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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME ALTUNO ALVAREZ,

Defendant and Appellant.

H039691

(Santa Clara County
Super. Ct. No. C1230950)

A jury convicted defendant Jaime Altuno Alvarez of attempted murder (Pen. Code, §§ 187, 664, subd. (a))¹ and willfully discharging a firearm from a motor vehicle at a person other than an occupant of a motor vehicle (§ 26100, subd. (c)). The jury found true an allegation that he committed the attempted murder willfully, deliberately, and with premeditation (§§ 187, 189, 664). Gang allegations (former § 186.22, subd. (b)(1)(A)) as to both counts and firearm allegations (§ 12022.53, subds. (b), (c), (e)(1)) as to the willful discharge count were also found true. Defendant was sentenced to an aggregate term of 35 years to life in prison.

On appeal, defendant contends that (1) the trial court improperly allowed the prosecution's gang expert to explain the bases of his opinions with testimonial hearsay, in

¹ Subsequent unspecified statutory references are to the Penal Code unless otherwise noted.

violation of the Sixth Amendment right to confrontation; (2) the trial court abused its discretion in denying defendant's request for an Evidence Code section 402 hearing; (3) there was insufficient "independent" evidence to support the primary activities element of the gang enhancement; (4) there was insufficient evidence to support a finding that the Sureño gang is an "ongoing organization, association, or group"; (5) the trial court improperly admitted evidence of a Sureño gang member's offensive tattoo; (6) the prosecutor committed misconduct; and (7) cumulative prejudice requires reversal. We reverse.

I. Background

In the late afternoon on April 22, 2012, cousins David Ballesteros and Ramon Moncayo set off on their bikes to go swimming at a nearby apartment complex. They rode on the sidewalk down Alum Rock Avenue in San Jose with Ballesteros in the lead and Moncayo following. As Ballesteros passed Checkers Drive and approached the driveway of a shopping center on his right, a silver car pulled over to the curb on his left and stopped. Two men and a woman were in the car. Ballesteros got "a good look" at the woman in the front passenger seat as he bicycled past the car, which was so close that the woman could have reached out and touched him. He "locked eyes" with her. The woman was dark-skinned with long curly hair "dyed like [an] orange-ish color." She was wearing a multi-colored shirt with butterflies or flowers on it. The driver was wearing a black shirt. Ballesteros saw his face, although he did not get as good a look at the man as he did at the woman passenger. The man sitting in the back seat on the passenger side was "kind of light-complected" and bald. Ballesteros "looked at him pretty good."

The occupants of the car were talking and looking at Moncayo, who was wearing black and red and white checkered shorts and a San Francisco Giants baseball cap. Ballesteros became concerned and looked back at Moncayo. "That's when it all happened." As Moncayo reached the driveway of the shopping center, the silver car

“pulled up five feet more.” The back passenger-side door opened and the male passenger “got out halfway” and hesitated. He was holding a gun and pointing it at Moncayo. The driver of the car yelled, “Hurry,” and the man with the gun fired one shot. It missed Moncayo, who had “dropped his bike and zigzagged” into the shopping center.

The silver car “took off fast” on Alum Rock Avenue toward King Road. The occupants “were all looking back” and Ballesteros was “pretty sure” they were trying to see if Moncayo had been hit. Ballesteros had several chances to see the car’s occupants, including “while I was passing by and while they were passing me.”

Ballesteros ran to find Moncayo and then called 911. San Jose Police Officer Jason Guzman arrived on the scene at about 6:00 p.m. Ballesteros told Guzman he could identify the woman if he saw her again and that he might be able to identify the driver and the shooter. Moncayo described the shooter and said he would recognize him if he saw him again. He told Guzman that the back passenger-side window of the car was down. The driver was wearing a black shirt. Moncayo did not see the driver’s face. He saw a girl in the front seat but would not recognize her if he saw her again. He believed the suspects were Sureños. He said he could just tell. “[T]his is their hood.” Moncayo told Guzman that he associated with Norteños but was not a gang member.

Officer Michael Ceballos was driving a marked patrol car westbound on Capitol Expressway when he heard the shots-fired broadcast. A few minutes later, he saw an eastbound car that matched the information in the broadcast. The driver of the car “watched and stared” at Ceballos and turned his head more than 90 degrees so he could continue to watch over his shoulder even after he passed him. Ceballos made a U-turn and pulled in behind the car. When it turned onto Excalibur Drive without signaling, Ceballos pulled it over. The driver of the car was defendant. The front-seat passenger

was Martina Loya.² No one was in the back seat, but the back passenger-side window was down.

Defendant showed Ceballos the “13” tattooed on his abdomen and said he had been a Sureño for six years. Ceballos asked, “Who you kick it with, bro?” Defendant said, “I kick it with everyone, man. I know a lot of Sureños” Ceballos asked, “Who? SSP, SVP, VST?” Defendant responded, “I kick it with all of those fools, man.” He denied belonging to any particular subset of the Sureño gang.

Officer Sjon Tol drove Ballesteros to the Excalibur Drive traffic-stop site for an in-field showup. Ballesteros told Tol, “The shooter is not there.” Ballesteros identified defendant as the driver of the car involved in the shooting and Loya as the front seat passenger. Ceballos arrested defendant and Loya and recovered cell phones from them both. No guns or ammunition were found in the car.

Detective Justin DeOliveira testified as the prosecution’s gang expert. He had more than 160 hours of gang training beyond the basic gang training he received at the police academy. He spent four years on patrol in areas of San Jose that are specifically associated with gang activity. He then joined the gang investigations unit, where he was assigned to the Sureño team. He had spoken with gang members “well over 500 times” about their gangs, how they do business, and their alliances and allegiances. He had investigated more than 100 gang cases involving murder, attempted murder, shooting from a vehicle, and weapons possession.

DeOliveira described the symbols, culture, and activities of Hispanic street gangs in San Jose. Sureños align themselves with the Mexican Mafia prison gang. They identify with the color blue and the number 13. Norteños align themselves with the Nuestra Familia prison gang. They identify with the color red and the number 14.

² Before trial, Loya pleaded guilty to being an accessory after the fact (§ 32). The parties stipulated that Loya was a Sureña.

Norteños and Sureños are rivals who harbor “extreme hatred” for each other. If a person wears red in a Sureño neighborhood, or conversely if a person wears blue in a Norteño neighborhood, that person “definitely would be confronted” with violence from the gang that claims the neighborhood as its own, even if the perceived offender is not a gang member. DeOliveira described Alum Rock Avenue as a thoroughfare between rival gang areas. Sureños and Norteños both use that thoroughfare, and “you tend to see [rival] gang members that run into each other.” A person wearing a Giants cap and red checkered shorts on Alum Rock Avenue “could easily be perceived as being a Norteño gang member.” Even apart from the color of their clothing, gang members can “often” be identified by “[t]he way they stand, the way they walk, haircuts, [and] what type of clothing they are wearing.”

Gang members go “hunting” for rival gang members. Norteños call it “scrap hunting” and Sureños call it “buster hunting.” DeOliveira opined that one of the primary goals of the Sureño gang is to inflict injury or death on Norteños. Violence is “a key aspect in gang life.” “Violence speaks the loudest.” “It shows who you are.” “It . . . controls the community and the [gang] members.” “[I]t’s a way of putting in work. It’s a way of earning your stars or bones. And it’s a way of furthering yourself within the gang.” Gang members “have to keep putting in . . . work to be in good standing with [the] gang.”

Weapons are key. A Sureño drive-by shooting “sends the message that, one, the gang has a gun.” A drive-by shooting also “strikes fear” because it’s a “very easy” crime to commit. Weapons are a sign of power.

DeOliveira opined that the San Jose Sureños are a group or association of three or more people that has the color blue and the number 13 as its common sign or symbol. He opined that the group’s primary activities include assault with a deadly weapon, attempted murder, and murder. He described three predicate crimes: a July 2010 attempted assault with a hammer, a November 2010 stabbing, and a January 2011 assault

and stabbing. Certified court records establishing the convictions were admitted into evidence.

DeOliveira opined that defendant was an active participant in the Sureño criminal street gang, although he could not say which particular subset defendant belonged to. He based his opinion on defendant's "13" tattoo, his admission to Ceballos during the traffic stop, photographs of defendant wearing gang clothing and displaying gang hand signs, and prior law enforcement contacts with defendant in association with other known Sureño gang members.

In response to a hypothetical question that tracked the evidence presented, DeOliveira stated that the shooting was committed for the benefit of or in association with a criminal street gang to promote, further, or assist in criminal conduct by that gang. He explained that the shooting happened in a contested area. "A shooting of someone wearing red clothing in that area, bottom line would send the message" not only to the particular targets but also to their friends and to the community. "The fact that Sureños are strong, specifically SVP is a subset in the area, would gain some type of credibility, some type of respect, not only among Sureños, but also Norteños in the area. Now they know they have a gun and they are willing to go out and shoot people in that area."

Ballesteros was 17 when he testified at trial. He has never been a gang member. He described what he saw that day. He identified defendant as the driver of the car. From photographs, he identified Loya as the female passenger, explaining that she had changed her shirt and put her hair in a ponytail before the field show-up, and "I had to point [it] out." From another photograph, Ballesteros identified "the car that they were in." Recordings of the 911 call, the infield identification, and police interviews were played for the jury, and jurors were also given transcripts. Ballesteros pointed out a number of substantive errors in the infield identification and interview transcripts. He testified that he was "positive" about his identification of Loya and "sure" about his identification of defendant. "Hundred percent sure."

Moncayo was 22 when he testified at trial. He admitted that he was in court only because he was told he would be jailed if he failed to appear. He acknowledged having been shot in the leg several years earlier while wearing a red shirt. Moncayo insisted that he was not a Norteño. He said that the “S” with a line through it³ tattooed on his hand was supposed to be a dollar sign, but “we ran out of ink.”

Moncayo described what happened that day. He agreed that it “wouldn’t be smart” or “the safest move” to wear red on Alum Rock Avenue. He believed the shooting was gang-related but did not think he was targeted for wearing red shorts. He claimed not to recognize defendant at trial. A recording of Moncayo’s interview with DeOliveira was played for the jury, and jurors were also given transcripts.

Officer William Stanfill collected evidence from the scene. He then went to the Excalibur Drive traffic-stop site and swabbed defendant’s hands and the car for gunshot residue (GSR). Criminalist Trevor Gillis testified as an expert in GSR analysis. He explained that a positive finding of GSR associates someone with firearm activity in one of four ways: the person discharged a firearm, was close by when a firearm was discharged, came in contact with a firearm, or came in contact with a surface that had GSR on it. GSR particles have three main constituents: lead, barium, and antimony. Those three in the presence of other supporting particles are characteristic of GSR. But the deposition of GSR is “incredibly unpredictable.” GSR was present on defendant’s left hand but not on his right hand. GSR testing of a swab taken from the exterior rear passenger-side door of defendant’s car was negative. Gillis explained that the test showed elevated levels of one of the three elements but “all three have to be elevated . . . to make a finding” of GSR.

³ DeOliveira testified that an S with a line through it or an X over it is a sign of disrespect to Sureños. It is “very common among Norteños.” “You see it in tattoos, but you primarily see it in graffiti.”

San Mateo County Sheriff's Department Intelligence Analyst Dylan McCulley analyzed defendant's and Loya's cell phone records. Computer graphics showing which cell phone tower sectors handled calls and texts to or from their phones that afternoon were admitted into evidence. The records showed both phones pinging off the same tower (at Alum Rock Avenue and King Road) in the same sector between 5:39:26 p.m. and 5:50 p.m. and between 5:53 p.m. and 5:57:47 p.m. There were no calls to or from either phone between 5:57:47 p.m. and 5:59:41 p.m. Both phones pinged off the same tower (in the area where Ceballos stopped defendant's car) in the same sector at 6:26 p.m. and 6:32 p.m.

Defense investigator James O'Keefe testified that he and another investigator drove various routes between Checkers Drive and Alum Rock Avenue and King Road and Alum Rock Avenue, stopping at the crime scene and attempting to replicate the incident. Their purpose was to see if it was possible for the car to travel from the area where the last cell phone call pinged off the tower at Alum Rock Avenue and King Road, commit the shooting, and return to where the next cell phone call pinged off that tower within the one-minute-and-54-second gap between those two calls. They timed each experiment. The results suggested that it could not be done in fewer than two minutes and 30 seconds. O'Keefe conceded that he had not listened to any trial testimony. He further conceded that defendant's and Loya's calls were not necessarily made from the starting and stopping points that he used. O'Keefe also conceded that he did not know what the traffic conditions were that day and that defendants fleeing crime scenes do not necessarily obey all traffic laws as he and his investigator did.

After deliberating for approximately four and a half hours, the jury returned guilty verdicts on both counts and found the enhancement allegations true. Defendant was sentenced as previously described. He filed a timely notice of appeal.

II. Discussion

A. Confrontation Clause Challenge to Gang Expert's Testimony

Defendant contends that the true findings on the gang and firearm allegations must be reversed because they were based on testimonial hearsay that DeOliveira improperly conveyed to the jury to establish that Sureños are a “criminal street gang” as former section 186.22, subdivision (b) defined the term.

1. Background

The prosecution moved in limine to admit gang evidence, including expert basis evidence. Relying on Evidence Code section 802 and *People v. Gardeley* (1996) 14 Cal.4th 605, 617-620 (*Gardeley*), the prosecutor argued that California law permits an expert “to describe the material that forms the basis of his opinion even when that opinion is based on inadmissible material.” He asserted that the gang’s primary activities would be established through the testimony of a gang expert, that evidence of the prior gang crimes was highly probative for establishing the statutorily required predicate crimes and proving the primary activities of the gang, and that the requested information was also probative “in explaining how the expert reached his opinions regarding the primary activities”

The defense filed a competing motion to preclude the gang expert from recounting any hearsay as a basis for his opinions. It argued in particular that expert opinion on the primary activities and pattern of criminal gang activity elements was inadmissible hearsay and lacked foundation. The defense emphasized that it “could not locate authority authorizing an expert . . . to recapitulate the contents of police reports to prove that an alleged gang has in fact engaged in predicate offenses constituting the pattern of criminal gang activity necessary to support a gang enhancement.”

At the in limine hearing, defendant’s trial counsel objected to the gang expert “pick[ing] three predicate offenses and read[ing] the police report and provid[ing], you know, testimony regarding that.” He also argued that “[i]t’s not enough for him to

summarize the gist [of] what an officer told him.” The trial court responded that “[e]very case is different, and I’m not sure if that’s the case . . . with this particular witness. You make reference to police reports. . . . I’m not sure what evidence we’re talking about” The prosecutor interjected that “[t]he large portion of [the gang expert’s] testimony is based on the police reports underlying the . . . predicate convictions, as well as his own experiences and investigations, communicating with gang members, as well as review of -- as far as gang membership and various people was related to reviewing field identification [FI] cards in this case. He contacted two other officers that personally interviewed the defendant.” The trial court asked, “So we have police reports that are the basis of subsequent convictions?” The prosecutor responded, “Correct.”

The trial court denied the defense motion. The court explained, “I think that it would be appropriate to allow the expert to testify concerning the police reports that involve these [predicate offenses], obviously that were generated by an investigating officer, which may include statements by a percipient witness given to the officer.” “I don’t think it’s appropriate to have testimony if it’s contained in the police report, where a witness is telling the police officer some things that person did not personally perceive, like: Oh, yeah, A told me this and that, and it’s just recounting to the police officer. That type of stuff is too far removed. [¶] I agree with you, it being incompetent hearsay, but not knowing what is contained in each individual police report that you’re concerned with, Mr. Morales, it makes it difficult for me to make a specific ruling. But I’m just trying to give you some general guidance on how I view it. And I believe if he’s looking at a police report, with the addition of a conviction, that the officer, the investigating officer, is recounting information that is given to him by percipient witnesses. And I think the expert relying on that information is sufficient to allow him to rely on it. [¶] That does not say that you are not in a position to cross-examine him on those individual police reports to demonstrate to the jurors that [the expert is relying] on information that he’s not personally aware of or that is incompetent or not very valid. So his opinion

should be given less weight, you know. Obviously, you're entitled to go into all of that without restriction."

DeOliveira described the predicate crimes. In November 2010, Edgar Loya and Dyann Ramirez spotted a man who was walking home from work. The man had visible tattoos. Loya got out of the car in which he was riding, questioned the man about his gang affiliation and tattoos, and stabbed him with a knife. Loya yelled "Sur trece" as he fled. He pleaded no contest to assault with a deadly weapon and admitted a gang allegation.

The prosecutor asked DeOliveira, "Is Mr. Loya a documented Sureño?" DeOliveira responded, "He is." DeOliveira was not questioned about the source of his information.

The next predicate crime involved Jayro Torres. DeOliveira said he was "familiar with" the Torres case and had reviewed "the reports" in the case. In July 2010, Sureño gang members in a car spotted a pedestrian who was "flamed out" in red clothing. Torres jumped out of the car with a hammer as the others yelled "chap," a derogatory Spanish term (chapete) for Norteños. Torres attempted to assault the victim with the hammer. The victim fled, and Torres and others chased after him. An officer who happened to be in the area arrested Torres. Torres told investigating officers that he was a Sureño. He pleaded no contest to assault with a deadly weapon and admitted a gang allegation.

The final predicate crime involved Mario Quinones and Salvador and Jesus Canales. In January 2011, they confronted an individual at the Berryessa flea market. The victim was not a Norteño but he was wearing clothing that could be perceived as Norteño—a gray and black checkered flannel with a black hoodie, a gray belt with a silver buckle, and a black bandana folded out of his pocket. DeOliveira explained that among Norteños who associate with the West Side San Jose subset and also among some Norteños on the east side, "within the last couple of years there has been some type of fad to move to gray clothing, especially with the belts." When the victim denied being a

gang member, the three attacked and stabbed him several times. Jesus Canales pleaded guilty to assault with a deadly weapon and admitted gang and great bodily injury allegations. Salvador Canales and Quinones pleaded no contest to assault with a deadly weapon and admitted gang allegations.

The prosecutor asked DeOliveira, “So how do you know that Salvador Canales . . . was a Sureño?” DeOliveira replied, “Based on, one, the elements or the circumstances within the crime, his prior documentation of being with gang members, and his gang tattoos.” The prosecutor asked DeOliveira how he knew that all three assailants were Sureños. DeOliveira replied “Within the case. Also, there was an interview afterwards by investigating officers, and one of the suspects stated that the fight ensued because they believed that the victim had called them a derogatory gang name.”

2. Confrontation Clause Case Law

The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right “to be confronted with the witnesses against him.” In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that this provision prohibits the admission of testimonial hearsay unless the witness is unavailable or there was a prior opportunity for cross-examination. (*Id.* at p. 68.) The court held that the confrontation clause barred the prosecution from introducing a statement made during a formal police interview, explaining that “interrogations by law enforcement officers fall squarely within” the definition of testimonial hearsay. (*Crawford*, at p. 53.)

The *Crawford* court did not provide a definition of “‘testimonial’ statements” but noted “[v]arious formulations” of the term, including “‘*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ [citation]; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as

affidavits, depositions, prior testimony, or confessions,’ [citation]; ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ [citation].” (*Crawford, supra*, 541 U.S. at pp. 51-52.)

The high court again declined to “attempt[] to produce an exhaustive classification” of testimonial statements in *Davis v. Washington* (2006) 547 U.S. 813, 822 (*Davis*). In *Davis*, the court held that a victim’s statements to a 911 operator during and immediately after the crime were not testimonial because their “primary purpose was to enable police assistance to meet an ongoing emergency” (*id.* at p. 828), whereas a victim’s statements made to a police officer were testimonial because “[t]here was no emergency in progress” and the primary purpose of the interrogation “was to investigate a possible crime.” (*Id.* at pp. 829-830).

The *Davis* court set forth “what has come to be known as the ‘primary purpose’ test.” (*Ohio v. Clark* (2015) ___ U.S. ___ [135 S.Ct. 2173, 2179] (*Clark*)). “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Davis, supra*, 547 U.S. at p. 822.) The court held that the confrontation clause did not apply only to “testimonial statements of the most formal sort—sworn testimony in prior judicial proceedings or formal depositions under oath,” and it noted that “the protections of the Confrontation Clause can[not] readily be evaded by having a note-taking policeman *recite* the unsworn hearsay testimony of the declarant, instead of having the declarant sign a deposition.” (*Davis*, at p. 826.)

The court provided “additional clarification” on the primary purpose test in *Michigan v. Bryant* (2011) 562 U.S. 344, 359 (*Bryant*). The court explained that “the

relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred.” (*Id.* at p. 360.) The court held that a shooting victim's statement to the police, made while the victim lay bleeding in a parking lot, was not testimonial because the objective circumstances indicated “that the ‘primary purpose of the interrogation’ was ‘to enable police assistance to meet an ongoing emergency.’” (*Id.* at p. 378.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 308 (*Melendez-Diaz*), the court considered whether the confrontation clause permitted the prosecution to introduce “‘certificates of analysis.’” The police had found plastic baggies containing a white substance in a car the defendant had been in. The baggies were submitted to a lab for forensic analysis, which revealed that the substance was cocaine. Because “the *sole purpose* of the affidavits” was to provide evidence for use at trial, the affidavits were testimonial hearsay. (*Id.* at p. 311.)

In *Bullcoming v. New Mexico* (2011) ___ U.S. ___, ___ [131 S.Ct. 2705, 2717, 2710] (*Bullcoming*), the court reaffirmed that “[a] document created solely for an ‘evidentiary purpose,’ . . . made in aid of a police investigation, ranks as testimonial.” In *Bullcoming*, the court held that a certified forensic laboratory report prepared to determine a suspect's blood alcohol content could not be admitted “through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” (*Bullcoming*, at p. ___ [131 S.Ct. at p. 2710].) The court declined to distinguish *Melendez-Diaz* on the basis that the laboratory reports were not signed under oath, explaining that in determining whether a document is testimonial, “‘the absence of [an] oath [i]s not dispositive.’” (*Bullcoming*, at p. ___ [131 S.Ct. at p. 2717].) Additionally, the court rejected the claim that a document prepared during a police investigation is outside the scope of the Sixth Amendment simply because it “record[s]

an objective fact” such as “the address above the front door of a house or the read-out of a radar gun,” specifically noting that a police report containing such information would be testimonial. (*Id.* at p. ___ [131 S.Ct. at p. 2714].)

In *Williams v. Illinois* (2012) ___ U.S. ___ [132 S.Ct. 2221] (*Williams*), the court considered whether “basis evidence”—that is, evidence that provides a basis for an expert opinion—is admissible under the confrontation clause. The question before the court was, “[D]oes *Crawford* bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify?” (*Williams*, at p. ___ [132 S.Ct. at p. 2227].) The court examined whether a laboratory expert could rely on a DNA report from a prior criminal case in rendering his opinion that the defendant’s DNA profile matched the prior sample. In a 4-1-4 opinion, the court held that admission of the expert’s testimony did not violate the confrontation clause.

A plurality of the *Williams* court held that even if the basis evidence was offered for its truth, it was not testimonial. (*Williams, supra*, ___ U.S. at p. ___ [132 S.Ct. at p. 2228 [plur. opn. of Alito, J., joined by Roberts, C. J., Kennedy & Breyer, JJ.].) The DNA report was “produced before any suspect was identified,” it was sought “for the purpose of finding a rapist who was on the loose” rather than to obtain evidence against the defendant, and it was “not inherently inculpatory.” (*Id.* at p. ___ [132 S.Ct. at p. 2228].) Justice Thomas agreed that the basis evidence was not testimonial, but for different reasons: it “lack[ed] the solemnity of an affidavit or deposition,” and, “although the report was produced at the request of law enforcement, it was not the product of any sort of formalized dialogue resembling custodial interrogation.” (*Id.* at p. ___ [132 S.Ct. at p. 2260] [conc. opn. of Thomas, J.].)

In *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*), the California Supreme Court noted that although the United States Supreme Court “has not agreed on a definition of ‘testimonial,’ testimonial out-of-court statements have two critical components. First, to

be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.” (*Id.* at p. 619.)

The United States Supreme Court recently reaffirmed that “a statement cannot fall within the Confrontation Clause unless its primary purpose was testimonial.” (*Clark, supra*, ___ U.S. at p. ___ [135 S.Ct. at p. 2180-2181] [three-year-old child’s statement to teachers about child abuse inflicted by the defendant, was “not made with the primary purpose of creating evidence”].)

The California Supreme Court has not yet decided whether the confrontation clause prohibits a gang expert from relying on testimonial hearsay as the basis of an opinion, nor whether a gang expert can rely on testimonial hearsay to provide evidence of the elements of the gang enhancement.⁴ In *Gardeley*, the court reasoned that, “[c]onsistent with [the] well-settled principles” concerning expert witness testimony, a 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*, 14 Cal.4th at p. 619.) The *Gardeley* court reasoned that a gang expert can rely on inadmissible hearsay in rendering an opinion because such evidence is not offered as “‘independent proof’ of any fact.” (*Ibid.*) *Gardeley* did not address a Confrontation Clause claim or whether testimonial hearsay can be admitted through a gang expert to prove elements of the gang enhancement such as the “primary activities” or “pattern of criminal gang activity” elements. (Former § 186.22, subd. (f).)

⁴ The California Supreme Court is currently considering whether the Sixth Amendment right to confrontation bars a gang expert’s reliance on testimonial hearsay. (*People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted May 14, 2014, S216681; see also *People v. Archuleta* (2014) 225 Cal.App.4th 527, review granted June 11, 2014, S218640 [briefing deferred pending consideration and disposition of *People v. Sanchez*].)

3. Analysis

Defendant challenges the bases for DeOliveira's opinion that the Sureño gang is a "criminal street gang" as former section 186.22, subdivision (f) defined that term. He argues that the "primary activities" and "pattern of criminal gang activity" elements were improperly established by testimonial hearsay—specifically, statements from police reports and field information cards and admissions from gang members about their gang status, all of which were "manifestly gathered by police for use in gang prosecutions." The Attorney General counters that "most, or all, of the out-of-court information and statements on which Officer DeOliveira relied were not testimonial." Both parties recognize that resolution of the issue depends on which party had the burden of proof. We begin there.

Defendant contends that his trial counsel's "*Crawford* objection to the expert's use of hearsay triggered the black letter rule that the proponent of evidence has the burden of establishing its admissibility." We agree. Defendant challenged the admission of the evidence on confrontation clause grounds, requested an Evidence Code section 402 hearing, and obtained a ruling that his in limine objections would be deemed continuing objections. The Attorney General has expressly acknowledged the adequacy of defendant's *Crawford* objections to the admission of testimonial hearsay gang basis evidence. Thus, the burden was on the prosecution, "as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause," to prove that the statements DeOliveira relied on were not testimonial. (*Idaho v. Wright* (1990) 497 U.S. 805, 816 (*Wright*), overruled in part by *Crawford, supra*, 541 U.S. at pp. 60-62.)

The record in this case reflects that DeOliveira had significant gang experience. He personally knew "well over 25, 30" San Jose Sureños, and assault with a deadly weapon was "probably the most abundant violent crime" that he investigated as a detective on the Sureño team of the gang investigations unit. But he testified only generally about the sources of the information he relayed to the jury about the predicate

offenses. He said that he was “familiar with” the Torres case and had reviewed “the reports” in that case. He was not asked how he knew the details of the Canales/Quinones case. He testified that he knew all three assailants in the Canales/Quinones case were Sureños because “there was an interview afterwards by investigating officers and one of the suspects stated that the fight ensued because they believed that the victim had called them a derogatory gang name.” He added that he knew Salvador Canales was a Sureño based on “the circumstances within the crime, his prior documentation of being with gang members, and his gang tattoos.” DeOliveira was not asked how he knew the details of the Loya/Ramirez case. Nor was he asked about the basis of his opinion that Edgar Loya was a Sureño.

The prosecutor had earlier represented that “[t]he large portion of [the gang expert’s] testimony is based on the police reports underlying the . . . predicate convictions” But no police reports were introduced in evidence. The only documents supporting the predicate offenses were certified court records establishing the defendants’ convictions. The records do not indicate what gang any of the convicted defendants belonged to. Nor do they provide details about how the offenses were committed.

On this record, we must conclude that the prosecution failed to meet its burden of establishing that the statements DeOliveira relied on were not testimonial hearsay. The prosecution did not establish that those statements were not made “in response to structured police questioning” or otherwise “lacked the solemnity and formality that characterize” testimonial statements. (*Crawford, supra*, 541 U.S. at p. 53, fn. 4; *Dungo, supra*, 55 Cal.4th at p. 623, Werdegar, J., conc.) It made no showing that the primary purpose of the statements did not “pertain[] in some fashion to a criminal prosecution.” (*Dungo*, at p. 619; see *Melendez-Diaz, supra*, 557 U.S. at pp. 310-311.) The prosecution could have carried its burden by eliciting testimony that DeOliveira had personal knowledge of the convicted defendants’ gang affiliations and the details of their crimes,

or that he obtained that information from nontestimonial sources. The prosecution could have called another officer to testify about the convicted defendants' gang affiliations and the details of their crimes without relying on testimonial hearsay. It did not do so, and we cannot conclude on the record before us that DeOliveira's testimony came from nontestimonial sources.

The Attorney General contends that the certified court records establishing convictions for the predicate offenses were not testimonial hearsay. (*People v. Taulton* (2005) 129 Cal.App.4th 1218, 1225.) She is correct, but that does not advance her position because the records did not reveal the convicted defendants' gang affiliations or provide details about how the offenses were committed. Thus, the documents did not establish that *Sureño* gang members had engaged in a "'pattern of criminal gang activity'" by participating in "'two or more' of specified criminal offenses (so-called 'predicate offenses')" within the requisite time period. (Former § 186.22, subs. (e), (f); *Gardeley, supra*, 14 Cal.4th at p. 610.)

The Attorney General also argues that FI cards and certain statements made to police officers are nontestimonial because they are not generated for the purpose of providing evidence in a potential criminal trial, even if they are ultimately used as evidence in court. That argument does not advance her position either because even if we assume the argument has merit, we cannot conclude on the record before us that DeOliveira relied solely on those sources of information when he testified about the details of the predicate offenses and about the convicted defendants' gang affiliations. We conclude that the prosecution failed to meet its burden of demonstrating that the challenged testimony about the *Sureño* gang's "pattern of criminal gang activity" was not testimonial. (Former § 186.22, subd. (f); *Wright, supra*, 497 U.S. at p. 816.) Admission of the testimony violated the confrontation clause.

The next question is whether the error was harmless. Where a criminal defendant's Sixth Amendment confrontation right has been violated, reversal is required

unless the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) This standard of review requires “the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*)). Reversal is required if there is a “reasonable possibility that the evidence complained of might have contributed to the conviction.” (*Chapman*, at p. 23; *Yates v. Evatt* (1991) 500 U.S. 391, 403 (*Yates*), disapproved on another point in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) “To say that an error did not ‘contribute’ to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.” (*Yates*, at p. 403.) “To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that [the error] did not contribute to the verdict is to make a judgment about the significance of the [error] to reasonable jurors, when measured against the other evidence considered by those jurors independently of the [error].” (*Yates*, at pp. 403-404.) “[T]he appropriate inquiry is ‘not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.’ (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)” (*People v. Quartermain* (1997) 16 Cal.4th 600, 621 (*Quartermain*); accord *People v. Neal* (2003) 31 Cal.4th 63, 86.)

DeOliveira’s challenged testimony here, “the large portion” of which was “based on the police reports underlying the . . . predicate convictions” and also on his communications with gang members and his review of field identification [FI] cards, was the only evidence that the perpetrators of the predicate offenses were Sureños. Without evidence that they were Sureños, the prosecution could not have established that defendant’s gang engaged in a “pattern of criminal activity” by committing or attempting to commit two or more of the offenses enumerated in former section 186.22, subdivision

(e). Without proof that the gang engaged in a pattern of criminal activity, the prosecution could not have established that the Sureño gang is a “criminal street gang” as former section 186.22, subdivision (f) defined that term. And without proof that the Sureño gang was a criminal street gang, the jury could not have found the gang and firearm allegations true. Thus, the error here necessarily contributed to the true findings on those enhancement allegations. The error was not harmless beyond a reasonable doubt.

(*Chapman, supra*, 386 U.S. at p. 23; *Yates, supra*, 500 U.S. at p. 403.)

The Attorney General argues that the error was harmless beyond a reasonable doubt because “the charged crimes committed by [defendant] and his two companions also qualified as predicate offenses.” We cannot agree. “Under the statute, the pattern of criminal activity can be established by proof of ‘two or more’ predicate offenses committed ‘on separate occasions, *or* by two or more persons.’” (*People v. Loewen* (1997) 17 Cal.4th 1, 9; former § 186.22, subd. (e).) Attempted murder is an enumerated offense. (Former § 186.22, subd. (e)(3).) Defendant admitted that he was a Sureño, so his attempted murder charge qualified as one predicate offense.⁵ There was no evidence that the shooter was a Sureño, so none of his uncharged offenses qualify. The parties stipulated that Loya was a Sureña. But there was little if any evidence that she aided and abetted defendant’s crimes. “‘To be an abettor the accused must have *instigated or advised* the commission of the crime *or been present for the purpose of assisting in its commission* [and] must share the criminal intent with which the crime was committed’ [Citations.]” (*People v. Durham* (1969) 70 Cal.2d 171, 181.) “[M]ere presence alone at the scene of the crime is not sufficient” (*Ibid.*) Here, the only basis for a finding that Loya aided and abetted defendant’s crimes was evidence that she was in the car, that she and the other two occupants were talking and looking at Moncayo

⁵ Defendant’s conviction for willfully and maliciously discharging a firearm from a motor vehicle is not an enumerated offense. (Former § 186.22, subd. (e)(6); § 26100, subd. (c).)

immediately before the shooting, and that she made telephone calls to unknown persons before and after the shooting. This scant evidence that Loya aided and abetted an enumerated offense was greatly eclipsed by DeOliveira's detailed description of the three predicate offenses and his testimony that the perpetrators of those offenses were Sureños. Consequently, we cannot say that the jury's true findings on the gang and firearm allegations were "surely unattributable to the error" in admitting DeOliveira's challenged testimony. (*Quartermain, supra*, 16 Cal.4th at p. 621.) We reject the Attorney General's argument that the error was harmless beyond a reasonable doubt.

B. Refusal to Conduct Evidence Code Section 402 Hearing

In his opening brief, defendant asserted that the combination of the trial court's in limine rulings and his trial counsel's objections to DeOliveira's expert testimony adequately preserved his claim of *Crawford* error for appeal. The Attorney General responded that the trial court recognized defendant's continuing hearsay objection to the admission of DeOliveira's expert testimony. She agreed that defendant preserved his *Crawford* objection. She stated that "[i]t is therefore unnecessary to address or resolve appellant's claim that the trial court failed to conduct an evidentiary hearing to litigate the admissibility of the gang expert's testimony." Defendant replied that her "concession" was well-taken.

We have addressed defendant's *Crawford* claim. Where both parties agree that we need not address his Evidence Code section 402 claim, we decline to do so.

C. Sufficiency of the Evidence

1. Primary Activities

Defendant challenges the sufficiency of the evidence to support the gang and firearm enhancements, arguing that there was insufficient "independent" evidence of the primary activities element of the gang enhancement. We disagree.

“We review the sufficiency of the evidence to support an enhancement using the same standard we apply to a conviction. [Citation.]” (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) “[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

“The phrase ‘primary activities,’ as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s ‘chief’ or ‘principal’ occupations. [Citation.]” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.) “Sufficient proof of the gang’s primary activities might consist of evidence that the group’s members *consistently and repeatedly* have committed criminal activity listed in the gang statute.” (*Id.* at p. 324.) The trier of fact may consider past offenses and the charged offenses in determining whether the primary activity element is satisfied. (*Id.* at pp. 320, 323.) “Also sufficient might be expert testimony, as occurred in *Gardeley* There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. [Citation.] The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on ‘his personal investigations of hundreds of crimes committed by gang members,’ together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]” (*Id.* at p. 324.)

Here, DeOliveira testified based on his experience as a patrol officer and as a detective on the Sureño team of the gang investigations unit that he was aware of “tens upon tens, if not hundreds, of cases” that caused him to believe that assault with a deadly weapon, attempted murder, and murder were among the primary activities of the San Jose Sureños. He had personally investigated numerous gang cases involving murder and attempted murder. He testified that assault with a deadly weapon was “probably the most abundant violent crime” that he investigated as a gang unit detective. His testimony, together with evidence of the charged crimes, was sufficient to establish the primary activities element of the gang enhancement.

2. Ongoing Organization, Association, or Group

Defendant challenges the sufficiency of the evidence that Sureños are a criminal street gang by arguing that there was not sufficient evidence to show that they are an “ongoing organization, association, or group” as provided in former section 186.22, subdivision (f). We disagree.

The issue is one of statutory interpretation of former section 186.22, subdivision (f). “We begin with the fundamental premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citations.] To determine legislative intent, we turn first, to the words of the statute, giving them their usual and ordinary meaning. [Citation.] When the language of a statute is clear, we need go no further. However, when the language is susceptible of more than one reasonable interpretation, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]” (*People v. Flores* (2003) 30 Cal.4th 1059, 1063.)

“When attempting to ascertain the ordinary, usual meaning of a word [in a statute], courts appropriately refer to the dictionary definition of that word.” (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.) As defendant himself

points out, “[a]n ‘association’ is defined as a ‘group of people organized for a joint purpose.’” He notes that “organization” is similarly defined as “[a] group of persons organized for a particular purpose’”

Here, there was more than sufficient evidence to prove the “ongoing . . . association” element of former section 186.22, subdivision (f). DeOliveira testified that there are “around 900” Sureños in San Jose and that he personally knew and could identify by first and last names “[p]robably well over 25, 30 individuals” in that group. Sureños are aligned with the Mexican Mafia prison gang, with “very much” the same guidelines and philosophy. DeOliveira testified that one of the primary goals of the Sureño gang is to inflict injury or death on Norteños. The crimes in this case involved Sureños attempting to inflict violence on a perceived Norteño. This evidence was sufficient to establish that Sureños in San Jose are an “ongoing organization, association, or group.” (Former § 186.22, subd. (f).)

Defendant argues that “[i]nterpreting the gang statute to define a criminal street gang as a ‘group,’ i.e., an assembly of people with similarities, would lead to absurd results unintended by the Legislature” because fans of The Grateful Dead, “inmates of California’s prison system,” and “hometown fans of . . . the Philadelphia Phillies” fit the dictionary definition of “group.” The argument lacks merit. The statutory definition is written in the disjunctive: “organization, association, or group.” (Former § 186.22, subd. (f).) The word “or” . . . ordinarily is used as a disjunctive conjunction, the function of which is to mark an alternative generally corresponding to ‘either,’ as ‘either this or that.’” (*People v. Smith* (1955) 44 Cal.2d 77, 78.) Here, we have concluded that there was sufficient evidence that Sureños are an association or organization as defendant himself claims those words are defined.

Defendant’s reliance on a quote that he takes from *People v. Williams* (2008) 167 Cal.App.4th 983 is misplaced. The defendant in that case argued that there was insufficient evidence to support *the primary activities element* that had to be proven to

establish that his gang, the Small Town Peckerwoods, was a “criminal street gang.” (*Id.* at p. 986.) The issue on appeal was “the relationship that must exist before a smaller group can be considered part of a larger group for purposes of determining whether the smaller group constitutes a criminal street gang.” (*Id.* at p. 985.) The court explained that “having a similar name” was not “of itself, sufficient to permit the status or deeds of the larger group to be ascribed to the smaller group.” (*Id.* at p. 987.) “[S]omething more than a shared ideology or philosophy, or a name that contains the same word, must be shown before multiple units can be treated as a whole when determining whether a group constitutes a criminal street gang. . . . [S]ome sort of collaborative activities or collective organizational structure must be inferable from the evidence, so that the various groups reasonably can be viewed as parts of the same overall organization.” (*Id.* at p. 988.) The California Supreme Court recently reached a similar conclusion in *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), holding that “where the prosecution’s case positing the existence of a single ‘criminal street gang’ for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.” (*Id.* at p. 71.)

Neither *People v. Williams* nor *Prunty* helps defendant here. *People v. Williams* did not address what must be shown to establish the “ongoing association” element of a criminal street gang. Unlike in *People v. Williams*, there was no evidence here that defendant was part of a local gang that shared no more than a similar name and a shared ideology with a loosely-organized larger group. Defendant self-identified as “a Sureño,” not as a member of a separate local gang. He claimed to know “a lot of Sureños” in San Jose, and said he “kick[ed] it” with all of them. There was no evidence that the San Jose Sureños differentiated themselves in any meaningful way from the larger organization or belonged to it only in name. *People v. Williams* is inapposite.

Unlike *People v. Williams*, *Prunty* did address what must be shown to establish the “‘ongoing organization’” element of a criminal street gang. (*Prunty, supra*, 62 Cal. 4th at

p. 71.) But it did so in circumstances quite different than those presented here. In *Prunty*, the court considered “what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets.” (*Id.* at p. 67.) The issue “arises only when the prosecution seeks to prove a street gang enhancement by showing the defendant committed a felony to benefit a broader umbrella gang, but seeks to prove the requisite pattern of criminal gang activity with evidence of felonies committed by members of subsets to the umbrella gang.” (*Id.* at p. 91 [Corrigan, J., conc. in judg.]) The *Prunty* court concluded that “where the prosecution’s case positing the existence of a single ‘criminal street gang’ for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.” (*Prunty*, at p. 71.)

The issue that the court considered in *Prunty* did not arise in this case. Not only was there no evidence that the San Jose Sureños differentiated themselves in any meaningful way from the larger organization, there was affirmative evidence that San Jose Sureños were not Sureños in name only. DeOliveira described the organizational structure of the gang. “[Y]ou have the Mexican Mafia prison gang and beneath that . . . your street Sureños.” “And, beneath that, the Sureños can be split up into small sub gangs for particular neighborhoods.” He explained that Sureño gang subsets in San Jose are not as defined by particular neighborhoods as Norteño subsets are. “You see [Sureño subsets] having affiliation to multiple areas. East San Jose, for example.” The reason is that there are far fewer Sureños than there are Norteños in San Jose, only around 900 Sureños versus almost 10,000 Norteños. Sureños in San Jose “needed to band together” because they are vastly outnumbered by their common enemy, the Norteños.

DeOliveira testified that gang members are expected to put in work for the gang. “Putting in work” can include “posting” in a neighborhood to show a gang presence, committing crime for the gang (for example, stealing a car to be used in a shooting or a

burglary), and “hunting” and inflicting violence on rival gang members. Gang leaders control the membership by violence. Discipline (or “DP”) is “crucial.” Members are disciplined for not following “gang rules and standard operating procedures.” They can be physically disciplined for failing to “do anything about it” when challenged by a rival gang member, for cooperating with law enforcement, or for failing to put in work for the gang. Some discipline is financial. A gang member who sells drugs and fails to pay “taxes” to the gang can be disciplined financially “because they know you have money.” Given all of this evidence, neither *People v. Williams* nor *Prunty* advances defendant’s argument. Thus, there was sufficient evidence to establish the “ongoing association element” of former section 186.22, subdivision (f).

D. “Offensive Tattoo” Evidence

Defendant contends that the trial court abused its discretion by overruling his Evidence Code section 352 objection to one of the slides in DeOliveira’s Powerpoint presentation about gangs. We disagree.

1. Background

DeOliveira’s PowerPoint presentation included photos of Sureños with whom defendant had been known to associate. One slide showed Alejandro Garcia, who had “Fuck the Judge and the DA” tattooed across his forehead. Defense counsel argued that the tattoo was “highly offensive,” that the prejudicial effect of the slide was “extraordinary,” and that its probative value was “minimal.” The trial court overruled the objection. “It’s my belief that the gang expert will be talking, among other things, about the gang culture and habits and customs of the gangs. And tattoos in the gang lifestyle, I think, [are] a major part of gangs. I might feel a little differently if the tattoo involved specifically [defendant]. But, clearly, it does not.”

2. Analysis

“The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. . . . ‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.’” (*People v. Karis* (1988) 46 Cal.3d 612, 638.) We review the trial court’s evidentiary rulings for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 724.) “‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’” [Citation.]” (*People v. Jones* (2013) 57 Cal.4th 899, 924.)

The court’s ruling here was not arbitrary, capricious, or patently absurd. The challenged slide appeared in the section of DeOliveira’s presentation that illustrated defendant’s association with members of at least six different Sureño gang subsets. That slide and several others supported and augmented defendant’s admission (depicted in another slide) that he “kick[ed] it with everyone man, a lot of Sureños you know.” Defendant’s association with Garcia, whose facial and head tattoos suggested his strong commitment to the gang, was relevant to show the extent of defendant’s involvement with a variety of Sureño subsets. Garcia’s tattoo was also relevant to illustrate DeOliveira’s testimony about gang culture in general and Sureño gang culture in particular.

We do not find the slide unduly prejudicial. First, the tattoo at issue belonged to another gang member, not to defendant. For that reason, it was unlikely to evoke an emotional bias against defendant. Second, the tattoo's placement at Garcia's hairline rendered its message difficult if not impossible to read on the slide. The message was also recited on the slide, but it was not emphasized. On the contrary, it appears in much smaller print than that used for the other statements on the slide. Finally, the slide was only briefly displayed. DeOliveira's testimony about defendant's association with Garcia consumed less than one page of the more than 750 pages of trial testimony. The prosecutor then moved on to the next slide, which depicted Loya.

Defendant argues that the slide depicting Garcia's tattoo was "completely unnecessary to the prosecution's case." But that is not the relevant standard. Evidence need not be excluded merely because it is "cumulative of the testimonial evidence presented." (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) Nor is the prosecution required to limit itself to evidence that the defense finds palatable. (See *Old Chief v. United States* (1997) 519 U.S. 172, 186 [the "standard rule [is] that the prosecution is entitled to prove its case by evidence of its own choice"].)

Defendant claims "[t]here was a danger that jurors would resort to guilt by association and judge [defendant] harshly because Garcia was the sort of company he kept." We are not persuaded. The court instructed the jury pursuant to CALCRIM No. 1403 that it could consider gang activity only for limited purposes, that it could not consider such evidence "for any other purpose," and that it specifically could not "conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crimes." "We 'credit jurors with intelligence and common sense' [citation] and presume they generally understand and follow instructions [citation]." (*People v. McKinnon* (2011) 52 Cal.4th 610, 670.) We conclude that the trial court did not abuse its discretion in overruling defendant's Evidence Code section 352 objection to admission of the slide showing Garcia's tattoo.

E. Prosecutorial Misconduct

Defendant complains that the prosecutor committed misconduct during closing argument by improperly urging the jury to draw adverse inferences from defendant's failure to testify, in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), and by misstating the concept of proof beyond a reasonable doubt. The Attorney General responds that defendant forfeited these arguments and that they lack merit in any event. We agree with the Attorney General.

““The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’”” [Citation.]” (*People v. Gray* (2005) 37 Cal.4th 168, 215-216.) “A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence. [Citation.]” (*People v. Ledesma*, (2006) 39 Cal.4th 641, 726.) “When the issue ‘focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citations.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203, (*Cole*)). “In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.] [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553-554 (*Brown*)).

“As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an

assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Defendant did not object to the prosecutor’s arguments below. Nor did he seek appropriate admonitions. His failure to do so has forfeited his claims on appeal. (*People v. Turner* (2004) 34 Cal.4th 406, 420; *People v. Green* (1980) 27 Cal.3d 1, 34-35, abrogated on another ground in *People v. Martinez* (1999) 20 Cal.4th 225.) Defendant’s claims of prosecutorial misconduct lack merit in any event. We address each in turn.

1. *Griffin* Error

Defendant claims the prosecutor committed *Griffin* error by urging the jury to draw adverse inferences from his failure to testify at trial.

In *Griffin*, the United States Supreme Court held that the Fifth Amendment prohibits a prosecutor from commenting either directly or indirectly on a defendant’s failure to testify. (*Griffin, supra*, 380 U.S. at p. 613.) Although a prosecutor is not prohibited from commenting on testimony or evidence presented at trial, it is *Griffin* error “for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf.” (*People v. Hughes* (2002) 27 Cal.4th 287, 371 (*Hughes*)). In reviewing a claim of *Griffin* error, we examine whether there is a reasonable likelihood that the jury understood the remarks, in context, as a comment on the defendant’s failure to testify. (*People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*)). We find no such likelihood here.

Defendant challenges two sentences that he excerpts from the prosecutor’s closing argument: “Listen to the defense in this case, and listen if there is any explanation based on the evidence, not speculation or conjecture, for that gunshot residue on his hands. It was on his hands because the shooter fired the gun through the window in the back seat.” Defendant argues that these remarks “implied that [he] had failed to explain state evidence uniquely within his knowledge.” We cannot agree.

The challenged sentences must be read in context. (See *Clair, supra*, 2 Cal.4th at p. 663.) The prosecutor argued that the evidence against defendant was overwhelming. He recalled the broadcast that Ceballos heard after the shooting. He asked, “[W]hat are the odds . . . that the two people [he] pulls over driving away from the shooting scene in the silver car just happened to be gangsters? . . . And gee, not only are they gangsters, but they just happened to be two Sureños. . . . [T]he cell phone records, maybe that will exonerate them. No. The cell phone records put them around the area before the shooting and during the shooting. [¶] The driver has gunshot residue on his hands.”

The prosecutor then referred to the upcoming defense argument: “*Listen to the defense argument*, ladies and gentlemen” (Italics added.) “[I]f the defendant is truly not guilty, he has to be the unluckiest Sureño in the world. Because if this theory of innocence, that he’s just driving around with Ms. Loya and he knows nothing about a shooting, what an incredible string of coincidences.” The prosecutor summarized these “coincidences” and then made the challenged remarks, which once again referred to the defense’s upcoming argument.

We do not think a rational jury would have understood the challenged statement to refer even indirectly to defendant’s failure to testify. Jurors would have instead understood it as a comment on the state of the evidence and as a repetition of the prosecutor’s earlier exhortation to listen carefully to defense counsel’s upcoming closing argument. The prosecutor had earlier argued that the defense theories lacked merit. He dismissed the defense suggestion that the GSR on defendant’s left hand was the result of contamination picked up in the back seat of Ceballos’s patrol car, calling the theory “speculation and conjecture” unsupported by any evidence. The prosecutor also urged the jury to dismiss the defense argument that officers failed to bag defendant’s hands, reminding them of Gillis’s testimony that it is better from an analytical standpoint *not* to bag suspects’ hands. The prosecutor added, “I make this point because there was something said by defense counsel in opening statement, some assertions of facts that

would be shown that actually weren't shown during the course of the trial” He cautioned jurors not to accept defense counsel opening statement as true. “You have to base your decision in this case on the evidence presented in this courtroom.” He exhorted the jury yet again to “listen to the defense’s closing argument. Listen. If there is any evidence, actual evidence that the . . . GSR found on the defendant’s hands was a result of contamination.”

The statements that defendant challenges here were fair comment on the evidence. In *Hughes*, the California Supreme Court held that far stronger remarks were fair comment on the evidence and the relative weight that the jury should assign to it. (*Hughes, supra*, 27 Cal.4th at p. 374.) During closing argument in *Hughes*, the prosecutor asked the jury, “‘Where is there a single piece of evidence that . . . something snapped because they were surprised at [seeing] each other [in the apartment]? Where is there evidence of that? *Where is there a witness to testify to that?* Where is there a piece of physical evidence to suggest that?’” (*Hughes*, at p. 373.) The prosecutor in *Hughes* argued that “[t]here is no rational alternative explanation that has been offered by the defense evidence in this case” (*Id.* at p. 374, fn. 20.) He pointed out that “[t]he defense has called no witness that could testify that this is what he drank or how much he drank,’ and ‘there has been no evidence that [defendant] ingested cocaine that day.’” (*Id.* at p. 373.) The *Hughes* court held that because none of these statements could reasonably have been understood in context as comments on the defendant’s failure to testify, none of them violated *Griffin*. (*Hughes*, at pp. 372–375.) We reach the same conclusion here. Because there is no reasonable likelihood that the jury understood the challenged excerpt to refer to defendant’s failure to testify, his claim of *Griffin* error fails.

Defendant maintains, however, that how GSR came to be found on his hand was “uniquely within his knowledge.” We disagree that he was the only witness competent to testify about that. Had he recently been to a shooting range or to a gun store, for example, the defense could have called employees of those establishments to testify. Had

a person who worked around guns recently driven defendant's car and possibly transferred GSR to the steering wheel, the defense could have called that person to testify. The defense could also have called an expert to describe the various ways in which GSR can be transferred to a person's hand.

Defendant next challenges an excerpt from the prosecutor's argument about the fact that the rear passenger side window was down. The prosecutor argued that he could prove defendant was the driver of the car with a single photograph. He told the jury that defendant "and Ms. Loya and the shooter screwed up. The shooter got out with the gun, but [defendant] didn't . . . roll up the back window. Not both windows, just one. You'll see from the photographs, ladies and gentlemen, [that defendant's] window is rolled down, Ms. Loya's window is rolled down, and the right rear passenger window is rolled down because that is where the shooter was riding." Defendant takes issue with the following statement: "You'll see in the photos that the left rear passenger window was rolled up. In fact, on that photograph, you could see Officer Stanfill's reflection in that window as he's taking the crime scene photos. Ladies and gentlemen, *there is absolutely no explanation for that right window to be down, for the gunshot residue to be on his hands, these two Sureños driving around in a Norteño neighborhood, the cell phone records putting them in the area, and this is all -- all of this evidence, it's overwhelming.*"

We reject defendant's assertion that the challenged statement violated *Griffin*. No reasonable juror would have understood the argument to refer even impliedly to defendant's failure to testify. The prosecutor summarized the overwhelming evidence connecting defendant to the shooting. He argued that the defense had offered no alternative explanation for the evidence. We reject defendant's suggestion that he was the only one who could have refuted this evidence. Had someone other than the shooter been riding in the back passenger side seat, defendant could have called that person to testify that he or she left the window down. If the rear window mechanism was broken,

defense counsel could have asked the officers whether they tried to roll the window up after they searched the car. The prosecutor expanded on this point in his rebuttal argument. He explained that “defendant in particular, has a right to rely on the state of the evidence. In this case, the defense decided to call witnesses . . . in his defense. He called a doctor in an attempt to . . . question the identifications that were made, and he called an investigator to address the cell phone evidence.” The prosecutor told the jury it could “consider the defense’s failure to call logical witnesses” He asked them, “[I]f the defense is [that] they got the wrong guy . . . [w]hy didn’t we hear from an alibi? [Defendant] made a call right after the shooting. [I]n fact it was a minute and 6 second call from [his] phone. Why didn’t we hear from the person he called to come in and say: Yeah, I talked to Jaime. He called me up and I could hear a bar in the background, or it sounded like he was at a football game or a soccer game or baseball game. Or: Yeah, Jaime was sitting right next to me at my house and he made a call to his girlfriend.” “Why didn’t we hear that?”

Defendant’s reliance on *People v. Vargas* (1973) 9 Cal.3d 470 (*Vargas*) is misplaced. In *Vargas*, the California Supreme Court synthesized the holdings of numerous prior cases and carefully distinguished impermissible comments about a *defendant’s* failure to deny harmful evidence from permissible comments about *the defense’s* failure to introduce material evidence or to call logical witnesses. (*Vargas*, at pp. 475-477.) *Vargas* was a robbery case. Neither defendant testified or presented a defense at trial. (*Id.* at p. 474.) In his closing argument, the prosecutor asked, “‘Why didn’t they have some witnesses to say where they were on the 29th, on the evening of the 29th [when the robbery occurred]. They had to be somewhere’” (*Ibid.*) No one suggested that this remark was anything other than fair comment on the evidence. (*Ibid.*)

But it was *Griffin* error when the prosecutor argued that there was “no *denial at all that* [the defendants] *were there*” when the robbery occurred. (*Vargas, supra*, 9 Cal.3d at pp. 474, 481.) The court reasoned that “the word ‘denial’ connotes a personal response

by the accused himself. Any witness could ‘explain’ the facts, but only defendant himself could ‘deny’ his presence at the crime scene. Accordingly, the jury could have interpreted the prosecutor’s remark as commenting upon defendant’s failure to take the stand and deny his guilt.” (*Vargas*, at p. 476.)

Vargas does not help defendant. Like the unchallenged comment in *Vargas*, the challenged comments here described the state of the evidence. (*Vargas, supra*, 9 Cal.3d at p. 474.) They were not *Griffin* error.

Defendant next challenges the prosecutor’s argument in rebuttal that “as far as gunshot residue goes, ladies and gentlemen, it’s on his hands. That’s the sciences. That’s the solid evidence. He can’t dispute it. They didn’t call an expert in to say: Oh, that actually wasn’t gunshot residue. It was gunshot residue on his hands, and the defense has made no argument and made -- presented no evidence to provide an alternative explanation other than the defendant was involved in the shooting.”

We acknowledge that the statement that “[h]e can’t dispute it” might be problematic were we to consider it in a vacuum. But we do not consider claims of prosecutorial misconduct in a vacuum. (*Clair, supra*, 2 Cal.4th at p. 663.) Nor do we “‘lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]’ [Citation.]” (*Brown, supra*, 31 Cal.4th at pp. 553-554.) Here, any possible confusion occasioned by the prosecutor’s use of the word “he” was immediately dispelled by his express reference to the defense’s failure to call *an expert* to refute the GSR evidence. No reasonable juror would have understood the challenged remarks in context to refer to defendant’s failure to testify. Defendant appears to concede this point. He argues, however, that “defendant, not an expert, was the person who would have known why” there was GSR on his hands. We have already rejected defendant’s argument that he was the only witness competent to explain how GSR came to be found on his left hand.

The prosecutor's arguments on this point tracked the evidence. He urged the jury to reject the defense theories that the positive finding resulted from contamination and/or from the officers' failure to bag defendant's hands. He pointed out the defense failure to call an expert to refute Gillis's expert testimony. A rational jury would have understood his argument that way. This is particularly so given Gillis's testimony that the deposition of GSR is "incredibly unpredictable." Gillis explained that a positive finding of GSR does not reveal whether a gun was fired or not. Nor does it reveal whether the person whose hand tested positive for GSR fired a gun, handled a gun before or after it was fired, touched the hand of a person who fired a gun, or came in contact with a surface that had GSR on it. Gillis observed that "[w]e could probably sit here all day and think of various scenarios as to how somebody could not have detectable GSR on the right hand but [would have] some on the left hand." The prosecutor's argument was fair comment on the evidence. It was not *Griffin* error.

2. Misstatement of Reasonable Doubt Standard

The prosecutor told the jury in closing argument that "you have to make your decision based on a reasonable doubt. A reasonable doubt is based on the evidence. It is not speculation or conjecture. It is not a mere conflict in testimony, and it must be reasonable. As the judge instructed you, anything is open to some possible or imaginary doubt. The question in this case, ladies and gentlemen, if you have a doubt -- after reviewing all the evidence, if you have a doubt that the defendant is guilty, ask yourself if it reasonable?" Defendant claims that this misstated the reasonable doubt standard. He bases his argument on *People v. Hill* (1998) 17 Cal.4th 800 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.

In *Hill*, the prosecutor argued that reasonable doubt "'must be reasonable. It's not all possible doubt. Actually, very simply, it means, you know, you have to have a reason for this doubt. *There has to be some evidence on which to base a doubt.*'" (*Hill, supra*, 17 Cal.4th at p. 831.) The California Supreme Court found this statement "somewhat

ambiguous,” and it labeled the question “a close one.” (*Id.* at p. 831 & fn. 3.) The court held that the prosecutor committed misconduct by misstating the law “insofar as her statements could reasonably be interpreted as suggesting to the jury [that] she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt.” (*Id.* at p. 831.) “To the extent [she] was claiming there must be some affirmative evidence demonstrating a reasonable doubt, she was mistaken as to the law, for the jury may simply not be persuaded by the prosecution’s argument.” (*Ibid.*) The court recognized that “[o]n the other hand, [the prosecutor] may simply have been exhorting the jury to consider the evidence presented, and not attorney argument, before making up its mind.” (*Id.* at p. 832.)

In our view, there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*Cole, supra*, 33 Cal.4th at pp. 1202-1203.) The prosecutor’s statement in *Hill* could reasonably have been interpreted to mean that there had to be affirmative evidence on which to base a doubt. (*Hill, supra*, 17 Cal.4th at p. 831.) By contrast here, the challenged statement cannot be so interpreted. It told the jury that any doubt about defendant’s guilt had to be based on their *review* of all of the evidence and also had to be reasonable. The challenged statement then referred the jury to the standard instruction on reasonable doubt, which the court had just given. That instruction communicated the same message that the challenged statement communicated. It told the jury that “[i]n deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty.” (CALCRIM No. 220.) We conclude that the prosecutor did not misstate the law on reasonable doubt. No prosecutorial misconduct occurred.

3. Ineffective Assistance of Counsel

Defendant argues that his trial counsel's failure to object to the prosecutor's alleged misconduct constituted ineffective assistance. We disagree.

A defendant seeking reversal for ineffective assistance of counsel must prove both deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218 (*Ledesma*); *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). A court deciding an ineffective assistance claim does not need to address the elements in order, or even to address both elements if the defendant makes an insufficient showing on one. (*Strickland*, at p. 697.) Defendant cannot establish deficient performance here. We have rejected his claims of prosecutorial misconduct. Had his trial counsel objected below on the grounds defendant raises for the first time on appeal, those objections would properly have been overruled. "Representation does not become deficient for failing to make meritless objections." (*People v. Ochoa* (1998) 19 Cal.4th 353, 463; see *Strickland*, at pp. 687-690.)

F. Cumulative Error

Defendant claims the cumulative prejudice resulting from the trial court's failure to exclude evidence of Garcia's tattoo and from the prosecutor's alleged misconduct requires reversal of the judgment. We disagree. We have decided both issues against defendant. Because there was no error, there is no prejudice to cumulate. (*People v. Lee* (2011) 51 Cal.4th 620, 657.)

III. Disposition

The judgment is reversed and the matter is remanded for retrial of the gang and firearm allegations. If the prosecution elects not to retry defendant on those allegations, the trial court shall resentence defendant on the attempted murder and willful discharge

of a firearm counts and on the allegation that he committed the attempted murder willfully, deliberately, and with premeditation.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Márquez, J.

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