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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO ROMAN, et al., Defendants and Appellants.	B267330 (Los Angeles County Super. Ct. No. BA361087)

APPEAL from judgments of the Superior Court of Los Angeles County. Larry P. Fidler, Judge. Remanded with directions.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Antonio Roman.

Robert E. Boyce, under appointment by the Court of Appeal, for Defendant and Appellant Jose Rodriguez.

Carlo A. Spiga for Defendant and Appellant Ivan Lozano.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, David E. Madeo and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Antonio Roman, Jose Rodriguez, and Ivan Lozano challenge their convictions and sentences on numerous grounds. We reverse their convictions on count 16, active participation in a criminal street gang. We remand for the trial court to resentence Roman and to ensure that he has an opportunity to present evidence for his eventual youth offender parole hearing. We conditionally reverse Rodriguez's conviction and transfer the matter to the juvenile court with directions to conduct a transfer hearing. In the event the juvenile court transfers Rodriguez's case to the criminal court, we instruct the trial court to provide Rodriguez with the opportunity to present evidence for his eventual youth offender parole hearing. In all other respects, the judgments are affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006 and 2007, the Los Angeles Sheriff's Department conducted a wiretap investigation involving the Compton Varrio Locos Trece gang, commonly called "Locos Trece." The investigation resulted in the indictment of multiple members and associates of the gang. Roman, Rodriguez, and Lozano were tried together.[1] With one exception, the charges pertained to five separate events between December 2006 and May 2007.

With respect to the first event, the shooting of Lucio Amparo on December 15, 2006, Roman was convicted of

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[1] To distinguish the three individuals tried in this trial from the others with whom they were indicted, we use the terms "defendants" and "co-defendants" to refer to Roman, Rodriguez, and Lozano, and we refer to the other individuals charged in the indictment as "collaborators."

conspiracy to commit murder (Pen. Code,[2] §§ 182, subd. (a)(1), 187) (count 1), with a special allegation that the conspiracy was committed to benefit a criminal street gang under section 186.22, subd. (b) found true; active participation in a criminal street gang (count 3); and attempted murder (§§ 187, 664) (count 4). On count 4, the jury found true the gang enhancement allegation and firearms enhancement allegations under sections 12022.53, subdivisions (b) through (d).

The second incident, the "Lucien Street Incident," occurred on December 17, 2006. In conjunction with this event, both Roman and Lozano were convicted of conspiracy to commit murder (count 5), with a gang enhancement allegation under section 186.22, subd. (b)(1)(C) found true; and active participation in a criminal street gang (§ 186.22, subd. (a)) (count 7). Lozano was also convicted of carrying a loaded firearm as an active participant in a criminal street gang (fmr. § 12031, subds. (a)(1), (a)(2)(C)) (count 6).

The third incident, described as the "Ladybugs Incident" because "Ladybugs" was a pejorative term Locos Trece used to describe members of the targeted rival gang, took place on January 19, 2007. Roman was convicted of conspiracy to commit murder (count 11), with the gang enhancement allegation found true. Both Roman and Rodriguez were convicted of active participation in a criminal street gang (count 13).

Rodriguez and Lozano were charged with four offenses in conjunction with the February 3, 2007 "Baby Shower Incident," so named because the alleged victims were attendees at a baby

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[2] Unless otherwise indicated, all further statutory references are to the Penal Code.

shower: conspiracy to commit murder (count 14), active participation in a criminal street gang (count 15), and two counts of attempted murder (counts 21 and 22). Both men were convicted on counts 14 and 15, with a true finding on the gang enhancement allegation attached to count 14. The two attempted murder counts against Lozano were dismissed after a mistrial; Rodriguez was convicted on each of those counts but they were subsequently dismissed on the prosecutor's motion after two witnesses recanted.

In conjunction with the final incident, the May 26, 2007 shooting of Gabriel Velasquez, Roman was convicted of attempted murder, with a gang enhancement (count 17); conspiracy to commit murder, with a gang enhancement (count 18); and active participation in a criminal street gang (count 19).

Finally, all three defendants were charged with and convicted of actively participating in a criminal street gang (§ 186.22, subd. (a)) between December 2006 and May 2007 (count 16).

Roman was sentenced to life imprisonment on count 4. Also on count 4, the court imposed an additional consecutive 15-year term pursuant to its understanding of section 186.22, and a consecutive 25 years to life for the firearms enhancement under section 12022.53, subd. (d). The court sentenced Roman to three consecutive sentences of 25 years to life in state prison for counts 5, 11, and 18. The court imposed and stayed the sentences on counts 1, 3, 7, 13, 16, 17, and 19 pursuant to section 654. The court denied Roman presentence custody credits, imposed a restitution fine in the amount of $300, and imposed and stayed a parole revocation fine in the amount of $300.

Rodriguez was sentenced to 25 years to life in state prison on count 14, and a consecutive upper term sentence of three years on count 13. The court imposed and stayed the sentences on counts 15 and 16 under section 654.

The trial court sentenced Lozano to two consecutive sentences of 25 years to life in state prison (counts 5, 14). The court imposed and stayed sentence on counts 6, 15, and 16. It was discovered after sentencing that the court had not sentenced Lozano on count 7; the court then dismissed that count under section 1385 at the prosecutor's request.

Roman, Rodriguez, and Lozano appeal.

DISCUSSION

I. Confrontation Clause (All Defendants)

A. Fujino's Testimony

Los Angeles County Sheriff's Department Sergeant Michael Fujino testified for the prosecution both as an expert witness and as a percipient witness. Fujino testified that between 2006 and 2007, he investigated Locos Trece as part of the Compton Murder Task Force. Fujino, who was already familiar with Locos Trece and its members, listened to phone calls that had been recorded by wiretap. In those recordings, Fujino recognized the voices of Roman, Rodriguez, and Lozano, as well as their collaborators and uncharged participants. Fujino also responded to locations where the telephone calls indicated criminal activity was about to occur.

Fujino testified about the general culture and priorities of gangs; the history, membership, activities, insignias, tattoos, terminology, territory, and relationships of Locos Trece; and the background facts establishing that Locos Trece was a criminal

street gang engaging in a pattern of criminal gang activity. He testified about the defendants and their seven separately-tried collaborators, opining that nine of those indicted were members of Locos Trece and that the tenth individual was a Locos Trece associate. Based on hypothetical questions mirroring the facts of this case, Fujino testified that the charged offenses were committed for the benefit of, at the direction of, and in furtherance of the gang.

In the course of his testimony, Fujino testified to the contents of 9 different field identification cards and 2 gang cards, five of which he had written. The statements on the cards were admitted for their truth; in many instances, Fujino essentially read the card into evidence. For example, with respect to Exhibit 6, the prosecutor asked, "[O]n what date was [Rodriguez] stopped?" and Fujino responded, "It says here October 14, 2005." "And does the field identification card of People's Exhibit 6 reflect whether or not Jose Rodriguez is a gang member?" the prosecutor asked. Fujino testified, "It says here that he is suspected of being a gang member . . . ." The 11 field identification and gang cards were admitted into evidence at the close of the prosecution's case.

B. Applicable Law

Section 186.22, subdivision (a), provides that "[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in, or have engaged in, a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang," has committed a criminal offense. Section 186.22, subdivision (b)(1), imposes additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with

the specific intent to promote, further, or assist in any criminal conduct by gang members." The enhancement "applies when a defendant has personally committed a gang-related felony with the specific intent to aid members of that gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 68.)

To establish that a group is a criminal street gang within the meaning of section 186.22, the People must prove that it is an ongoing association of three or more persons with a common name or common identifying sign or symbol; has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and includes members who either individually or collectively have engaged in a pattern of criminal gang activity. (*People v. Sanchez* (2016) 63 Cal.4th 665, 698 (*Sanchez*).) "[A] 'pattern of criminal activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of, . . . or conviction of two or more of . . . [the enumerated] offenses . . . and the offenses were committed on separate occasions, or by two or more persons." (§ 186.22, subd. (e).)

An expert may provide testimony that a gang "engage[s] in various criminal practices" to establish the "primary activities" element of section 186.22, subdivision (f). (*People v. Prunty* (2015) 62 Cal.4th 59, 82; see *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411 (*Vega-Robles*).) "'Expert opinion that particular criminal conduct benefited a gang' is not only permissible but can be sufficient to support the . . . section 186.22, subdivision (b)(1) gang enhancement." (*People v. Vang* (2011) 52 Cal.4th 1038, 1048; see *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550 [an expert may testify about the '"motivation for a particular crime, generally retaliation or intimidation' and 'whether and how a crime was committed to benefit or promote a gang'"].)

"The admission of expert testimony is governed not only by state evidence law, but also by the Sixth Amendment's Confrontation Clause, which provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Id.* at p. 686.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) If the hearsay is testimonial, "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; see *Crawford v. Washington* (2004) 541 U.S. 36, 53-54 (*Crawford*) [court may not admit "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination"].)

"Gang experts, like all other[ ] [experts], 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." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) Background information includes general gang behavior, descriptions of the gang's conduct and its territory, the gang's primary activities, and its rivalry with another gang. (*Vega-Robles, supra,* 9 Cal.App.5th at p. 411.)

"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." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) Thus, "a court addressing the admissibility of out-of-court statements must engage in a two-step analysis. 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* 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." (*Id.* at p. 680.) "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Id.* at p. 694.)

"We review the trial court's determination as to the admissibility of evidence (including the application of the exceptions to the hearsay rule) for abuse of discretion [citations] and the legal question whether admission of the evidence was constitutional de novo." (*People v. Mayo* (2006) 140 Cal.App.4th 535, 553.)

C. Defendants' Arguments

Each defendant argues that the evidence presented violated the confrontation clause of the Sixth Amendment. Roman argues that Fujino's opinion that the defendants were participants in Locos Trece was based, "at least in part, on out-of-

court statements made by the defendants and recorded in various [field identification] cards he had reviewed." He contends that field identification cards are testimonial in nature and that "their admission violates the confrontation clause absent a prior opportunity for cross-examination." Roman also challenges the testimony given by Fujino to establish the predicate crimes and establish a pattern of criminal gang activity on confrontation clause grounds. He argues that the evidence that the defendants and collaborators were Locos Trece members was critical to their conviction for active participation in a criminal street gang in violation of section 186.22, subdivision (a) and the jury's true findings on the section 186.22, subdivision (b) gang enhancement.

Additionally, in briefing prepared before the California Supreme Court's recent major decision on the confrontation clause and testimonial hearsay, *Sanchez*, *supra*, 63 Cal.4th 665, Roman also argued that Fujino relied on out-of-court statements for his testimony about the size and history of the Locos Trece gang, its relationship with the Mexican Mafia, and the roles of fear, respect, and retaliation in the gang world, and that this violated the confrontation clause.

Rodriguez joins in Roman's arguments and argues that "Fujino's opinions concerning the Compton Varrio Locos Trece were based on testimonial hearsay and barred by the confrontation clause." Specifically, he contends that the evidence of the gang's pattern of criminal activity was Fujino's opinion that the two men who committed those crimes were Locos Trece members, and that this opinion was impermissibly based on interviews with the two men "on the streets during his investigation."

In addition to challenging Fujino's testimony as to gang membership and his review of field identification cards to the jury, Lozano contends that Fujino provided impermissible case-specific hearsay that (1) he received a phone call from the wire room informing him that a drive by shooting was about to occur; and (2) another officer told him a suspect had admitted that a drive-by shooting had occurred. He also argues that Fujino improperly testified to another officer's translated statements concerning one witness's account of the shooting on Bliss Street and that this hearsay testimony "helped bolster the accuracy" of the witness's initial statement to law enforcement.

Roman and Rodriguez contend that their convictions for active participation in a criminal street gang and the gang sentence enhancements should be reversed as a result of the confrontation clause violation. Lozano, however, argues that his convictions on all counts should be reversed because Fujino's testimony was "wide[-]ranging and mostly based on hearsay and consequently implicates all the counts." The hearsay, he contends, was particularly pernicious in the context of the Baby Shower Incident, in which "the most damning evidence consisted of [Fujino's] objected[-]to hearsay statements concerning the Bliss [S]treet shooting that may never have taken place": the testimony that the wire evidence indicated a specific shooting was planned and the statement of a suspect made after arrest that the shooting had in fact occurred. Lozano argues that this bolstered a weak case that suffered from internally inconsistent testimony by the main witnesses and the absence of physical evidence of shots fired at the victims.

D. Hearsay in Violation of the Confrontation Clause

Because this case was tried before the California Supreme Court's decision in *Sanchez*, *supra*, 63 Cal.4th 665, in which the court significantly revised the limitations on expert witnesses in relating hearsay in explaining the basis for an opinion, questions that are now relevant in evaluating whether an expert witness is relating case-specific testimonial hearsay were not salient at the time of trial, leaving us with a record that lacks sufficient information to ascertain whether each particular item of testimony was case-specific testimonial hearsay that implicates the confrontation clause.[3]

1. Field Identification Cards/Gang Cards

Fujino related the contents of 11 different field identification cards and gang cards to the jury, all of which were admitted into evidence. Although it cannot consistently be determined whether the facts related by Fujino were hearsay or from his independent knowledge, these cards contained facts relating to the particular events and participants alleged to have been involved in the case being tried. It therefore appears that at least some number of the cards did contain case-specific hearsay, not all of which fell within an exception to the hearsay rule or

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[3] This recent sea change in this area of the law also leads us to reject the Attorney General's contention that the defendants forfeited the confrontation clause issue because they failed to object on that ground in the trial court. Their failure to object is excused because an objection would have been futile. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 507-508; *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted Mar. 22, 2017, S239442, opinion ordered to remain precedential.)

was independently proven through competent evidence. For the purposes of this analysis, we assume that all the cards contain case-specific hearsay.

The critical question under the confrontation clause is whether the case-specific hearsay was "testimonial." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.) The *Sanchez* decision surveyed the substantial body of case law regarding the proper formulation of "testimonial" and summarized the concept as follows: "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.) Also, in order to be considered testimonial, "the statement must be made with some degree of formality or solemnity." (*People v. Dungo* (2012) 55 Cal.4th 608, 619; see also *Sanchez*, at pp. 692-694.) While the *Sanchez* court made no bright-line ruling as to whether field identification cards are testimonial, the court noted that "[i]f the field identification card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Id.* at p. 697.)

Fujino testified that during 2006 and 2007 he was involved in "this investigation" and was "in charge of investigating any crimes that were generated by" Locos Trece. He did not testify to the specific circumstances in which every card was prepared. Fujino testified generally that officers "carded up," or contacted, gang members out on the streets and then filled out a field identification card. Officers "are responsible" for filling out field identification cards, "and if they meet certain criteria that

documents them as a gang member." Most field identification cards, Fujino testified, were produced after consensual contacts with gang members, but they were also prepared in conjunction with detentions, at traffic stops, and when officers are investigating a crime. Field identification cards were a way of gathering "gang intelligence."

Gang cards are identification cards that are produced in the investigation of a crime. They include the time, the person's name, address, personal information, the gang the person belongs to, and the person's moniker, and they are attached to the case file for a specific investigation or arrest.

As the People acknowledge, the record does not include evidence of the circumstances of each card's preparation. As a result, the record does not permit us to determine whether the hearsay was testimonial in nature, and the People, as the proponent of this evidence, did not establish grounds for the admission of this evidence that complied with the confrontation clause. (Evid. Code, §§ 400, 403.)

2. Predicate Acts Testimony

To establish Locos Trece's pattern of criminal activity for purposes of the charges of active participation in a criminal street gang under section 186.22, subdivision (a) and the gang enhancements alleged under section 186.22, subdivision (b), Fujino testified to crimes committed by Rodrigo Nocito and Ricardo Montemayor. Regarding Nocito, Fujino testified that he was familiar with Nocito's conviction for attempted murder, as shown through a certified minute order, because he investigated the case and was "present for the aftermath of a shooting that occurred on a witness to a murder." Fujino testified that the two

suspects involved in the case were "self-admitted gang members from Locos Trece." Fujino personally knew Nocito and had "contacted him out in the streets, actually talking to him during this investigation after he was taken into custody as a result of a search warrant." Fujino opined that Nocito was a member of Locos Trece based on "intelligence gathering, the actual facts of this case, the actual victim's statements in this case; knowing that these two individuals were in fact gang members, their self-admission to myself."

When shown a certified minute order reflecting Montemayor's murder conviction, Fujino testified that he was "familiar" with Montemayor. The prosecutor asked how he was familiar with Montemayor, and Fujino stated, "He is a Locos [Trece] gang member that goes by the moniker Peanut. He was convicted of murder for this case. I was actually present for the service of a search warrant in the aftermath of this particular murder." Fujino testified that he had "contacted [Montemayor] the day of this murder when he was being detained in front of his house prior to a search warrant being served."

Sanchez and the confrontation clause are implicated by this testimony only to the extent that Fujino's testimony contained case-specific testimonial hearsay. The prosecution was required to prove the existence of a criminal street gang, which, in turn, required establishing a pattern of criminal activity. (§ 186.22, subds. (a)-(f).) Thus, Fujino's testimony regarding the predicate offenses, and Nocito's and Montemayor's respective gang memberships, were offered to prove elements of the crimes and enhancements alleged. Under these circumstances, this testimony may not be fairly described as background information; that is, "testimony regarding [Fujino's] general knowledge in his

field of expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 676.) Rather, Fujino's testimony regarding the predicate offenses was case-specific. (See *id*., at pp. 676-677.)

The fact that Nocito was convicted of attempted murder was shown through the admission of certified court documents; those documents were not hearsay. (Evid. Code, § 452.5, subd. (b)(1).) Fujino knew Nocito and had personal knowledge of the circumstances of the crime because he investigated it. He believed Nocito to be a Locos Trece member based on intelligence gathering, the facts of this case, and victim statements in this case, as well as knowing that the suspects were gang members and that they had admitted their membership to him. Most of these stated grounds for Fujino's opinion appear to be permissible descriptions of "the kind and source of the 'matter' upon which his opinion rests." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so." (*Id*. at pp. 685-686.) To the extent that Fujino's opinion that Nocito was a member of Locos Trece was based on Nocito's self-admission, Fujino was offering Nocito's out-of-court statements for the truth of the matter, i.e., to establish Nocito was a gang member, and it appears to be hearsay. (Evid. Code, § 1200.) As there was no showing of Nocito's unavailability, the evidence could not be admitted as a declaration against penal interest (Evid. Code, § 1230), and the People have not shown that it was admissible under any other exception to the hearsay rule. As the record does not include sufficient evidence of the circumstances of the admission such that it can be determined whether that hearsay was testimonial in nature, the People, the proponent of this evidence, did not establish grounds for the admission of this

evidence without a violation of the confrontation clause. (Evid. Code, §§ 400, 403.)

The defendants, however, have not met their burden of demonstrating error on appeal with respect to the testimony that Montemayor was a gang member. Fujino testified only that Montemayor was a member of Locos Trece and used the moniker Peanut. He presented this information not as an opinion but as a fact. Fujino mentioned having contact with Montemayor but did not relate any out-of-court statements attributed to him. As such, the record does not demonstrate that Fujino related case-specific hearsay concerning Montemayor.

3. Other Claimed Hearsay

The defendants' other confrontation clause contentions lack merit. Fujino's testimony as to the size and history of the Locos Trece gang, the Mexican Mafia, the roles of fear, respect, and retaliation within gangs are all matters of background information within Fujino's general knowledge, and the admission of this testimony was not error. (*Sanchez*, *supra*, 63 Cal.4th at pp. 675-678, 685.) Fujino's percipient witness testimony that he (1) surveilled a particular location based on a telephone call intercepted by the wiretap; and (2) learned from detectives that a suspect had admitted a drive-by shooting had occurred was not hearsay because it was offered not for the truth of the matter asserted but to explain the reasons for Fujino's actions. Fujino's testimony concerning a witness's prior inconsistent statement was not rendered hearsay because of the use of a translator. (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 448.)

E. Harmless Error

The erroneous admission of nontestimonial hearsay is a violation of state statutory law subject to the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818. (*Sanchez*, *supra*, 63 Cal.4th at p. 685, 698.) Under this standard, reversal is required only if it is reasonably probable that the defendant would have achieved a more favorable result if not for the error. (*People v. Wall* (2017) 3 Cal.5th 1048, 1060.) The erroneous admission of testimonial case-specific hearsay in violation of a defendant's right to confront witnesses against him is "an error of federal constitutional magnitude" and requires reversal unless the error is "harmless beyond a reasonable doubt" under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Sanchez*, at pp. 685, 698.)

We conclude that the admission of any case-specific testimonial hearsay in this matter was harmless beyond a reasonable doubt. Although Roman contends that the evidence that the defendants were members of a gang "was based primarily on the hearsay found in the field identification cards," the record does not support that contention. Setting aside the presumptive case-specific hearsay evidence, the record contains overwhelming evidence that the defendants were members of the Locos Trece gang. The entire case revolved around the operation and criminal activities of the gang, and defendants' gang membership was "independently proven by competent evidence." (*Sanchez*, *supra*, 63 Cal.4th at p. 686.)

Fujino had been familiar with the Locos Trece gang since the early 1990s, and he knew the activities of the gang; its clothing, insignia and signs, its territory; and its relationships with other gangs. Fujino properly testified to and relied upon

this information in forming his opinions. (*Id.* at pp. 676-678.) Fujino was assigned to the Locos Trece gang; he was personally familiar with and had met all three defendants, and he had listened to thousands of wiretapped telephone calls over the course of the investigation. The recorded telephone calls offered direct evidence of the defendants' and their collaborators' involvement with Locos Trece. Every defendant and collaborator had been recorded in the wiretapped calls played for the jury. The callers used Locos Trece slang, called each other by their monikers, and revealed the gang's operations, plans, hierarchy, and activities. They discussed obtaining guns and ammunition; shooting at and being shot at by members of rival gangs, guarding their territory and searching for rival gang members to attack.

Rodriguez had admitted to Fujino that he was a member of Locos Trece. Fujino identified Rodriguez's tattoos as relating to the Locos Trece gang: one was an abbreviation for Locos Trece and another was the professional baseball team's insignia that Locos Trece had adopted. Fujino had heard Rodriguez in hundreds of telephone calls. He believed Rodriguez to be a Locos Trece member, and when asked for the basis of his opinion he specified his prior contacts with Rodriguez in which Rodriguez admitted his moniker and membership, the wiretapped calls, and Rodriguez's association with other Locos Trece gang members. Fujino then added that Rodriguez had been the driver in a drive-by shooting.[4]

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[4] Rodriguez asserts that "the most significant fact relied on by Fujino establishing Rodriguez was a Trece gang member was that Rodriguez 'was actually in the vehicle as the driver during a drive-by shooting' on February 3, 2007, the offense charged in

Lozano also had admitted to Fujino that he was a member of Locos Trece. Lozano had tattoos that said "Compton" and referred to Locos Trece. Fujino had heard Lozano in hundreds or thousands of telephone calls. He knew that Lozano had contact with Roman and another Locos Trece member based on the investigation and wiretapped calls. He believed Lozano was an active member of Locos Trece "[b]ased on this entire investigation, basically the information I received from a confidential informant all the way through this investigation,[5] the contacts that were made out in the streets, other gang members that he was associating with at the time by not only myself but also other gang officers and/or deputy sheriffs that patrolled the area, also the actual incident that occurred during this investigation and the phone calls that were intercepted in this investigation." He also believed Lozano was a "shot caller" in Locos Trece based on factors related to the instant case: "[b]ased upon all the incidents that occurred in this case, all the telephone conversations that were intercepted and that I monitored, which were approximately over 2,000, that individuals that are

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count 14," and that in concluding that there was a drive-by shooting Fujino relied on evidence that was later recanted. When stating the bases for his opinion Fujino did not state that this fact was most significant to him, and Rodriguez has not offered any citation to the record to support this contention. Moreover, the recantations, which are discussed at length below, have no bearing on whether there was a confrontation clause violation and did not undermine Rodriguez's conviction on count 14 for conspiracy to commit murder.

[5] References to confidential informants were subsequently stricken, and the court admonished the jury to disregard them.

defendants in this case were actively seeking permission or guidance from Mr. Lozano."

While Roman had not admitted to Fujino that he was a member of Locos Trece, Fujino was familiar with Roman based on personal contact, from listening to the wiretapped telephone calls, and from performing a traffic stop based on information learned from those calls. Roman's tattoos included the word "Compton" and the professional baseball team logo adopted by Locos Trece. Fujino had seen Roman in the company of other gang members. In May 2007, after wiretapped phone calls indicated that Roman and others were going to pick up a firearm from the home of Roman's grandmother, he waited near the home in an attempt to interrupt the firearm transfer. He saw Roman driving near the house with one of the collaborators as a passenger immediately before the collaborator committed a drive-by shooting. Fujino considered Roman's grandmother's home a known Locos Trece location and safe house, not because Roman lived there but because during the investigation, Roman indicated in wiretapped calls that certain individuals would be at the home and that particular weapons would be at the residence or brought there. Fujino testified that it was his opinion that Roman was a Locos Trece member based on his tattoos, the company that he associated with and was detained with, the Locos Trece crimes that he was involved in, and the wiretapped telephone conversations Fujino had listened to over the course of the investigation.

Therefore, even without reference to case-specific hearsay, there was overwhelming evidence that the defendants and their collaborators were members of the Locos Trece gang. (See *Sanchez*, *supra*, 63 Cal.4th at p. 677 [an expert's opinion

regarding gang membership based on tattoos is admissible]; *People v. Iraheta* (2017) 14 Cal.App.5th 1228, 1248 [personal observations by gang experts of gang member's tattoos, attire, companions, and location were admissible].)

As to the predicate acts testimony, Fujino's testimony as to Montemayor's crime offered evidence of one predicate act. While it appears that the prosecution did not establish that the evidence concerning Nocito was admissible without a violation of the confrontation clause, the jury was instructed that it could consider the defendants' offenses in the instant matter when determining the existence of predicate offenses. (See CALCRIM No. 1401.) Either of Roman's two convictions of attempted murder in this case established the second of the two required predicate acts under section 186.22, subdivision (e). There was no reversible error.

II. Count 16: Absence of Unanimity Instruction (All Defendants)

"In a criminal case, a jury verdict must be unanimous," and "the jury must agree unanimously the defendant is guilty of a specific crime." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) Generally, if the "evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Ibid*.) "'When the prosecutor does not make an election, the trial court has a sua sponte duty to instruct the jury on unanimity.' [Citation.]" (*People v. Leonard* (2014) 228 Cal.App.4th 465, 491 (*Leonard*).)

Neither instruction nor election is required, however, if the case falls within the continuous course of conduct exception.

(*Leonard*, *supra*, 228 Cal.App.4th at p. 491.) "An offense is of a continuing nature when it may be committed by 'a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.' [Citations.] [¶] The courts have looked to the statutory language to determine whether the Legislature intended to punish individual acts or entire wrongful courses of conduct and have concluded that when the language of the statute focuses on the goal or effect of the offense, the offense is a continuing offense. [Citations.] Other courts have found a continuing course of conduct where the wrongful acts were successive, compounding, interrelated, and aimed at a single objective." (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 632.) "The primary significance of defining a crime as a continuous course of conduct is that the jury need not agree unanimously that the defendant committed any particular act or acts; it need only agree unanimously that he or she engaged in the prohibited conduct." (*People v. Culuko* (2004) 78 Cal.App.4th 307, 325.)

Here, each charge of active participation in a criminal street gang[6] was alleged to have occurred on the same date as one of the charged conspiracies to commit murder, with the exception of count 16. In count 16, the defendants were alleged to have actively participated in a criminal street gang from the period December 14, 2006, to May 29, 2007, a period corresponding to and spanning all five charged conspiracies.

At the close of evidence, the trial court instructed the jury, "The defendant is accused of having violated Penal Code section 186.22, subdivision (a), street terrorism in count 16 by having engaged in a course of conduct between December 14, 2006 and

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6 This offense was referred to at trial as "street terrorism."

May 29, 2007. The People must prove beyond a reasonable doubt that the defendant engaged in this course of conduct. Each juror must agree that defendant engaged in acts or omissions that prove the required course of conduct. As long as each of you is convinced beyond a reasonable doubt that the defendant committed some acts or omissions that prove the course of conduct, you need not all rely on the same acts or omissions to reach that conclusion."

Roman, Rodriguez, and Lozano appeal their convictions on count 16 on the ground that the trial court did not instruct the jury that it was required to agree unanimously on the underlying felonious conduct on which it relied to convict them. The Attorney General agrees that the trial court erred and requests that this court reverse the convictions on count 16 because the error cannot be determined to be harmless. We agree with the parties' analysis.

The Legislature's stated purpose in enacting section 186.22 was the eradication of criminal activity by street gangs. (§ 186.21.) Section 186.22, subdivision (a), therefore, "link[s] criminal liability to a defendant's criminal conduct in furtherance of a street gang." (*People v. Castenada* (2000) 23 Cal.4th 743, 752.) At all relevant times, the statute has provided, "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." (§ 186.22, subd. (a).) The California Supreme Court has held, "Mere active

and knowing participation in a criminal street gang is not a crime. Applying the third element of section 186.22[, subd.](a), a defendant may be convicted of the crime of gang participation only if he also willfully does an act that 'promotes, furthers, or assists in any felonious criminal conduct by members of that gang.' (§ 186.22[, subd.](a).)" (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130-1131.) That act must be "a specific felony committed by gang members." (*Castenada*, at p. 749.) "Thus, a person who violates section 186.22[, subd.](a) has also aided and abetted a separate felony offense committed by gang members . . . ." (*Ibid.*) The purpose of the statute, its language, and the emphasis by the Supreme Court on the statute's requirement of specific acts of felonious conduct lead to the conclusion that the statute is violated each time an active gang participant assists other gang members in a felony.

Because the language and objective of section 186.22, subdivision (a) indicate that the offense is not a continuing offense but one that is committed each time an active gang member promotes, furthers, or assists gang members in committing felonious conduct, the trial court erred when it relied upon the continuous course of conduct exception and declined to instruct the jury on the requirement of unanimity for the purpose of determining the underlying felonious conduct in count 16. The error was not harmless because it cannot be determined whether each juror agreed on the particular criminal act that formed the basis for the verdict, or whether the jury based its verdicts on count 16 on the same conduct that it used to convict them of the same offense in counts 3, 7, 13, 15, or 19. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576-578; *People v. Reed* (2006) 38 Cal.4th 1224, 1227.) Accordingly, we reverse the convictions on

count 16. As the trial court imposed but stayed the sentence on this count for each defendant, the reversal of the convictions on this count does not alter the defendants' sentences.[7]

III. Impact of Witness Recantations (Rodriguez and Lozano)

Rodriguez and Lozano were both charged with conspiracy to commit murder (count 14), active participation in a criminal street gang (count 15), and two counts of attempted murder (counts 21 and 22) in conjunction with the Baby Shower Incident.

The Baby Shower Incident began on February 2, 2007, with a flurry of intercepted telephone calls. Shortly after 5:00 p.m. Roman called Carlos Montelongo and told him that someone in a white Honda had just shot at him and Pasqual Campos.

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7 Roman also argues that there was insufficient evidence to support a conviction on count 16; that he cannot be convicted of two counts of active gang participation based on the same felonious conduct; and that his conviction on count 16 violated the double jeopardy clauses of the United States and California Constitutions. These arguments are premised on the contention that the prosecution failed to present any evidence of Roman's active participation in a criminal street gang other than the conduct that served as the basis of the other four convictions for this offense. The evidence of Roman's participation in the planning and preparation for the Baby Shower Incident, however, was sufficient to permit a reasonable jury to conclude that Roman willfully committed an act that promoted, furthered, or assisted in felonious criminal conduct by members of the gang in conjunction with that incident. The jury, therefore, could reasonably convict Roman on a fifth count of active participation in a criminal street gang without relying on the conduct that formed the basis of his other four active participation convictions.

Pasqual[8] called his brother Saul and told him to stay indoors because of the shooting. Pasqual said their mother had talked about calling the police but told her he would handle this himself.

The collaborators then began attempting to locate guns and ammunition. At 5:45 p.m. Felix Silva told Rene Rivera about the shots fired at Roman and Pasqual, and they discussed getting a gun, noting that Montelongo had one. Rene Rivera then told his brother Anthony[9] about the shooting and the attempts to get a weapon into the neighborhood. Rene said that one gun was being held by "Kiki" for Montelongo. The Riveras speculated that Roman and Pasqual had been shot at by one of Locos Trece's two rival gangs.

In a 7:20 p.m. call, Lozano and another person discussed the shooting and how to get a gun into the neighborhood. "Kiki" was mentioned as the person holding a mini-14 assault rifle for Montelongo. Just before 8 p.m., Pasqual described the shooting to Lozano. He described the shooter as looking familiar, probably someone from one of the rival gangs, and reported that he was standing guard in the neighborhood looking for the white Honda. Lozano told Pasqual that he was trying to obtain a weapon so Pasqual would not have to borrow one.

A few minutes later Lozano told Rodriguez that he had all the "banana ones," referring to a large capacity magazine shaped like a banana and called a banana clip. Lozano told Rodriguez that Montelongo had the mini-14 assault rifle and that the

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[8] Because the Campos brothers share a surname, we refer to them by their first names for clarity.

[9] We also refer to Rene and Anthony Rivera by their first names for clarity.

banana clips were at "Big Mono's house." Rodriguez asked Lozano if the clips were loaded. Lozano confirmed that they were loaded, and told Rodriguez to go get them. Rodriguez agreed, and Lozano exhorted him, "[T]ag them mother fuckers, fool. Don't let them niggas go on y['all's] block and bust on y['a]ll." Rodriguez again agreed.

At 8:13 p.m., Rodriguez asked Lozano to call Big Mono so he (Rodriguez) and Montelongo could pick up the banana clips. Lozano then instructed Roman to call Big Mono and tell him to take out the clips he had for the mini assault rifle because "[t]he homies are going to pick it up right now." Roman told Big Mono that Lozano wanted the clips for the mini assault rifle, then reported back to Lozano at 8:22 p.m. that Big Mono agreed to have the clips ready. Lozano directed Roman to have Rodriguez pick them up.

At 8:24 p.m., Lozano told Jesus Garcia that the "little homies" "are going to go over and handle that shit right now." About half an hour later, Saul was recorded telling Montelongo, "Let[']s go cause some damage, fool." To "cause damage" means to perform a shooting or to cause some other kind of mischief. Montelongo said he also wanted to cause some damage and that he wanted to "serve those fools," meaning to shoot at their rivals; he had ammunition and was looking for a stolen car. Montelongo said he would shoot with the mini assault rifle while Saul used the nine millimeter gun.

At 11:23 p.m., Lozano called Rodriguez to check up on him and to find out what was going on in the neighborhood. Rodriguez told Lozano that Montelongo had the mini assault rifle and the clips.

The next evening, February 3, 2007, Saul told Rodriguez that Montelongo wanted to get a stolen car and that they would pick up Rodriguez. Rodriguez instructed Saul to call when they had reached a certain location.

In a 7:03 p.m. conversation, Rodriguez complained to Montelongo that they were having difficulty operating the vehicle. Montelongo told Rodriguez to drive because they could not risk being pulled over by the police. In the next conversation, at 7:06 p.m., it appeared that Rodriguez was now driving the car. Montelongo directed them to wait for him on Cherry Street, where he lived, because he had a weapon. A few minutes later, Montelongo said he was going to go to Bliss Street to make sure the intended targets were there. Montelongo told Saul, "[W]e're going to roll right now." After further coordination about parking Montelongo told Rodriguez to come out "so we can plan this shit out right quick."

At this point, the police, who were listening to these conversations by means of the wiretap, sent numerous police cars to the area. The men sought to hide the assault weapon. Shortly after 8:00 p.m., Rodriguez asked Roman about dropping off the mini assault rifle right away, but Roman refused. Rodriguez immediately called another person, "Shanky," to see if he could take the mini assault rifle from them "real quick." Shanky asked who was with Rodriguez, who answered that he was with Montelongo and one of the Campos twins.

At 8:20 p.m., Pasqual asked Saul if he had the AK-47 assault rifle with him, and told Saul that if Saul got caught he should make sure that Rodriguez took the blame, as Rodriguez was not wanted in the Locos Trece neighborhood anyway. At 8:39 p.m. Montelongo told Saul that if he saw "those niggers" that

he should shoot them, but that he should make sure that there were no bystanders so that no one would see his face.

Laura Marquez, Montelongo's girlfriend, testified under a grant of immunity that she and Montelongo were in his van at approximately 8:45 p.m. on February 3, 2007. Montelongo was driving. They stopped to pick up Saul and Rodriguez, who were carrying a long gun. Montelongo drove past 2227 Bliss Street, and Saul said he wanted to shoot someone at that house. Marquez told Montelongo she wanted to go home, but he said he wanted her with him because "it was going to be obvious" if only men were in the van.

Saul and Rodriguez left the van and got in a red car. Rodriguez drove, and Saul sat in the front passenger seat. Montelongo stopped his van at the corner of Bliss Street and pointed out 2227 Bliss Street as the target. Saul and Rodriguez drove the red car down Bliss Street.

Marquez's accounts of the shooting varied. On the night of the shooting Marquez led the police to 2227 Bliss Street. She said that she saw Saul shoot at the house once and that residents on the street fired back several times. She told the police that she heard more than eight gunshots. Marquez said that she knew the later shots were different from Saul's shot because they sounded different. At trial, however, Marquez testified that she had not seen the shooting and that she lied to the police when she said Saul fired the gun first. Marquez testified that she actually heard two or three gunshots, and that afterwards one of the men, either Saul or Rodriguez, said he had put a gun out the window of the car. Marquez testified that after the shooting Saul and Rodriguez returned to the van and sat in the back. Saul had

been shot in the buttocks. They were going to take Saul to the hospital when the police stopped them.

Fujino was one of the police officers who responded to the area on the night of February 3, 2007, because of the intercepted calls indicating that a drive-by shooting was possibly about to occur there. At approximately 8:45 p.m., Fujino saw a gray van driving on Bliss Street with its headlights off. The van double parked on the street, and then Fujino heard seven or eight gunshots fired from the vicinity of the van. Five to 10 seconds later, the van started to move, its headlights went on, and the vehicle made a turn. Fujino followed the van and called for backup. Fujino was present as other officers stopped the van and removed its occupants. He later saw Montelongo, Marquez, and Rodriguez in custody and Saul being treated for a gunshot wound.

Deputy Sheriff Russell Helbing heard the gunshots and stopped the van. Montelongo was the driver, Marquez the front passenger, and Saul and Rodriguez the rear passengers. Saul was bleeding from the buttocks and said he had been shot. Helbing found a mini-14 assault rifle in the van.

A red Honda Civic was found abandoned in the area of the shooting. DNA from the blood found on the car's passenger seat matched Saul's DNA, as did DNA extracted from blood from the van's rear seat. Saul also had gunshot residue on his hands.

Fujino interviewed Jesse Mejia the evening of the shooting. Mejia, an attendee at the baby shower, had seen a gray van pass by the house four or five times and a red compact car pass by at least once before the shooting. Mejia recognized the van as related to Locos Trece. At the time of the shooting, Mejia saw at least two individuals in the red car, a driver and a front

passenger, and he saw seven to eight flashes of what he believed was gunfire. Mejia heard someone in the car call out, "Locos." Mejia said his father, Alfredo Mejia Vargas, returned fire with a rifle and the red car drove away.

Mejia was a reluctant witness at trial. He testified that he had seen a red car driving slowly near the house during the baby shower; its lights were off although it was somewhat dark outside. He was in the driveway at the time of the shooting and heard gunshots. He testified that he could not see the occupant(s) of the car and that he did not hear anyone call out. He no longer remembered if his father had a gun and did not see his father holding a rifle after the shooting. Mejia testified that he had spoken with the police the night of the shooting and that he had told them the truth. He denied telling the police about a gray van passing by the house before the shooting or stating that the van belonged to Locos Trece members, but he testified that the police showed him a gray van and that he told them he recognized it as the van he had seen earlier in the day. He denied telling the police that the red car was present at the shooting, that he saw a driver and a passenger in that car, or that there were gunfire flashes after the red car drove past the house with its lights off. He also denied telling the police that his father had returned fire.

Also at trial Mejia admitted that he had testified before the grand jury, but he initially denied making the responses shown in the transcript of the grand jury proceedings. Upon questioning by the court, Mejia then admitted that he had in fact given that testimony before the grand jury. This testimony included Mejia's statements that he had seen a gray van and a red car drive by; that when the red car drove slowly by the passenger fired at them

from the vehicle; that his father then shot back at the car with a rifle; and that he had not heard anyone in the red car say anything. Mejia claimed that his responses were different at trial because he had now forgotten what happened. Mejia denied knowing what Locos Trece was at trial but acknowledged that he had testified before the grand jury that the Bliss Street house was in the territory of the Locos Trece and Tortilla Flats gangs, that the two gangs did not get along, and that Locos Trece members never came to his home but Tortilla Flats members did.

Deputies recovered a rifle from the backyard of Vargas's home after the incident, and the parties stipulated that shell casings found in the street on Bliss Street matched that weapon.

In addition to this evidence, the prosecution presented the testimony of two witnesses who later recanted portions of their testimony. Alejandro Hernandez testified at trial that on February 3, 2007, he was at the Bliss Street residence for a baby shower. During the party, Hernandez noticed a white van drive down the street between two and four times, but he was not suspicious at that time. An hour or so before the shooting, Hernandez testified, he was riding in his cousin's new car around the block when he noticed a red car following them. At this point Hernandez became suspicious that the people in the red car might be the people that had been in the van. The red car paused at a stop sign when Hernandez's cousin turned on Bliss Street to return to the house; after 15 or 20 seconds the car drove away. Hernandez returned to the party, and about an hour later he heard possibly nine to 12 gunshots: first one gunshot, and then multiple shots a few seconds later. After the shooting stopped, Hernandez walked outside and saw his uncle, Vargas, with a rifle. Hernandez did not see who fired the first shot, and he did

not know what his uncle had done with the rifle. Hernandez spoke with the police when they arrived, but he did not tell them about the red car or the van when they asked about suspicious vehicles. Vargas told Hernandez that he had shot at the vehicle.

Vargas testified at trial pursuant to a grant of immunity. He testified that during the baby shower a small red car drove slowly past the house, and someone fired a gun from the passenger side of the car; he did not remember how many shots were fired, but it was more than one and less than 10. The passenger either opened the door to shoot or stepped out of the car. Someone in the car called out, "Locos." Vargas testified that he ran into the street and shot at the car as it drove away. Vargas also testified that when he spoke to the police after the shooting, he told them that he saw a small red vehicle with two Hispanic men inside, and that they shot at his home. He had told the police that he was not aware of anyone shooting back, and he said that to protect one of his sons. He testified that he had lied to the police.

Both Rodriguez and Lozano were convicted of conspiracy to commit murder and active participation in a criminal street gang (counts 14 and 15). Rodriguez was also convicted on both attempted murder counts (counts 21 and 22); the jury was unable to reach a verdict on the attempted murder charges against Lozano.

After trial, at the prosecutor's request, the court voided Rodriguez's convictions on counts 21 and 22 and dismissed the two charges as to both Rodriguez and Lozano because witnesses Vargas and Hernandez had recanted portions of their trial testimony. Specifically, Hernandez admitted that he lied about seeing anyone with a firearm and about seeing any vehicles that

might have been involved in the shooting. He had not seen cars involved in a shooting, firearms, or anyone shooting. Vargas stated that no one in the red car pointed or discharged a weapon or said anything, and he had not fired at the red car. Vargas asserted that one of his neighbors shot at the car and then told Vargas to hide the weapon from the police. He explained that he said he fired the weapon to explain why the weapon was found on his property without blaming the neighbor.

Rodriguez and Lozano sought new trials, alleging that the testimony of Vargas and Hernandez had tainted the remaining verdicts against them. The trial court denied both motions. In denying Rodriguez's new trial motion, the court stated, "Normally[,] your motion, I would be very receptive to it. You don't want to have any perjured testimony in any trial. [¶] Remember. This is a wiretap case. And the intent of the parties is clear. The fact that we now know they did shoot into the residence. We know what they were going to do. [¶] It's clear from the overt acts in this case what the defendants were going to do. Even though it's an attempted murder, we know what their plan was. Good thing they're lousy shots. We would have had a multiple murder case otherwise. [¶] If you take out the testimony, there's so much there that indicates what they were going to do. The conspiracy had been formed. The fact that somebody came in and said originally we got shot at but they admitted on the stand they didn't get shot at, it doesn't really change anything, but for the fact we know what they were going to do. [¶] It's a rare case. That's what wiretaps do. Wiretaps show the parties committing crimes, having conversations. [¶] I don't think there's any prejudice. I don't think there's any doubt about what the jury found or what the result would be. I don't

consider it compelling, because of the facts of this particular case, that the motion should be granted."

The court explained its reasoning again when denying Lozano's motion for a new trial: "[T]his case is completely unusual and out of the ordinary because the entire crime was plotted and partially carried out on a wiretap, which we heard. And the conspiracy has absolutely nothing to do with the other counts on which Mr. Lozano was convicted[]. [¶] As I say, this is an unusual situation, but you can see the entire crime, the fact that an individual testified about who fired at whom and later admitted that he was not testifying truthfully is irrelevant because of all the other evidence where you can't—you can have no doubt that the crime took place and the jury had ample evidence to convict on. So the motion for new trial is denied."

The use of false evidence to convict a criminal defendant offends due process where such evidence is substantially material or probative; that is, if there is a reasonable probability that, had it not been introduced, the result would have been different. (*In re Roberts* (2003) 29 Cal.4th 726, 742; see also *In re Richards* (2016) 63 Cal.4th 291, 312-313 [a defendant must establish that false evidence with reasonable probability could have affected the outcome of his trial].) We review a ruling on a motion for new trial for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 635, 686.)

The trial court did not abuse its discretion in denying the motion for new trial because the evidence was not material to the remaining convictions. While the attempted murder charges associated with the Baby Shower Incident were properly dismissed as a result of the two recantations, nothing about the recantations tends to undermine Rodriguez and Lozano's

convictions for active participation in a criminal street gang, conspiracy to commit murder, or any of the other surviving charges. The conspiracy was complete, and the defendants' participation in the criminal street gang established, before Rodriguez drove down Bliss Street. Lozano and Rodriguez were recorded, along with fellow Locos Trece members and associates, planning a drive-by shooting in retaliation for shots fired at Roman and Pasqual. The calls demonstrated the conspirators' intent to secure a gun, ammunition, and a stolen vehicle; their attempts to locate their intended victims; their plan to commit a retaliatory shooting; the intended street for the shooting; and their plan to escape the scene. Moreover, the conspiracy was established by Marquez's testimony that she heard Rodriguez and others discussing their plans to commit the shooting and that they drove past the Bliss Street house. Non-recanted evidence established that Rodriguez and Saul drove down Bliss Street and put the weapon out the car window. The active participation in a criminal street gang and conspiracy counts did not turn on whether Rodriguez and Saul fired a weapon when they drove down Bliss Street, and there is no reasonable possibility that the jury would have returned a different verdict on the active participation in a criminal street gang and conspiracy counts, or on any of the surviving charges in the absence of the now-recanted testimony.[10] Rodriguez and Lozano have not established error.

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[10] Rodriguez, in his reply brief, also argues that it was revealed in a collaborator's trial that Mejia perjured himself and this evidence also was material and requires a new trial. Rodriguez did not seek a new trial on the basis of Mejia's testimony. At Rodriguez's request we took judicial notice of the

IV. CALCRIM No. 372 (Roman)

Roman argues that his convictions for attempted murder in counts 4 and 17 should be reversed because CALCRIM No. 372, the instruction that authorized the jury to consider as evidence of guilt his flight after the crime was committed, allowed the jury to make a permissive inference of guilt from his conduct of fleeing from the respective crime scenes.

"A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180, superseded by statute on another ground as stated in *People v. Brooks* (2017) 3 Cal.5th 1, 63, fn. 8.) Reviewing CALCRIM No. 372's predecessor, CALJIC No. 2.52, the California Supreme Court concluded that permitting "a jury to infer, if it so chooses, that the flight of a defendant immediately after the commission of a crime indicates a consciousness of guilt" does not violate due process. (*Mendoza, supra,* 24 Cal.App.4th at p. 180.)

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record in the collaborator's trial (*People v. Campos* (July 18, 2016, B259896) [nonpub. opn.]), but Rodriguez did not provide any citations to evidence in that record to support his assertion that the prosecution in that case conceded that Mejia perjured himself Even if evidence that Mejia lied when describing the Baby Shower Incident had been presented to the trial court and to this court, however, the result would be unchanged. As discussed above, whether Rodriguez and Saul actually performed a shooting when they traveled down Bliss Street, or whether they were shot at instead, is immaterial to Rodriguez and Lozano's remaining convictions.

Roman argues, however, that CALCRIM No. 372 differs from CALJIC No. 2.52 because it uses the phrase "aware of his guilt" rather than CALJIC No. 2.52's term "consciousness of guilt." Applying *Mendoza* to CALCRIM No. 372 in *People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, the Fifth District found no meaningful difference between the words "aware" and "conscious": "Our short etymological analysis of Ríos's argument begins with a dictionary definition of the word 'aware': 'Having knowledge or cognizance.' (American Heritage Dict. (4th ed.2000) p. 125.) In reliance on the dictionary's list of synonyms that include the word 'aware,' Ríos argues that the word 'implies knowledge gained through one's own perceptions or by means of information.' [Citation.] 'Conscious,' another word on the list, 'emphasizes the recognition of something sensed or felt' [citation], which, of course, focuses on the acquisition of knowledge not by 'information' but by 'perceptions.' [Citation.] Since the dictionary defines 'consciousness' as '[s]pecial awareness or sensitivity: class consciousness; race consciousness' [citation], ipso facto the special awareness that *Mendoza* allows a jury to infer from a flight instruction is 'guilt consciousness' (in the syntax of the dictionary) or 'consciousness of guilt' (in the syntax of the California Supreme Court). [Citation.] As the inference in *Mendoza* passes constitutional muster, so does the inference here." (*Id*. at pp. 1158-1159.) We agree, and find no error here.

V. Proposition 57 (Rodriguez)

In *People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, (*Lara*), the California Supreme Court held that Proposition 57, the "Public Safety and Rehabilitation Act of 2016" (Proposition 57) prohibits the prosecution of juveniles directly in adult court;

requires a transfer hearing in the juvenile court before children may be charged in adult courts; and applies retroactively to cases not yet final as of November 9, 2016. It is uncontested that Rodriguez was a minor at the time of the charged offenses; that he was prosecuted in adult court without the benefit of a transfer hearing; and that his case was not yet final as of November 9, 2016.

At oral argument and in supplemental briefing, counsel for Rodriguez requested that we conditionally reverse his convictions and remand the matter to the juvenile court for a transfer hearing. The Attorney General contends that he forfeited his entitlement to this relief by not raising the issue of the retroactivity of Proposition 57 in his opening brief (which was filed after Proposition 57 took effect but before *Lara* was decided) or by supplemental brief after *Lara* was issued on February 1, 2018.

We address the claim on its merits because it is one of law based on undisputed facts; to avert any claim of inadequate assistance of counsel; and because, while Proposition 57 had taken effect, its retroactivity had not been definitively recognized until shortly before oral argument in this matter. (See, e.g., *People v. Yarborough* (2008) 169 Cal.App.4th 303, 310-311.) Rodriguez's convictions must be conditionally reversed and the matter remanded for a transfer hearing.

VI. Opportunity to Present Evidence for Future Youth Offender Parole Hearing (Roman and Rodriguez)

Roman, who was 21 or 22 years old when he committed his offenses, and Rodriguez, who was 16 years old when he committed his offenses, contend that pursuant to *People v.*

Franklin (2016) 63 Cal.4th 261 (*Franklin*), they are entitled to a limited remand so that they may present evidence relevant to their eventual youth offender parole hearings. The Attorney General agrees.

In relevant part, section 3051 provides that any prisoner who was 25 years of age or younger at the time of his or her controlling offense shall be provided a youth offender parole hearing for the purpose of reviewing his or her parole suitability. For those like Roman and Rodriguez, whose controlling offenses carry a term of 25 years to life or greater, the youth offender parole hearing occurs during their 25th year of incarceration. (§ 3051, subd. (b)(3).)

In *Franklin*, the 16-year-old defendant was sentenced before the enactment of section 3051. (*Franklin*, *supra*, 63 Cal.4th at pp. 270, 282.) The California Supreme Court held that section 3051 entitled him to present evidence in the superior court about his youth-related characteristics as a juvenile offender if he had not had a sufficient opportunity to do so at sentencing. (*Id*. at pp. 283-284.) The court remanded the case to the superior court to determine if the defendant had had such an opportunity, and if not, to allow him to present this evidence. (*Id*. at p. 284.) In doing so, the court noted that assembling such evidence is "more easily done at or near the time of the juvenile's offense rather than decades later . . . ." (*Id*. at pp. 283-284.)

Here, Roman and Rodriguez were sentenced on September 25, 2015, before the effective date of section 3051, and before *Franklin* was decided. Their attorneys did not provide the court with any briefing or evidence regarding their youth-related factors, and they did not place on the record any information that might be relevant at a youth offender parole hearing, nor did the

trial court solicit any such information. Thus, Roman is entitled to a limited remand so the trial court can ensure they are provided a full opportunity to develop a record that may be used at a future youthful offender parole hearing. Should Rodriguez's convictions be reinstated following the juvenile court transfer hearing to which he is entitled under Proposition 57, as discussed above, Rodriguez is also entitled to a full opportunity in the trial court to develop a record that may be used at a future youthful offender parole hearing.

VII. Senate Bill No. 620 (Roman)

The trial court sentenced Roman to an additional 25 years to life in prison on count 4 because he personally and intentionally discharged a firearm, causing great bodily injury. (§ 12022.53, subd. (d).) At the time of sentencing, section 12022.53, subdivision (h), prohibited the court from striking this firearm enhancement, and section 12022.53, subdivision (f), required the court to impose it. Senate Bill No. 620, which went into effect on January 1, 2018, gives the trial court new discretion to strike a firearm enhancement under section 12022.53: "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." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Roman contends, the People concede, and we agree the new law applies retroactively to this case. (See *People v. Conley* (2016) 63 Cal.4th 646, 656.)

The People, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, argue that "[r]emand is not appropriate because no

reasonable court would exercise its new discretion to strike appellant Roman's firearm enhancement." In *Gutierrez*, the trial court "did not indicate that it had discretion to strike" a serious or violent felony conviction under the "Three Strikes" law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)). (*Gutierrez*, at p. 1896.) While the appeal was pending, the Supreme Court held in *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 that trial courts have the discretion to strike such convictions in the interest of justice. While acknowledging that resentencing was required "unless the record shows that the sentencing court clearly indicated that it would not, in any event, have exercised its discretion to strike the allegations," the *Gutierrez* court decided "no purpose would be served" in remanding that case for resentencing because the trial court had "stated that imposing the maximum sentence was appropriate" and that "'this is the kind of individual the law was intended to keep off the street as long as possible.'" (*Gutierrez*, at p. 1896.)

Here, although the trial court described the case as an "extremely serious" one that could have resulted in multiple deaths, and it chose to impose consecutive sentences and high term sentences on the stayed counts because the aggravating factors outweighed the non-existent mitigating factors, the court did not express an intention to impose the maximum possible sentence, nor did the court state it would not exercise discretion to strike the enhancement even if it had the discretion to do so. (Cf. *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 ["[t]he petition [for resentencing] may . . . be summarily denied if the record reflects that the sentencing court clearly indicated that it would not have exercised discretion to sentence under [the more

lenient statute] even if it had been aware that it had such discretion"].)

Moreover, "'[d]efendants are entitled to sentencing decisions made in the exercise of the "informed discretion" of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *id.* at pp. 1391-1392 [remand appropriate because the record did not clearly indicate the court would have imposed the same sentence had it been aware of the full scope of its discretion after a change in the law].) Senate Bill No. 620 changed the law to give trial courts discretion to strike the firearm enhancement in the interest of justice. Because the trial court sentenced Roman without the benefit of this discretion, remand for resentencing is appropriate.

VIII. Additional Sentencing Issues (Roman and Rodriguez)

Although Roman must be resentenced in light of Senate Bill No. 620, making it unnecessary to address his remaining arguments about sentencing error, we address two of the sentencing issues Roman raised because they are likely to arise again at resentencing. First, the court sentenced Roman to life imprisonment on count 4, attempted murder, and imposed an additional sentence of 15 years on that count because the jury found true the allegation that the crime was committed for the benefit of a criminal street gang. As Roman and the Attorney General agree, Roman's sentence should include a 15-year

minimum parole eligibility term on count 4, not an additional term of imprisonment. (§ 186.22, subd. (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

Second, Roman is entitled to presentence conduct credits. At all relevant times, section 2933.5, subdivision (a)(1) has provided that a defendant convicted of an applicable felony offense is ineligible for presentence conduct credits if he or she "previously has been convicted two or more times, on charges separately brought and tried, and [] previously has served two or more separate prior prison terms, as defined in subdivision (g) of Section 667.5, of any offense or offenses listed in paragraph (2)." Although the instant conviction involved an offense enumerated in paragraph (2) of section 2933.5, there is no indication in the record that he had previously been convicted of an offense listed in that paragraph. We agree with Roman and the Attorney General that section 2933.5 does not apply to Roman, and that Roman is entitled to an award of presentence conduct credits pursuant to section 2933.1.

Roman also argues that the imposition of a $300 restitution fine pursuant to section 1202.4, subdivision (b)(1), and a corresponding $300 parole revocation restitution fine pursuant to section 1202.45 constituted an unconstitutional ex post facto punishment because the trial court meant to impose the statutory minimum fine, which at the time of the crimes in 2006 and 2007 was $200, but that it "apparently believ[ed]" that the minimum fine at the time of sentencing in 2015, $300, was required. We need not address this issue because the appropriate fine amount will be determined at Roman's resentencing.

Turning to Rodriguez, he argues for the first time in his reply brief that the imposition of a $300 restitution fine pursuant to section 1202.4, subdivision (b)(1), and a corresponding $300 parole revocation restitution fine pursuant to section 1202.45 was an unconstitutional ex post facto punishment. "Ordinarily, we do not consider arguments raised for the first time in a reply brief." (*People v. Mickel* (2016) 2 Cal.5th 181, 197.) As Rodriguez has offered no explanation for his failure to raise the issue in his opening brief, he has failed to demonstrate any reason to depart from this general rule.

DISPOSITION

The convictions of Antonio Roman, Jose Rodriguez, and Ivan Lozano on count 16, active participation in a criminal street gang, are reversed. As to Antonio Roman, the matter is remanded for resentencing and to allow Roman the opportunity to present evidence for a future youth offender parole hearing. As to Jose Rodriguez, the remainder of the judgment of the criminal court is conditionally reversed. The case is remanded to the juvenile court with directions to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a), no later than 90 days from the filing of the remittitur.

If, at the transfer hearing, the juvenile court concludes Rodriguez should have been transferred to a court of criminal jurisdiction, the judgment, with the exception of count 16, shall be reinstated as of that date, and the criminal court shall then permit Rodriguez the opportunity to present evidence for a future youth offender parole hearing.

If, at the transfer hearing, Rodriguez is declared fit for rehabilitation within the juvenile justice system, his convictions shall be deemed juvenile adjudications as of that date. The juvenile court shall conduct a dispositional hearing within its usual timeframe and impose an appropriate disposition within its discretion under juvenile court law.

In all other respects, the judgments are affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

FEUER, 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.