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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER BANUELOS,

Defendant and Appellant.

In re

JAVIER BANUELOS,

on Habeas Corpus.

B254014

(Los Angeles County
Super. Ct. Nos. GA073894,
GA274850)

B282605

(Los Angeles County
Super. Ct. Nos. GA073894,
GA274850)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Carter, Judge. Affirmed in part and reversed in part.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus, Michael D. Carter, Judge. Petition denied.

Alex Coolman, under appointment by the Court of Appeal, for Defendant, Appellant and Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Douglas L. Wilson, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Javier Banuelos (Banuelos) of conspiracy to murder one victim, the attempted premeditated murder of another victim, and four other counts, with firearm and gang enhancements. The trial court sentenced Banuelos to an aggregate term of 51 years to life. Banuelos filed a direct appeal. He also filed a petition for writ of habeas corpus. We ordered that the petition be considered with the appeal, and we resolve the appeal and the petition in this opinion.

We reverse in part the judgment on appeal and we deny the petition for habeas corpus.

BACKGROUND

On July 25, 2011, a jury convicted Banuelos of conspiracy to commit the murder of Albert Guzman (Pen.

Code,¹ § 182; count 1), possession of ammunition (§ 12316, subd. (b)(1); count 6), attempted premeditated murder of Don Ferguson (§§ 664, 187, subd. (a); count 8), carrying a concealed firearm as a convicted person (former § 12025, subd. (a)(2), now codified at § 25400; count 9), and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 14), all committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The jury also convicted Banuelos of discharging a firearm with gross negligence (§ 246.3, subd. (a); count 13). As to count 8, the attempted murder of Ferguson, the jury found true allegations that Banuelos personally used a handgun, personally and intentionally discharged a firearm, and caused great bodily injury to Ferguson (§ 12022.53, subds. (b), (c), (d)). As to the attempted murder and negligent discharge, the jury found true the allegation that Banuelos used a semiautomatic firearm (§ 12022.5, subd. (b)).² The parties stipulated that Banuelos had a prior felony conviction.

¹ All further statutory references are to the Penal Code.

² The original information charged Banuelos and four codefendants with counts of conspiracy, possession of ammunition, attempted murder, and carrying a concealed weapon. After the codefendants entered pleas and were no longer part of the case against Banuelos, the trial court permitted the consolidation of another case, in which Banuelos was charged with negligent discharge and felon in possession, and an amended information reflecting the consolidation was filed on July 14, 2011.

The evidence at trial focused on Banuelos's alleged involvement in 2008 in an attempted murder and a conspiracy to commit another murder, in connection with a Pasadena street gang, the Summit Street Smokers (Summit Street).

Attempted premeditated murder of Don Ferguson (count 8), April 15, 2008

Don Ferguson testified that at around 8:00 p.m. on April 15, 2008, he was standing on the sidewalk near the 100 block of Washington close to the Kings Villages apartments, talking to a female friend. Ferguson noticed a goldish-brown car pull up to the curb. Banuelos stepped out of the passenger side and onto the sidewalk, four to seven feet away, and Ferguson got a good look at him. His female friend saw the car and "her eyes got big. She seen something about to happen, so I looked back and I heard gunshots." One of the shots hit him in the top left front of his scalp. Ferguson ran about 15 to 20 feet to the apartment of someone he knew in Kings Villages, and collapsed on the floor. He was taken to the hospital and treated for a couple of hours. For the next month and a half, Ferguson could not speak, and he continued to suffer severe headaches and nightmares. Ferguson identified Banuelos as the shooter in a photographic six-pack shown to him by the police three and a half months after the shooting, and he identified Banuelos out of five codefendants at the preliminary hearing.

On cross-examination, Ferguson confirmed that at the preliminary hearing he said the car was bright yellow, which was “in the same mix” as goldish-brown. Ferguson did not get a good look at the driver and could not describe him. Although he had described the shooter as about his height (5’7”), he agreed that Banuelos looked about six feet tall. He saw the gun but could not tell what kind it was, or what Banuelos was wearing. Banuelos fired seven shots and the fourth or fifth shot hit Ferguson.

Pasadena Police Sergeant Christopher Kirby testified that when he arrived at the scene around 8:57 p.m., bystanders led him to the apartment. Ferguson lay face down inside the front doorway, bleeding from the head. Ferguson had trouble talking but mumbled that he had been shot at about five times by two male Hispanics, who fled in a yellow Cadillac, and he did not hear any gang slogans yelled out. At the crime scene on Washington, Sergeant Kirby found seven small-handgun caliber bullet casings. In the police report, Sergeant Kirby wrote that Ferguson said “ ‘they shot at him.’ ”

Detective Grant Curry testified that he interviewed Elizabeth Salcedo, who was Banuelos’s girlfriend in 2008. Banuelos was nervous and paranoid the day after Ferguson was shot. He told Salcedo he had shot an African-American man in the head, and showed her a bullet wrapped in a napkin. He wiped off the bullet and threw into the trash.

When Banuelos was arrested on July 5, a May 5, 2008 newspaper article (in which Ferguson rejected retaliation)

was in Banuelos's sock. Police found a semi-automatic weapon at Banuelos's home. The casings at the shooting scene were from a semi-automatic, and the size of the bullet Salcedo described was consistent with a semi-automatic.

Conspiracy to commit murder of Albert Guzman (count 1), July 3, 2008

Joseph Diego testified that he associated with the Baldwin Park gang, and in July 2008 he and Angel Arrieta (nicknamed Tweety) lived at 147 West Figueroa Street. Summit Street member Michael Delatorre (nicknamed Hits) was shot dead in front of the Figueroa address on June 28, 2008. Beginning the following weekend, Banuelos, a Summit Street member with the nickname Bird, called one big meeting and three small meetings, held at the side of the Figueroa house. Banuelos instructed others to take funeral donations, help Delatorre's family, and see who was "ready to go get payback" for Delatorre's death on behalf of Summit Street.

Vidal Gaytan, Mauro Ruiz, Arrieta (who had a couple of guns), and three other Summit Street members were at the meetings. Banuelos told the Summit Street members " [j]ust keep your eyes aware. Any Pepper Street you see, just smash 'em.' " Banuelos passed around a photograph of a Pepper Street associate, Albert Guzman, who Banuelos believed killed Delatorre. Guzman lived in the Kings Villages housing projects half a mile away, which was Pepper Street territory. Banuelos told the other Summit Street members to collect guns and "put in work" by going

into the projects to kill the person who killed Delatorre, and to defend themselves. Banuelos said he was going to do his job: “ ‘I got to do this because that was my homie.’ ” Summit Street and Pepper Street always had problems with each other, and Guzman had bragged on MySpace about killing Delatorre and putting in work for Pepper Street. Arrieta said he would get a gun from the VPR gang, which was friendly with Summit Street, and Diego told him to get a gun that was inside the house. Diego also heard Summit Street members talk about “getting” individual “tintos,” or African-Americans.

On cross-examination, Diego testified he had been arrested for conspiracy to commit murder on July 5, 2008, but the charges were dropped after police interviews. He had told the police that an assault weapon they recovered belonged to Arrieta, who had bragged that he was going to put in work and kill Pepper Street. Banuelos said, “ ‘Get prepared for Pepper Street, fools, so that we are ready for them when they come.’ ”

Gaytan testified that on the afternoon of July 3, 2008, Alex Villegas, with Ruiz driving, drove to Anaheim to pick up Gaytan to take him to a family 4th of July picnic in Pasadena. Gaytan brought along ammunition and a shotgun, detaching the barrel and putting the gun and ammunition in a bag in the trunk. Gaytan was arrested in Pasadena, and later pleaded guilty to carrying a concealed weapon in the car. He told police that Villegas told him to

get the shotgun because they knew who shot Delatorre, and “they need to light him up.”

Elizabeth Salcedo testified that she was Banuelos’s girlfriend in 2008. Banuelos did not want her around when he hung out with his friends, over whom he seemed to have some authority. After Delatorre was killed, Banuelos told her, “ ‘payback’s a bitch, and what goes around comes around.’ ” Salcedo heard Banuelos saying to his friends on the phone: “ ‘Don’t worry. Don’t trip. We’ll handle this.’ ” People got together at 147 West Figueroa to plan a carwash to raise money for Delatorre’s funeral; there was no talk about guns or retaliation.

Salcedo had been arrested for conspiracy to commit murder. While in custody, in spite of police pressure, she told the police that it was not Banuelos who shot Ferguson in April 2008, and that Ruiz drove an old beige Cadillac. She also told the detectives that Banuelos told her Ruiz was with him in the car on April 14, and “ ‘[h]e’s (Banuelos) just racist against black people.’ ” Banuelos kept a newspaper article about the Ferguson shooting, and told her, “ ‘I can’t believe that guy didn’t die and he got shot in the head.’ ”

In an interview (a tape of which was played to the jury), Salcedo told Detective Curry that she heard Banuelos talk about payback: “ ‘I’ve got to do what I’ve got to do’ ” and “ ‘payback’s a bitch.’ ” After his brother Gabriel was shot, she saw Banuelos hand off something wrapped in a blue rag that she thought might be a handgun.

Salcedo's brother Francisco Hernandez testified that he remembered the day Delatorre was shot and the gatherings at 147 West Figueroa, where he heard Banuelos trying to raise money and plan the funeral. He did not remember any talk of retaliation against Guzman, other than a desire to see him in police custody. Delatorre was not a gang member, but an associate of Summit Street, which was really a tagging "crew." Hernandez was not a gang member or associate, and he did not know whether Banuelos was a gang member.

Pasadena Police Officer Ara Bzdigian, however, testified that in an interview Hernandez told him that he knew that Banuelos (Bird) was a "shot caller" in Summit Street, and that during Summit Street meetings he heard members plan retaliation for Delatorre's murder. They passed around a photo they said was of Guzman, who was from Pepper Street, and Banuelos said, " 'Don't trip, we got this.' " The jury heard a recording of portions of the interview and received a transcript.

Jonathan Mena testified that Delatorre was a friend of his and he knew Banuelos from high school. After Delatorre was killed, Mena went to 147 West Figueroa, where he saw Banuelos with a group of friends from high school. Mena believed Banuelos was a member of Summit Street, which was not a gang but a tagging crew that might defend itself with weapons like rocks or sticks, but would not attack others. Mena would never tell a jury that he heard a gang

member say he was going to kill someone: “Would I want to get killed?”

Detective Curry testified that during an interview, Mena told him that Banuelos instructed the other Summit Street members to find out who killed Delatorre. Summit Street had problems with Pepper Street and the Latin Kings, and Banuelos said he was going to retaliate. When police made a traffic stop of Gaytan’s car during a period of police surveillance of Summit Street, they found two newspaper articles about Delatorre’s death. Detective Curry arrested Guzman in April 2009.

Pasadena Police Officer Andrea Perez testified that as part of the investigation of Delatorre’s murder and the planned retaliation against Guzman, she monitored a phone call to Banuelos which Villegas and Ruiz, passing the phone to each other, made from jail shortly after their arrest. The three men spoke in a code used by gang members, saying in Spanish “the movie is over because the ears are alive,” or “the show is over for now,” which meant “their show, their plan, their program, is on hold for now,” because the police were aware of their plan to retaliate for the killing of Delatorre.

Jessica Aldana testified that she was a good friend of Delatorre, and went to gatherings at 147 West Figueroa in the days following his murder. Everyone there was angry and sad, but she did not hear Banuelos say anything about retaliation. People were worried that Delatorre’s killers might come and shoot at them. She had been angry with

Banuelos because he had been monopolizing Salcedo, her best friend. Summit Street was not a gang. She did not want to be testifying; it was always a bad thing to be a snitch.

Officer Bzdigian testified that when he interviewed Aldana in late July 2008, she told him Banuelos was a Summit Street gang member. Banuelos seemed to boss the other members around and had authority with the gang. Salcedo had told Aldana that Banuelos accidentally shot Banuelos's younger brother during a fight, when Banuelos was about to kick a man on the ground. Aldana also told Officer Bzdigian that Summit Street found out that Guzman from Pepper Street shot Delatorre; Banuelos said "they should do a drive-by and go get him"; and after Summit Street members passed around a photo behind 147 West Figueroa, Banuelos said "the photo was a burn and they needed to get rid of it."

Negligent discharge (count 13), July 1, 2008

About four days after Delatorre's death, a group of about 15 men were outside the house on West Figueroa when another man walked up and was identified as a member of the Pasadena Latin Kings, a rival gang of Summit Street. Banuelos hit the man several times in the back of the head with a gun. The gun went off and hit Banuelos's younger brother Gabriel in the back of his leg.

Gabriel Banuelos testified that on July 1, 2008, he was at a candle shrine in the front yard of 145 West Figueroa, "praying for a friend that died," when he got shot in his left

shin. His eyes were closed so he did not see who shot him. He lost consciousness after he was shot, and when he came to in the hospital, he saw his mother and Banuelos.

Gang enhancement evidence

Officer David Duran testified that he attended five months of field training, and a total of 102 hours of gang training (including field training regarding Pasadena gangs with two additional hours specific to street gangs in Pasadena). His duties since 2008 in the gang special enforcement unit included contacting and identifying gang members, participating in investigations of gang-related crimes, and questioning gang members during formal and informal contacts. Officer Duran had developed rapport with some gang members during his six-and-a-half years as an officer. Respect was important to gang members, who wanted other gangs and the community to fear them. Those who testified against gang members could face violent retaliation.

The Summit Street Smokers (or Stoners) had seven to 10 documented members, and their territory included West Figueroa. Their common hand signs were cupping each of their two hands in a “C,” or using their index and middle fingers, to form a letter “S.” The gang’s primary activities were assault with a deadly weapon, possession of firearms, narcotics sales, vehicle thefts, and graffiti. Summit Street’s primary enemy was the Pepper Street gang in Kings Villages; the Latin Kings were another enemy gang. Summit Street did not get along with Pepper Street

primarily because Pepper Street included African-Americans. A member of Pepper Street said that during a meeting between Summit Street, Pepper Street, and another gang, Pepper Street was told “there will be no peace amongst the gangs so long as they continue to associate with African-Americans,” for whom Hispanic gangs used the derogatory term “tinto.” This could trigger violent conflict. In 2007 a Pepper Street member fired at Summit Street members in Kings Villages. A willingness to shoot and do a violent act enhances an individual’s status in the gang and increases his respect and influence, allowing him to move up the ranks.

Officer Duran opined that Banuelos was a member of Summit Street. Banuelos admitted his gang membership and his moniker “Bird” as documented in field interview (F.I.) cards. Officer Duran had contacted Banuelos, and even arrested him, in the presence of other Summit Street members.

A gang “associate” was someone who would hang out with the gang, but was not a formal member. Over time, an associate would develop a close relationship with the gang, and could become a member by getting “jumped into” the gang or by committing a crime on the gang’s behalf in another member’s presence. Banuelos was an active member and a “shot caller” in Summit Street, directing the activities of the gang, keeping order, and imposing discipline. Snitches were the lowest label in a gang, and witnesses might be assaulted or shot. “Putting in work” was

committing crimes that benefited the gang, to show a member's loyalty and elevate his status.

Pepper Street considered the Kings Villages its territory, while the area around 147 West Figueroa was controlled by Summit Street. The jury saw a photo (taken shortly after Delatorre's death) of a truck that had been parked on the same block as 147 West Figueroa. Graffiti on the side and back of the truck showed "SSS" (Summit Street) crossed out with "P.L.K." (Pasadena Latin Kings), which was again crossed out with SSS and " 'Risk,' " the moniker of Jeremy Tapia, a Summit Street member. In gang culture crossing out another gang's graffiti was an act of war. A photo of Mena, Banuelos, and Villegas found during the search at 147 West Figueroa showed them making the Summit Street hand sign. Another photo showed graffiti on the sidewalk outside the house saying " 'R.I.P. Hits.' " (Delatorre). Written underneath was " 'Your homies' " and " 'Summit Street,' " then " 'Stuck' " (Ruiz), " 'Arves' " (Villegas), " 'Burden' " (Banuelos), " 'Cluts' " (Gabriel Villegas), and another nickname Officer Duran did not recognize. Delatorre was a Summit Street associate, and Ruiz, the Villegas brothers, and Banuelos were Summit Street members. Other Summit Street members were Mena (" 'Saigon' "), Leander Jimenez (" 'Oz' "), Arrieta (" 'Tweety,' " a "close associate"), and Tapia (" 'Risk' ").

The prosecutor proposed a hypothetical: A gang dislikes that a rival gang permits African-American members, and has expressed this dislike in meetings. Gang

members drive into the rival gang's territory, pull up the car, and a passenger exits and shoots at someone seven times, hitting the person in the head, before getting back in the car and returning to the gang's neighborhood. Officer Duran opined the shooting was for the benefit of the gang. Going into the rival gang's area showed courage and loyalty, took on a mission targeting an individual associating with the rival gang after it was told not to hang out with African-Americans, and sent a message that the practice should stop. If the rival gang stopped hanging out with African-Americans, that would enhance the first gang's status through terror. The prosecutor described another hypothetical in which a rival gang came into the gang's territory and killed one of the gang members or associates, the gang found out who the killer was, and held meetings to plan going into the rival gang's territory to retaliate by shooting the killer, or any rival gang member or associate. In Officer Duran's opinion, holding meetings to discuss retaliation benefited the gang because it showed that the gang could handle the situation without law enforcement, a necessary show of strength. If the gang did not promptly take care of one of its own, the community would think of the gang as weak and it would lose its control.

On cross-examination, Officer Duran agreed that Summit Street had seven to 10 members in 2008, and although the members and others called the group a "crew," the police considered them to be a street gang under the Penal Code. The name Summit Street Smokers, or Stoners,

referred to marijuana use. He had not seen Summit Street tattoos on Banuelos. One act could potentially, but not necessarily, convert a tagging crew into a gang. He had seen 15 instances of graffiti in different locations, and Summit Street in 2008 had engaged in two narcotics sales and one grand theft auto (pleaded down to taking a vehicle without the owner's consent).

An F.I. card for April 28, 2008 refreshed Officer Duran's memory that Banuelos had been with Jimenez, Ruiz, and Villegas; an earlier card from May 2007 showed he was with Mena and Jose Soto; in every stop of Banuelos, he had been in the company of other Summit Street members. During a July 3, 2008 search at 147 West Figueroa, Officer Duran saw an SKS rifle and ammunition on the floor of a bedroom. When Officer Duran stopped Banuelos's car on July 5, Ruiz's younger brother and Gabriel Villegas, also Summit Street members, were passengers. A round of ammunition found underneath the driver's seat was the same caliber and manufacturer as the ammunition found in the search, which would be used in the type of rifle recovered. Since 2008, Officer Duran had investigated other crimes in which he believed Summit Street was involved. One F.I. card listed Banuelos as an associate of Summit Street, and another did not contain a gang affiliation.

The parties stipulated to a Summit Street member's conviction for assault with a firearm (§ 245(a)(2)) on October 3, 2005. On March 12, 2007, Banuelos and Ruiz were convicted of unlawful taking of a vehicle (§ 10851).

The jury convicted Banuelos on all counts and found the allegations true.

Postconviction motions

Banuelos retained new counsel before sentencing, and filed a motion for new trial, including a claim of ineffective assistance by trial counsel and insufficient evidence to support the gang enhancement. The trial court, noting that it had written a 12-page tentative opinion, heard argument and denied the motion. The court allowed Banuelos to file a *Pitchess*³ motion in support of a second new trial motion. The trial court denied the *Pitchess* motion, and did not allow Banuelos to file the second new trial motion.

The court sentenced Banuelos to an aggregate sentence of 51 years to life. Banuelos filed this timely appeal.

DISCUSSION

I. The trial court did not abuse its discretion in denying the posttrial *Pitchess* motion.

On February 23, 2013, Banuelos filed a second motion for new trial citing “recent findings of misconduct committed by Pasadena police detectives,” and alleging that Pasadena Police Detective Gomez threatened and coerced Salcedo to make false statements about Banuelos. Detective Gomez and Detective Pham misreported the statements of Ana Diaz, a witness to the attempted murder of Ferguson. Ferguson may have been a police informant, and on

³ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

information and belief, Detective Okamoto had paid informants.⁴ Officer Duran falsely testified that Banuelos was a Summit Street member, although Banuelos had tattoos from the VPR gang, and falsely testified that a bullet was found under the driver's seat of Banuelos's car. Attached as an exhibit was a February 2013 news article which reported that the Pasadena police chief had ordered an audit of cases handled by Detective Okamoto and other detectives, after a judge found egregious misconduct by Detective Okamoto in a case involving a 2007 drive-by shooting; the article did not name Detectives Gomez, Pham, or Duran. A declaration by counsel detailed her review of transcripts of Detective Okamoto's 2013 testimony regarding his misconduct in the drive-by shooting case.

The court allowed Banuelos to file a *Pitchess* motion in support of the new trial motion. The *Pitchess* motion, filed April 12, 2013, alleged that Detectives Okamoto, Gomez, Pham, and Officer Duran had engaged in misconduct. Detectives Gomez and Pham fabricated evidence by telling Ferguson to identify Banuelos in a photographic six-pack, and falsely reported their interview with Diaz, the witness to the Ferguson shooting; Detectives Gomez and Okamoto had used Ferguson as an informant and did not notify the defense. Officer Duran falsely claimed he saw Gomez recover a bullet from Banuelos's car, and lied when he

⁴ Banuelos concedes that the record does not show that Detective Okamoto had any direct role in his case.

testified that Banuelos was a Summit Street member and leader, because he must have seen that Banuelos had VPR gang tattoos. Attached was a declaration by new counsel, a May 4, 2008 newspaper article about Ferguson's rejection of retaliation for the shooting, an affidavit by Ana Diaz, a defense investigative report, and police reports.⁵

At the hearing on the *Pitchess* motion, the trial court asked what "pending litigation" was in issue posttrial, and defense counsel responded that it was the pending second new trial motion based on new evidence of officer misconduct which, if known, would have led to a more favorable outcome at trial. The trial court noted that it had held a day of argument on the first motion for new trial before denying the motion, and would not allow a second motion for new trial unless there was new evidence. The court saw no new evidence to support the second motion. Defense counsel said the new evidence was "impeachment evidence as to the officers" that came to light in recent newspaper articles. The trial court responded that the news reports, including a 2008 newspaper article about Ferguson attached to the *Pitchess* motion, were not new evidence, and were inadmissible as hearsay. Further, the officer's misconduct as alleged in the *Pitchess* motion was based on hearsay and speculation, and

⁵ Counsel's declaration stated that Ferguson himself (as quoted in the newspaper article) and the defense investigative report both indicated that Ferguson did not see the man who shot him, but that assertion is not supported by any of the attached material.

if the court did receive information regarding past misconduct by the detectives, it would not suffice to prove misconduct regarding Ferguson's identification of Banuelos, and would not have led to a different outcome. The defense had failed to make a prima facie case for *Pitchess* discovery by arguing, without supporting declarations and against the evidence at trial, that Ferguson was unable to identify Banuelos on his own, and that the detectives lied when they said a bullet was under Banuelos's car seat. The misconduct was "just speculation by the defense," and nothing had been presented to justify in-camera review beyond the bare statement that some Pasadena police officers were under investigation and so the detectives in this case must have done something wrong. The court denied the request to file a new trial motion and the *Pitchess* motion.

A posttrial *Pitchess* motion must set forth how the requested police personnel records would be relevant to the litigation *pending at the time the motion is filed*, rather than to the trial that has been completed. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1477–1478.) The determination of a new trial motion is entirely within the court's discretion, and in ruling on the motion the court must consider whether it is probable that any newly discovered evidence would " 'render a different result probable on retrial [of the cause].' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

Here, the pending litigation was the second motion for new trial alleging police misconduct, based on recent news

reports. The trial court was correct to review the *Pitchess* motion in the light of the second new trial motion, and correct to require that the defense show that the officers' personnel records would likely produce a different result in a new trial.

“Defendant bears the burden of showing the court abused its discretion by denying his posttrial *Pitchess* motion.” (*People v. Nguyen, supra*, 151 Cal.App.4th at p. 1478.) A new trial motion based on newly discovered evidence is viewed with disfavor, and such a motion will not be granted if its only value is to impeach or contradict the testimony of a witness. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151; *People v. Hall* (2010) 187 Cal.App.4th 282, 299.)

Banuelos has not met his burden to show that the trial court abused its discretion when it denied his *Pitchess* motion. The posttrial evidence submitted with the second new trial motion was inadmissible hearsay, consisting of a 2013 newspaper article regarding an investigation of police misconduct. In any event, the detectives with substantial involvement in this case were not mentioned in the article. Nothing attached to the *Pitchess* motion related to possible misconduct by the detectives, or cast doubt on the considerable evidence against Banuelos at trial. As the trial court concluded, the defense presented only speculation unsupported by any admissible evidence. We see no abuse of discretion in the trial court's conclusion that the information sought by the *Pitchess* motion would not support the pending

second new trial motion. The new evidence would not have produced a different result for Banuelos on retrial.

II. Banuelos has not shown ineffective assistance by trial counsel.

In his direct appeal, Banuelos renews a claim he made in his first new trial motion. Banuelos argues that in defending him against the charge of attempted murder of Ferguson, his trial counsel rendered ineffective assistance when she failed to interview or call to testify two eyewitnesses to the shooting, and failed to present police testimony that neither eyewitness selected Banuelos's photograph as the shooter. He makes the same claim in his habeas petition. Appointed counsel (the same counsel representing Banuelos on appeal) states that trial counsel declined to provide a declaration, and stated that she did not remember why she did not pursue those eyewitnesses, and that Ferguson was an effective witness on the stand.

“Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim, we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel.” (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 590–591.)

Banuelos must show both deficient professional performance and prejudice. As to performance, we “indulge a strong presumption that counsel's conduct falls within the

wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” ’ ’ (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) Under *Strickland v. Washington* (1984) 466 U.S. 668, Banuelos must show trial counsel’s errors were “ ‘so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment,’ ” depriving him of a fair trial with a reliable result. (*Harrington v. Richter* (2011) 562 U.S. 86, 104.) Banuelos must also show that “ ‘ “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” ’ ” (*People v. Patterson* (2017) 2 Cal.5th 885, 900.) “ ‘In the usual case, where counsel’s . . . strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel’s acts or omissions.’ ” (*People v. Orloff* (2016) 2 Cal.App.5th 947, 955.) To prevail on a claim of inadequate investigation, Banuelos must show that prejudice from the failure to investigate is “ ‘a “demonstrable reality,” not simply speculation as to the effect of the errors or omissions of counsel. [Citation.] . . . The petitioner must demonstrate that counsel knew . . . further investigation was necessary, and must establish the nature and relevance of the evidence that counsel failed to present or discover.’ ” (*In re Clark* (1993) 5 Cal.4th 750, 766.) A failure to call certain witnesses is a “matter[] of trial tactics as to which we

will not ordinarily exercise judicial hindsight.” (*People v. Beagle* (1972) 6 Cal.3d 441, 458.)

“The trial judge is the one best situated to determine the competency of defendant’s trial counsel. Where, as here, defendant is represented by different counsel at the motion for a new trial and the issue is called to the trial court’s attention, the trial judge’s decision is especially entitled to great weight and we defer to his fact finding power. Absent a showing of clear and unmistakable abuse, we will not disturb his decision.” (*People v. Wallin* (1981) 124 Cal.App.3d 479, 483.)

The first new trial motion identified Ana Diaz and Larry Johnson as eyewitnesses who saw the shooting, told police they saw the shooter and could identify him, and yet failed to identify Banuelos as the shooter when the police showed them a photographic six-pack including Banuelos’s photograph. Diaz executed an affidavit stating that the police twice presented her with photo six-packs, and she told them none of the photos looked like Ferguson’s shooter.⁶

⁶ Diaz stated that on the day of the shooting, she was in a well-lit area when her friend Ferguson approached her. “We spoke for a few minutes. [¶] Then, I noticed a car arriving at the parking lot and two Hispanics got out of the car. I was two feet away from Don and saw the Hispanic men walking towards Don and me. When the Hispanic men were approximately seven feet away from me, I saw that one of them was carrying a gun that was covered with a black fabric. [¶] I saw this man shoot towards Don. I started to run away right after the first shot and was able to see that

The habeas petition characterizes Diaz and Johnson as “eyewitnesses who would have said petitioner did not shoot Don Ferguson.” That is an overstatement. The record reflects that Diaz and Johnson said they could not identify the shooter after looking at two photo six-packs, one of which included Banuelos’s photograph, according to a police report.⁷ Banuelos’s new defense counsel admitted at the

Don also had started running. I heard several shots but cannot recall how many. I ran to my apartment and was later contacted by police. [¶] I was able to see the face of the shooter very clearly and told the police that I would be able to recognize the shooter if I were to see him again. I also told the police that I had never seen the men before and did not recognize them as being from the neighborhood. [¶] A few days later, the police went to my workplace and showed me approximately six photos. Each photo was on a separate 8 by 11.5 page. I looked at the suspects and told the police that none of the suspects shown to me was Don’s shooter. About a week later, the police contacted me again. This time, they showed me approximately 8 photographs on a separate 8 by 11.5 page each. I again told the police that I was clear that none of the suspects in the photos looked like the shooter. After that second time that I was shown the photos, I was never again approached in regards to the shooting of Don Ferguson until today.” The declaration is not signed or dated. Very similar language appears in a July 18, 2012 defense investigative report attached to the *second* new trial motion (which did not raise ineffective assistance).

⁷ Also attached to the second new trial motion is a report by Detective Pham stating that he put together two photo lineups, one including a photograph of Banuelos and

hearing on the first new trial motion that Johnson refused to be interviewed by her investigator and stated he “didn’t get that good of a look at the shooter,” and argued there was no valid strategic reason for trial counsel not to call Diaz to testify at trial.

Diaz was unable to identify the shooter when shown a six-pack containing Banuelos’s photograph. Ferguson, shown the same six-pack, identified Banuelos as the shooter, and testified that he got a good look at Banuelos from four to seven feet away. The shot hit the front of his scalp, supporting an inference that he was looking at the shooter. Ferguson’s identification of Banuelos was strong, and there was other evidence (including Salcedo’s testimony) that Banuelos shot Ferguson. That Diaz did not select Banuelos as the shooter from a lineup does not create a demonstrable reality of prejudice from counsel’s failure to interview Diaz or call her to testify. As the trial court stated in its decision rejecting the first new trial motion, the decision not to call Diaz was a strategic choice, and Banuelos has not shown that any error in failing to present Diaz’s testimony had a “reasonable probability to change the state of the evidence before the jury.”

the other including a photograph of Ruiz, showed the lineups once to Diaz and once to Johnson, and both were “unable to identify anyone as the suspects.” From the same lineups, Ferguson identified Banuelos as the shooter, stating, “That’s him.”

The trial court did not abuse its discretion in concluding that Banuelos did not demonstrate that his trial counsel provided ineffective assistance when she did not interview Diaz or call her to testify.

III. Any *Sanchez* error in the testimony of the gang expert was harmless.

Banuelos contends that much of Officer Duran’s expert testimony was testimonial hearsay under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). *Sanchez* reversed jury findings on street gang enhancements, because “the case-specific statements related by the prosecution expert concerning defendant’s gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford* [*v. Washington* (2004) 541 U.S. 36)]. The error was not harmless beyond a reasonable doubt.” (*Id.* at pp. 670–671.) *Sanchez* “drew a distinction between ‘an expert’s testimony regarding his general knowledge in his field of expertise,’ and ‘case-specific facts about which the expert has no independent knowledge.’ [Citation.] The former is not barred by the hearsay rule, even if it is ‘technically hearsay,’ while the latter is.” (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408.) Case-specific knowledge that is inadmissible, testimonial hearsay includes “statements about a completed crime, made to an investigating officer by

a nontestifying witness . . . unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial.” (*Sanchez*, at p. 694.) Police reports were therefore testimonial, but the court in *Sanchez* “was unable to determine whether information about the defendant recorded on an FI card was testimonial because the circumstances of its creation were not clarified by the parties at trial.” (*Vega-Robles*, *supra*, 9 Cal.App.5th at p. 410.)

Banuelos argues that Officer Duran relied on case-specific, testimonial hearsay during his expert testimony. Although Banuelos did not object on that ground, we decline to conclude that he forfeited this issue because the trial took place before *Sanchez*, when such an objection “would likely have been futile.” (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7.)

Banuelos identifies as case-specific Officer Duran’s testimony opining that Banuelos was a Summit Street member or leader; that a nickname in graffiti was linked to a particular person; that Summit Street engaged in certain primary activities; and that the gang disliked that Pepper Street included African-Americans and held a meeting to convey this dislike to Pepper Street.

Officer Duran testified that Banuelos was a Summit Street member nicknamed “Bird,” based in part on F.I. cards prepared by other officers. We agree that this qualifies as case-specific hearsay. Nevertheless, Officer Duran described the F.I. cards as used to keep track of gang members and

their activities, and to document who hangs out in particular areas, so when a crime is committed officers could look up cards from that area to see what individuals might be involved. *Sanchez, supra*, 63 Cal.4th 665 suggested “[i]f the 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.) Officer Duran’s description does not suggest that the F.I. cards were created for evidentiary purposes during the course of a police investigation of a specific crime.

Even if considered testimonial hearsay, Officer Duran’s testimony based on the contents of F.I. cards was harmless beyond a reasonable doubt. Officer Duran also testified that he knew Banuelos was from Summit Street based on his personal contacts with Banuelos when he was with other Summit Street members, and he had arrested Banuelos in the presence of other Summit Street members. Other witnesses testified that Banuelos was a member and leader of Summit Street. Diego testified that Banuelos was a Summit Street member with the nickname “Bird,” and that Banuelos called the meetings at the Figueroa Street house and directed others to put in work and kill Guzman. Salcedo testified that Banuelos seemed to have authority over his friends. In the transcripts of her police interview given to the jury, she repeatedly referred to him as “Bird,” and related that he was “going to get the Peppers” “the same way they did to Michael [Delatorre].” Mena and Aldana both identified Banuelos as a Summit Street member.

The remaining testimony Banuelos objects to did not reference F.I. cards. Officer Duran's opinions regarding gang graffiti, Summit Street activities, and the animosity between Summit Street and Pepper Street were background information and were based on his personal knowledge and his training and background, which included instruction on Pasadena gangs.

IV. The evidence was sufficient to prove Summit Street's primary activities.

Officer Duran testified that Summit Street's primary activities included "assault with a deadly weapon, firearms possession, narcotics sales, vehicle thefts, and graffiti." Banuelos argues that insufficient evidence supported this list of primary activities, and therefore there was insufficient evidence that Summit Street was a street gang. We examine the record in the light most favorable to the jury's true findings on the gang enhancement allegations. (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329.)

The gang enhancement statute provides: "[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) We review the record to

determine whether there was substantial evidence upon which the jury could have concluded that “the commission of one or more of the statutorily enumerated crimes [was] one of [Summit Street’s] ‘chief’ or ‘principal’ occupations.”

(*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

Sufficient proof may consist of evidence that the gang’s members have consistently and repeatedly committed criminal activity listed in section 186.22, subdivision (e); evidence of past offenses may tend to prove primary activities. (*Id.* at pp. 323–324.) A gang expert’s testimony (founded on conversations with gang members, personal investigation of gang crimes, and information obtained from law enforcement colleagues) may also be sufficient to prove primary activities. (*Id.* at p. 324.)

Each of the crimes identified by Officer Duran appears in section 186.22, subdivision (e), pars. (1), (4), (10), (20), and (e). The parties stipulated that that a Summit Street member committed assault with a firearm in 2005, and was convicted later that year. The charged crime in this case, attempted murder of Ferguson, involved assault with a firearm, and also could be considered in evaluating whether assault with a firearm was one of Summit Street’s primary activities. (*People v. Sengpadychith, supra*, 26 Cal.4th at pp. 322–323.) On cross-examination, Officer Duran testified that in 2008 there were two documented narcotics sales by Summit Street members. Another predicate offense was shown with a certified docket sheet showing a conviction for unlawful taking of a vehicle by Ruiz, who Officer Duran

testified was a Summit Street member. Given that Summit Street was a small gang (seven to 10 members), a small number of crimes (here, five) would be sufficient to establish the gang's primary activities. In *People v. Vy* (2004) 122 Cal.App.4th 1209, 1219, 1225, evidence of three serious violent crimes over three months was sufficient evidence to support a finding of the primary activities requirement for a six-member gang in existence for two years at the time of the charged crime. Further, Officer Duran gave expert testimony about the gang's primary activities, including several of the individual crimes, based on his field training, gang training, and work in the gang special enforcement unit. (*Id.* at p. 1226.) Banuelos cites *In re Alexander L.* (2007) 149 Cal.App.4th 605, but in that case the only evidence of primary activities was an expert's testimony that he " 'kn[e]w' " the gang had committed various offenses, "[n]o specifics were elicited as to the circumstances of these crimes, or where, or when, or how [the expert] had obtained the information," and the expert did not directly testify that criminal activities were the primary activities of the gang. (*Id.* at pp. 611–612.)

Sufficient evidence supported the jury's finding that Summit Street engaged in one or more crimes listed in section 186.22, subdivision (e) as its primary activity.⁸

⁸ Having found no error to this point, we reject Banuelos's claim that the cumulative impact of the errors requires reversal of his conviction of attempted murder of Ferguson.

V. The evidence was insufficient to support Banuelos’s conviction of carrying a concealed weapon.

Banuelos argues that no testimony or evidence was ever presented that he concealed on his person the gun he used to shoot Ferguson, or any other gun. We agree that his conviction on count 9, which charged him with carrying a concealed firearm on his person at the time of the attempted murder of Ferguson,⁹ must be reversed.

Former section 12025, now codified at section 25400, provides in subdivisions (a)(2) and (a)(3) that a person is guilty of carrying a concealed firearm when he carries *concealed* upon his person, or “causes to be carried *concealed* within any vehicle in which the person is an occupant, any pistol, revolver, or other firearm capable of being concealed upon the person.” (Italics added.) No evidence supported a conclusion that Banuelos carried a gun *concealed* on his person or *concealed* within the car in which he was a passenger on the day he shot Ferguson. While Ferguson testified that Banuelos got out of the passenger side of the car and shot at him, there was absolutely no evidence that Banuelos concealed the gun on his person or while carrying it inside the car.

A concealed weapon inside a car might be found underneath a floor mat (*People v. Ellison* (2011) 196

⁹ The amended information charges Banuelos with the attempted murder of Ferguson, and the carrying of a concealed firearm, “[o]n or about April 18, 2008.”

Cal.App.4th 1342, 1346; *People v. Jefferson* (2015) 238 Cal.App.4th 494, 499), hidden in the gap in a split bench seat (*People v. Padilla* (2002) 98 Cal.App.4th 127, 132, 137, or even partially concealed by hiding “an essential component of a visible weapon” underneath an ashtray. (*People v. Hale* (1974) 43 Cal.App.3d 353, 356.) Here there was no evidence of such concealment inside the car. Respondent suggests that Ferguson’s testimony that his friend Diaz’s “eyes got big” supports an inference that after Banuelos exited the car, he concealed the weapon on his person until he was four to seven feet away from Banuelos. This misrepresents the testimony. Ferguson testified that he was facing the passenger side when the car pulled up, and he had a good view of Banuelos when he got out of the car, from four to seven feet away. Respondent also points out that Banuelos did not “brandish[] the firearm out of the window of the car,” but failing to wave a gun out of a window is not evidence that Banuelos concealed the gun somewhere inside the vehicle. As respondent admits, Diaz’s declaration describing Banuelos carrying the gun covered with a black fabric was not before the jury. With no evidence before the jury that Banuelos concealed the gun somewhere inside the car or on his person, we must reverse his conviction on count 9.

VI. No *Brady* violation occurred.

In his habeas petition, Banuelos argues that the prosecution failed to turn over basic facts related to the

attempted murder count, in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). We address each “fact” in turn.

Banuelos asserts that the prosecution knew that Ferguson was an associate of the Crips gang. Banuelos argues that this fact casts doubt on the prosecution’s arguments that Ferguson was not a gang member and simply was in the wrong place at the wrong time, and that the motivation for the shooting was Summit Street’s rejection of Pepper Street’s inclusion of African-Americans.

The record does not demonstrate that the prosecutor knew that Ferguson was a Crips associate. After trial, Banuelos’s new counsel argued that the gang enhancement finding in connection with the attempted murder should be stricken,¹⁰ and in discussion the prosecutor stated, “Don Ferguson, from what I recall, was a member of a rival Crip gang. That is what my memory serves me at. He wasn’t Pepper Street.” Banuelos’s counsel objected that she had seen no discovery identifying Ferguson as a Crip. Later, Banuelos’s counsel argued that Officer Duran added a fact not in evidence when, in response to the hypothetical mirroring the Ferguson shooting, he opined that the victim was an individual who associated with members of the rival

¹⁰ The trial court found clerical error in the amended information, which included the gang enhancement on the attempted murder count in the summary, but not in the body of the information. The court concluded that Banuelos had adequate notice of the enhancement and did not object at trial.

gang. In addressing this objection, the prosecutor stated, “I wanted to correct myself . . . the Ferguson I am thinking of was a victim in a shooting by some P.D.L. gang members. I think that was in Judge Milton’s courtroom that I tried that case a few years ago, so I stand corrected when I say he was a Crip. That Mr. Ferguson was, in fact, a Crip. This Ferguson is merely an associate.” The prosecutor argued that the gang officer was allowed to suggest that Banuelos may have thought Ferguson was a Pepper Street associate.¹¹ The prosecutor explicitly corrected his mistaken identification of Don Ferguson as a Crip, and in context, calling him “merely an associate” is clearly a reference to Pepper Street, not to the Crips gang.

Banuelos also states that the prosecution team knew that Kings Villages were claimed by another gang, the Pasadena Denver Lanes Bloods, a “‘sworn enemy’” of the Crips. As Ferguson was not a Crip, that enmity is not relevant in this case. Further, Banuelos’s exhibits contain references to a number of gangs operating in Kings Villages, and nothing in the exhibits precludes Pepper Street’s presence in the housing project.

Banuelos points to Ferguson’s arrest 17 days before he was shot and the resulting charges of narcotics sales. The defense was provided with discovery including a file from the

¹¹ Discovery provided to the defense included a statement by Ferguson that some of his friends were gang members, which would support an inference that he might be a gang associate rather than a member.

Pasadena police department showing Ferguson's arrest on March 29, 2008, for possession for sale of marijuana, and thus had notice of the arrest. Ferguson eventually pleaded no contest to three counts, was placed on diversion, and was ordered to complete an outpatient drug program. After he successfully completed the program, on June 1, 2009, the court dismissed all the felony counts against Ferguson in the furtherance of justice, leaving Ferguson convicted of misdemeanor possession of marijuana, a count that was later dismissed after the trial of this case, when Ferguson successfully completed probation. At the time of trial in 2011, Ferguson had no felony convictions. Simple possession of narcotics is not a crime of moral turpitude with which Ferguson could be impeached (*People v. Castro* (1985) 38 Cal.3d 301, 317), and the dismissal of the felony counts occurred in 2009, two years before Banuelos's trial in 2011. (See *People v. Dyer* (1988) 45 Cal.3d 26, 48.) The evidence of Ferguson's arrest and the subsequent charges, the dismissal of the felony counts, and the diversion, was not impeachment evidence and therefore not material.

DISPOSITION

The conviction on count 9 is reversed and the case is remanded for resentencing. In all other respects, the judgment is affirmed.

The petition for habeas corpus is denied.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.