

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE SANCHEZ,

Defendant and Appellant.

H037360

(Monterey County

Super. Ct. No. SS081002B)

I. INTRODUCTION

Defendant Jorge Sanchez was convicted after jury trial of two counts of attempted premeditated murder (Pen. Code, §§ 664, 187, subd. (a)),¹ two counts of assault with a semiautomatic firearm (§ 245, subd. (b)), and one count of active participation in a criminal street gang (§ 186.22, subd. (a)). The jury also found true a gang allegation (§ 186.22, subd. (b)(1)) and enhancement allegations for discharge of a firearm (§ 12022.53, subd. (c)), discharge of a firearm causing injury (§ 12022.53, subd. (d)), personal use of a firearm (§ 12022.5, subd. (a)), and infliction of great bodily injury (§ 12022.7, subd. (a)). The trial court sentenced defendant to prison for 40 years to life.

On appeal, defendant contends that (1) the trial court erred by admitting unnecessary and inflammatory gang evidence concerning defendant's prior acts and associations, (2) the court erred by admitting inadmissible hearsay from the gang expert

¹ All further statutory references are to the Penal Code unless otherwise indicated.

and violating defendant's constitutional rights to confrontation, and (3) trial counsel rendered ineffective assistance by allowing a witness's police interview to be admitted into evidence without redaction.

For reasons that we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by second amended information with two counts of attempted premeditated murder (§§ 664, 187, subd. (a); counts 1-2), two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 3-4), and one count of active participation in a criminal street gang (§ 186.22, subd. (a); count 5). As to the attempted murders, the information further alleged that defendant personally and intentionally discharged a firearm, and that the discharge caused great bodily injury (§ 12022.53, subds. (c) & (d)). As to the assaults, the information alleged that defendant personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). As to the attempted murders and the assaults, the information also alleged that defendant was a principal (§ 12022.53, subds. (c), (d) & (e)(1)), and that the offenses were committed for the benefit of, at the direction of, or in association with the Norteño criminal street gang (§ 186.22, subd. (b)(1)).

A. The Prosecution's Case

1. The Charged Offenses

In the early afternoon of February 15, 2008, Ivan and Victor were walking home from high school in Salinas.² At the time of trial in June 2011, Ivan was 18 years old. Ivan testified that he was associated with the street gang "South Siders," and that "North" gangs are rivals. Victor similarly identified with or was affiliated with Southerners, South Siders, or Sureños.

² Some of the witnesses were identified at trial by first names only.

As Ivan and Victor were walking, a black Honda containing two people pulled up near them. The passenger in the car asked if they “banged,” and Ivan replied, “I don’t bang.” Shots were then fired from the passenger side of the car. Ivan started running away but was hit by two shots, one in the right arm and one in the right leg. By the time of trial, Ivan still felt numbness on occasion in his arm and leg. Victor was also shot twice, including in the right shoulder. The police subsequently found nine spent bullet casings at the crime scene. The police determined that only one weapon, a semiautomatic gun, had been used.

Eric Michael Gruss, who was a police officer for the Salinas Police Department at the time of the shooting, testified that he talked to Ivan at the hospital after the shooting. Ivan had reported that, after he told the occupants of the car “we don’t bang,” the passenger of the car responded, “Salinas East Marketa,” and began shooting. Ivan told the officer that the shooter was approximately ten feet away from him, and that the shooter was a light-skinned Hispanic male between 16 and 18 years old. Ivan described the driver as a thin male wearing a black hat with an orange star logo on it. Ivan further reported that he could identify the shooter based on a picture or in person. He did not tell the officer that he knew the name of the shooter, that he recognized the person, or that the shooter had green eyes.

During the course of the investigation, police identified two possible suspects, defendant and Charles Arroyo. Based on that information, Salinas Police Officers Heath Johnson and Robert Zuniga conducted a further investigation.

Within two weeks after the shooting, Officer Johnson prepared a photographic lineup to show to Ivan. Before showing Ivan the lineup, Officer Johnson admonished him that the person involved in the incident might not be in the lineup. Officer Johnson then pulled the lineup out of a notebook while Ivan was in front of him. According to Officer Johnson, as Ivan was looking at the lineup upside-down, he stated, “I already saw him.” Ivan pointed at the picture of defendant and said, “That’s him. I got a good look at

him.” When Officer Johnson asked whether he was sure, Ivan responded affirmatively. Ivan also told Officer Johnson that he had never seen the shooter before. One week later, Officer Johnson showed Ivan a photographic lineup that contained a picture of Arroyo and not defendant. Ivan did not identify anyone in this second lineup.

In January 2009, nearly a year after the shooting, John Coletti, an investigator from the district attorney’s office, met with Ivan. Coletti asked Ivan about the photographic lineup and identification he had made with Officer Johnson. Ivan indicated that he was positive regarding the identification. Coletti testified that Ivan also stated that he had received a phone call a couple of days after the shooting and was told by the caller that the shooter was defendant. At that point, Ivan recalled the name and recalled that he had attended a “juvenile impact program” with defendant approximately two years prior to the shooting. The program met once a week for five hours over the course of a month. Ivan told Coletti that he had gotten into an argument with defendant about a seat while they were in the program. Ivan indicated to Coletti that once he heard defendant’s name and remembered the seat incident, it helped him to identify the person who had shot him. Coletti testified that Ivan stated, “I remember him, his face, and those green eyes.” Ivan could not identify the driver to Coletti.

At trial, Ivan testified that he had a “little bit” of an opportunity to look at the two people in the car. However, he did not have much time to look at the face of the person who was shooting at him. When asked whether he saw anyone in the courtroom who had been in the car at the time of the shooting, Ivan stated, “I’m not sure.” He further testified that he had received a call regarding the shooter’s identity a couple of months, not a couple of days, after the shooting. He testified that he had received the call after he had already identified the shooter in the lineup and after defendant was already in custody. The caller had stated that the shooter was in custody with the caller. Ivan further testified that he was “not sure” whether he knew defendant from a juvenile impact

program, but acknowledged that he did have an argument with a person named George or Jorge about a chair at that program.

Besides the victims, there were several other individuals in the area of the high school who were able to see or hear part of the shooting. Jesus was getting a ride to the school at the time of the shooting, and was interviewed by Salinas Police Officer Jacqueline Bohn afterwards. Officer Bohn testified that Jesus had reported seeing someone shooting out of the passenger side of a dark green car, with a model year of approximately 2000. Jesus had estimated that the car was about 20 to 25 feet in front of him.

Raul was walking home from school with two others when he saw a black Honda drive by with two people inside. Raul turned around after hearing a noise and saw the passenger in the black Honda shooting at Victor and Ivan, who had been walking behind Raul. Nearly one year after the shooting, Raul met with Coletti, the district attorney investigator, and was shown a series of photographs. Raul identified a photograph of Arroyo as the driver with a certainty of three or four out of 10, and he identified a photograph of defendant as the passenger with a certainty of six or seven out of 10. At trial, Raul testified that the driver of the car was skinny and wearing a black hat while the passenger was “heavier set” and wearing a “white ‘T.’ ” Raul further testified that he did not see the driver or the passenger in the courtroom.

Luis was walking home from school with two friends when he heard shots. Luis turned around and saw two males who had been shot. Luis spoke to Salinas Police Officer Brandon Hill that same day. Luis reported that he had seen the passenger in a black Honda Accord shooting at people. Luis described the passenger as wearing a white T-shirt and as being larger than the driver. At trial, Luis testified that he did not remember telling the officer about the passenger, and he denied that he could recognize the type of car that had been in the area or who was in the car. Luis further testified that

he used to hang around a “North” gang, that he felt uncomfortable testifying in a case involving gang allegations, and that gangs view testifying as an act of betrayal.

Charles Andrew Arroyo III was charged, along with defendant, in connection with the shooting. The charges against Arroyo included attempted murder, and he potentially faced a life sentence if found guilty. Arroyo testified at defendant’s trial pursuant to an April 2009 plea agreement in which he agreed, in return for his truthful testimony, to plead guilty to assault with a semiautomatic firearm and admit a gang enhancement with the understanding that the prosecution would recommend felony probation. In June 2009, Arroyo was released on his own recognizance and placed in the witness relocation program. He had been in jail for less than one and a half years. As part of the witness relocation program, Arroyo received financial assistance of approximately \$1,500 per month, for a total of nearly \$40,000 by the time of defendant’s trial. Arroyo’s girlfriend had given birth to Arroyo’s child shortly after the shooting. According to Arroyo, the money was not enough for him to live on, and his testimony in this case placed his life in danger. Coletti, the district attorney investigator, testified that assistance under the witness relocation program ends approximately three months after the conclusion of a case.

Arroyo testified about the shooting as follows. Arroyo was 18 years old at the time of the shooting. He had been associating with Salinas East Market, a Norteño gang, for about two years but denied being a member because he “wasn’t initiated in the gang.” Arroyo testified that defendant was also associated with the Salinas East Market gang, and that defendant had “SEM” tattooed on his chest. According to Arroyo, gang members commonly called each other by nicknames, and defendant was called “Little Morris” or “Yogi.” Arroyo had been “hanging out” with defendant for about a year, and they had committed other crimes together prior to the shooting incident.

Arroyo testified that he picked up defendant in a black, 2000 Honda Accord about a half hour before the shooting. Arroyo was wearing black pants, a black sweater, and a

black and red Houston Astros hat. Arroyo testified that the hat, which had a red star on it, symbolized Norteños. Defendant was wearing blue pants, a white shirt, a grey sweater, and a blue and red Minnesota Twins hat. According to Arroyo, the hat was associated with the Salinas East Market gang.

Arroyo testified that, as they were traveling to defendant's house, defendant pointed at two pedestrians and referred to them as "scraps," a derogatory term for Sureños. Arroyo did not recognize the two pedestrians. Defendant showed Arroyo a gun and said, "Let's smoke them," which meant shoot them. Arroyo kept driving and made a series of turns until they came upon the two pedestrians again. Defendant told Arroyo to stop the vehicle. The two pedestrians were about 20 feet away and on the passenger side of the vehicle. Defendant asked one of the pedestrians where he was from, which was a challenge or a question as to gang affiliation. The taller male responded, "Surenos." Defendant then pulled the gun out of his waistband, leaned out the window yelling "Salinas East Market," and started shooting. After he stopped shooting, he told Arroyo, "Go, go, go." They went to Arroyo's house, where they stayed for approximately 40 minutes before Arroyo dropped off defendant. At some point, defendant and Arroyo talked about what had happened. Defendant told him not to worry and "to come up," meaning "[t]o officially be part of the Nortenos."

Arroyo's phone records, which were introduced into evidence, reflected that he exchanged calls and/or texts with defendant throughout the day on February 15, 2008, except for a three-hour period around the time of the shooting.

On February 28, 2008, almost two weeks after the shooting, Arroyo voluntarily went to the police station after being contacted by the police and was interviewed by Salinas Police Officer Robert Zuniga. The interview was videotaped, and a DVD of it was played for the jury. The jury also received a transcript of the recording. During the interview, Arroyo described defendant as "[b]ig" and "light-complected." The video reflects that Arroyo is relatively slim. Arroyo testified at trial that he did "[n]ot

completely” tell the truth to Officer Zuniga, although he ultimately did tell the officer that he was the driver and that defendant was the shooter. Officer Zuniga placed Arroyo under arrest.

2. The Gang Evidence

Salinas Police Detective James Knowlton testified that he was previously assigned to the police department’s Violence Suppression Unit, where his duties included registering gang members pursuant to section 186.30. Detective Knowlton was the officer who registered defendant as a gang member in 2006.

Monterey County Deputy Sheriff Cynthia Dorgan was assigned to the classification unit in the jail. In this position, Deputy Dorgan assessed the “risk and needs” of each inmate and, if the inmate admitted to gang affiliation, she determined whether the inmate may be housed in the “general housing population for that specific gang or a lockdown-type pod for that gang.” Deputy Dorgan testified that defendant was “functioning as an active gang member within the Monterey County jail.” She explained that defendant had been housed in “[a]dministrative segregation, lockdown for Nortenos” while at the jail between 2009 and 2011. Deputy Dorgan indicated that if an inmate was not in good standing with the Norteño gang, the inmate would be forced out of the gang’s housing area in the jail. Deputy Dorgan also testified about various inmate-generated writings found at the jail, including a “housing roster” containing defendant’s name and identifying his “AKA” as “YOGI,” and his “HOOD” as “SEM,” meaning Salinas East Market; graffiti found in defendant’s cell during a June 2011 search referring to his nickname Yogi, to the Salinas East Market gang, and to Norteños in general; and a writing found in defendant’s cell referring to some of the “14 bonds” which comprise the “Norteno constitution.”

At trial, the parties stipulated to the following. First, Salinas Police Officer Michael Muscutt, if called as a witness, would testify that he observed “SEM” carved in multiple places on a car on September 5, 2007, and that he arrested defendant, who

admitted to committing the vandalism. Second, Salinas Police Officer Kenneth Schwener, if called as a witness, would testify that he contacted defendant and another person walking in Salinas on June 9, 2006, and that defendant was wearing a red belt and had a red beanie in his back pocket. Third, defendant did not have the tattoo of an “M” on his neck prior to his arrest on February 28, 2008. Fourth, the two gunshot wounds suffered by each of the two victims, Ivan and Victor, were considered great bodily injury within the meaning of section 12022.7.

Officer Zuniga, who had interviewed Arroyo, the driver, about the shooting, testified as a gang expert. Officer Zuniga had been assigned to the Violence Suppression Unit, which was the gang unit, for approximately four of the last six years that he had been a peace officer. Zuniga testified that the Norteño gang is a criminal street gang, and that Salinas East Market is a subset of the gang. The common signs and symbols of the Norteño gang include the number 14, one dot and four dots, and the color red. Gang members commonly wear certain sports logos to associate themselves with a particular gang. For example, the red “M” on a Minnesota Twins hat is associated with Salinas East Market, and the “A” of the Houston Astros is associated with Salinas Accosta Plaza, another subset of the Norteño gang. According to Officer Zuniga, Norteños in Monterey County often commit crimes, such as homicides, shootings, carjackings, robberies, and drug dealing. The officer provided several examples of criminal activity by Norteno gang members that resulted in convictions. Officer Zuniga further testified that Sureños are the rivals of Norteños, and that “[s]craps” is a derogatory term for Sureños.

In Officer Zuniga’s opinion, defendant was an active participant in the Norteño criminal street gang based on his tattoos, certain jail information, his prior contacts with law enforcement, and the shooting incident.

Regarding tattoos, defendant had “SEM,” an abbreviation for Salinas East Market, tattooed in large letters across his chest. He also had a large letter M, which signifies Salinas East Market, tattooed behind one ear such that “[a]nybody in the public can

clearly see the tattoo.” The letter M was also tattooed on one of his middle fingers. Further, defendant had one red dot and four red dots tattooed on his elbows, which is an “abbreviation” that Norteños use to represent the number 14.

Regarding jail information that indicated defendant was an active Norteño gang member, Officer Zuniga relied on various inmate-generated writings. For example, defendant was listed in a writing commonly prepared by gang members to keep track of who is housed within a jail pod and who is in good or bad standing with the gang. There was also graffiti in defendant’s jail cell containing his nickname Yogi, as well as multiple references to Salinas East Market. Further, a writing from defendant’s cell contained part of the “14 bonds,” which are “standard . . . rules” for Norteños telling them what they “can and can’t do.”

Regarding defendant’s contacts with law enforcement, Officer Zuniga testified about the following incidents, based on documents he had reviewed such as prior police reports. On July 11, 2008, an individual who was in custody with defendant “came forward and wanted to give information that [defendant] had been threatening him and was somewhat running or continuing business for the Nortenos and had made some statements as to getting his homeboys to take care of [the individual who had come forward].” On February 26, 2008, defendant was contacted as a passenger in a stolen vehicle with an active Norteño gang member. Officer Zuniga testified that, in this incident, defendant was conspiring with an admitted Norteño gang member by possessing the stolen vehicle, and that defendant was “actually arrested for outstanding warrants.” On September 5, 2007, defendant vandalized a car with references to Salinas East Market. On July 4, 2007, defendant was found to be associating with a known Norteño gang member. On October 11, 2006, defendant was contacted and was wearing a hat with a red star. On September 11, 2006, defendant was found to have a binder containing gang writing. On July 23, 2006, defendant committed a crime with another Norteño gang member. On June 9, 2006, defendant was found associating with another gang member.

Regarding the shooting incident, Officer Zuniga believed it was gang related. He testified that a phrase such as “Where are you from,” or “Do you bang,” is usually used by gang members as a “challenge” and is usually followed by a very violent act.

In Officer Zuniga’s opinion, Arroyo was also an active participant in the Norteño criminal street gang at the time of the shooting incident. Officer Zuniga referred to evidence that Arroyo was driving the car, that he was wearing a Houston Astros hat with a star, and that he admitted committing other crimes with Norteños. Officer Zuniga further testified that a search of Arroyo’s residence had yielded items linking him to Norteño activity, and that, after his arrest in this case, Arroyo had been housed in an active Norteño gang unit in jail.

Officer Zuniga was presented with a hypothetical based on the facts of the case. He concluded that the shooting was done in association with, and at the direction of, the Norteño gang. He also determined that the shooting benefitted the Norteño gang. According to Officer Zuniga, when gang members commit these types of crimes, it instills fear in the community, makes community members less likely to come forward to help law enforcement, and enables the gang to continue committing violent acts without fear of prosecution. Violent acts that are publicized also help the gang’s recruitment process because it shows the gang’s power.

According to Officer Zuniga, people who testify against gang members are “frowned upon” by the gang. The gang’s motto was “snitches get stitches,” meaning the person may be assaulted or killed. Further, a Norteño who is wrongfully accused of a crime committed by a fellow gang member and who reports that fact to the police would probably face “repercussions,” such as being assaulted or killed. Officer Zuniga also explained that gang members “have to do something to earn their tattoos,” such as committing a crime for the benefit of the gang. He acknowledged that a Norteño could be “rewarded” with a tattoo if that Norteño “[took] one for the team” and remained silent when wrongfully accused by another Norteño. However, Officer Zuniga did not believe

that he had ever heard about a tattoo being given under those circumstances in his six-year career.

Regarding the interview of Arroyo, Officer Zuniga testified that his “initial goal was to build a rapport with [Arroyo].” The officer acknowledged that his questioning of Arroyo “could have been done better.” He “could have been more patient and not spoken so much and let [Arroyo] speak more.” According to Officer Zuniga, his failure to do so was probably the result of him “knowing that [Arroyo] was free to leave at any point in time, the sense of urgency.” Officer Zuniga acknowledged that his interrogation techniques included using a ruse, such as telling Arroyo that defendant “had spilled the beans,” that defendant admitted being present during the shooting, and that defendant stated Arroyo was the shooter, when in fact none of these statements were true. The officer also acknowledged that he “filled in the blanks for [Arroyo],” by suggesting to Arroyo some of the details of the shooting, when Arroyo “seemed to be exhausted in the interview as far as shutting down” and the officer was afraid that Arroyo “was going to walk away.”

B. The Defense Case

District attorney investigator Coletti testified that in January 2009, nearly a year after the shooting, Ivan reported that he had received a phone call a couple of days after the shooting from someone who stated that defendant was the shooter. In June 2011, shortly before trial began, Coletti met with Ivan and reviewed his January 2009 statement. During this meeting, Ivan stated that he did not remember saying the phone call occurred a couple of days after the shooting, and he stated that he believed it was actually a couple of months after the shooting. Ivan also stated that the caller told him that the person responsible for the shooting was in jail, but he did not recall being specifically told that the person who shot him was defendant.

Coletti testified that Ivan was “more relaxed” during their first meeting. Ivan did not have an understanding of the criminal justice system, nor an understanding of the

ramifications of making the identification and possibly coming to court. Coletti testified that once he started to explain the “court procedure” and the need for Ivan “to come to court, that’s when he started becoming evasive.” According to Coletti, Ivan indicated that he did not want to testify because of his family. His brother was in custody and he was afraid for his brother’s safety if it became known that he had testified. Ivan’s mother also did not want him to testify. Ivan grew up with the understanding that, “if he sees something, you just say you didn’t see it. Just ignore it. It didn’t happen to us. And let’s just move on and not to testify.”

At some point, Ivan appeared “stressed” to Coletti. Coletti testified that he eventually “offered to provide [Ivan] with some assistance in directing him to some help with immigration issues.” Coletti clarified that it was a few days after the June 2011 meeting when he was “checking in with [Ivan] again” that “the issue of his citizenship came up.”

C. Verdicts and Sentencing

After the close of evidence, and on motion of the prosecution, the allegations that defendant was a principal in the attempted murders and assaults (§ 12022.53, subs. (c), (d) & (e)(1)) were dismissed.

On June 23, 2011, the jury found defendant guilty of two counts of attempted premeditated murder (§§ 664, 187, subd. (a); counts 1-2), two counts of assault with a semiautomatic firearm (§ 245, subd. (b); counts 3-4), and one count of active participation in a criminal street gang (§ 186.22, subd. (a); count 5). The jury also found true the gang allegation (§ 186.22, subd. (b)(1)) and the enhancement allegations for discharge of a firearm (§ 12022.53, subd. (c)), discharge of a firearm causing injury (§ 12022.53, subd. (d)), personal use of a firearm (§ 12022.5, subd. (a)), and infliction of great bodily injury (§ 12022.7, subd. (a)).

In September 2011, the trial court sentenced defendant to prison for 40 years to life. The sentence consists of concurrent terms of 40 years to life (15 years to life, plus

25 years for the enhancement for discharge of a firearm causing injury) on each of the two counts of attempted premeditated murder (counts 1 & 2). The court stayed the sentence on the enhancements for discharge of a firearm and the sentences on counts 3 through 5 pursuant to section 654.

III. DISCUSSION

A. Prior Acts and Associations

I. Background

In pretrial motions in limine, defendant sought to exclude or limit the testimony by the gang expert. Defendant generally objected to the admission of evidence concerning his “friendship” with Norteño gang members and to the admission of “other crimes evidence” as being unduly prejudicial. Defendant specifically sought to exclude testimony concerning four instances on February 26, 2008, January 10, 2007, June 9, 2006, and May 11, 2005, in which law enforcement had found him associating with another gang member, including one instance in which defendant was a passenger in a stolen vehicle. Defendant argued that the evidence was “highly prejudicial without sufficient information” showing that he knew the individuals with whom he was associating were gang members. At the hearing on the motions in limine, defense counsel argued that evidence concerning defendant’s contacts with law enforcement was “highly inflammatory.” Defense counsel contended that, even if the jury was shown that the evidence was not credible or was unreliable, the jury might decide “there must be something there” given “the number of contacts.” The trial court ruled that the prosecution would be allowed to introduce evidence concerning defendant’s contacts with law enforcement, and that “the defense would have ample opportunity to question the foundation . . . , the reliability of the information through cross-examination or through appropriate objections at the time that it’s offered.”

During trial, and prior to the gang expert testifying, defendant also sought to exclude evidence of a July 11, 2008 incident involving a minor who was in custody with

defendant at juvenile hall. The minor had asked the staff for assistance in dealing with defendant, who was threatening him and talking about his Northerner friends. Defense counsel argued that the incident should be excluded under Evidence Code section 352 because it was highly prejudicial. Defense counsel further argued that the prosecution “has multiple incidents to bring forward to the jury without getting into [this incident].” The prosecutor responded that all of the incidents provided a “timeframe” for the jury concerning defendant’s ongoing and active participation in the Norteño gang, including after he had been arrested for the instant offense, and that the evidence “avoids” an argument by the defense that defendant had given up the gang. Defense counsel replied that there was evidence defendant had received a gang tattoo after he was in custody for the instant offense, as well as evidence defendant had been housed in an “active Norteño unit,” and thus it would “def[y] logic” for the defense to claim that defendant was no longer an active gang member. Defense counsel further argued that the “prejudicial effect and inflammatory nature of that particular incident outweighs its contribution to what [the prosecution] seeks to obtain.” In response to an inquiry from the court, the prosecutor indicated that the gang expert would testify about the incident along with other law enforcement contacts, and that the testimony concerning the incident at issue would “take a minute or two.” The court ruled that testimony concerning the incident would be allowed and stated, “I don’t see that it . . . creates a cumulative impact that rises to the level of undue prejudice or an undue consumption of time.”

At trial, Officer Zuniga testified about the following contacts that defendant had with law enforcement, based on documents that he had reviewed such as prior police reports. On July 11, 2008, an individual who was in custody with defendant “came forward and wanted to give information that [defendant] had been threatening him and was somewhat running or continuing business for the Nortenos and had made some statements as to getting his homeboys to take care of [the individual who had come forward].” On February 26, 2008, defendant was contacted as a passenger in a stolen

vehicle with an active Norteño gang member. Officer Zuniga testified that, in this incident, defendant was conspiring with an admitted Norteño gang member by possessing the stolen vehicle, and that defendant was “actually arrested for outstanding warrants.” On September 5, 2007, defendant vandalized a car with references to Salinas East Market. On July 4, 2007, defendant was found to be associating with a known Norteño gang member. On October 11, 2006, defendant was contacted and was wearing a hat with a red star. On September 11, 2006, defendant was found to have a binder containing gang writing. On July 23, 2006, defendant committed a crime with another Norteño gang member. On June 9, 2006, defendant was found associating with another gang member.

II. Parties’ contentions

On appeal, defendant contends that the above-listed eight incidents concerning his prior acts and associations were “entirely unnecessary” to prove his gang affiliation and should have been excluded under Evidence Code sections 352 and 1101, subdivision (a), and that their admission violated due process. He argues that the evidence was cumulative and its probative value “negligible” because the defense acknowledged during opening statement that he was affiliated with Salinas East Market, a Norteño gang. Further, there was evidence that defendant had gang tattoos, and that he had been housed with Norteños without incident while in jail. Defendant contends that the above-described eight incidents “risked inflaming the jury against [him], for it portrayed him as a criminally recidivist gang commander who was likely disposed to commit the charged crimes and who in any case needed to be removed from society.” He also contends that he was prejudiced by the admission of the evidence.

The Attorney General contends that defendant did not object to all of the incidents about which he now complains and to that extent, his claim is forfeited. The Attorney General further contends that the trial court did not abuse its discretion in admitting the evidence, and that any error was harmless.

In supplemental briefing, defendant contends that his trial counsel rendered ineffective assistance to the extent any portion of his claim has been forfeited. The Attorney General responds that defendant fails to demonstrate prejudice as a result of his trial counsel's conduct.

III. Analysis

Assuming defendant did not forfeit his challenge to each of the eight prior contacts with law enforcement, we determine that the trial court did not err in admitting evidence of those eight contacts.

Section 186.22, subdivision (a) punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.” In this case, the prosecution had the burden of proving the substantive gang offense set forth in section 186.22, subdivision (a) beyond a reasonable doubt. To do this, the prosecution had to prove, in part, defendant’s “active participation in a criminal street gang, in the sense of participation that is more than nominal or passive.” (*People v. Albillar* (2010) 51 Cal.4th 47, 56 (*Albillar*)). In general, “[e]xpert testimony is admissible to establish . . . a defendant’s membership in a gang.” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120 (*Hill*)). Further, an expert witness generally may state on direct examination the matter upon which the opinion is based. (Evid. Code, § 802; *People v. Bell* (2007) 40 Cal.4th 582, 608; *People v. Gardeley* (1996) 14 Cal.4th 605, 618 (*Gardeley*)).

In this case, Officer Zuniga testified that defendant was an active participant in the Norteño criminal street gang. He explained that his opinion was based in part on defendant’s prior contacts with law enforcement, including the eight contacts about which defendant now complains. The testimony about the eight contacts with law enforcement was admissible if it was “not more prejudicial than probative and [was] not cumulative. [Citation.]” (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223; see

Evid. Code, § 352 [allowing the exclusion of evidence if its probative value is substantially outweighed by its prejudicial effect].) For Evidence Code section 352 purposes, “ ‘prejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “ ‘uniquely tends to evoke an emotional bias against defendant” ’ without regard to its relevance on material issues. [Citations.]” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) “Although no bright-line rules exist for determining when evidence is cumulative, we emphasize that the term ‘cumulative’ indeed has a substantive meaning, and the application of the term must be reasonable and practical.” (*People v. Williams* (2009) 170 Cal.App.4th 587, 611 (*Williams*).) A trial court’s ruling on the admission of gang testimony is reviewed for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1194.) As *Williams* observed, “[t]he trial court has great discretion in determining the admissibility of evidence, and on appeal, we find reversible error if the trial court’s exercise of its discretion was arbitrary, capricious, or patently absurd resulting in a manifest miscarriage of justice. [Citations.]” (*Williams, supra*, at p. 606.)

In this case, the testimony concerning the eight law enforcement contacts at issue, which included references to defendant’s prior acts and associations, was highly probative of Officer Zuniga’s credibility and the weight to be given his opinion about defendant’s active participation in a gang. Further, the testimony concerning defendant’s eight law enforcement contacts was not more inflammatory than the testimony concerning defendant’s and Arroyo’s conduct in connection with the shooting. In addition, the jury was instructed that it “may not conclude” from the evidence of gang activity “that the defendant is a person of bad character or that he has a disposition to commit a crime.” In view of the record, we believe the trial court was acting well within its broad discretion in overruling any evidentiary objection to the testimony about the eight contacts, as the testimony was highly probative and the probative value was not substantially outweighed by any prejudicial effect. (See *People v. Valdez* (1997) 58

Cal.App.4th 494, 511.) In addition, although Officer Zuniga presented other bases for his opinion, the testimony at issue did not “necessitate undue consumption of time.” (Evid. Code, § 352.) The testimony about each of the eight incidents was very brief, and the testimony regarding *all* of defendant’s prior contacts with law enforcement, including the eight at issue, entailed less than six pages of the multi-volume trial transcript. (Compare *Williams, supra*, 170 Cal.App.4th at pp. 610-611.)

We are not persuaded by defendant’s contention that his gang affiliation was not in dispute, and that the eight law enforcement contacts were cumulative of other evidence concerning his gang affiliation. Defense counsel’s acknowledgment of defendant’s gang affiliation in opening statement did not relieve the prosecution of proving beyond a reasonable doubt defendant’s active participation in a criminal street gang. (§ 186.22, subd. (a).) Further, Officer Zuniga testified that defendant was an *active participant* in the Norteño gang. The eight law enforcement contacts at issue, which occurred between June 2006 and July 2008, after defendant had been arrested for the February 2008 shooting, collectively supported that opinion. The incidents individually might be discounted by the jury as coincidence, as isolated, or otherwise as an insufficient basis to support the opinion that defendant’s participation in the gang was active, as opposed to nominal or passive, at the time of the shooting. (See *Albillar, supra*, 51 Cal.4th at p. 56.) Moreover, evidence of defendant’s gang tattoos and his housing at the jail with other Norteños did not establish beyond dispute that defendant was an active participant in the Norteño gang at the time of the shooting. All but one of defendant’s tattoos were acquired at some unknown time before the shooting, and thus those tattoos were not irrefutable evidence that defendant was still an active gang participant at the time of the shooting. Regarding the single gang tattoo that defendant obtained after his arrest in this case, the defense elicited testimony from Officer Zuniga suggesting that a Norteño could be “rewarded” with a tattoo if that Norteño “[took] one for the team” and remained silent when wrongfully accused by another Norteño. The jury might conclude from this

testimony that defendant earned the tattoo through passive, rather than active, participation in the gang. Similarly, that defendant was in good standing with the gang, as reflected by his jail housing, did not irrefutably establish that he was an *active* gang participant.

In sum, we conclude that admitting testimony regarding the eight law enforcement contacts at issue, which formed part of the basis for Officer Zuniga's opinion that defendant was an active participant in the Norteño gang at the relevant time, was not "arbitrary, capricious, or patently absurd." (*Williams, supra*, 170 Cal.App.4th at p. 606.) Further, no due process violation has been shown.

B. Hearsay Basis of Expert Opinion

Defendant next contends that certain testimony by Officer Zuniga should have been excluded as inadmissible hearsay (Evid. Code, § 1200), that the admission of the testimony violated his constitutional rights to confront witnesses (Cal. Const., art. I, § 15; U.S. Const. 6th Amend.), and that he was prejudiced by the admission of the testimony. Specifically, defendant refers to Officer Zuniga's testimony concerning seven of defendant's prior contacts with law enforcement (all of the contacts previously discussed except the contact of October 11, 2006 when defendant was wearing a hat with a red star), which formed part of the basis for the officer's opinion that defendant was an active gang participant. Defendant also refers to Officer Zuniga's testimony about certain crimes for which various individuals were criminally convicted, and which formed the basis for the officer's opinion that those individuals were Norteño gang members at the time of their crimes. According to defendant, Officer Zuniga's testimony was based on statements "by other police officers and by persons being questioned by the police or making accusations to the police." Defendant contends that such statements were offered for their truth, were testimonial, and should have been excluded. Defendant also asserts that his confrontation claim is not forfeited by his failure to raise it below because there is

appellate authority contrary to his position, and thus an objection below would have been futile.

The Attorney General contends that defendant has forfeited his confrontation claim, that there was no violation of his confrontation right, and that any error was harmless.

In supplemental briefing, defendant contends that his trial counsel rendered ineffective assistance to the extent his appellate claim is forfeited by the failure to raise it below. The Attorney General responds that defendant fails to establish ineffective assistance of counsel.

First, we understand defendant to contend that some of Officer Zuniga's opinions were based on hearsay and therefore those opinions were inadmissible. We disagree. "It is the long-standing rule in California that experts may rely upon and testify to the sources on which they base their opinions [citations], including hearsay of a type reasonably relied upon by professionals in the field. [Citations.]" (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *Gardeley, supra*, 14 Cal.4th at pp. 618-619.) In *Gardeley*, the California Supreme Court determined that the gang expert's testimony in the case before it helped establish whether a particular gang met the definition of a criminal street gang, and provided evidence that the defendant had attacked the victim for the benefit of the gang. (*Gardeley, supra*, at pp. 619-620; see § 186.22, subs. (b)(1) & (f).) The court observed that, "[c]onsistent with [the] well-settled principles" concerning expert witness testimony, the detective "could testify as an expert witness and could reveal the information on which he had relied in forming his expert opinion, including hearsay." (*Gardeley, supra*, at p. 619.) In the present case, Officer Zuniga properly testified about the bases for his opinions, and his testimony was not made inadmissible by his reliance on hearsay.

Second, assuming defendant did not forfeit his objection to Officer Zuniga's testimony and assuming Officer Zuniga based his opinion on testimonial hearsay, we

determine that Officer Zuniga’s testimony did not violate defendant’s confrontation rights. The California Supreme Court has indicated that otherwise inadmissible hearsay relied upon by an expert witness may not be considered by the jury as independent proof of the facts recited. (*Gardeley, supra*, 14 Cal.4th at p. 619 [“a witness’s on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into ‘independent proof’ of any fact”].) In *Hill*, the First District Court of Appeal (Div. Five) examined gang expert testimony and determined that, in many cases, the expert’s opinion is meaningful only if the jury finds its basis true. (*Hill, supra*, 191 Cal.App.4th at p. 1131.) However, the Court of Appeal concluded that “we must follow *Gardeley* and the other California Supreme Court cases in the same line of authority.” (*Ibid.*, fn. omitted.) The Court of Appeal concluded that the “basis evidence” in the case before it violated neither the hearsay rule nor the confrontation clause because the out-of-court statements were not admitted for their truth. (*Ibid.*; see *Williams v. Illinois* (2012) 567 U.S. ___, ___ [132 S.Ct. 2221, 2228] (plur. opn. of Alito, J., joined by Roberts, C. J., Kennedy & Breyer, JJ.) [“Out-of-court statements that are related by the expert solely for the purpose of explaining the assumptions on which that opinion rests are not offered for their truth and thus fall outside the scope of the Confrontation Clause”]; but see *Williams v. Illinois*, at p. ___ [132 S. Ct. at p. 2257] (conc. opn. of Thomas, J.) [“statements introduced to explain the basis of an expert’s opinion are not introduced for a plausible nonhearsay purpose”]; *Williams v. Illinois*, at p. ___ [132 S. Ct. at p. 2268] (dis. opn. of Kagan, J., joined by Scalia, Ginsburg, and Sotomayor, JJ.) [an expert’s statements about a report, upon which the expert based her opinion, “went to its truth, and the State could not rely on her status as an expert to circumvent the Confrontation Clause’s requirements”].)

In this case, we are not persuaded by defendant’s contention that the Court of Appeal in *Hill* was mistaken in its interpretation of *Gardeley*. As he offers no persuasive reason to part company with *Hill, supra*, 191 Cal.App.4th 1104 and the authority on

which it relied, we conclude that defendant's confrontation rights were not violated. (See Cal. Const., art. I, § 24; *People v. Gonzales* (2012) 54 Cal.4th 1234, 1271 ["state confrontation right affords no greater rights than federal" Constitution].)

C. Arroyo's Police Interview

The day before the jury watched the DVD of Officer Zuniga's interview of Arroyo, the trial court and counsel discussed the DVD outside the presence of the jury. The prosecutor indicated his intent to play the entire DVD and to edit only personal information, such as Arroyo's address, date of birth, and last name of his girlfriend. Defense counsel had no objection to the prosecutor's proposal.

On appeal, defendant contends that his trial counsel rendered ineffective assistance by failing to request redaction of the following portions of Arroyo's police interview. First, during the police interview, Arroyo referred to defendant as having been "locked up." Arroyo further stated that he had asked defendant, "are you out already," and defendant responded, "No, I'm on the run." Second, Officer Zuniga asked Arroyo the meaning of defendant getting "SEM" tattooed on his chest. Arroyo answered, "I guess you have to earn it or whatever." When the officer asked how defendant would earn it, Arroyo responded, "Just do, I don't know. Like doing things, you know?" The officer further asked, "Like what? Like shootings?" Arroyo stated, "Probably." Third, defendant claims Arroyo stated during the police interview that, with respect to defendant, "you kind of fear him" and "[h]e does a lot of crazy stuff." As to this third claim, the record actually reflects that *Officer Zuniga* made these statements, and that Arroyo responded that he *did not know* about any "crazy stuff" and that he *did not know* whether a lot of people feared defendant.

Defendant contends that "[t]he jury was . . . exposed to Arroyo's statements that [defendant] had been locked up, claimed to have escaped from custody, and does a lot of crazy stuff that inspires fear, all of which is inadmissible character evidence, inadmissible hearsay, and inadmissible because it is more unfairly prejudicial than probative. . . . The

jury was also exposed to Arroyo's speculation that [defendant] probably earned the SEM tattoo by shootings. This was inadmissible for the same reasons and also because it is speculation."

The Attorney General contends that defendant's trial counsel's "failure to request redaction of any part of Arroyo's interview was the product of an informed, tactical choice. The defense theory was that Arroyo named [defendant] as the shooter because he succumbed under the pressure of Zuniga's heavy handed interrogation techniques. Counsel wanted the jury to witness the entire interview so that it could see this pressure firsthand. Redacting it would rob her argument of its persuasiveness." The Attorney General further argues that there is no reasonable probability that redaction of the interview in the manner suggested by defendant would have changed the outcome of the trial.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.' [Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746 (*Ledesma*); see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694 (*Strickland*).

We determine that the failure of defendant's trial counsel to seek redaction of portions of Arroyo's police interview may have been the product of sound trial strategy.

We first observe that a substantial portion of trial counsel's cross-examination of Officer Zuniga pertained to the officer's interview methods during his interview of Arroyo. Through cross-examination, trial counsel attempted to establish that Officer Zuniga lied to Arroyo, that the officer "filled in the blanks" for Arroyo when he failed to provide information supporting what the officer thought was the truth, that the officer tried to induce Arroyo to provide information, and that the officer tried to lead Arroyo into saying certain things. As trial counsel explained to the trial court after the prosecutor objected to several questions, the purpose of some of trial counsel's questions was to elicit information "as to the pressure that was placed on Mr. Arroyo by this officer and, therefore, reflecting the reliability of the information that was received." In argument to the jury, trial counsel contended that Officer Zuniga's interrogation was flawed; that he provided more information during the interview than Arroyo; that Arroyo provided the information that the officer wanted to hear, such as defendant being present during the shooting incident, in the hopes that he (Arroyo) could go home; and that although Officer Zuniga may have intended to try to get the truth from Arroyo, what the officer actually got was the officer's "version of the truth."

Most of the portions of Arroyo's police interview about which defendant now complains could support trial counsel's theory and argument to the jury concerning Officer's Zuniga's interview techniques. For example, the manner in which the officer questioned Arroyo concerning the significance of defendant's "SEM" chest tattoo, concerning whether others feared defendant, and concerning whether defendant did "crazy stuff" could support the defense theory that the officer "filled in the blanks" for Arroyo, tried to lead Arroyo into saying certain things, provided more information than Arroyo himself provided, and sought Arroyo's confirmation of information that the officer wanted to hear.

We further observe that during the police interview, Arroyo made several statements that were favorable to defendant. For example, Arroyo told Officer Zuniga that defendant was a “good guy,” that he had a “good heart,” and that he had stated to Arroyo that he wanted to “change” and “get an education.” Indeed, defendant’s trial counsel, while cross-examining Officer Zuniga about Arroyo’s police interview, referred to some of these favorable statements by Arroyo, which drew an objection from the prosecutor and a limiting instruction from the trial court. Before the police interview was played for the jury, defendant’s trial counsel may well have determined that it was important for the jury to hear Arroyo’s positive statements about defendant, as no similar information would likely be presented to the jury from another source. Trial counsel may have further determined that, if the defense started requesting redaction of certain unfavorable statements by Arroyo on the grounds that the statements were inadmissible character evidence, inadmissible hearsay, or inadmissible as unduly prejudicial under Evidence Code section 352, then the prosecution might similarly object to and request redaction of Arroyo’s favorable statements about defendant.

At the same time, trial counsel may have well determined that, to the extent the unfavorable statements by Arroyo were prejudicial, the prejudice was minimal because the unfavorable statements were brief in relation to the length of Arroyo’s entire police interview of more than one hour, the jury was already aware of the unfavorable information, or the issue could be addressed through other evidence presented at trial. For example, within the first ten minutes of the interview, and before Arroyo made any of the statements about which defendant now complains, Arroyo told Officer Zuniga that defendant had been “locked up” and that he eventually “came out.” The jury thus heard early on in the police interview that defendant had previously been in custody. Regarding the issue of tattoos, Arroyo indicated during the police interview that a person generally may earn a gang tattoo “[b]y getting locked up.” Although he agreed with Officer Zuniga that a tattoo “[p]robably” would be earned by “doing things” such as a

shooting, he never stated that defendant actually earned the “SEM” chest tattoo from shooting someone. At trial, during the cross-examination of Officer Zuniga, trial counsel elicited testimony suggesting that a Norteño could be “rewarded” with a tattoo if that Norteño “[took] one for the team” and remained silent when wrongfully accused by another Norteño. The jury was thus left with no definitive evidence as to the circumstances under which defendant actually obtained the “SEM” chest tattoo.

In sum, we cannot conclude that “ ‘there simply could be no satisfactory explanation’ ” for trial counsel’s failure to seek redaction of those portions of Arroyo’s police interview challenged by defendant on appeal. (*Ledesma, supra*, 39 Cal.4th at p. 746.) As defendant has not shown deficient performance by trial counsel, defendant fails to demonstrate ineffective assistance of counsel. (*Id.* at pp. 745-746; *Strickland, supra*, 466 U.S. at pp. 687-688.)

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.