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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOHN SILVA RAMIREZ, Defendant and Appellant.	B267429 (Los Angeles County Super. Ct. No. NA093863)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jessie I. Rodriguez, Judge. Affirmed.

Patrick Morgan Ford, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Carl N. Henry, and David Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant John Silva Ramirez (defendant) appeals from his murder conviction. He contends: that the denial of his severance motion violated his Sixth Amendment right of confrontation; his codefendant's coerced statements were improperly admitted; government misconduct resulted in a denial of due process; it was error to admit the victim's identification of defendant as a dying declaration; the prosecution's expert's reliance on case-specific hearsay was error; jurors lost the ability to remain impartial due to inflammatory gang testimony and the intimidating behavior of defendant's father outside the courtroom; and that the cumulative effect of errors resulted in the denial of a fair trial. Defendant also purports to join the arguments contained in codefendant's as yet unfiled briefs in his separate appeal. Finding no reversible error, we affirm the judgment.

BACKGROUND

Defendant and his brother, codefendant Jose Trinidad Ramirez (Jose),[1] were jointly charged in count 1 of a felony information with the murder of Martin Contreras (Contreras), in violation of Penal Code section 187, subdivision (a).[2] Defendant was charged in count 2 with possession of a firearm by a felon with priors, in violation of section 29800, subdivision (a)(1). The information alleged that in the commission of the murder, defendant personally used and discharged a firearm, causing great bodily injury and death to the victim, within the meaning of section 12022.53, subdivisions (b), (c), (d), and (e). In addition,

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[1] Codefendant Jose Ramirez is not a party to this appeal, as his separate appeal in case No. B280623 has not been consolidated with defendant's appeal.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

the information alleged pursuant to section 186.22, subdivision (b)(1), that the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. As to both counts 1 and 2, the information alleged that defendant had suffered a prior serious or violent felony conviction, within the meaning of the "Three Strikes" law (§§ 1170.12, subd. (a)-(d), 667, subd. (b)-(j)), and for purposes of enhancement under section 667, subdivision (a)(1); and that he had served a prior prison term due to the conviction, within the meaning of section 667.5, subdivision (b).

A jury found defendant guilty of both counts as charged, found the murder to be in the first degree, and found true the special gang and firearm allegations. Defendant admitted the prior conviction and prison term allegations.

On September 29, 2015, the trial court sentenced defendant to a total term of 80 years to life in prison, comprised of 25 years to life as to count 1, doubled as a second strike, with 25 years to life under section 12022.53, subdivision (d), and five years under section 667, subdivision (a). The court imposed and stayed sentences on count 2 and the remaining firearm allegations. Defendant was awarded 1,221 days of combined presentence custody credit, and ordered to pay mandatory fines and fees, as well as victim restitution. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Shortly after midnight on April 20, 2012, Contreras, Jose, and others, including defendant and Jose's father Miguel Ramirez (Miguel), were drinking at a bar they all frequented.[3]

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[3] As defendant, his codefendant, father, and others mentioned at trial share the same surname, we refer to each such

The bar's security guard identified photographs of some of the regular or semi-regular customers he saw at the bar that night, including Miguel and Jose. He also identified defendant (who was not at the bar that night) as Miguel's other son and Jose's brother. While Jose and Contreras argued inside the bar, Jose mentioned the Westside Longo gang several times. Jose told Contreras and his companions repeatedly that they were in his neighborhood and they should respect that.

A short time later, as Contreras and others were leaving the bar, Jose followed them out and spoke to Contreras. Soon the two came to blows. After being summoned from inside the bar, Miguel came out and hit or kicked Contreras. Contreras responded by hitting Miguel with a backhand, causing Miguel to fall to the ground and lose consciousness. The bar security guard sprayed pepper spray into the air surrounding the combatants. Contreras ran away in one direction, and Jose's companions ran in another. Jose ran to his white Ford pickup truck. Three friends of Contreras (Julio V, Orlando M., and Christian L.) left in Julio's car to find Contreras.

His friends found Contreras a short time later in front of his house washing off pepper spray with a hose. As Orlando and Christian got out of Julio's car, Jose arrived in his white truck and parked behind Julio's car. Jose got out of the truck holding a steel pipe about the size of a baseball bat, and told Julio not to move. Jose asked whether they had been hanging out with Contreras, and said such things as, "You mother fuckers, you're going to pay; this is not going to end like this." Christian ran off as a black Dodge Ram pickup truck arrived on the scene and

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person either by party designation or first name to avoid confusion.

parked behind the white truck. Orlando testified that he saw "Johnny" or defendant, emerge from the black truck, before he too ran off. Julio, still seated in his car, and Orlando both heard a gunshot. Julio testified that it came from behind him and described it as sounding very close.

At the time of the shooting Contreras and Erika Silva (Erika) lived together with their four children and her two cousins. Erika woke up around 1:16 a.m. to the sounds of people arguing. Then she heard a gunshot and went out to investigate just as Contreras came in, bleeding from his waist, near his right hip. He told her he had been shot, and that he did not want to die. He was breathing hard and appeared scared. Erika called 911, and at the operator's direction, asked Contreras who had shot him. Erika replied to the operator that he named "Johnny."

Erika later heard Contreras tell a police officer that it was Johnny Ramirez who had shot him. Erika did not know who Johnny Ramirez was, although she knew Jose since Contreras had worked for him. Long Beach Police Officer Harrison Moore testified that he was one of the first officers on the scene after the shooting, and had questioned Contreras in English as he lay wounded on the couch. Contreras was groggy, and answered in English slowly and with difficulty as he slipped in and out of consciousness. In response to Officer Moore's question who had shot him, Contreras replied, "Johnny Ramirez," adding that Johnny was 31 and had left in a two-door black Dodge Ram pickup truck.

Elizabeth C. testified that her friend Johnny, whom she identified as defendant, was visiting her at her apartment between midnight and 1:00 a.m. on the night of the shooting. After receiving a call just before 1:00 a.m., defendant left saying he had to go handle something because his brother and father had gotten into a fight. He returned about 20 or 30 minutes

later, banging on the door loudly "like he was a cop," saying let me in until she opened the door. He appeared "jibbery" and paced nervously until a car arrived to collect him a few minutes later, about 1:20 or 1:30 a.m.

Defendants' cell phone records for the night of the shooting were admitted by stipulation. Defendant's cell phone and Jose's cell phone were both used at or near the scene of the shooting between 12:56 a.m. and 1:14 a.m. Jose's phone called defendant's phone a 12:56 a.m., 12:57 a.m., 12:58 a.m., and 1:14 a.m., and one call was made from defendant's phone to Jose's phone at 1:01 a.m. All calls were answered.

Retired Deputy Medical Examiner, Dr Lisa Scheinin, testified that she performed the autopsy, and determined that a large caliber bullet entered Contreras's body from behind, although not so directly behind as to rule out the possibility that Contreras could see the shooter. The location of the wound was consistent with an attempt to turn away upon seeing a gun. The bullet entered the soft tissue near the right hip, travelled slightly downward into the pelvis, through the pelvic area, and stopped in the soft tissue of the left groin. The bullet damaged an artery and two veins, and despite surgery to repair them, Contreras died of his gunshot wound about 20 hours later.

After Contreras was taken to the hospital, Erika telephoned Maria, whom she considered her sister-in-law, as Maria's husband, Juan Barajas (Barajas) was Miguel's nephew and defendants' cousin. Barajas testified that sometime between 1:00 a.m. and 3:00 a.m., defendant came to his home and told Barajas to tell his wife to remain silent, that defendant's name could not get around because he had problems with the police. Defendant showed Barajas his tattoos and said he was a "soldier" in his gang, adding that as a gang member, all he had to do was to give an order to have Barajas and his family killed if they said

anything. Defendant also explained he had done what he had done because of his father, and then left. Barajas testified that he had already known that defendant was a member and soldier of the Westside gang. Later that afternoon, Barajas told defendant that Contreras had been gravely injured and was going to die. Defendant replied that the shot they had given him was not enough for him to die.

Sometime after the night of the shooting, Julio, Christian, and another friend were parked at a liquor store when Jose drove up, blocked their car, and said that what had happened to Contreras was nothing compared to what would happen to them if they said anything. Then defendant arrived in another car, said that this was his "hood," to remain quiet about what had happened, and all would be fine.

Defendant and Jose were arrested in November 2012. A black Dodge Ram truck registered to defendant and a white Ford F250 truck registered to Jose were seized. No gun was located.

Jose was placed in a cell with an informant, their conversations were recorded, and over an hour of the recordings were played for the jury, with occasional explanations by the investigating officer, Detective Teryl Hubert. Among other things, Jose told the informant that his brother was a "rider," and that he telephoned his brother to "to have this fool hit," and to tell him that "this fool needs to go down" and "be gone." Jose did not directly say that his brother or that defendant shot Contreras, but when the informant asked whether "you shot that fool," Jose replied "Nah"; and replied "yes" when the informant asked, "your brother?" Jose then said that his brother was being blamed, but that it was "some other fool," a "homeboy" who was never arrested and was unknown to the police. Jose said that the gun used was a revolver, which was disposed of by his brother.

The prosecution's gang expert, Long Beach Police Detective Chris Zamora, testified with regard to gang culture in general, and in particular, the culture, primary activities, membership, common signs and symbols of the Westside Longo (Westside Longo) criminal street gang. Given a hypothetical question mirroring the facts in evidence in this case, Detective Zamora expressed his opinion that the crime described would have been committed for the benefit of and in association with Westside Longo.

Detective Zamora testified to being familiar with defendant and codefendant, and that in his opinion, they were both members of Westside Longo. He based his opinion on both men's prior law enforcement contact, their gang-related tattoos and the facts surrounding the investigation in this case. Detective Zamora explained the gang-related tattoos to the jury as photographs of the tattoos were shown. On defendant's chest was "West" and "LB," which Detective Zamora said was indicative of Westside Longo. Above it were two lines with three dots on top, which was a Mayan numbering symbol, signifying that Westside Longo was a "Sureno" gang, subservient to the Mexican Mafia prison gang. One must earn the privilege of wearing such a symbol by putting in work for the gang, meaning the commission of violent assaults. Detective Zamora also explained that "rider" is a term in Sureno criminal street gangs that refers to an active member of the gang who puts in work for the gang.

Defense evidence

The defense presented the testimony of its own gang expert, Martin Flores, who opined that rather than showing a gang-related crime, the hypothetical facts described for Detective Zamora indicated a family dispute and a shooting to benefit the family name, not a gang. He agreed that defendant's tattoos were gang-related, but did not agree that the evidence

demonstrated that defendant was an active member of the gang at the time of the shooting. He noted that gang members did not necessarily have tattoos removed upon leaving the gang. Flores noted that was common for jail inmates to lie or exaggerate the reasons for their arrest and incarceration. Flores also testified that "rider" can have many meanings, including the more benign meaning of "buddy."

DISCUSSION

I. Jose's jailhouse conversations

A. Background

Defendant's first three assignments of error concern the recordings of Jose's jailhouse conversations with an informant. As the three contentions are dependent upon the existence of certain facts about the informant and the circumstances surrounding the use of the informant we begin with a discussion of those asserted facts and circumstances.

Defendant claims that after Jose had asserted his Fifth Amendment privilege, the police placed an informant in his cell who was an intimidating, high level Mexican Mafia gang leader, "for the purpose of extracting a statement from him." Defendant argues the informant actively questioned Jose regarding Jose's and defendant's participation in the crime, and that he pressured Jose into making incriminating statements.

Defendant also claims that the prosecution's refusal to reveal the identity of the informant made it difficult to prove facts about the informant. Nevertheless, defendant suggests that all the facts supporting his claims were established because the prosecutor did not dispute or deny them. No written motions, supporting documents, or opposition papers have been included in the appellate record. To support the asserted facts, defendant cites various arguments made orally by both his attorney and codefendant's attorney, in pretrial hearings on written motions to

sever trials, compel disclosure of the informant's identity, and to suppress the statements as coercive and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), as well as a midtrial oral objection to the investigating detective's testimony, alleging improper comment on defendant's right to remain silent. To support his assertion that Jose invoked his right to remain silent prior to the jailhouse conversations, defendant claims the prosecutor failed to deny this fact. Finally, defendant points to testimony of the defense gang expert regarding gang culture and behavior generally in Los Angeles County jail.

The trial court denied defendant's motions. In the alleged violation of his Fifth Amendment rights, and denying the motion to suppress Jose's statements, the court expressly based its determination on "the documentation, on the moving documents and the arguments given to the court," including opposition from the prosecutor and found there was no custodial interrogation or coercive atmosphere. In denying the motion for disclosure of the informant's identity, the court stated that it had read the moving papers, particularly "exhibit A," and concluded that the informant was not a material witness.

We review the ruling using a deferential standard of the trial court's factual findings, resolving conflicts and drawing inferences most favorable to the prevailing party. (See, e.g., *People v. Zamudio* (2008) 43 Cal.4th 327, 342 (suppression motion); *People v. Stansbury* (1995) 9 Cal.4th 824, 831 (*Miranda* issue).) "It is axiomatic that the unsworn statements of counsel are not evidence. [Citations.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11.) "'[E]vidence is that probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue.' [Citation.] Argument of an attorney whether it be statements made at a hearing or statements contained in points and authorities is not proof legal

or evidentiary. [Citations.]" (*City of Fresno v. Superior Court* (1980) 104 Cal.App.3d 25, 31.)

An appellant is required to present an adequate record for review on appeal and to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) The rulings of the trial court are presumed to be correct, and where the record is silent, we presume the trial court had a proper factual basis for its order. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114-1115.) In addition, when an appellant's claim is dependent upon evidence and matters not reflected in the record on appeal, we may decline to consider it. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 947-948, 952.)

Here, defendant has not caused the motions, opposition, exhibits or any other supporting evidence to be included in the record on appeal, and he has not otherwise established that any of his asserted facts were supported by substantial evidence. We thus presume that the trial court had a proper factual basis for its findings and that it properly rejected defendant's asserted facts as inadequately supported, including defendant's claim that the informant was a gang member, that he pressured Jose, and that the police deliberately placed him in Jose's cell for the purpose of extracting a statement from him after Jose had invoked his right to remain silent. Further, we presume that the trial court had a proper factual basis for finding that the identity of the informant was not subject to disclosure and that the jailhouse conversations did not constitute custodial interrogation.

***B. Aranda-Bruton*[4]**

Defendant contends that the trial court violated his right to confront witnesses against him when it denied his severance

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[4] See *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*); *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*).

motion based on the ground that the *Aranda-Bruton* rule barred admission of the jailhouse recordings of Jose and an informant. Defendant alternatively requested a separate trial from his codefendants. *Bruton* and *Aranda* held that with some exceptions, the Sixth Amendment confrontation clause generally precluded the admission of a statement or confession of a nontestifying defendant when the admission or statement inculpates a jointly tried codefendant. (See *Bruton* at pp. 127-128; *Aranda* at p. 529.) Since the publication of those cases it has become settled that the confrontation clause applies only to testimonial hearsay. (*Crawford v. Washington* (2004) 541 U.S. 36, 51 (*Crawford*); *Davis v. Washington* (2006) 547 U.S. 813, 823-826 (*Davis*); *People v. Gonzales* (2012) 54 Cal.4th 1234, 1270.) Because the *Bruton* rule is premised on the confrontation clause, it does not apply to nontestimonial statements. (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571.)

An inmate's surreptitiously recorded jailhouse conversation with an inmate/informant is not testimonial. (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1401-1402; see *Davis, supra*, 547 U.S. at p. 825, citing *Bourjaily v. United States* (1987) 483 U.S. 171, 181-184 [statements unwittingly made to government informant], and *Dutton v. Evans* (1970) 400 U.S. 74, 87-89 [conversation between prisoners].) Defendant has not shown that the conversations were testimonial. The trial court found that the informant did not interrogate Jose, and defendant has not shown that the informant was even given any instructions. The *Bruton* rule thus has no application here, and the trial court did not err in denying the motion to sever on that ground.

C. Miranda

Defendant contends that his right to due process was violated because Jose's jailhouse statements were coerced and obtained in violation of *Miranda*, after Jose had invoked his Fifth

Amendment right to remain silent. Defendant contends that he has standing to assert Jose's Fifth Amendment privilege because the statements were obtained in a coercive manner and were thus unreliable.[5] Regardless of standing, defendant's contentions have no merit, as the trial court rejected this contention and defendant has not demonstrated error.

Statements do not violate the safeguards set forth in *Miranda* unless they were obtained by law enforcement in a custodial interrogation. (*Miranda, supra*, 384 U.S. at p. 444; *People v. Peevy* (1998) 17 Cal.4th 1184, 1187-1188.) Here, the trial court found that Jose's jailhouse statements did not violate the Fifth Amendment or *Miranda*, as they were not obtained in a custodial interrogation. The court also explained that it had made its determination based on documentation filed with the court. Because that documentation is not in the record on appeal and we presume that the court's determination was based upon a proper factual basis, defendant has failed to demonstrate that the trial court erred.

The court also found that Jose's statements were not obtained in a coercive atmosphere, and that the informant was not a material witness. This finding was based upon documentation reviewed by the trial court, but not in the appellate record. We thus infer that the evidence presented by defendant below did not support a finding that the informant was an intimidating or dangerous gang leader who the government deliberately placed in Jose's cell for the purposed of questioning

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[5] A defendant does not have standing to assert the violation of another person's Fifth Amendment privilege as protected under *Miranda*, with the exception that a defendant may object to statements obtained from a third party by coercive police tactics. (See *People v. Varnum* (1967) 66 Cal.2d 808, 812-813; *People v. Enriquez* (1982) 132 Cal.App.3d 784, 792-793.)

Jose. Defendant has not met his burden to demonstrate error with an adequate record.

D. Government conduct

Defendant contends he was denied due process by the government's "outrageous conduct" of placing Jose in a jail cell with a "dangerous gang member" to obtain incriminating statements.

Respondent observes that since defendant failed to seek exclusion of Jose's statements on this ground in the trial court, he has forfeited his contention. (See Evid. Code, § 353.) Though defendant does not claim to have requested any relief from the trial court on this ground, he asks that we nevertheless exercise our inherent authority to address his contentions, because the state engaged in deliberate misconduct. Defendant asserts that the misconduct consisted of (1) using an informant who was a dangerous gang leader so that Jose would answer questions out of fear for his safety, (2) refusing to reveal the identity of the informant so that defendant could not determine whether the informant received some benefit for his role, and (3) deliberately delaying the filing of charges until after recording the conversations, in order to eliminate a viable claim under *Massiah v. United States* (1964) 377 U.S. 201 (*Massiah*).

A *Massiah* violation occurs "when, after adversarial judicial criminal proceedings have been initiated and in the unwaived absence of counsel, a government agent deliberately elicits from a defendant incriminating statements . . . . (*Fellers v. United States* (2004) 540 U.S. 519, 523; *Maine v. Moulton* (1985) 474 U.S. 159, 170; *Massiah, supra,* 377 U.S. at p. 206.)" (*People v. Dement* (2011) 53 Cal.4th 1, 33, overruled on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) "To prevail on a *Massiah* claim, a defendant must show that the police and the informant took some action, beyond merely listening, that was designed

deliberately to elicit incriminating remarks. [Citations.] 'Specifically, the evidence must establish that the informant (1) was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage, and (2) deliberately elicited incriminating statements.' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 67; see also *People v.* Fairbank (1997) 16 Cal.4th 1223, 1247; see, e.g., *United States v. Henry* (1980) 447 U.S. 264, 266-268; *In re Neely* (1993) 6 Cal.4th 901, 916-818.) It is the defendant's burden to demonstrate a *Massiah* violation. (*People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1006-1007.) A "general policy of encouraging inmates to provide useful information does not transform them into government agents." (*People v. Williams* (1988) 44 Cal.3d 1127, 1141.)

As discussed, defendant has not shown that the informant was a dangerous gang leader or that the police instructed him to question or to extract incriminating statements from Jose. Further, defendant has pointed to no evidence suggesting that the police had any preexisting arrangement with the informant, or that the initiation of criminal proceedings were deliberately delayed, or that questioning the informant was the only way to obtain such evidence.

We must therefore decline defendant's request that we reach the merits of his contentions, as we find no evidentiary basis in the record which would allow consideration of the issue. (See *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 947-948, 952.)

E. No prejudice

We agree with respondent that the admission of Jose's statements were harmless, as the evidence of defendant's guilt and the gang connection to the crime was overwhelming.

First, the circumstances of the shooting identify defendant as the shooter. The shooting took place at approximately 1:16 a.m. When defendant received a call while visiting Elizabeth about 15 minutes before the shooting, he told her he had to go handle something because his brother and father had gotten into a fight. It was Contreras with whom Jose and Miguel had fought that night. Defendant then returned to Elizabeth's apartment shortly after the shooting, acting nervous. Defendants' cell phone records placed him at the scene of the shooting at 1:14 a.m. Two witnesses, Julio and Orlando, saw defendant's black truck arrive on the scene just before the shooting, and both identified defendant as its driver. Minutes after the shooting, as Contreras lay mortally wounded, he identified defendant as his assailant and described his vehicle.

Second, defendant's own behavior and admissions identify him as the shooter. Defendant strongly suggested to Barajas that he had shot Contreras, by soon after the shooting saying that he had done what he had done because of his father, and by later saying that the shot to Contreras was not enough for him to die. Defendant also admitted to Barajas that he was a gang member and a "soldier" in his gang, and showed his gang-related tattoos. Barajas further testified that he had known defendant all his life, and knew before defendant's admission that defendant was a member and soldier of Westside Longo. Sometime after the shooting defendant and Jose threatened witnesses Julio and Christian. Defendant told them to remain quiet about what had happened, and reminded them that this was his "hood."

We conclude beyond a reasonable doubt that defendant would not have obtained a different result without the jailhouse conversations.

II. Dying declaration

Defendant contends that the trial court erred in admitting the statement of Contreras identifying defendant as the person who had shot him, as a dying declaration exception to the hearsay rule.[6]

The "sense of immediately impending death" is a required foundational fact which "may be shown by the declarant's own statements to that effect, or inferred from circumstances such as the declarant's physical condition, the extent of his injuries, his knowledge of his condition, and other types of statements made by the declarant. [Citations.]" (*People v. Sims* (1993) 5 Cal.4th 405, 458.) We accept a trial court's finding that the decedent sensed impending death if it is supported by substantial evidence. (*Id.* at p. 459.) The court's determination is reviewed for an abuse of discretion. (*People v. Tahl* (1967) 65 Cal.2d 719, 725.) "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.) We presume that the trial court's ruling is correct, and it is defendant's burden to affirmatively demonstrate error. (*Denham v. Superior Court, supra*, 2 Cal.3d at p. 564.)

Defendant filed a pretrial written motion to exclude Contreras's statements based upon testimony at the preliminary hearing. Defendant focused on Contreras's physical condition

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[6] "Evidence of a statement made by a dying person respecting the cause and circumstances of his death is not made inadmissible by the hearsay rule if the statement was made upon his personal knowledge and under a sense of immediately impending death." (Evid. Code, § 1242.)

and the extent of his injuries, and argued that evidence of the nature and seriousness of the wounds was insufficient to support a finding that Contreras had a sense of impending death. However defendant disregards the preliminary hearing evidence and again summarizes his version of the facts from counsel's argument. He concludes from that summary that the evidence showed Contreras was shot once in the large muscle of the buttock, that Contreras was "'feeling no pain'" because he was heavily intoxicated and high on cocaine, and that he never lost consciousness, arguing that under such circumstances, the statement, "I don't want to die," did not support the court's finding.

Counsel's arguments are not evidence. (*In re Zeth S.*, *supra*, 31 Cal.4th at p. 414, fn. 11.) Our review of the preliminary hearing testimony differs in key respects to defendant's summary. We found no evidence in the preliminary hearing transcript that indicated defendant was shot in the muscle of the buttocks, or that he was intoxicated or high on cocaine. We further found no mention of the phrase "feeling no pain."

Indeed our review of the testimony reveals that contrary to defendant's argument that Contreras never lost consciousness, Officer Harrison testified that Contreras drifted in and out of consciousness for two minutes and then lost consciousness altogether. Also, Erika testified that she knew Contreras had been drinking that day, but did not smell alcohol on him and he did not appear to be drunk. She did not know whether he had ingested cocaine, but did not think he appeared to be high. Detective Hubert testified to having spoken with the Deputy Medical Examiner who performed the autopsy. The doctor said the cause of death was a gunshot wound to the abdomen and pelvis, causing damage to the organs and veins. There was no

mention of whether Contreras was shot in the front or back, the path of the bullet, or whether a projectile had been found, only that Contreras died of a gunshot wound to his abdomen and pelvis. The doctor did not say anything about cocaine ingestion or intoxication. The only evidence that Contreras was wounded in or near the buttocks was Erika's gesture toward her upper right buttock as an indication of where she had seen the wound. Officer Harrison testified that although he could not see the wound, Contreras was holding his hand over his right front abdomen, and blood was flowing profusely from underneath his hand.

Substantial evidence thus supported the trial court's finding that Contreras sensed impending death based on having suffered a grave injury to his organs and pelvic veins, knew he was bleeding profusely, was struggling to maintain consciousness, and had expressed a fear of dying. Defendant has cited no evidence at all, and has not met his burden to demonstrate a failure of substantial evidence to support the trial court's finding, or that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner.

Moreover, defendant has not demonstrated a miscarriage of justice. As we have discussed above, overwhelming evidence in addition to the dying declaration established that defendant shot and killed Contreras.

III. *Sanchez* error

Defendant contends that the judgment must be reversed due to a violation of the rule found in *Crawford*, that the use of testimonial hearsay violated a criminal defendant's Sixth Amendment right of confrontation unless the declarant is unavailable and defendant has had a prior opportunity to cross-examine him. (*Crawford, supra*, 541 U.S. at pp. 59, 62, 68.) In particular, relying on *People v. Sanchez* (2016) 63 Cal.4th 665

(*Sanchez*), defendant contends that it was a *Crawford* violation to admit the gang expert's reliance on case-specific hearsay as a basis for his opinion that defendant was a member of the Westside Longo gang. "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez*, at p. 676.)

Respondent contends that defendant has forfeited the issue by failing to raise a confrontation objection in the trial court. A challenge to the admissibility of evidence is generally not cognizable on appeal in the absence of a specific and timely objection in the trial court on the ground urged on appeal. (Evid. Code, § 353.) This includes a claim of error under the Sixth Amendment. (*People v. Redd* (2010) 48 Cal.4th 691, 730-732.)

Defendant counters that the failure to object should be excused as futile, as the trial took place prior to the publication of *Sanchez*. A failure to object may be excused where governing law at the time of trial ""afforded scant grounds for objection,"" and where requiring an objection """would place an unreasonable burden on defendants to anticipate unforeseen changes in the law,""" such as when the new rule is "'flatly inconsistent with the prior governing precedent'" and issued well after trial concluded. (*People v. Rangel, supra*, 62 Cal.4th at p. 1215.)

In *Sanchez*, the California Supreme Court held that case-specific statements on which the prosecution's gang expert relied to prove the defendant's gang membership, constituted inadmissible hearsay under California law. (*Sanchez*, *supra*, 63 Cal.4th at p. 670.) The court noted that some of its own precedents, such as *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*) had blurred the distinction between case-specific hearsay and the hearsay sources from which experts frequently derived their general knowledge and expertise, and that this caused some California courts to justify the admission of case-

specific hearsay as the basis for a gang expert's opinion on the fiction that it was not offered for its truth, but rather to assist the jury in evaluating the expert's opinion. (*Sanchez, supra*, at p. 678.) *Sanchez* thus reinstated the traditional state law hearsay rule that precluded expert witnesses "from relating *case-specific* facts about which the expert has no independent knowledge." (*Sanchez, supra*, at p. 676; see also pp. 682-683.)

The court also considered the degree to which the *Crawford* rule limited an expert witness from relating case-specific hearsay in explaining the basis for his opinion. (*Sanchez, supra*, 63 Cal.4th at p. 670.) The court held: "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. It cannot logically be maintained that the statements are not being admitted for their truth. 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." (*Id*. at p. 686.)

Though Sanchez did not enunciate an unanticipated new rule that was flatly inconsistent with prior authority regarding the confrontation clause, our Supreme Court decisions in *Gardeley* and *People v. Montiel* (1993) 5 Cal.4th 877 (*Montiel*) were prior precedents, binding on lower courts until overruled by our Supreme Court. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450. Because *Gardeley* and *Montiel* were not overruled until after this trial in the *Sanchez* decision, we do not find that defendant forfeited his *Sanchez*-based objection.

On the merits we note that contrary to defendant's assertion that all the photographs of defendant's tattoos were taken by someone else, Detective Zamora testified at trial that he

personally took all but one of the photographs. Only the photograph of defendant's head tattoo came from a police report. Once a photograph is properly authenticated, the expert may give an opinion regarding the gang significance of the tattoos depicted based on hearsay sources from which experts routinely derive their knowledge and expertise. (*Sanchez*, *supra*, 63 Cal.4th at pp. 677-678.)

Further, defendant's other factual assertions are inadequate for meaningful discussion. Defendant claims that various police reports relied upon by the expert contain testimonial hearsay because "they involve statements about a crime made to an investigating officer by a nontestifying witness." Without knowing what the particular statements were and who made them, we cannot determine whether they were testimonial or not. Defendant has failed to show that the declarant in any challenged statement was a nontestifying witness.

Defendant does point out one statement with particularity: defendant's admission that he was a Westside gang soldier. Defendant claims this was testimonial hearsay admitted in violation of his right of cross-examination, because his cousin Barajas made the statement, which was then described in a police report given to the expert by Detective Hubert. Defendant seemingly ignores that the statement was independently proven by Barajas's testimony of defendant's admissions to him. In addition, Barajas testified that he had known defendant since birth, and that he already knew that his cousin was a member and soldier of Westside Longo. Under these circumstances, Barajas's knowledge, coupled with defendant's admission to him, was properly admissible, probative evidence of defendant's gang membership. (See *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1511.) As defendant acknowledges, an expert may rely on case-

specific facts independently proven by admissible evidence. (*Sanchez*, *supra*, 63 Cal.4th at pp. 684, 686.)

Respondent concedes that Detective Zamora's testimony conveyed some case-specific hearsay in violation of *Sanchez* in the following three respects: the gang-related "CK" tattoo on defendant's head; defendant's gang nickname, "Mousey"; and evidence of prior police contact with defendant and other gang members. Thus, defendant's confrontation challenge is, in essence, based upon the admission one of the four photographs of defendant's tattoos, evidence of his nickname, and evidence that defendant had been seen in the company of other gang members.

We agree with respondent that such evidence was inconsequential and its admission was harmless under any standard. As respondent observes, defendant's own expert testified about his familiarity with defendant's tattoos, including the one on defendant's head, and that in his expert opinion the tattoos were gang-related, indicating that defendant was at one time a member of Westside Longo. Further, defendant admitted his membership in the gang to Barajas, who testified that he already knew his cousin was a soldier in Westside Longo. Julio too testified regarding defendant's behavior in confronting him, Christian, and a companion by claiming his "hood."

Finally, although a defendant's gang membership may provide evidence to support the gang enhancement, it is not an element which the prosecution was required to prove. (*Sanchez, supra*, 63 Cal.4th at pp. 698-699.) A gang finding has two prongs: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (§ 186.22, subd. (b)(1); *People v. Albillar* (2010) 51 Cal.4th 47, 61, 67-68.) The first prong is satisfied with substantial evidence that the

defendant committed the crime in concert with a known gang member; and the jury may reasonably infer proof of the second prong from substantial evidence that the defendant intended to commit the crime with the other gang member. (*Albillar*, *supra*, at p. 68; *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) Defendant does not challenge Detective Zamora's opinion that defendant's brother Jose was a gang member, or the evidence that Jose participated in the crime.

We conclude beyond a reasonable doubt that the three instances of testimonial hearsay did not affect the verdict,

IV. Juror impartiality

Defendant contends that the gang expert's testimony regarding violent gang culture and the ambiguous behavior of defendant's father Miguel soon after that testimony, frightened several jurors and rendered them unable to be impartial.

The court received a note from Juror No. 6, reporting that a few days earlier, defendant's father stood outside the courtroom near the escalator during afternoon recess, staring at jurors as they walked by, making Juror No. 6 uncomfortable; and that a few days after that, Miguel stood outside a courthouse exit with feet apart, hands on hips, staring ahead in a position that required jurors to go around him to leave the building. The juror expressed discomfort and a belief that Miguel was trying to intimidate the jury. The juror also spoke with several other jurors, who also felt intimidated.

After the court questioned Juror No. 6, who verified the report, the court assured the juror that Miguel would be ordered to stay away from the courthouse by several blocks. The court also told the juror that other jurors would be questioned so that Miguel would not know who raised the issue, and that all juror identifying information would be sealed. Juror No. 6 replied that this eased his (or her) concern, "[I]t made me mad but will not

influence my decision on the case." Juror No. 6 believed that any intimidation felt by other jurors was minimal, that Miguel's behavior was merely irritating, and that he/she could remain impartial and fair to both sides.

The court separately questioned each of the 16 jurors and alternates, without suggesting the facts of Juror No. 6's report, and gave each juror the same assurances. The seven who had either noticed Miguel's behavior or had heard about it expressed a sense of reassurance and told the court that he or she could be impartial and fair to all sides.

At the end of the jury interrogation the court asked all counsel if there were other questions, objections, or any motions. Each attorney answered in the negative and submitted the issue. Miguel was then brought in to court and ordered to stay away from the courthouse and given specific boundaries. Miguel agreed to abide by the stay-away order and apologized to the court.

In his reply brief, defendant clarifies that he makes no claim of juror bias or misconduct, but contends that the jurors lost their *ability* to remain impartial due to the gang expert's inflammatory testimony about how gang members commit violent crimes against those who testify against them in a criminal trial. He contends that the expert presented "unnecessarily frightening testimony in an obvious attempt to use fear to prejudice the jurors against the defendant[] [which] was too convincing and the result was that the jurors lost their impartiality."

In essence, defendant challenges the gang evidence, arguing that violent, criminal gang culture is frightening, and the inflammatory effect of gang evidence can be amplified when combined with the stares, glares, or body language of the father of two gang members on trial for murder. Defendant points to no objection made during trial to the expert's testimony on the

ground that it was unduly inflammatory or was potentially more prejudicial than probative. Furthermore defendant made no motion to have the court remove any of the seven jurors who had seen or heard about Miguel's behavior, and when given the opportunity to suggest further questioning, declined.[7]

Though gang evidence can be inflammatory and frightening, it can also be highly probative of a contested issue in a case, as it was here. (See *People v. Valdez* (2012) 55 Cal.4th 82, 133-134.) To preserve a challenge to such evidence defendant was required to interpose an appropriate objection under Evidence Code section 352, and to demonstrate that the evidence was more prejudicial and unduly inflammatory, than probative. (*Ibid.*) Further, to preserve a claim that he was deprived of his Sixth Amendment right to an impartial jury, defendant was required to request the removal of the affected jurors or suggest additional examination (*People v. Holloway* (2004) 33 Cal.4th 96, 124, 126-127); or move for a mistrial after the court's examination of the jurors. (*People v. McIntyre* (1981) 115 Cal.App.3d 899, 906.)

Here, defendant not only did not object to the gang evidence under Evidence Code section 352, but acquiesced in the court's jury examination procedure. Defendant has not preserved this point for review.

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[7] Defendant contends that during argument on his motion for new trial, "counsel reminded the court that when the juror fear discussion had taken place, he had asked for a mistrial, and to have Juror No. 6 . . . removed." Defendant has not included a citation to the pages in the reporter's transcript for such motions, and after a thorough review of the record, we find no such motion.

Regardless, there is no indication of juror bias, as each of the jurors reassured the court that they could remain fair and impartial. Further, we agree with respondent that there was no prejudice, due to the overwhelming evidence of defendant's guilt.

V. No cumulative error

Defendant contends that the judgment must be reversed because the cumulative effect of all the asserted errors was to deny him a fair trial. As "[w]e have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial," we must also reject defendant's claim of prejudicial cumulative effect. (*People v. Sapp* (2003) 31 Cal.4th 240, 316.)

VI. Joinder

Defendant purports to join in any arguments raised by his codefendant to the extent that such argument might benefit him, but makes no effort to specify what arguments might be applicable to him. Such a blanket joinder is ineffective (see *People v. Bryant* (2014) 60 Cal.4th 335, 363), particularly where, as here, defendant's appeal has not been consolidated with codefendant's appeal. Further it bears noting that this appeal was fully briefed before codefendant's opening brief was due, resulting in no arguments for defendant to join.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.