken. In all other respects, the judgment is affirmed.

BACKGROUND

I. The charges and sentence

Following a jury trial, Anchondo was convicted of two counts of first degree murder (Pen. Code, § 187, subd. (a);

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

counts 1, 2) and one count of evading a peace officer causing serious bodily injury (Veh. Code, § 2800.3, subd. (a); count 3). The jury found true the firearm allegations attached to the murder counts. (§ 12022.53, subds. (b)-(d).) The jury also found true the multiple murder special circumstance (§ 190.2, subd. (a)(3)). During a bifurcated proceeding, the trial court found that Anchondo had sustained three prior strike convictions within the meaning of section 667, subdivisions (b) through (j), and section 1170.12, as well as a five-year prior conviction pursuant to section 667, subdivision (a).

On count 1, the trial court sentenced Anchondo to life without the possibility of parole for the murder conviction plus 25 years to life for the firearm enhancement plus five years for the prior conviction. On count 2, the trial court sentenced Anchondo to life without the possibility of parole for the murder conviction plus 25 years to life for the firearm enhancement plus five years for the prior conviction. On count 3, the trial court sentenced Anchondo to the upper term of seven years for the evasion conviction, which was doubled under section 1170.12 for a 14 year consecutive sentence. The court stayed the remaining firearm enhancements.

II. Prosecution evidence

A. JANUARY 15, 2014

Ariana Arriaga (Arriaga) regularly hung out with Oscar "Scrappy" Curial (Curial) and others behind an apartment complex at 604 Walnut Street in Inglewood. According to Arriaga, people continually passed through the apartment complex's rear parking lot at all hours. Many stayed for just a few minutes and left. Juan Hernandez (Hernandez) spent a great deal of time in the area. Hernandez was known as

"Calakas" because he was "really, really skinny."[2] Curial had a medium build and was about five feet eight inches tall. Arriaga identified Anchondo in court as "Danger" and testified that she saw him for the first time on January 15, 2014. Arriaga said Anchondo was around five feet six inches or five feet seven inches tall with a medium build.

According to Arriaga, Curial had a cast on his leg on January 15, 2014, and was unable to walk. He had a wheelchair but he did not use it. Instead, Hernandez used the wheelchair to "play around." Curial either used a crutch to get around or would "hop on one foot." Curial drove a red two-door Tahoe and was able to drive even with a cast on his leg. Curial also had a Lincoln. Once or twice a week, Arriaga saw Curial counting large amounts of cash. Two days before he was killed, Curial placed a thousand dollars in his Lincoln.

On the morning of January 15, 2014, Arriaga hung out in the alley with Curial and a friend of Curial's that Arriaga knew as "Lalo."[3] Lalo stood about five feet nine inches tall and weighed about 230 pounds. Arriaga had a Bluetooth speaker for sale. She was sitting in Curial's Lincoln along with Curial, and speaking to Lalo about buying the speaker, when Anchondo approached. Anchondo looked at the item then told Arriaga to give him back his speaker. Arriaga was surprised because she had just purchased the speaker and it belonged to her. She had never met or seen Anchondo before then.

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[2] Calacas translates to skeletons in Spanish.

[3] At some point on that day, Arriaga, Hernandez, and Lalo watched as Curial counted out $2,000 in cash. Anchondo was not present at the time.

Arriaga said, "What?" and Anchondo repeated that the speaker was his. Arriaga said, "No, it's not. It's my speaker. I just bought it." Anchondo then asked to see the speaker, and said he would show her where he had his initials carved into it. Arriaga had just bought the speaker the day before and knew there were no initials carved in it. Arriaga then asked Curial what was wrong with Anchondo, and Curial told her to just ignore him. Arriaga ignored Anchondo when he asked three more times about the speaker. Anchondo then called Arriaga a " 'fucking bitch.' " Anchondo appeared angry. Arriaga did not want to spend more time around Anchondo, so she left.

Arriaga returned to the location later that evening around 7:00 p.m. She and Curial began working on Curial's red Tahoe, which was parked in the alley. They worked on the vehicle until around 11:00 p.m. or 11:30 p.m. that night, leaving the right headlight unconnected. During this time, Arriaga saw Abel Anchondo[4] (Abel), Anchondo's brother, as he drove a vehicle through the alley. Anchondo was a passenger in the vehicle. Abel and Anchondo took a blue bike out from the vehicle. Abel spoke to Curial about the bike and then greeted Arriaga. Anchondo said to Abel, "Oh hell, don't tell me you know her" and Abel responded, "Yeah. That's my homegirl." Anchondo appeared angry. Abel left after about 15 minutes, but Anchondo remained at the location, and started speaking. Arriaga and Curial tried to ignore him. Arriaga was "shocked" at what Anchondo was saying, because it "was not making sense." Arriaga and Curial began laughing at Anchondo.

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[4] We refer to Abel Anchondo by his first name for the sake of clarity, intending no disrespect.

Anchondo then asked Curial what happened to the bag of laundry that he left on top of the truck. Curial told Anchondo that he did not know what Anchondo was talking about. Anchondo kept looking around the truck. Lalo told Anchondo the bag was behind the backseat of the red truck. Curial then told Anchondo, "Go look behind the backseat, and don't ever leave shit on top of my car when there's kids around here." Anchondo walked to the backseat of the truck and then went inside the laundry room nearby. It was then around 10:00 p.m. Anchondo grabbed two bags in the laundry room and got on the bike that he and Abel had dropped off earlier. Anchondo called Curial over and said he had to talk to him. Anchondo and Curial went to the side of the building and spoke to each other for about 10 minutes. Anchondo then got on his bike and rode off. Curial looked very angry. Curial told Arriaga, "Could you believe this motherfucker came and told me that he didn't appreciate me bagging on him in front of the people that are here?"

After this conversation, Anchondo came back and walked into the laundry room. On the way back out, Anchondo told a neighbor named "Diablo" that he was leaving some bags in there and to make sure that nobody took them. Diablo responded that he would "lock it up so nobody can take your stuff." Anchondo then left on his bicycle. Arriaga continued working on the Tahoe and then left around 11:15 p.m. Arriaga saw Anchondo holding a cell phone throughout that day and evening.

B. JANUARY 16, 2014

On January 16, 2014, around 3:00 a.m., L.C. was in her apartment overlooking the alley when she heard loud male voices. She heard someone yell "no" in an angry voice. Then she heard multiple gunshots. L.C. walked onto the balcony. She saw

a person in a "hoodie sweater" approaching the passenger door of a red Tahoe, then go around, enter the vehicle and move it "so it wouldn't hit the wall and would directly come out." The person in the hoodie appeared to be a male, five feet seven inches or five feet eight inches tall with a thin build and wearing dark pants.[5] The Tahoe almost hit a wall on the way out. L.C. never saw any other person in the alley or any other vehicle drive away.

Around 8:00 a.m. on January 16, 2014, Cassandra H., a 10th-grader, left for school through the back door of the apartment where she lived with her mother and Diablo, her mother's boyfriend. The apartment's back door was a few feet from the laundry room. In the rear parking lot, Cassandra H. saw the bodies of Curial and Hernandez. Neither man was breathing. Cassandra H. called 911. Curial's red truck, which was often parked there, was missing.

About 10 minutes after calling 911, Cassandra H. spoke with Inglewood Police Detective Jack Aranda. Detective Aranda recorded their conversation. Cassandra H. told Detective Aranda about an incident that happened the day before, involving Anchondo, whom she knew as Danger. Cassandra H. saw Anchondo with Curial in the parking lot area behind the apartment complex. Cassandra H. said she heard Curial and Anchondo yelling at each other.

The jury heard two recorded interviews between Cassandra H. and Detective Aranda. In the first interview, on January 16, 2014, Cassandra H. stated that Danger (Anchondo) and Oscar (Curial) had been arguing the night before. Cassandra H.

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[5] Anchondo was five feet six inches to five feet seven inches tall and weighed approximately 140 to 160 pounds.

described Anchondo as "skinny," a little shorter than her height of five feet eight inches tall and wearing dark pants. Anchondo called Curial over and they talked, but got quieter as Cassandra H. walked by and stopped talking. Anchondo and Curial argued, then Curial went back to his truck and Anchondo left on a bike Cassandra H. described as a "blue specialized." In the second interview, on January 21, 2014, Cassandra H. said she heard Curial tell Anchondo, "You need to stop. You need to calm down. You need to stop burning people."

C. FORENSIC EVIDENCE

The police collected and booked into evidence three expended .380 cartridge cases found near the bodies. Senior Forensic Specialist Celeste Hewson swabbed two blue bikes at the location. She also went inside a nearby laundry room. Neither she nor Detective Aranda found a bag of clothing inside the laundry room. She did not find any fingerprints on the bikes or the casings. No weapons were found on either victim nor were any weapons recovered from the crime scene.

Around 4:00 p.m. on January 16, 2014, Inglewood Police Sergeant Tyrin Bailous was on duty in a patrol car. The car was equipped with flashing lights and a siren. Sergeant Bailous became aware that a vehicle pursuit was occurring in his vicinity. As he prepared to turn west onto Centinela, at the northwest corner of Centinela and La Brea Boulevard, Sergeant Bailous observed a red SUV come out of an alley traveling at a high speed and crash into a school bus. The driver's side door of the SUV opened "and some objects came out of the car." Sergeant Bailous activated his patrol car's lights and siren and pursued the vehicle, which was moving west on Centinela at 70 to 80 miles per hour. The red SUV crashed into several vehicles less than a

mile later, at Centinela and La Cienega. Sergeant Bailous ordered the driver—Anchondo—out of the car, but Anchondo responded that he was trapped and could not get out. Anchondo ultimately got out of the vehicle, hopped a few feet, and lay down. Another officer pulled Anchondo away from the vehicle because it started to catch on fire. Anchondo was then arrested.

A search of the area where Anchondo had thrown items from the SUV yielded a set of keys with an alarm control and a black folding knife. Keith Hall, Jr.'s vehicle was impacted during the SUV collision on January 16, 2014. Hall was making a left turn and the next thing he remembered was waking up in the hospital. Hall suffered a fractured pelvis and was hospitalized for two or three days. Doctors instructed Hall to stay off his left hip; he spent the next six months in bed, in pain.

Forensic Specialist Hewson went to the scene of the collision and saw Curial's red Tahoe on fire. Hewson photographed the vehicle as it burned and after the fire department had extinguished the fire. The next day, Hewson, Detective Aranda and another detective visited the storage yard where the Tahoe had been towed. They conducted a cursory search of the vehicle, because the Tahoe was still "somewhat smoldering" and had a very strong odor of fire. Detective Aranda found a gun grip in the passenger side of the vehicle. Six weeks later, they returned to the vehicle, still in the storage yard. They searched the Tahoe and found a cell phone, an iPod, a sweatshirt, and a metal spring. The sweatshirt was burned and melted.

T-Mobile/Metro's records custodian testified that a text message sent from Anchondo's cell phone stated, "at Scrapas."[6]

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[6] Scrapas is a Spanish slang term for Scrappy.

The text was sent on January 16, 2014, at 2:22 a.m. Cell tower locations and "call-outs" for the cell phone were plotted on a map of the general area around the crime scene during the time period surrounding the shootings.

Los Angeles Coroner's Department Medical Examiner Dr. Glen Gliniecki testified that as a medical examiner he determines the cause and manner of death. Dr. Gliniecki did not personally perform the autopsies on the bodies of Curial and Hernandez. Dr. Luis Pena had conducted the autopsies, but he had since retired. Dr. Gliniecki reviewed the case files, including photographs, of each victim. Based primarily on the photos, Dr. Gliniecki opined that Hernandez died from a single gunshot wound to the chest. Autopsy photos showed an entrance wound but no exit wound. One projectile was recovered from the body. Dr. Gliniecki opined that Curial died of gunshot wound injuries caused by two separate gunshot wounds to the left-upper chest. There were no exit wounds for either gunshot; two bullets were recovered. Although gunshot stippling suggested the gun was no more than six inches from Curial's body, Dr. Gliniecki did not have enough information to determine the distance from which Hernandez was shot.

Detective Aranda went to the coroner's office on January 30, 2014, and collected one expended projectile that had been removed from Hernandez's body as well as two expended projectiles removed from Curial's body. Los Angeles County Sheriff's Deputy Ivan Chavez examined the three bullets and determined that all three were ".380 auto" and had been fired from the same gun. Deputy Chavez correspondingly determined that all three cartridge cases had been ejected from the same gun. Additionally, Deputy Chavez examined a black plastic pistol

grip and a piece of burnt, melted plastic. Deputy Chavez determined that the pistol grip was consistent with a Lorcin model "L" .380 caliber automatic pistol.

Forensic analysts compared DNA profiles from reference samples of Curial, Hernandez, and Anchondo to a partial DNA profile obtained from the gun grip. The profile proved to be consistent with two contributors but no further conclusions could be made due to the limited data. A DNA profile obtained from the handlebars of a blue Gary Fisher brand bike revealed at least four contributors. The major contributor profile matched the profile of Hernandez. Curial and Anchondo were excluded as major contributors. No conclusions could be made as to minor contributors. Curial, Hernandez, and Anchondo were excluded as major contributors to the profile mixture obtained from a second set of handlebars, the "blue Hard Rock Specialized bike handlebars." No conclusions could be made as to the minor contributors. A partial DNA profile was obtained from the exterior neck area of the burned black sweatshirt recovered from the burned SUV, but the limited data in the mixture permitted no conclusions.

III. Defense evidence

The defense rested without presenting any witnesses.

DISCUSSION

I. Admissibility of medical examiner's testimony

Anchondo contends that the trial court erred in allowing medical examiner Dr. Gliniecki to testify to case-specific testimonial hearsay he learned from reviewing the Hernandez and Curial autopsy files—including autopsy reports, photographs, and anatomical diagrams—which were prepared by now-retired medical examiner, Dr. Pena. Specifically, Anchondo

argues that Dr. Gliniecki's testimony about the precise locations of the bullets found in the victims' bodies, the direction those bullets traveled through the bodies, and the absence of any exit wounds, constituted case-specific hearsay which Dr. Gliniecki derived from both victims' autopsy files, thus violating *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*) and the Sixth Amendment's confrontation clause.

A. *PEOPLE V. SANCHEZ*

In *Sanchez*, *supra*, 63 Cal.4th 665, the defendant was charged with drug and firearm offenses as well as active participation in the Delhi street gang. At trial, a gang expert relied upon a "STEP notice," police documents, and an FI card as the basis for his expert opinion.[7] Those documents indicated Sanchez associated with, and had been repeatedly contacted by police while in the presence of, Delhi gang members. (*Id*. at pp. 671–673.) The expert had never met Sanchez and had not

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[7] Police officers "issue 'STEP notices' to individuals associating with known gang members. The purpose of the notice is to both provide and gather information. The notice informs the recipient that he is associating with a known gang; that the gang engages in criminal activity; and that, if the recipient commits certain crimes with gang members, he may face increased penalties for his conduct. The . . . officer records the date and time the notice is given, along with other identifying information like descriptions and tattoos, and the identification of the recipient's associates. Officers also prepare small report forms called field identification or 'FI' cards that record an officer's contact with an individual. The form contains personal information, the date and time of contact, associates, and nicknames, etc. Both STEP notices and FI cards may also record statements made at the time of the interaction." (*Sanchez*, *supra*, 63 Cal.4th at p. 672.)

been present when the STEP notice was issued or during any of Sanchez's other police contacts. His knowledge derived solely from the police reports and FI card. Based on the information in the STEP notice, the police documents, and the FI card, as well as the circumstances of the offense at issue, the expert opined that Sanchez was a member of the Delhi gang and that the charged crimes benefitted the gang. (*Id*. at p. 673.)

Sanchez, *supra*, 63 Cal.4th 665 held that the case-specific statements relayed by the expert witness regarding the defendant's gang membership constituted inadmissible hearsay under California law. Those details had been recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).[8] Furthermore, the error was not harmless beyond a reasonable doubt. (*Sanchez*, at pp. 670–671.)

Sanchez, *supra*, 63 Cal.4th 665 distinguished between an expert's general knowledge and case-specific facts about which the expert has no independent knowledge. "Case-specific facts are those relating to the particular events and participants

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[8] In *Crawford*, *supra*, 541 U.S. 36, the United States Supreme Court held that the Sixth Amendment's confrontation clause generally bars admission of a testimonial out-of-court statement offered for its truth against a criminal defendant, unless the maker of the statement is unavailable to testify and the defendant had a prior opportunity for cross-examination. (*Id.* at p. 68.)

alleged to have been involved in the case being tried."[9] (*Id.* at p. 676.) Over time, the distinction between background information and case-specific hearsay had become blurred, the court noted, leading to the rule that an expert could explain the " 'matter' " upon which he or she relied, even if that matter was hearsay. (*Id.* at pp. 678–679.) California law allowed such hearsay "basis" testimony if a limiting instruction was given; in cases where an instruction was inadequate, the evidence could be excluded under Evidence Code section 352.[10] (*Id.* at p. 679.) However, the court concluded, "this paradigm is no longer tenable because an expert's testimony regarding the basis for an opinion *must* be considered for its truth by the jury." (*Ibid.*) "Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting

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[9] In explaining the difference between general information and case-specific facts, *Sanchez*, *supra*, 63 Cal.4th 665 used this example: "That hemorrhaging in the eyes was noted during the autopsy of a suspected homicide victim would be a case-specific fact. The fact might be established, among other ways, by the testimony of the autopsy surgeon . . . *or* by authenticated photographs depicting it. What circumstances might cause such hemorrhaging would be background information an expert could provide. The conclusion to be drawn from the presence of the hemorrhaging would be the legitimate subject for expert opinion." (*Id.* at p. 677, italics added.)

[10] Under Evidence Code section 352, a court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception." (*Id*. at p. 684, fn. omitted.) Alternatively, the court held, "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.)

However, *Sanchez*, *supra*, 63 Cal.4th 665 made clear that its holding did not do away with all gang expert testimony. "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so," that is, he or she may "relate generally" the "kind and source of the 'matter' upon which his opinion rests." (*Id.* at pp. 685–686.) "Gang experts, like all others, can rely on background information accepted in their field of expertise under the traditional latitude given by the Evidence Code. They can rely on information within their personal knowledge, and they can give an opinion based on a hypothetical including case-specific facts that are properly proven. They may also rely on nontestimonial hearsay properly admitted under a statutory hearsay exception." (*Id*. at p. 685.) "What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.)

To determine whether admission of Dr. Gliniecki's testimony constituted prejudicial error, we use the two-step

analysis required by *Sanchez*. "The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford*[, 541 U.S. 36] limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial* hearsay, as the high court defines that term." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.) An improperly admitted hearsay statement ordinarily constitutes statutory error under the Evidence Code. (*Id*. at p. 685.) Where the hearsay is testimonial and is admitted in violation of *Crawford*, the error is one of federal constitutional magnitude. (*Sanchez*, at p. 685.)

B. TRIAL PROCEEDINGS

At a pretrial hearing, the trial court explained the procedures previously followed in her courtroom when the coroner who had performed the autopsy was no longer available—a coroner's representative would testify about the autopsy process, review the autopsy photographs, and testify as to his or her opinion as to the cause of death based on the photographs. The trial court asked whether either party had an objection to this procedure. The prosecutor said she intended to follow the court's procedure, which also comported with *People v. Ford* (2015) 235 Cal.App.4th 987 (*Ford*).[11] Defense counsel

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[11] *Ford*, *supra*, 235 Cal.App.4th at page 997 "directly pose[d] the 'absent pathologist' problem: if statements in autopsy reports are testimonial under the United States Supreme Court's confrontation clause jurisprudence, how is cause of death

objected on foundation and hearsay grounds, then stated, "But I agree with the Court that if it's limited to the observations of the photos, then it's hard—it's hard saying this without, actually, hearing his testimony, but I think what the Court proposed would be—would not violate the rule of hearsay and my client's due process and confrontation right." The trial court invited counsel to renew his "foundation objection" if appropriate.

Just before Dr. Gliniecki took the stand, the trial court reiterated that counsel had previously agreed that, assuming a proper foundation had been laid for the photos taken at the time of death, Dr. Gliniecki would be allowed to give his opinion as to the cause of death based on his review of the photos. The trial court said it had read the *Ford* opinion and asked the prosecutor what she was seeking to elicit pursuant to the opinion. The prosecutor said she wanted Dr. Gliniecki to testify that he had reviewed Dr. Pena's autopsy reports, as well as the specific anatomical and physiological observations detailed in the reports and diagrams, and that he used those findings, in addition to the photos, to reach his opinion as to the cause of death and the angle of penetration of the bullets in the body of each victim.

The trial court noted that *Ford*, *supra*, 235 Cal.App.4th 987 did not discuss what statements were testimonial in nature, instead deferring to *Dungo* on that point. The trial court also

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established when the pathologist has died or otherwise becomes unavailable before trial?" Following *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), *Ford* held that the defendant's confrontation rights had not been violated by his inability to cross-examine the autopsy report's author. (*Ford*, at p. 995.)

noted that *Ford* had questioned the future viability of *Dungo*.[12] (*Ford*, at pp. 997–998.) The trial court then asked defense counsel if he agreed, without forfeiting any objection he had raised, that *Dungo*, *supra*, 55 Cal.4th 608 supported the admission of the evidence at issue. Defense counsel said he did not see how autopsy reports prepared by the coroner's office for law enforcement review in a homicide case could be considered nontestimonial and asked to preserve his objection.

The trial court ruled the following materials were admissible as long as the proper foundation was established: (1) photos taken during the autopsy, which the court found were self-authenticating to the extent that they depicted each victim, the gunshot entry wounds, and any exit wounds;[13] (2) the autopsy diagrams that correlated to the autopsy photos; and (3) the expert witness' own opinion based on the diagrams and photos. However, the trial court ruled that the autopsy reports were inadmissible.

At trial, Dr. Gliniecki testified that he had not performed the autopsies on Curial and Hernandez. Dr. Pena did, but he had since retired. Dr. Gliniecki said he had reviewed the case files, including photos, of each victim. With respect to Hernandez, Dr. Gliniecki opined that, based primarily on the photos, Hernandez

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[12] Although the continued viability of *Dungo*, *supra*, 55 Cal.4th 608 has been called into question, the case has not been overturned and Supreme Court decisions are binding upon all the state courts of California. (*Auto Equity Sales, Inc. v. Superior Cour*t (1962) 57 Cal.2d 450, 455.)

[13] Outside the presence of the jury, the trial court noted that the lack of an exit wound meant the projectile remained in the body.

died from a single gunshot wound to the chest. The photos showed an entrance wound but no exit wound. Based solely on "how the gunshot wound is shaped," Dr. Gliniecki opined that the bullet traveled "from left to right and downwards and front to back." One projectile was recovered from Hernandez's body. With respect to Curial, Dr. Gliniecki opined that Curial died of gunshot wound injuries caused by two separate gunshot wounds to the left-upper chest. Dr. Gliniecki opined that the bullets passed from front to back, left to right, and downwards. There were no exit wounds for either gunshot and two bullets were recovered. Gunshot stippling indicated that the gun was no more than six inches from contact with Curial. Dr. Gliniecki did not have enough information to determine the distance from which Hernandez was shot.

Over a continuing defense objection, the trial court ruled that the prosecutor had laid a sufficient foundation for the admission of the autopsy photos and diagrams as well as the witness' opinions.

C. MERITS

In general, "the Sixth Amendment's confrontation right bars the admission at trial of a testimonial out-of-court statement against a criminal defendant unless the maker of the statement is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination." (*People v. Lopez* (2012) 55 Cal.4th 569, 580–581.) "Although the high court has not agreed on a definition of 'testimonial,' testimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal

prosecution. The high court justices have not, however, agreed on what the statement's primary purpose must be." (*Dungo*, *supra*, 55 Cal.4th at p. 619.) "On appeal, we independently review whether a statement was testimonial so as to implicate the constitutional right of confrontation." (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.)

We first note that case-specific facts may be established by authenticated photos depicting the facts. (*Sanchez*, *supra*, 63 Cal.4th at p. 677.) Here, the autopsy photos on which Dr. Gliniecki based his opinions were properly authenticated and admitted into evidence. Furthermore, as noted above, "[a]ny expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id.* at p. 685.) Here, Dr. Gliniecki gave his expert opinion regarding the cause of death for each victim and the direction the bullets traveled. Dr. Gliniecki also told the jury that in addition to the photos he personally reviewed, he was relying on hearsay—the autopsy report and autopsy diagrams—as a basis for his opinion. However, Dr. Gliniecki said he had primarily relied on the autopsy photos in reaching his opinions and did not reveal any specific facts he had read in the autopsy reports. Thus, such testimony did not run afoul of *Sanchez* or the confrontation clause.

Nevertheless, Anchondo argues, Dr. Gliniecki relayed to the jury case-specific facts he had learned from his review of the autopsy files (beyond the photographs), testifying that, according to Hernandez's file, there was no exit wound on Hernandez's body; one projectile was found near rib nine on the left side; the bullet traveled a diagonal path, front to back, left to right, and downward; and the wound was fatal. Dr. Gliniecki further

testified that, according to Curial's file, Curial had two bullet wounds to the left upper chest, he had no exit wounds; two projectiles were found near the last thoracic rib; both bullets traveled a diagonal path, front to back, left to right, and downward; and both wounds were fatal.

As discussed above, any testimony based on a review of the autopsy photos, such the cause of death or the direction the bullets traveled, fell within the purview of *Sanchez* and did not violate the confrontation clause. The remaining testimony, although case-specific, was admissible pursuant to *Dungo*. In *Dungo*, a victim's autopsy had been performed by Dr. Bolduc. (*Dungo*, *supra*, 55 Cal.4th at p. 613.) When the defendant was tried for murder, however, Dr. Lawrence, who had not been present at the autopsy, gave expert opinion testimony based on his review of Dr. Bolduc's autopsy report and autopsy photos. (*Id*. at pp. 614–615.) Dr. Lawrence testified that, in his opinion, the victim was strangled to death slowly, as shown by pinpoint hemorrhages in her eyes, neck hemorrhages, the purple color of her face, her bitten tongue, and her unbroken hyoid bone. (*Id*. at p. 614.) The report and photos were not introduced. (*Id*. at p. 615.)

In *Dungo*, *supra*, 55 Cal.4th at pages 618–621, our Supreme Court held there was no *Crawford* violation because the contents of the autopsy report, as relayed by Dr. Lawrence, were not testimonial. To be deemed testimonial under *Crawford*, an out-of-court statement must have been made with some degree of formality or solemnity and must have a primary purpose that pertains in some fashion to a criminal prosecution. (*Dungo*, at p. 619.) Neither of the two requisite components of a testimonial statement were present. The court began by noting "[a]n autopsy

report typically contains two types of statements: (1) statements describing the pathologist's anatomical and physiological observations about the condition of the body, and (2) statements setting forth the pathologist's conclusions as to the cause of the victim's death." (*Ibid.*)

According to the Supreme Court, the out-of-court statements at issue in *Dungo*—Dr. Bolduc's observations about the condition of the victim's body—"all fall into the first of the two categories." (*Dungo*, *supra*, 55 Cal.4th at p. 619.) The court held that such statements, "which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature." (*Ibid.*) The court also considered the primary purpose of autopsy reports, concluding that "criminal investigation was not the *primary* purpose for the autopsy report's description of the condition of [the victim's] body; it was only one of several purposes." (*Id.* at p. 621.) Indeed, the court noted that autopsy reports help relatives decide whether to file a wrongful death action, help insurance companies determine whether a particular death is covered by one of its policies, satisfy the public's interest in knowing the cause of death, and provide answers to grieving family members. (*Ibid.*) Thus, the court concluded, the defendant's confrontation rights were not violated by his inability to cross-examine the autopsy report's author.[14] (*Ibid.*)

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[14] The majority opinion did not discuss whether this evidence had been offered for its truth. The concurring opinion

Here, the autopsy photos and diagrams were not so formal or solemn as to render them testimonial. (See *Dungo*, *supra*, 55 Cal.4th at pp. 618–621.) Nor was their primary purpose to preserve evidence for criminal prosecution. (See *Sanchez*, *supra*, 63 Cal.4th at p. 693.) Indeed, as noted by the People, a coroner must "determine the circumstances, manner, and cause of all violent, sudden, or unusual deaths," including deaths from known or suspected homicide. (Gov. Code, § 27491.) Thus, a medical examiner performing an autopsy does far more than provide information to support a criminal investigation. Consequently, here, as in *Dungo*, neither requisite component of a testimonial statement were present and there was no *Crawford* violation.

Even if we were to agree with Anchondo that the photos and diagrams should have been excluded, we would find their admission and the testimony about them harmless. Erroneous admission of evidence in violation of a defendant's right to confront and cross-examine witnesses requires reversal unless the People can demonstrate beyond a reasonable doubt that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Dr. Gliniecki's opinion regarding the angles of the bullet wounds and their trajectories were not important to proving

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did address this issue, stating, "Dr. Lawrence relayed to the jury certain physical observations recorded by Dr. Bolduc in his report of the autopsy, using those observations to support Dr. Lawrence's own expert opinions as to the cause and manner of death. Dr. Bolduc's observations were introduced for their truth, and since Dr. Bolduc was not shown to be unavailable and had not been subject to prior cross-examination on this matter by defendant, his statements, were they testimonial, would have been inadmissible under *Crawford*." (*Dungo*, *supra*, 55 Cal.4th at p. 627.)

Anchondo's guilt. It was undisputed that Hernandez and Curial died from their gunshot wounds, that there were no exit wounds, and that projectiles had been removed from their bodies. Although Anchondo contends that Dr. Gliniecki linked the bullets recovered from Hernandez and Curial to the casings found at the crime scene and to the gun plate found in the car driven by Anchondo, the bullets in both bodies were undeniably linked to the crime scene because the bodies themselves were found at the crime scene. Anchondo argued with Curial at the crime scene hours before the shooting, cell phone records placed him in the area near the time of the shooting, and he was caught in Curial's vehicle. Any error was harmless.

II. The jurors were properly sworn

Anchondo next contends that the jurors were not properly sworn to try the case. However, this claim is based on an error in the original reporter's transcript that has since been corrected.

According to the original reporter's transcript, the clerk of the court swore the selected jurors pursuant to Code of Civil Procedure, section 232, subdivision (a): "You do, and each of you, understand and agree that you will accurately and truthfully answer under penalty of perjury all questions propounded to you concerning your qualifications and competency to serve as a trial juror in the cause now pending before this Court and that failure to do so may subject you to criminal prosecution." As Anchondo notes, this was in error because the jurors should have been sworn pursuant to Code of Civil Procedure section 232, subdivision (b): "Do you and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." However,

the official court reporter recently filed a correction of the transcript. The corrected reporter's transcript states that the clerk of the court swore the jurors as follows: "Do you and each of you understand and agree that you will well and truly try the cause now pending before this court and a true verdict render according only to the evidence presented to you and to the instructions of the court." Accordingly, there was no error.

III. Remand for resentencing

On October 11, 2017, the Governor signed Senate Bill 620, which amends section 12022.53 to give the trial court the authority to strike in the interests of justice a firearm enhancement allegation found true under that statute. Effective January 1, 2018, section 12022.53, subdivision (h), is amended to state: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

In a supplemental opening brief, Anchondo argues that the amendment to section 12022.53 applies to him because his case is not yet final on appeal, citing the rule of *In re Estrada* (1965) 63 Cal.2d 740. Under the *Estrada* rule, courts presume that, absent evidence to the contrary, the Legislature intends an amendment reducing punishment under a criminal statute to apply retroactively to cases not yet final on appeal. (*Id*. at pp. 747–748; see *People v. Brown* (2012) 54 Cal.4th 314, 324.) *Estrada* has been applied not only to amendments reducing the penalty for a particular offense, but also to amendments giving the court the discretion to impose a lesser penalty. (*People v. Francis* (1969) 71

Cal.2d 66, 75.) Anchondo argues that because his case is not yet final, it must be remanded to the trial court for resentencing under the amended version of section 12022.53, subdivision (h), so the trial court can consider whether to strike the firearm enhancements imposed in his case. The People agree that the amendment to section 12022.53 is subject to the *Estrada* rule and will apply retroactively to cases not final on appeal.

In the respondent's brief, the People correctly observed that because the amendment would not become effective until January 1, 2018, the issue was not then ripe. Because this opinion will be handed down after January 1, 2018, the issue is now ripe.

The People argue that we need not remand the case because the trial court would not have exercised its discretion to lessen Anchondo's sentence. The People cite *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, in which a different division of this court concluded that remand was unnecessary when the trial court erroneously believed it lacked the discretion to strike a prior conviction under the "Three Strikes" law. In that case, however, the trial court stated on the record that it would not have exercised such discretion in any event. (*Id.* at p. 1896.) Here, the trial court made no comparable statements as to how it would exercise its discretion as to whether the firearm enhancements should be stricken. Thus, although we express no opinion as to how the trial court should exercise its newly granted discretion under section 12022.53, subdivision (h), on remand, we recognize that the trial court must exercise this discretion in the first instance.

DISPOSITION

The trial court shall hold a sentencing hearing to consider whether, pursuant to Penal Code section 12022.53, subdivision (h), it should strike or dismiss an enhancement otherwise required by Penal Code section 12022.53. In all other respects, the trial court is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, 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.