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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JUAN S., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN S.,

Defendant and Appellant.

G043262

(Super. Ct. Nos. DL035751, 08SF0509)

OPINION

Appeal from a judgment of the Superior Court of Orange County,  
Kimberly Menninger and Lance Jensen, Judges. Reversed and remanded.

Jeffrey E. Thoma, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Scott Taylor and  
Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

## INTRODUCTION

On June 6, 2008, members of the Varrío Viejo criminal street gang entered territory claimed by the Varrío Chico criminal street gang with the intention of fighting the rival gang. Varrío Viejo members hit a Varrío Chico member on the head, and then attempted to flee. When Varrío Chico members tried to block the path of the Varrío Viejo car, the driver approached them at a high rate of speed, as if to run them over. Someone in the Varrío Chico group threw a concrete block at the speeding car as it passed; the concrete block broke the windshield, and hit one of the Varrío Viejo members in the head; he died as a result of the wound.

Juan S. was not the person who threw the concrete block at the car, but he had been in the vicinity of the incident that night. He was alleged to be a member of the Varrío Chico gang, and was charged with aiding and abetting murder, and street terrorism. He was 14 years and four months of age on June 6, 2008. A jury convicted him of involuntary manslaughter, with a gang enhancement, and street terrorism.

Juan S. argues the trial court prejudicially erred in instructing the jury regarding the defenses to involuntary manslaughter. He is correct. The trial court instructed the jury that Juan S. was not guilty if he acted in lawful self-defense or defense of another, or if the killing occurred while he was trying to effect a citizen's arrest. The trial court refused Juan S.'s requested modification of the standard jury instructions, which would have informed the jury that Juan S. was not guilty if the actual perpetrator who threw the block was acting in self-defense or defense of another, or trying to effect a citizen's arrest. Because Juan S.'s defense was that he was present but did not participate in the incident, the failure to instruct the jury that the perpetrator's justification would absolve Juan S. from liability as an aider and abettor was not harmless beyond a reasonable doubt. We therefore reverse the conviction for involuntary manslaughter and the attendant gang enhancement.

Additionally, because the trial court erred in instructing the jury regarding self-defense and the defense of others, it also erred by failing to instruct the jury regarding the elements of and defenses applicable to assault and battery, which were the crimes the People alleged Juan S. had committed as part of the involuntary manslaughter. This error, too, requires us to reverse Juan S.'s conviction for involuntary manslaughter and the attendant gang enhancement.

Juan S. contends there was insufficient evidence supporting the convictions for involuntary manslaughter and street terrorism. Based on the evidence presented, the jury could have found Juan S.'s presence at the scene, combined with his association with the Varrio Chico criminal street gang, and the People's gang expert's testimony, was sufficient to establish his liability for aiding and abetting involuntary manslaughter and for street terrorism.

Juan S. argues the trial court erred in denying his motion to suppress statements he made to the investigating officers. Under the authority of *J.D.B. v. North Carolina* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 2394], we conclude the trial court was required to, but did not, consider Juan S.'s age as a factor in determining whether his initial interview with the investigating officers was a custodial interrogation. We therefore reverse the judgment on this independent ground and remand for reevaluation of this issue.

Finally, we conclude Juan S. forfeited his claims on this appeal that the trial court failed to instruct the jury regarding antecedent threats, and that the trial court failed to redact statements by coparticipants from the transcripts and audiotapes of Juan S.'s police interviews. Neither of these issues was raised in the trial court.

Because Juan S. was found not guilty of aiding and abetting murder and voluntary manslaughter, there is no ground for returning this case to the criminal court. We remand the case to the juvenile court for further proceedings. On remand, the juvenile court shall reconsider the motion to suppress before it addresses other issues. In

light of our holding, if the juvenile court again denies the motion to suppress, it shall reinstate the adjudication on the street terrorism charge. The involuntary manslaughter charge shall be readjudicated, consistent with our opinion herein.

#### STATEMENT OF FACTS AND PROCEDURAL HISTORY

In June 2008, Erick Quezada, Juan Arriaga, Victor Arriaga, Efrain Segura, and Jonathan Mendez were all active members of the Varrío Viejo criminal street gang. On the evening of June 6, 2008, they drove to San Clemente to buy salvia at a smoke shop. Mendez wanted to fight other gang members, so the group parked on a dead-end street in the claimed territory of a rival gang, Varrío Chico, and removed tools from the trunk of the car to use as weapons. They walked down the street and through an alley yelling, “Varrío Viejo gang. San Juan Capistrano.” When the group saw several bald-headed men standing together, they split into two groups so they could “surround” them. Erick Quezada and Juan Arriaga struck one of the bald-headed men, Stephen Quezada, on the side of the head. They then ran to warn the rest of the Varrío Viejo group that 15 people were chasing them and they needed to leave.

At the same time, Segura, Mendez, and Victor Arriaga saw three men with shaved heads, sitting on the stairs. Segura and the others banged the ground with sticks, and yelled, “San Juan Capistrano.” Someone yelled, “[t]here’s a lot of them,” and the entire group ran back to Juan Arriaga’s car. Mendez was the last to return to the car; a group of men was chasing him.

Juan Arriaga, who was driving the car, was forced to make a U-turn in the dead-end street. Between 10 and 15 Varrío Chico members were standing in the street, blocking the car’s way out. Someone in the car said, “floor it, let’s go,” and “[s]peed up. Run them over,” and “[g]o fast. Go. Let’s get out of here.” Juan Arriaga drove over 60 miles per hour toward the group in the street, trying to run them over. Mendez was yelling, “Varrío Viejo,” out the car window. Someone in the Varrío Chico group in the

street suddenly threw a concrete block at the car; the block went through the windshield and struck Mendez in the forehead. Mendez died as a result of severe blunt head trauma.

On June 9, Juan S. was questioned by law enforcement during three consecutive interviews over the course of four and one-half hours. Ultimately, Juan S. admitted he had been with a group of friends who chased the boys who attacked Stephen Quezada, heard something hit Juan Arriaga's car, and saw the car pull away. Juan S. consistently denied having thrown anything himself.

The People's expert witness on gangs testified, based on a hypothetical detailing the facts of this case, that Mendez's murder was committed for the benefit of and in association with a criminal street gang. The act benefitted the Varrío Chico gang, because it had been "disrespected" by the Varrío Viejo gang and needed to respond to maintain respect from other gangs. The expert witness testified that Juan S. was an active participant in the Varrío Chico street gang on June 6, 2008. The expert's opinion was based on seven field identification cards prepared by law enforcement, regarding contacts with Juan S. when he was hanging out with known Varrío Chico members, a police report detailing gang indicia recovered from Juan S.'s mother's car, Juan S.'s interview with the police following Mendez's death, the facts and circumstances of the incident, and the expert witness's knowledge of and experience with gangs. One of the field identification cards, on which the People's expert witness relied, was dated May 16, 2008, and claimed that Juan S. had run from the scene of a crime on that day at 12:30 p.m. That field identification card stated that the deputy sheriff did not directly contact Juan S. on that day, but recognized him from prior contacts.

In defense, Juan S. presented evidence that he was at school all day on May 16, 2008, had purchased lunch in the school cafeteria at 12:39 p.m., and had been observed on the school grounds during the lunch period. Juan S. also offered numerous witnesses who testified to his good character for nonviolence, and for being a hard-working student.

Juan S. also presented testimony from an expert witness on gangs. The defense expert testified Juan S. was not a gang member, based on his lack of a criminal record, his associations with gang members and nongang members, his in-class behavior and school performance, his lack of tattoos or a moniker, and the lack of evidence that he had been “jumped into” a gang. The expert opined that the murder of Mendez was not a gang-related crime, but rather was a spontaneous, impulsive act.

Pursuant to Welfare and Institutions Code section 707, Juan S. was charged in an information filed in the criminal court with one count of murder (Pen. Code, § 187, subd. (a)), and one count of street terrorism (*id.*, § 186.22, subd. (a)). The information alleged the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang. (*Id.*, § 186.22, subd. (b)(1).) A jury found Juan S. not guilty of murder, but guilty of the lesser included offense of involuntary manslaughter; the jury found the gang enhancement true. The jury also found Juan S. guilty of street terrorism. The case was transferred to the juvenile court for disposition.

The juvenile court set a maximum term of confinement of two years, declared Juan S. to be a ward of the juvenile court, and committed him to the custody and control of the Orange County Probation Department. Juan S. filed a timely notice of appeal.

## DISCUSSION

### I.

#### *INSTRUCTIONAL ERROR*

##### A.

#### *Failure to Properly Instruct the Jury Regarding Perpetrator’s Justification*

Juan S. argues the trial court erred by failing to modify CALCRIM Nos. 505 and 508, the jury instructions on justifiable homicide due to self-defense or the

defense of others, and on justifiable homicide while attempting to effect a citizen's arrest, to clarify that the perpetrator's justification would absolve Juan S. from criminal liability.

The trial court instructed the jury with CALCRIM No. 505 as follows:

“The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense or defense of another. The defendant acted in lawful self-defense or defense of another if: [¶] One, the defendant reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; [¶] Two, the defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; [¶] And, three, the defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself or someone else. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified. [¶] When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The defendant's belief that he or someone else was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. [¶] A person is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of great bodily injury has passed. This is so even if safety could have been achieved by retreating. [¶] Great bodily injury means significant or substantial physical injury. It is an injury greater than minor or moderate

harm. [¶] The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder/manslaughter.”

CALCRIM No. 508 was read to the jury as follows: “The defendant is not guilty of murder or manslaughter if he killed someone while trying to arrest him or her for a violent felony. Such a killing is justified, and therefore not unlawful, if: [¶] One, the defendant committed the killing while lawfully trying to arrest or detain Jonathan Mendez for committing the crime of felony assault with a deadly weapon; [¶] Two, Jonathan Mendez actually committed the crime of felony assault with a deadly weapon; [¶] Three, the defendant had a reason to believe that Jonathan Mendez had committed the crime of felony assault with a deadly weapon; [¶] Four, the defendant had reason to believe that Jonathan Mendez posed a threat of serious physical harm, either to the defendant or to others or knew that Jonathan had committed the felony assault; [¶] And five, the killing was necessary to prevent Jonathan Mendez or the other occupants of the car from escaping. [¶] A person has reason to believe that someone poses a threat of serious physical harm when facts known to the person would persuade someone of reasonable caution that the other person is going to cause serious physical harm to another. [¶] The People have the burden of proving beyond a reasonable doubt the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.”

Juan S. requested that the instructions be modified to make clear that he should be found not guilty if *the person throwing the concrete block* was acting in self-defense or the defense of others, or was attempting to effect a citizen’s arrest. The People objected on the grounds the modification would impermissibly narrow what the jury could find, arguing that the jury could still find that Juan S. was the person who threw the concrete block. The trial court denied Juan S.’s request for modification of CALCRIM Nos. 505 and 508.

On appeal, the Attorney General argues that the modification to CALCRIM Nos. 505 and 508 requested by Juan S. would have been duplicative. The jury was instructed that Juan S. was not guilty of homicide if the victim was killed while Juan S. was trying to arrest him for committing a violent felony, or if the victim was killed while Juan S. was acting in self-defense or defense of another. The jury was also instructed that Juan S. could be found guilty as a perpetrator or an as aider and abettor, and was properly instructed with the elements of aiding and abetting liability, including the need to find that the perpetrator committed the crime. (CALCRIM Nos. 400, 401.)

The modification requested by Juan S. was not duplicative of other instructions. Juan S. requested a modification of CALCRIM Nos. 505 and 508, and was not requesting an additional instruction covering the same legal principles.

The Attorney General also argues that the failure to give the instructions as modified, under the circumstances of this case, was harmless. The People had the burden of proving beyond a reasonable doubt that the killing of Mendez was not justified. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1154-1155; *People v. Banks* (1976) 67 Cal.App.3d 379, 384.) If the instructional error lessened this burden, the federal constitutional standard of harmless error analysis applies. (*People v. Smith* (2005) 132 Cal.App.4th 1537, 1545.)

As instructed, the jury was asked to consider whether Juan S. was acting in self-defense or the defense of another, and whether Juan S. was trying to effect a citizen's arrest, while aiding and abetting the thrower of the concrete block. The jury was never asked to consider whether the thrower himself was justified in throwing the concrete block, either as a means of self-defense or defense of others, or while trying to effect a citizen's arrest. Juan S.'s entire defense was based on his lack of involvement; he contended he was standing to the side, never saw the incident, and only heard the concrete block hit the car. Under these circumstances, the jury could determine that Juan S. was not acting in self-defense or defense of another, and was not trying to effect a

citizen's arrest. But the jury could still have found that the concrete block thrower himself was justified under one of those legal theories. However, the aiding and abetting instructions did not make clear to the jury that the thrower's justification would completely absolve Juan S. of liability. We conclude the failure to modify CALCRIM Nos. 505 and 508 lessened the People's burden of proof. The error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

B.

*Failure to Instruct on Elements of Misdemeanor Offenses  
Underlying the Manslaughter Conviction*

The trial court instructed the jury with CALCRIM No. 580, as follows:

“The defendant committed involuntary manslaughter if: [¶] One, the defendant committed a crime that posed a high risk of death or great bodily injury because [of] the way in which it was committed; [¶] And two, . . . the defendant's acts unlawfully caused the death of another person. [¶] The People allege that the defendant committed the following crime[s]: Penal Code section 240, assault, and Penal Code section 242, battery.”

Juan S. argues the trial court erred by failing to instruct the jury with the elements of assault and battery. The Attorney General concedes this was error,<sup>1</sup> but

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<sup>1</sup> The Attorney General concedes that the jury should have been instructed as follows regarding the crimes of assault and battery: “To prove that the defendant is guilty of [assault], the People must prove that: [¶] 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, (he/she) was aware of facts that would lead a reasonable person to realize that (his/her) act by its nature would directly and probably result in the application of force to someone; [¶] [AND] [¶] 4. When the defendant acted, (he/she) had the present ability to apply force to a person; [¶] AND [¶] 5. The defendant did not act (in self-defense/ [or] in defense of someone else).” (CALCRIM No. 915.)

“To prove that the defendant is guilty of [battery], the People must prove that: [¶] 1. The defendant willfully and unlawfully touched the victim in a harmful or

argues the error was harmless beyond a reasonable doubt. According to the Attorney General, Juan S. never contested that an assault and battery took place; instead, she argues, Juan S.'s defenses were (1) although he was present, he did not aid or abet the offense that led to Mendez's death, and (2) no criminal offense was committed because the person who threw the concrete block was justified by self-defense, defense of others, or because he was making a citizen's arrest. Because the jury found defendant guilty of involuntary manslaughter, the argument continues, it must have rejected Juan S.'s defenses.

Juan S. counters that if the trial court had properly instructed the jury regarding the elements of assault and battery, it would also have instructed the jury regarding self-defense and defense of others, with CALCRIM No. 3470, which applies to nonhomicide crimes. Although the jury was instructed regarding self-defense and the defense of others in the context of a homicide with CALCRIM No. 505, the standard under CALCRIM No. 3470 is slightly different. Specifically, while CALCRIM No. 505 permits a defendant to defend him or herself or others if he or she reasonably believes they are "in imminent danger of being killed or suffering great bodily injury," CALCRIM No. 3470 allows a defendant to use force in self-defense or defense of another if he or she reasonably believes they are "in imminent danger of suffering bodily injury" or "in imminent danger of being touched unlawfully."

As explained *ante*, the jury was not correctly instructed regarding self-defense or the defense of others, because it was not instructed it should consider those defenses from the perspective of the thrower of the concrete block, rather than from the perspective of Juan S. Therefore, in this case, the failure to instruct the jury regarding the elements of and defense applicable to assault and battery was not harmless beyond a reasonable doubt.

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offensive manner; and [¶] 2. The defendant did not act (in self-defense/ [or] in defense of someone else . . . ." (CALCRIM No. 960.)

C.

*Failure to Properly Instruct the Jury Regarding Antecedent Threats*

Juan S. also argues the trial court erred by omitting the following language regarding antecedent threats from CALCRIM No. 505: “If you find that \_\_\_\_\_ <insert name of decedent/victim> threatened or harmed the defendant [or others] in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable. [¶] If you find that the defendant knew that \_\_\_\_\_ <insert name of decedent/victim> had threatened or harmed others in the past, you may consider that information in deciding whether the defendant’s conduct and beliefs were reasonable. [¶] Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person. [¶] If you find that the defendant received a threat from someone else that (he/she) reasonably associated with \_\_\_\_\_ <insert name of decedent/victim>, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another).” (CALCRIM No. 505.)

The Attorney General argues Juan S. did not request the jury be instructed with this portion of CALCRIM No. 505, and because these would be pinpoint instructions, the trial court did not have a sua sponte duty to instruct on antecedent threats. Juan S. does not dispute that he did not request the omitted portions of CALCRIM No. 505 be given. Rather, he argues substantial evidence created a sua sponte duty to instruct on antecedent threats.

“It is undisputed that there is a line of authority holding that it is erroneous to refuse a request for instruction on the effect of the victim’s antecedent threats or assaults against the defendant on the reasonableness of defendant’s conduct. [Citations.] The question we must resolve is whether the trial court is obligated to give such an instruction sua sponte. [¶] ““It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues

raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]” [Citation.] The court has a sua sponte duty to instruct on defenses when “it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.” [Citation.] Yet this duty is limited: ‘the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. [Citation.] Thus, the court is required to instruct sua sponte only on general principles which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.’ [Citations.] Alternatively expressed, ‘[i]f an instruction relates “particular facts to the elements of the offense charged,” it is a pinpoint instruction and the court does not have a sua sponte duty to instruct.’ [Citation.]” (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

Do the omitted paragraphs of CALCRIM No. 505 relate particular facts to the elements of the offense charged? No. As the court stated in *People v. Garvin, supra*, 110 Cal.App.4th at page 489: “The issue of the effect of antecedent assaults against defendant on the reasonableness of defendant's timing and degree of force highlights a particular aspect of this defense and relates it to a particular piece of evidence. An instruction on the topic of antecedent assaults is analogous to a clarifying instruction. It is axiomatic that ‘[a] defendant who believes that an instruction requires clarification must request it.’ [Citation.] Therefore, we conclude that this is a specific point and is not a general principle of law; the trial court was not obligated to instruct on this issue absent request.” The trial court had no sua sponte duty to instruct the jury with the omitted paragraphs of CALCRIM No. 505. Juan S.'s failure to request this portion of CALCRIM No. 505 has forfeited the issue on appeal.

## II.

### *SUFFICIENCY OF THE EVIDENCE*

Juan S. argues his conviction for involuntary manslaughter must be reversed because there is insufficient evidence he committed the predicate offense of assault or battery. Juan S. also argues his conviction for street terrorism must be reversed because there was insufficient evidence he willfully assisted, furthered, or promoted felonious criminal conduct by members of the Varrio Chico gang.

#### A.

##### *Standard of Review*

“‘In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “‘upon no hypothesis whatever is there sufficient substantial evidence to support’” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

#### B.

##### *Conviction for Involuntary Manslaughter*

The People’s theory was that Juan S. aided and abetted the assault and battery that resulted in Mendez’s death. Juan S. was not accused of having thrown the concrete block that struck Mendez.

“‘[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.’”

[Citation.]” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 295-296.) Mere presence at the scene of a crime, or failure to prevent the crime from being committed, are insufficient to establish liability as an aider and abettor. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) However, the factors to be considered in determining whether a defendant is liable as an aider and abettor “include presence at the scene of the crime, companionship, and conduct before and after the crime, including flight.” (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.) Juan S. argues there was insufficient evidence (1) he committed any act which facilitated or encouraged the person who threw the concrete block at Juan Arriaga’s car, (2) he intended to aid and abet the person who threw the concrete block at Juan Arriaga’s car, or (3) he knew the perpetrator was going to throw the concrete block at Juan Arriaga’s car.

The Attorney General contends the following facts are sufficient to establish Juan S.’s liability as an aider and abettor: Juan S. admitted he was with the group chasing Mendez to Juan Arriaga’s car, saw the car as it pulled away, and heard something hit the car. Miguel Bustos, a former Varrío Chico gang member who lived near the scene of the incident, heard whistling and yelling outside his home around 9:30 p.m. on June 6, and looked out his window to see Juan S. and two known Varrío Chico members walking down the street.<sup>2</sup> The People’s gang expert testified Juan S. was an active participant in the Varrío Chico gang, based on his contacts with law enforcement, gang indicia found in Juan S.’s mother’s car, the facts of the case, and the expert’s knowledge of and experience with gangs. The expert testified that Juan S. had been seen with members of Varrío Chico had admitted he had associated with Varrío Chico since August 2007, and had “posted” for the gang. (“Posting” means taking on the

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<sup>2</sup> This testimony was presented by an investigator, who interviewed Bustos on June 9. Bustos testified at trial that he saw Juan S. and the others about 8:00 p.m., and that when he heard yelling and whistling about 9:30 p.m., he looked out the window, but it was too dark to see anything.

role of a sentry; the gang member stands in a strategic spot, wearing gang clothing, and either looks for rival gang members or the possibility of crimes of opportunity, or warns other gang members about law enforcement.) The expert testified that an act of disrespect toward a gang or a member of a gang would normally be met by retaliation from the gang. Assault with a deadly weapon is a primary activity of the Varrio Chico gang. Active gang members will not commit crimes with nongang members; to the contrary, they commit crimes with other gang members so they will feel protected. Backups assist the gang by being present in case something goes wrong while a crime is being committed and their fellow gang member cannot “handle the mission that they’re engaging in.” Lookouts serve as protectors to guard against law enforcement and others who may disrupt the gang’s mission.

We conclude the evidence of Juan S.’s gang membership (specifically, the field interview cards showing he associated with and posted for the gang, and the gang graffiti on items found in Juan S.’s mother’s car), coupled with his presence as part of the larger group on the night of the incident, is sufficient to support the conviction for aiding and abetting involuntary manslaughter.

### C.

#### *Conviction for Street Terrorism*

Juan S. argues there was insufficient evidence he willfully assisted, furthered, or promoted felonious criminal conduct—specifically, murder or manslaughter—by any member of the Varrio Chico gang. Juan S.’s argument regarding this conviction is the same as his argument regarding the conviction for involuntary manslaughter. Therefore, we conclude that the evidence of Juan S.’s gang membership, along with the People’s gang expert’s testimony regarding the assistance provided by one member of a gang to others, and Juan S.’s presence at the scene of the incident, sufficiently supports the conviction for street terrorism.

### III.

#### *MOTION TO SUPPRESS*

Juan S. was interviewed by sheriff's deputies three times on June 9, 2008—twice at the sheriff's substation, and once at the scene of the incident. Juan S. was read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) at the start of the second interview, but not the first. Before trial, Juan S. moved to suppress his statements at all three interviews because (1) he was not properly *Mirandized* before the first interview, (2) he did not voluntarily waive his rights after finally being *Mirandized*, and (3) the deputy sheriffs continued to question him after he invoked his rights by asking to speak with his mother or grandmother.

#### A.

##### *Factual Background*

On June 9, about 7:00 a.m., Deputy Rich, Deputy Hoffman, and Investigator Voght went to Juan S.'s home to talk to him about the incident. Juan S.'s mother told the officers he was at his grandmother's house, and led the officers there. Deputy Rich contacted Juan S., who was asleep on his grandmother's couch, and asked him to come to the sheriff's substation to talk about an incident that happened over the weekend. Deputy Rich told Juan S. he was not under arrest, and was not required to go to the substation with the officers. Juan S.'s mother told Deputy Rich she did not want to go to the substation with her son, because she had to take her daughter to school.

The three officers began interviewing Juan S. in a conference room at the substation about 8:20 a.m. Juan S. was not handcuffed and the officers were in street clothes or sheriff's polo shirts, with their weapons concealed. Juan S. confirmed that he understood he was not under arrest, and told the officers what he had been doing the evening of June 6. During the interview, the officers took Juan S.'s cell phone. When pressed with questions, Juan S. told the officers to call his mom; the officer understood his requests for his mother and grandmother to mean that the officers could contact them

to confirm his story. The officers testified at the suppression hearing that Juan S. never asked for his mother during the interviews, and never said he did not want to speak with the officers or that he wanted to leave.

During the first interview, Juan S. told the officers he was at his grandmother's house the evening of June 6, when Stephen Quezada called him to say he had been hit. Juan S. went outside and saw Stephen bleeding. Juan S. went back inside for a Band-Aid, and returned to his grandmother's house after placing the Band-Aid on Stephen's wound. The officers obtained a DNA sample from Juan S., and the interview concluded at 9:26 a.m.

The second interview began at 9:50 a.m.; Juan S. had not left the substation and had been fingerprinted. At that time, the officers advised Juan S. of his *Miranda* rights. He indicated he understood those rights. During the second interview, Juan S. admitted he had been with Jesus Borja and Alejandro Hurtado, who were known to be members of the Varrío Chico gang, on the evening of June 6, but claimed he was not part of the group that confronted the Varrío Viejo gang, because he was getting a Band-Aid for Stephen Quezada. Juan S. did admit that Borja, Hurtado and Stephen Quezada told him they had thrown stuff at the Varrío Viejo car. The second interview ended at 10:41 a.m.

At 11:51 a.m., the officers transported Juan S. to the scene of the incident for a final interview. During this third interview, Juan S. admitted he had been with Borja, Hurtado, and Stephen Quezada when they chased the Varrío Viejo gang members back to Juan Arriaga's car. Juan S. stated, however, that he stopped near a light pole and watched as the Varrío Viejo gang members drove away. Juan S. was then released to his mother.

At a hearing on Juan S.'s motion to suppress, Juan S.'s mother testified the officers asked Juan S. a lot of questions and said they were taking him in for questioning. She asked if she could go to the station with him, but the officers said no.

Juan S. testified the officers woke him up, grabbed his cell phone, and told him to get dressed. The officers told his mother she could not go to the station with him because he was a “big boy.” The officers placed Juan S.’s hands behind his back and placed him in the back of a police car. Juan S. had never been arrested and had never had his *Miranda* rights read to him before that day. He was fingerprinted before the interview began. He was never told he was free to leave or given an option whether to go to the substation with the officers. Juan S. claimed he did not understand the *Miranda* rights as they were read to him. He was never physically assaulted, and the officers did not make any threats or promises to him.

The trial court ruled that the first interview was not a custodial interrogation, based on the totality of the circumstances. The court also found that Juan S.’s waiver of his *Miranda* rights was voluntary. Finally, the court found that Juan S.’s requests for his mother and grandmother during the interviews were not invocations of his rights, but rather were “calls for the police officers to contact mom for purposes of corroborating [Juan S.]’s story.” The court then denied the motion to suppress.

## B.

### *Was the First Interview a Custodial Interrogation?*

Law enforcement officers “are not required to administer *Miranda* warnings to everyone whom they question.” (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Rather, law enforcement officers are required to administer *Miranda* advisements only to those subject to custodial interrogation: “Absent “custodial interrogation,” *Miranda* simply does not come into play.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 401.) For purposes of *Miranda*, a person is in custody when there is “a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’ [Citations.]” (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; accord, *People v. Ochoa*, *supra*, at p. 401.)

“Custody determinations are resolved by an objective standard: Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest? [Citations.] The totality of the circumstances surrounding an incident must be considered as a whole. [Citations.] Although no one factor is controlling, the following circumstances should be considered: ‘(1) [W]hether the suspect has been formally arrested; (2) absent formal arrest, the length of the detention; (3) the location; (4) the ratio of officers to suspects; and (5) the demeanor of the officer, including the nature of the questioning.’ [Citation.] Additional factors are whether the suspect agreed to the interview and was informed he or she could terminate the questioning, whether police informed the person he or she was considered a witness or suspect, whether there were restrictions on the suspect’s freedom of movement during the interview, and whether police officers dominated and controlled the interrogation or were ‘aggressive, confrontational, and/or accusatory,’ whether they pressured the suspect, and whether the suspect was arrested at the conclusion of the interview. [Citation.]” (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404, fn. omitted.)

In *J.D.B. v. North Carolina*, *supra*, \_\_\_ U.S. at page \_\_\_ [131 S.Ct. at pages 2398-2399], the United States Supreme Court held that the age of a child subjected to police questioning is relevant to the analysis of whether the interrogation was custodial. In that case, a uniformed police officer removed the juvenile, who was 13 years old, from his seventh grade classroom, and questioned him in a closed door conference room; another police investigator and two school officials were also present. (*Id.* at p. \_\_\_ [131 S.Ct. at p. 2399].) The juvenile was not read his *Miranda* rights, was not permitted to speak with his legal guardian, and was not informed he was free to leave the conference room. (*Id.* at p. \_\_\_ [131 S.Ct. at p. 2399].) After being questioned for 30 to 45 minutes, the juvenile confessed to a series of break-ins. (*Id.* at p. \_\_\_ [131 S.Ct. at pp. 2399-2400].) The trial court denied a motion to suppress the juvenile’s confession,

ruling that the questioning did not amount to a custodial interrogation. (*Id.* at p. \_\_\_\_ [131 S.Ct. at p. 2400].)

The Supreme Court reversed. “Reviewing the question *de novo* today, we hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. [Citations.] It is, however, a reality that courts cannot simply ignore.” (*J.D.B. v. North Carolina, supra*, \_\_\_\_ U.S. at p. \_\_\_\_, fn. omitted [131 S.Ct. at p. 2406].) Because the juvenile’s age had not been considered as part of the custodial interrogation analysis, the Supreme Court remanded the matter back to the trial court. (*Id.* at p. \_\_\_\_ [131 S.Ct. at p. 2408].)

We review the trial court’s factual findings under the deferential substantial evidence standard, and we review *de novo* whether the interrogation was custodial. (*People v. Pilster, supra*, 138 Cal.App.4th at p. 1403.)

The trial court found: “[A]t the time that Mr. S[.] was contacted and then brought to the substation and initially spoke to, . . . Mr. S[.] was not in custody for purposes of requiring *Miranda* at that time. He was—it would appear to be someone that was a focus of investigation. And as we know, when one is a focus of investigation, *Miranda* requirements aren’t necessarily required at that time. He was not formally arrested. At some point, he was told he was not arrested. He voluntarily went to the station. He was a juvenile, he couldn’t get into his car and drive to the station. [¶] But it would appear the behavior of the officers at that time indicating to him that they wanted to take him out of the neighborhood environment and place him in a different environment in which to speak to him did not rise to the level of being in custody.”

As in *J.D.B. v. North Carolina*, the record in this case does not show the trial court considered Juan S.’s age as part of its determination that the first interview was

not a custodial interrogation. We therefore reverse the judgment and remand the matter to the juvenile court to reevaluate the issue.

On remand, if the juvenile court determines that the first interview was a custodial interrogation, it must then consider whether any or all of Juan S.'s statements during any of the three interviews are inadmissible. (See *People v. Sims* (1993) 5 Cal.4th 405, 445 [“A subsequent confession is not the tainted product of the first merely because, ‘but for’ the improper police conduct, the subsequent confession would not have been obtained. [Citation.] As the United States Supreme Court has explained: ‘[N]ot . . . all evidence is “fruit of the poisonous tree” simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.”’ [Citations.] The degree of attenuation that suffices to dissipate the taint ‘requires at least an intervening independent act by the defendant or a third party’ to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality. [Citations.]”].)

Nothing in this opinion is intended to limit the arguments the parties may make regarding the admissibility of defendant's statements at any point during the three police interviews; the failure to raise a particular argument previously does not prejudice a party from making such an argument on remand. Without limitation, this includes any argument that the officers used a two-step interrogation technique to undermine the *Miranda* warning given to Juan S. at the beginning of the second interview (*Missouri v. Seibert* (2004) 542 U.S. 600, 622; *People v. Camino* (2010) 188 Cal.App.4th 1359), or that Juan S.'s waiver of his *Miranda* rights at the beginning of the second interview was obtained through the violation of Juan S.'s initial right to be *Mirandized* at the start of the first interview.

C.

*Did Juan S. Invoke His Rights During the Interviews?*

Juan S. also argues that he invoked his *Miranda* rights by asking to speak to his mother and grandmother during his interviews. If the facts of the case demonstrate that a juvenile defendant’s purpose in asking to speak with his or her parent or grandparent is to invoke his or her Fifth Amendment privilege, any statements made after that request would be subject to exclusion. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1170.) The request, however, must clearly indicate to a reasonable officer that the juvenile is actually invoking his or her *Miranda* rights. “Where, as here, a juvenile has made a valid waiver of his *Miranda* rights and has agreed to questioning, a postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile *is actually* invoking—as opposed to *might be* invoking—the right to counsel or silence. (See *Davis [v. United States]* (1994) 512 U.S. [452,] 458-459.)” (*People v. Nelson* (2012) 53 Cal.4th 367, 381.)

In this case, the trial court found that Juan S.’s requests for his mother and grandmother during the interviews were not invocations of his rights, but rather were “calls for the police officers to contact mom for purposes of corroborating [Juan S.]’s story.” We agree. To explain our holding, we set forth here the portions of Juan S.’s interviews where he mentioned his mother or grandmother.

*Excerpt One*

“Investigator Hoffman: But I don’t think that you stayed inside on a Friday night after 9:15.

“Juan S[.]: You can even call my grandma if you want to.” (Some capitalization omitted.)

*Excerpt Two*

“Investigator Rich: Let’s not play games, okay.

“Juan S[.]: Well, I—

“Investigator Rich: You know who it is.

“Juan S[.]: —playing games. Well, call my mom.

“Investigator Rich: What do you mean call your mom?

“Juan S[.]: Call my mom.

“Investigator Rich: We already talked to your mom.

“Juan S[.]: Well, call her, I don’t really care. Tell her to bring me down here. That’s why I (inaudible) bring my mom. You guys don’t believe shit. You got (inaudible) to be here or to do something, you know what I mean?

“Investigator Rich: Or what?

“Juan S[.]: This is gay.

“Investigator Hoffman: What, to speak for you?

“Juan S[.]: Well, yeah, or do something.

“Investigator Voght: Why? You can’t speak for yourself?

“Juan S[.]: I can speak for myself. I’m doing it right now.

“Investigator Rich: Well, no, you’re lying for yourself.

“Juan S[.]: What the fuck? This is gay.

“Investigator Rich: Why gay? You’re the one that makes the decision to lie.

“Juan S[.]: Well, that’s why I told my mom to come here, you know. If you guys don’t believe me, you know, my mom can be right here.

“Investigator Rich: Your mom didn’t want to come.

“Juan S[.]: I told my mom—‘Hey, can my mom come?’ You guys, ‘No, you know what, it will’—you know.

“Investigator Rich: Your mom had to take the kids to school, make sure your sisters got out.

“Juan S[.]: No my sister—my sister (inaudible).

“Investigator Hoffman: You even said that your mom wouldn’t know if you were home or not, that it would be your grandmother, so why—[¶] . . . [¶]

“Juan S[.]: —and I went to my grandma’s house.

“Investigator Hoffman: Right, and you said you got there at 9:15. And I’m talking about what happened between 9:00 and 10:30.

“Juan S[.]: I said I was taking a shower by that time. I was taking a shower. Call my grandma and bring her in.

“Investigator Hoffman: But why do you get so angry, Juan? I mean, you sit up in your chair. You start using your hands to talk.

“Juan S[.]: Right, right, right. Just bring me my mom and them in. I’ll quote.

“Investigator Hoffman: Well, what does that mean, ‘bring me my mom and then I’ll quote’?

“Juan S[.]: So they could tell you—so they can—my grandma would tell you I was in the shower by that time.” (Some capitalization omitted.)

*Excerpt Three*

“Investigator Rich: All right. So I’m just about done with you and so are they just about done with you, all right? And if you keep lying and you keep playing games, all right, we’re going to go with everyone else’s story.

“Investigator Voght: Yeah, that’s what we’ll—we’ll just—

“Investigator Rich: You understand me? I don’t have all day. I’m tired.

“Juan S[.]: Well, bring my mom in. Bring my—

“Investigator Rich: You know what, don’t drag your mom into this.

“Juan S[.]: Why not? Why can’t I drag my mom into this?

“Investigator Rich: Because you know what—

“Juan S[.]: Or my grandma. How come I can’t do that?

“Investigator Rich: Because you don’t need your mom and your grandma—

“Juan S[.]: Well, how come—

“Investigator Rich: —to come in here and lie for you over something petty.

“Juan S[.]: How can they lie for me?

“Investigator Voght: Because they’re not the ones that were out there when the problem happened.

“Juan S[.]: Well, tell my grandma to come here. Tell her I was inside the whole time. She don’t let me out after 10:00.

“Investigator Hoffman: You’re never out after 10:00?

“Juan S[.]: She don’t let me out after 10:00.” (Some capitalization omitted.)

The foregoing portions of the transcript of Juan S.’s interviews make clear that Juan S.’s requests for his mother and grandmother were not attempts to invoke his rights under *Miranda*, but rather were attempts to obtain corroboration for his story. “A reasonable officer in the circumstances would not have understood defendant’s requests to call his mother, or any of his other statements, to be unambiguous and unequivocal invocations of his *Miranda* rights. [Citations.] Accordingly, [the] investigators . . . were not required to stop their questioning, and defendant’s custodial statements were properly admitted at trial.” (*People v. Nelson, supra*, 53 Cal.4th at pp. 383-384, fn. omitted.)

#### IV.

##### *FAILURE TO REDACT COPARTICIPANTS’ STATEMENTS FROM JUAN S.’S TAPED INTERVIEWS*

Juan S. argues that the trial court erred by failing to redact certain statements by coparticipants in the crime from the police interviews with Juan S. During the second interview, Investigator Hoffman confronted Juan S. with statements allegedly made by Stephen Quezada to the effect that Juan S. was present and was part of the group

that chased the Varrio Viejo gang members and threw a concrete block at their car. Juan S. contends the admission of the statements violated his confrontation rights, under *Crawford v. Washington* (2004) 541 U.S. 36, 68.)

However, as the Attorney General correctly points out, Juan S. did not raise this argument in the trial court. Although Juan S. objected to many portions of the interview, he did not object to the inclusion of the statements attributed to Stephen Quezada as violating the confrontation clause. We therefore find the issue to have been forfeited. (*People v. Neely* (2009) 176 Cal.App.4th 787, 794 [argument that evidence was inadmissible under *Crawford v. Washington* was forfeited because no objection on that ground was raised in the trial court].)

#### DISPOSITION

The judgment is reversed and the matter is remanded to the juvenile court.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.