Filed 12/29/11

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRED EDWARD ARCHULETA, Defendant and Appellant.	E049095 (Super.Ct.No. FVI1802610) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Lizabeth Weis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of part III.A., C., D., E., and F.

Peter Quon, Jr. and Angela Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Fred Edward Archuleta guilty as charged of possessing a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 1) and active gang participation (Pen. Code, § 186.22, subd. (a);[1] count 2). Defendant was sentenced to 40 years to life[2] and appeals, raising several claims of error concerning his active gang participation conviction.

In the published portion of this opinion, we address defendant's claim that the admission of an out-of-court testimonial statement that defendant directed a gang-related robbery violated his Sixth Amendment confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The statement was admitted solely as basis evidence to support the opinion of the prosecution's gang expert that defendant was an active, high-ranking gang member when he committed the charged crimes, and not, purportedly, as substantive evidence or independent proof that defendant was an active, high-ranking gang member. Based on current case law, we conclude that the admission

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

[2] The court found defendant had three prior strike convictions (§ 667, subds. (b)-(e)), three prior serious felony convictions (§ 667, subd. (a)), and three prison priors (§ 667.5, subd. (b)). Defendant's 40-year-to-life sentence consists of 25 years to life for his active gang participation conviction, plus five years for each of his three prior serious felony convictions. An additional 25-year-to-life term and three 1-year terms were imposed but stayed, respectively, on defendant's conviction for possessing methamphetamine and three prison priors. (§ 654.)

of the statement did not violate defendant's confrontation rights. (*Id.* at p. 59, fn. 9; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1129-1131 (*Hill*); *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209-1210 [Fourth Dist., Div. Two] (*Thomas*).)

Nevertheless, we address whether the testimonial hearsay statement that defendant directed a gang-related robbery should have been limited or excluded as basis evidence under state evidentiary law, namely, Evidence Code section 352. We conclude, and at oral argument the People agreed, that testimonial hearsay statements, when offered as expert opinion basis evidence, should be analyzed under Evidence Code section 352 and limited or excluded to the extent necessary to prevent undue prejudice to the criminal defendant or other adverse party, whether in criminal or civil trials. (See, e.g., *People v. Coleman* (1985) 38 Cal.3d 69, 91-93 (*Coleman*); *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 788-789 [Fourth Dist., Div. Two].)

As we explain, the admission of testimonial hearsay statements as basis evidence presents a particular risk of undue prejudice to the adverse party under Evidence Code section 352. By definition, testimonial statements are given and taken "*primarily* for the *purpose*" of establishing "some past fact for possible use in a criminal trial" and "under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. omitted.) Testimonial statements are thus factually assertive statements which are difficult if not impossible to disregard for their truth. (See *Hill, supra,* 191 Cal.App.4th at pp. 1129-1131.) Testimonial statements are also of suspect reliability, particularly when the adverse party

has not had an opportunity to cross-examine the declarant concerning the statement. (See *Crawford, supra,* 541 U.S. at pp. 61-62.)

We ultimately conclude, however, that the admission of Perez's statement as basis evidence was harmless under state law even if the jury considered it for its truth, because it is not reasonably probable it affected the verdicts in light of the record as a whole, including other evidence that defendant was an active, high-ranking gang member when he committed the charged crimes. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In the nonpublished portions of this opinion, we find defendant's other claims of error without merit. Accordingly, we affirm the judgment in all respects.

II. FACTS AND PROCEDURAL HISTORY

A. *The Circumstances of the Charged Offenses*

Around 1:00 a.m. on December 5, 2008, San Bernardino County Sheriff's Deputy Brian Roper and several other officers, including Detective Garth Goodell, a member of the department's High Desert Regional Gang Team, went to defendant's residence in Victorville looking for George Espinosa, a homicide suspect known as "Little Sleepy." Around one week earlier, Deputy Roper received information from Natividad Ramirez that Espinosa could be at defendant's residence.

After the deputies arrived at defendant's residence, Detective Goodell stood next to the garage while Deputy Roper and another detective went to the front door. The garage door opened, and defendant and Ramirez were in the garage. Defendant was

using a cellular telephone, and Ramirez dropped a bag of suspected methamphetamine on the garage floor. Espinosa was not found at the residence.

Deputy Roper searched Ramirez and found a plastic scale and a bag of suspected methamphetamine in his pockets. Detective Goodell searched defendant and found $100 cash in his left pants pocket and a bag of suspected methamphetamine wrapped around his right belt loop and tucked into his coin pocket. A vehicle parked in front of the residence had recently been reported stolen.

Detective Goodell collected the $100 cash, cellular telephone, plastic scale, and the two suspected bags of methamphetamine found on defendant and Ramirez, together with the third suspected bag Ramirez dropped. The detective also found a fourth "empty" bag on the garage floor that appeared to contain methamphetamine residue, but he did not believe it had any evidentiary value and threw it away. Defendant was placed under arrest, but Ramirez was allowed to leave.

The three suspected bags of methamphetamine were later tested and determined to contain 2.92, 0.40, and 0.27 grams, respectively, of methamphetamine. Apparently, the bag containing the smallest amount of methamphetamine was the bag found on defendant.

Ramirez and defendant were originally charged in the same two-count information with simple possession of methamphetamine and active gang participation. During jury selection at their joint trial, Ramirez pled guilty to both charges and admitted a prior

strike conviction and four prison priors. He was later sentenced to five years four months in prison.

B. *Expert Gang Testimony*

San Bernardino County Sheriff's Deputy Josh Conley testified as a gang expert for the prosecution. At the time of trial in May 2009, Deputy Conley had been a deputy sheriff for over seven years, first in Los Angeles County and later in San Bernardino County. He was trained in gang investigations and identifications, and had attended two "jail operations courses," which included additional instruction in gang "investigation, trends, identification . . . ." He later attended an "advanced gang awareness course" and received "more informal" training in gang investigation, identification, tattoos, trends, activity, and prosecution while working in the West Valley Detention Center (the WVDC) in Rancho Cucamonga.

Deputy Conley had experienced many personal contacts with gang members while working in jails in Los Angeles and San Bernardino Counties. Before July 2005, he worked in the WVDC's high security unit, which housed the "most violent and most reputed" gang members in San Bernardino County. He recalled that defendant was housed in the WVDC's high security unit some time before July 2005 when the deputy was working in the WVDC.

In July 2005, Deputy Conley was assigned to the Victorville sheriff's station. After completing a field training program and working on patrol for two years, he was assigned to the station's Gang Enforcement Detail. In that capacity, he performed parole

compliance checks and contacted parole agents and gang members at parole offices. During the course of his seven-year career, he had spoken with over 1,000 gang members and had documented over 300 gang members.

Eight criteria were used to "document" or identify a person as a gang member on a gang identification card: (1) the gang member's "self-admission"; (2) "classification admit" or the gang member's admission of his gang membership during a booking interview; (3) gang tattoos; (4) gang signs; (5) gang apparel; (6) "reliable source," for example, a confidential informant identifying the person as a gang member; (7) prison documentation; and (8) intercepting mail in a custodial facility with gang-related writing. At least two criteria were required to document a person as a gang member, with the exception of "classification admit" which was alone sufficient.

Not all gang members wear "gang specific" tattoos identifying their gang. The deputy had encountered persons who had been gang members for decades but who did not have tattoos identifying their "higher status" in the gang. It had recently become common for gang members not to get gang-related tattoos in order to prevent law enforcement officers from easily identifying them as gang members. The deputy kept currently informed on gangs and their activities through speaking with other investigators, professional associations, and "validation packets" prepared by the California Department of Corrections and Rehabilitation (CDCR) which documented persons as gang members.

Through his work at the Victorville station, Deputy Conley was familiar with a criminal street gang known as "East Side Victoria." The gang had approximately 150 documented members and 50 associates, and generally claimed the east side of Victorville as its turf. The deputy had personally contacted between 40 and 50 East Side Victoria gang members. Various signs and symbols were associated with the gang, including "ESV," "VCG," "EVG," and "ESVR." The gang's principal activities included murder, attempted murder, assault with a deadly weapon, and drug sales. Between May 2006 and 2008, three of its documented members had committed felony "predicate offenses" listed in the California Street Terrorism Enforcement and Prevention Act. (§ 186.20 et seq.) Since 2007, an injunction had been in effect prohibiting East Side Victoria members from associating with each other in the area claimed by the gang, which was known as the "safety zone." Gang members were subject to arrest for violating the injunction.

As a southern Hispanic gang, East Side Victoria was affiliated with and subordinate to the Mexican Mafia in the state prison system. The Mexican Mafia is a prison gang that controls all southern Hispanic gangs under the "Sureno umbrella." In gang parlance, the Mexican Mafia "calls down the shots" or directs the criminal activities of its subordinate gang members who act as its "foot soldiers." Subordinate gangs are required to "funnel up taxes" or pay a portion of the proceeds of their criminal activities to the Mexican Mafia, including drug sales, to remain in good standing. The failure to

pay taxes could result in a gang member or an entire neighborhood being "green lighted" or targeted for retaliation.

Particular symbols indicate that a southern Hispanic gang is affiliated with the Mexican Mafia. These include the acronym SUR, the number 13, La Eme, and a kampol symbol, which is two lines and three dots signifying the Mayan number 13. The acronym SUR stands for Southern United Raza, and "big homie" is a term normally used to denote a Mexican Mafia member.

A person can become a member of a southern Hispanic criminal street gang mainly in three ways: by "criming in" or putting in work for the gang, by being "jumped in" or beaten for 13 seconds, or by being "walked in," which is usually reserved for members with older siblings in the gang. "Shot callers" for the gangs are usually over 30 years old and are looked up to as leaders by younger members. A person can also be "jumped out" or "crimed out" of a southern Hispanic gang just as they can be jumped in or crimed in. A member can also ask an older gang member or "veterano" to be allowed out of the gang. Mexican Mafia membership, by contrast, is "blood in, blood out." In order to gain membership in the Mexican Mafia, a person has to "spill blood" or commit a violent assault, and the only way out of the Mexican Mafia is by death.

At the time of trial in May 2009, Deputy Conley was assigned to the Adelanto Detention Center (the ADC) in Adelanto where Ramirez was in custody. The deputy had personally completed a gang identification card documenting Ramirez as an ESV gang member. He told Ramirez he was documenting him as an ESV member, and Ramirez did

not object or correct him. Ramirez had ESV and Mexican Mafia-related gang tattoos, including "ESV," "SUR", "X3," and "3CE."

Deputy Conley became involved in the investigation of the present case after he searched Ramirez's property at the ADC and found a letter that defendant had written to Ramirez. In the letter, defendant discussed the charges against himself and Ramirez and wrote: "Just be sure that you don't agree to anything without us agreeing on it, because the charges are . . . real . . . petty."

Deputy Conley was familiar with defendant through his training, through speaking with other gang investigators, and through reviewing "documentation from CDC[R] and prior gang cards." A "validation packet" from the CDCR "validated" or identified defendant as a Mexican Mafia associate at the beginning of 1989. The deputy explained that the CDCR's "validation process" of labeling someone a gang member is a lengthy process that involves checking several sources of documentation or other proof. In addition, a 1993 gang identification card documented defendant as a member of the East Side Victoria.

A September 2004 "classification sheet" identified defendant as a member of "Vario Victoria Rifa," a clique of East Side Victoria, and indicated he was being housed in the high security unit. Defendant signed the 2004 classification sheet, acknowledging his gang status. The document was placed on an overhead projector and published to the jury. Deputy Conley was familiar with an offense defendant committed on September 1,

2004, namely, attempted possession of a firearm by a felon. (§§ 664, 12021.) The court took judicial notice of a court file concerning the offense.

A second classification sheet dated December 5, 2008, the date defendant was arrested on the current charges, indicated he was a member of the Vario Victoria Rifa and the Mexican Mafia. Defendant signed the 2008 classification sheet, "self admitting" its contents. The notation "red suit" was marked on the 2008 classification sheet, indicating defendant was "high security." The 2008 classification sheet was also published to the jury.

Deputy Conley opined defendant was an "active" member of the East Side Victoria at the time of trial and had been for a long time. Defendant was also a "shot caller" for the gang. Deputy Conley based this opinion on his contacts with defendant, his subsequent conversations with other gang members, including Ramirez, and with gang investigators, including Detective Goodell and Deputy Roper, on defendant's CDCR validation file, the 1993 gang identification card, and on the 2004 and 2008 gang classification sheets. Defendant was also an associate of the Mexican Mafia and enjoyed a high level of "influence and status" which allowed him to direct the activities of southern Hispanic gang members.[3]

Defendant expressed his high-level status in the East Side Victoria by directing the activities of other gang members. As an example that defendant directed the activities of

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[3] On cross-examination, Deputy Conley clarified that although defendant was a "shot caller" for the East Side Victoria and a "validated" Mexican Mafia associate for the East Side Victoria, he was not a shot caller for the Mexican Mafia.

other gang members, Deputy Conley pointed to defendant's April 2009 letter to Ramirez, telling him not to enter into a plea bargain unless defendant also agreed. According to the deputy, the letter indicated that defendant exercised "a certain amount of influence" over Ramirez and other members of East Side Victoria.[4]

As another example of defendant directing the activities of other gang members, Deputy Conley explained that, in November 2008, around one month before defendant's December 5, 2008, arrest on the current charges, three East Side Victoria gang members, namely, George Espinosa (Little Sleepy), Fernando Perez (Bam-Bam), and Joseph Delonie (Little Goofy) committed a residential robbery in downtown Victorville. The robbery was a "taxation" of a drug dealer who was dealing drugs in the old town area of Victorville, an area claimed by the East Side Victoria. During the robbery, Delonie was shot and killed by the drug dealer, and Perez was shot and wounded. Perez later recovered, and Perez and Espinosa—the homicide suspect the officers were looking for when they went to defendant's home on December 5, 2008—were charged with the murder of Delonie. Over defense counsel's objections, Deputy Conley then testified that "Perez gave a statement to investigators stating that [defendant] directed that robbery and taxation."[5]

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[4] The court then took judicial notice of its records in which Ramirez "entered a plea as charged [on] May 20th, 2009."

[5] Defense counsel objected to the admission of Perez's statement that defendant directed the robbery on "multiple levels of hearsay and lack of foundation" grounds. The court overruled these objections. Defendant did not object on confrontation grounds. Nor did he object on the ground the statement's irrelevance, unreliability, or potential

[footnote continued on next page]

The prosecutor then asked Deputy Conley whether defendant's possession of methamphetamine on December 8, 2008, was a gang-related activity. The deputy responded that it was in view of the "totality of the circumstances." These included: (1) defendant's "classification admission" of his gang status in jail following his December 5, 2008, arrest, as evidenced by the 2008 classification sheet; (2) defendant's association with Ramirez, another East Side Victoria gang member, at defendant's home; (3) the fact defendant's house was in East Side Victoria's territory and subject to the 2007 injunction; and (4) the fact a stolen car was parked in front of defendant's house at the time defendant and Ramirez possessed the methamphetamine. The deputy explained that stolen cars are common in gang culture because they can be used for "drive-bys" and other gang-related activity, and can be traded for weapons, drugs, or cash.

The prosecutor next posed a hypothetical question, asking Deputy Conley to assume Ramirez went to defendant's home to sell defendant methamphetamine, and the sale was interrupted by the arrival of law enforcement officers. When asked how that hypothetical sale of drugs to defendant could have furthered, assisted, or promoted criminal conduct by members of East Side Victoria, the deputy responded that sales of drugs, even between gang members, further the gang's criminal activities by generating profits that can be used to buy more drugs, cars, or weapons for the gang, or pay taxes to the Mexican Mafia.

[footnote continued from previous page]
prejudicial impact substantially outweighed its probative value as basis evidence under Evidence Code section 352.

Under cross-examination, Deputy Conley admitted defendant was the first "high ranking" gang member he had ever encountered who did not have gang-related tattoos. He also admitted that a gang member could distance himself from a gang and not commit crimes for the gang for several years while still claiming membership in the gang, but that normally entailed leaving the gang's territory and getting away from other members of the gang. Deputy Conley had never arrested defendant or any other East Side Victoria gang member for violating the 2007 injunction.

Deputy Conley did not complete or sign defendant's 2004 or 2008 classification sheets, and said it would be unethical to change a classification sheet after the inmate signed it. If a change had to be made, he would conduct a "reclassification interview" and complete a new classification sheet for the inmate to sign.

In April 2008, when defendant was in jail, Deputy Conley spoke with defendant and asked him about his status and CDCR validation as a Mexican Mafia associate. Defendant said he had been invalidated as a Mexican Mafia associate in 1988, and he was a member of "Victoria," not "East Side Victoria." Defendant explained he was around when the gang was formed; it started when members of different families who were associated with the gang were tagging "Victorville South Side." Then someone crossed out South Side and wrote East Side, and eventually East Side "stuck." During the April 2008 contact, the deputy also asked defendant whether he was in good standing with "Victoria" and the Mexican Mafia, and defendant responded, "I'm in good standing until I am not."

Lastly, Deputy Conley testified that, through a process known as "debriefing," a Mexican Mafia associate can "decloak" himself from that classification in the state prison system. The associate is placed in protective custody and must disclose all his past criminal activity on behalf of his gang and everything he knows about his gang's current activities. To the deputy's knowledge, defendant had never "debriefed."

C. *Defense Evidence*

Ramirez and defendant testified for the defense.

1. Ramirez's Testimony

Ramirez testified that on the night of December 5, 2008, he drove to defendant's house in a white Camry. He did not know the car had been reported stolen. He brought some methamphetamine, a scale, and a cellular telephone with him. He used some of the drug to get "high," and gave some of the drug to defendant. He believed defendant also got high, but he did not actually see defendant use the drug. As he was getting high himself, he was not paying attention.

After he was high, Ramirez separated the rest of the methamphetamine into bags and gave defendant a bag containing some "crumbs" of the drug. He did not see what happened to the bag he gave defendant. Then "the SMASH officers rolled up," and Ramirez panicked. He grabbed his bags of methamphetamine and dropped a couple of them as he was going toward the garage door. Ramirez insisted that the methamphetamine belonged to him and he could not let defendant spend the rest of his

life in prison for something he did. He did not sell defendant any methamphetamine, though he supported his own methamphetamine habit by selling the drug.

The jury heard that, the week before he testified, Ramirez pled guilty to possession of methamphetamine and active gang participation. He had prior felony convictions for negligent discharge of a firearm in 1996, possession of a stolen vehicle in 2003, and being a felon in possession of a firearm in 2007. Ramirez denied being a member of East Side Victoria until the week earlier, when he pled guilty to the active gang participation charge. The tattoos on his body, including "13," "IE," and "SUR," did not signify his membership in any gang. He got the tattoos in prison 10 years earlier.

Ramirez had grown up his "whole life" with East Side Victoria gang members, but defendant was "just a good friend" and never told Ramirez he was a gang member. Ramirez and defendant had known each other since the mid-1990's or earlier, when Ramirez was in his early to mid-20's.

When asked under cross-examination why he was putting the methamphetamine into bags, Ramirez said he was going to give one bag to the lady who gave him the Camry in exchange for her allowing him to use the car for a couple of days. He needed the car for transportation to "sell dope," and he was going to sell or give away the rest of the methamphetamine he was putting into bags. Ramirez sought defendant's advice concerning the Camry, because "the whole situation" did not seem right to Ramirez. The woman who gave him the car did not give him the car keys; the ignition was punched; and he started the car with a screwdriver. Ramirez understood the car was about to be

repossessed, and the woman told him he could take the car if he gave her some methamphetamine. Ramirez just wanted to know what defendant thought about the situation.

The prosecutor also questioned Ramirez about the letter defendant wrote to him after December 5, 2008, in which defendant discussed the charges against himself and Ramirez and wrote: "Just be sure that you don't agree to anything without us agreeing on it, because the charges are . . . real . . . petty." Ramirez recalled receiving the letter but did not interpret it to mean he could not enter into a plea bargain without defendant's consent.

Ramirez denied telling Deputy Roper he could find George Espinosa, also known as Little Sleepy, at defendant's house. Ramirez said he was not arrested on December 5, 2008, and was let go after Deputy Roper told him: "We got Fred. We got who we want." Ramirez heard one of the officers tell defendant that they "got him this time," and they were going to "put him away for life[.]"

2. Defendant's Testimony

Defendant was 45 years old at the time of trial in May 2009. In 1982, he was convicted of attempted murder, assault with a deadly weapon, and second degree burglary, and served eight and one-half years in prison. In 1994 and 1995, he was convicted of being a felon in possession of a firearm. In 2005, he pled guilty to attempting to possess a dangerous weapon, a dismantled shotgun. Since he was 12 years old, the longest time he had been out of custody was an eight-month period in 2007.

When he was still a minor, he was sent to the California Youth Authority for assault with a deadly weapon.

Around 1:00 a.m. on December 5, 2008, Ramirez called defendant and said he wanted to talk. Defendant said he was getting ready to go to bed, but allowed Ramirez to come over after Ramirez said he was just down the street and he would not take long. Defendant waited for Ramirez in his garage. When Ramirez arrived, he pulled out some methamphetamine and offered some to defendant. Defendant said he would take some of the drug, and Ramirez put some in a bag for defendant and put the bag on a table. Ramirez had a large bag and several smaller bags of methamphetamine with him. He did not make any other bags of methamphetamine in defendant's presence.

Minutes later, sheriff's deputies arrived. The bag Ramirez made for defendant was with the other bags Ramirez grabbed when the officers were outside. The bag of methamphetamine that Detective Goodell found wrapped around defendant's belt loop and tucked into his coin pocket was a bag defendant had earlier that day; he did not get that bag from Ramirez. Defendant did not use any methamphetamine with Ramirez, but had used the drug earlier that day.

Defendant denied he was a member of East Side Victoria or "Vario Victoria Rifa," as the gang was also known, or a "high ranking" member of any gang. In "the system," however, he had always claimed "Victoria SUR."

Defendant was familiar with how East Side Victoria began and explained its history. In the late 1970's, when he was 14 or 15 years old, defendant was fighting with

other "families" in the Victorville area, and he and a friend were tagging "Victoria" and "South Side." Someone crossed out "South Side" and wrote "East Side," and that was how "East Side" began.

Around 1979, defendant and other South Side families were involved in a fight against East Side families, but defendant later made peace with the East Side families. Thus, defendant was "originally an enemy of East Side." By the time he got out of prison around 1991, the East Side families had started "East Side." Defendant knew "all these kids" from "East Side" because he had grown up with them or their older family members.

Defendant said the "kids" from the East Side looked up to him with "a great deal of respect," but the respect he had gained over the years was not based on his membership in any gang; he was respected because he "followed the rules" and did not "snitch" on people. When he told Deputy Conley he was "in good standing," he meant he was not being threatened and was not in danger. Others sought his advice because he had experience and "three strikes."

Defendant said the CDCR "validated" him as a Mexican Mafia associate in 1988 based on information provided by other inmates. He denied he was a Mexican Mafia associate, but because he had never "debriefed" the CDCR still considered him an associate. He also denied he signed the 2004 classification sheet when it stated he was a Mexican Mafia "member," because admitting he was a member of the Mexican Mafia would be like signing his own "death warrant."

III. DISCUSSION

A. *Substantial Evidence Supports Defendant's Active Gang Participation Conviction*

Defendant was convicted in count 2 of actively participating in a criminal street gang in violation of section 186.22, subdivision (a). The statute provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists *in any felonious criminal conduct* by members of that gang, shall be punished . . . ." (Italics added.)

The offense has three elements: (1) active participation in a criminal street gang in a sense that is more than nominal or passive; (2) with knowledge that members of the gang engage or have engaged in a pattern of criminal gang activity; and (3) willful promotion, furtherance, or assistance in "any felonious criminal conduct" by a member of the gang. (*People v. Lamas* (2007) 42 Cal.4th 516, 523; 186.22, subd. (a).)

Defendant claims that insufficient evidence supports the third element of the offense because there is no evidence he promoted, furthered, or assisted a member of the gang in committing a *gang-related* felony or *gang-related* felonious criminal conduct. This argument is misplaced because, on December 20, 2010, after the parties filed their briefs on appeal, the California Supreme Court issued its decision in *People v. Albillar* (2010) 51 Cal.4th 47, 55, 59, concluding there is no requirement that the "felonious criminal conduct" described in the third element of the offense must be "gang related."

The *Albillar* court explained that the plain language of section 186.22, subdivision (a) "targets felonious criminal conduct, not felonious gang-related conduct," and there is no "unwritten requirement" that the felonious criminal conduct that the defendant promoted, furthered or assisted must be gang related. (*People v. Albillar*, *supra*, 51 Cal.4th at pp. 51, 55.) This literal interpretation of the statute will not yield absurd results, the court explained, because "there is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related. Gang members tend to protect and avenge their associates. Crimes committed by gang members, whether or not they are gang related or committed for the benefit of the gang, thus pose dangers to the public and difficulties for law enforcement not generally present when a crime is committed by someone with no gang affiliation. . . ." (*Id*. at p. 55.)

Ten years earlier, in *People v. Castenada* (2000) 23 Cal.4th 743, the court rejected a due process/vagueness challenge to the "active participation" element of the offense, reasoning that the usual and ordinary meaning of the phrase "active participation" means participation that is "more than nominal or passive." (*Id*. at pp. 745-752.) More broadly, the court reasoned that all three elements of the statute are "plainly worded" and "make reasonably clear" what conduct is prohibited: (1) more than nominal or passive participation in a criminal street gang, *in combination with* (2) knowledge of the gang's criminal purpose *and* (3) willful promotion of a felony or felonious criminal conduct by members of the gang. (See *ibid*.) It follows that *all three elements* of the offense can be

satisfied without proof that the felony or felonious criminal conduct the defendant willfully promoted was itself gang related. (*People v. Albillar, supra,* 51 Cal.4th at p. 56.)

In view of *Albillar*, we reject defendant's claim that insufficient evidence supports his active gang participation conviction on the ground there was no showing he promoted, furthered, or assisted the commission of a *gang-related* felony or *gang-related* felonious criminal conduct by a member of the gang. Nevertheless, we explain why substantial evidence supports all three elements of defendant's conviction.

In considering a claim that insufficient evidence supports a criminal conviction, we review the record in the light most favorable to the judgment to determine whether it contains substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could have found the defendant guilty of the offense beyond a reasonable doubt. (*People v. Carter* (2005) 36 Cal.4th 1215, 1257-1258.) We are required to accept all reasonable inferences the jury could have drawn from the evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Here, substantial evidence supports all three elements of the offense.

Regarding the first and second elements—more than passive participation in a gang with knowledge of its criminal purpose—the jury could have reasonably inferred that defendant actively participated in the gang by allowing Ramirez to come to his home on December 5, 2008, and during that meeting defendant was aware of the gang's criminal purpose. Defendant allowed Ramirez to come to his home seeking his advice

about the white Camry Ramirez was driving. The car had a punched ignition and had been reported stolen, and Ramirez was using the car to sell and distribute methamphetamine. Ramirez brought a bag of methamphetamine with him and separated the drug into several bags as defendant watched, and defendant accepted possession of one of the bags from Ramirez. The jury could have reasonably inferred that the methamphetamine Ramirez gave defendant was a sign of respect to defendant as a high-ranking member of the gang, or a customary payment or "tax" of a portion of the proceeds of Ramirez's methamphetamine sales to the "big homie." Thus, substantial evidence shows that, by meeting with Ramirez and accepting methamphetamine from him, defendant actively participated in a criminal street gang with knowledge of its criminal purpose.

Though defendant and Ramirez denied they were members of the East Side Victoria, substantial evidence showed they were. They had both been classified in jail as members of the gang, and gang cards prepared by law enforcement officers also documented their membership in the gang. Deputy Conley opined that defendant was a high-ranking member of the gang, and had been for a long time, when he met with Ramirez in his garage. Deputy Conley also explained that "taxes" or proceeds from criminal gang activities, including drugs and drug sales proceeds, are customarily paid to high-ranking gang members. Additionally, when defendant testified he indicated he was one of the gang's original members. He knew all of the gang's current members and associates because he had grown up with them or their older family members, and he was

familiar with the crimes the gang's members had committed. In defendant's own words, members of the gang looked up to him with "a great deal of respect." Thus, substantial evidence also shows defendant was a high-ranking gang member to whom taxes or proceeds from criminal gang activities are customarily paid.

The same evidence that supports the first and second elements also supports the third element of the offense. Regarding the third element, the jury was instructed that the People had to prove defendant "willfully promoted, furthered or assisted" "felonious criminal conduct" by members of the gang either by (a) directly and actively committing a felony offense, or (b) aiding and abetting a felony offense. (CALCRIM No. 1400.) "Felonious criminal conduct" was defined as "[p]ossession of a [c]ontrolled [s]ubstance." The instruction also stated: "Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

Thus, to prove the third element, the People had to prove that when defendant met with Ramirez in his garage, defendant either (A) possessed methamphetamine himself,[6] or (B) aided and abetted Ramirez in possessing methamphetamine. Substantial evidence supports both the "A" and "B" prongs of the third element. Defendant admitted he

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[6] The third element may be established by proof that defendant was a gang member and perpetrated a felony or engaged in felonious criminal conduct *himself*. (See, e.g., *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1307 [Fourth Dist., Div. Two] ["a gang member who perpetrates a felony by definition also promotes and furthers that same felony."].) A defendant may also actively participate in a gang by acting alone in perpetrating a felony, without assistance or participation by other gang members. (*People v. Gonzales* (2011) 199 Cal.App.4th 219.)

accepted and possessed the methamphetamine that Ramirez gave him in his garage, with knowledge the substance was methamphetamine. By accepting the methamphetamine from Ramirez, defendant engaged in the felonious criminal conduct of possessing methamphetamine. Defendant also assisted, facilitated, and promoted Ramirez's felonious possession of the drug by allowing him to bag the drug in his garage, which Ramirez admitted he intended to sell or distribute to others.

B. *The Admission of Perez's Testimonial Hearsay Statement as Basis Evidence Did Not Violate Defendant's Confrontation Rights Under Current Case Law, but the Statement Was Subject to Being Limited or Excluded as Basis Evidence Under Evidence Code Section 352*

In testifying as a gang expert for the prosecution, Deputy Conley opined that defendant was a high-ranking member of the East Side Victoria and had been for a long time when he committed the charged offenses of methamphetamine possession and active gang participation with Ramirez on December 5, 2008. As basis evidence to support his opinion, the deputy relied in part on a statement made "to investigators" by another alleged gang member, Perez, that defendant directed Perez and two other gang members to commit a November 2008 robbery of a Victorville drug dealer.

Defendant claims the admission of Perez's statement that defendant directed a gang-related robbery violated his confrontation rights under *Crawford*. He argues the statement was testimonial and *effectively* offered for its truth, because Deputy Conley relied on it for its truth to support his opinion that defendant was an active, high-ranking

gang member, and the jury was instructed to consider whether the statement was "true and accurate" in evaluating the weight of the deputy's opinion.[7]

Though we agree that Perez's statement was testimonial, and the jury was instructed to consider whether the statement was "true and accurate" in evaluating Deputy Conley's opinion, under *Crawford* and subsequent case law, including this court's decision in *Thomas*, out-of-court testimonial statements do not violate the confrontation clause when they are admitted solely as basis evidence to support an expert opinion and not as substantive or independent evidence of the truth of the matter asserted. (E.g., *Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210; *Hill, supra,* 191 Cal.App.4th at pp. 1127-1131; Evid. Code, § 1200.)[8] This is so even though there may be no practical or logical distinction between the truth of the matter asserted in the testimonial hearsay

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[7] CALCRIM No. 332 (Expert Witness Testimony) told the jury: "Witnesses were allowed to testify as experts and give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the expert relied was true and accurate*. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (Italics added.)

[8] As noted in footnote 5, *ante*, defense counsel did not object to the admission of Perez's statement on confrontation grounds. Assuming, however, that the confrontation issue has been preserved for appeal (see *People v. Partida* (2005) 37 Cal.4th 428, 433-434; Evid. Code, § 353), we reject it based on current case law (e.g., *Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210).

statement and its use or relevancy as basis evidence to support the expert's opinion. (See *Hill, supra,* at pp. 1127-1131.)

1. Testimonial Hearsay Basis Evidence and the Confrontation Clause

The confrontation clause of the Sixth Amendment protects the right of a criminally accused "to be confronted with the witnesses against him . . . ." (U.S. Const., 6th Amend.) In its seminal 2004 decision in *Crawford,* the United States Supreme Court upended confrontation clause jurisprudence and held that the confrontation clause "prohibits 'testimonial hearsay' from being admitted into evidence against a defendant in a criminal trial unless (1) the declarant [of the hearsay statement] is unavailable as a witness and the defendant has had a prior opportunity to cross-examine him or her, or (2) the declarant appears for cross-examination at trial." (*People v. Jennings* (2010) 50 Cal.4th 616, 651, citing *Crawford, supra,* 541 U.S. at pp. 53, 59 & fn. 9.) *Crawford* noted, however, that the confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford, supra,* at p. 59, fn. 9, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414.)

Following *Crawford,* this and other California appellate courts have issued decisions holding that the admission of testimonial out-of-court statements or testimonial hearsay evidence as basis evidence does not violate the confrontation clause. (*Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746-747; *People v. Ramirez* (2007) 153 Cal.App.4th 1422, 1426-1427; *People v. Sisneros* (2009) 174 Cal.App.4th 142, 153-154.) *Thomas* explained: "*Crawford* does not

undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, *the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion*." (*Thomas, supra,* at p. 1210, italics added.) Similarly, *Cooper* reasoned: "*Crawford* was concerned with the *substantive use* of hearsay evidence . . . . It did not suggest that the confrontation clause was implicated by admission of hearsay for nonhearsay purposes. . . ." (*People v. Cooper, supra,* at p. 747, italics added.)

This critical distinction between the "substantive use" of hearsay evidence for its truth and its use as expert opinion basis evidence was established in California long before *Crawford* rendered testimonial hearsay statements inadmissible for their truth in criminal trials, absent the defendant's opportunity to confront and cross-examine the declarant. (See, e.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-619.) *Gardeley* explained that experts may base their opinions "'on reliable hearsay, including out-of-court declarations of other persons,'" and may "'state on direct examination the reasons'" for their opinions. (*Ibid.*; Evid. Code, §§ 801, subd. (b) [expert may rely on reliable hearsay in forming opinions]; 802 [expert may generally explain basis of opinions on direct examination].)

Gardeley concluded that a gang expert, in opining that an assault in which the defendant participated was gang related, properly relied on and revealed an otherwise

inadmissible hearsay statement by one of the defendant's alleged cohorts that he, the alleged cohort, was a gang member. (*Gardeley, supra,* 14 Cal.4th at pp. 611-613, 618-619.) In reaching this conclusion, *Gardeley implicitly* reasoned it was proper for the expert to reveal the alleged cohort's hearsay statement, because the hearsay evidence or statement was not offered for its truth and was properly allowed under Evidence Code section 802. (*Gardeley, supra,* at pp. 618-619.) As indicated, however, *Gardeley* was decided before *Crawford,* and did not address whether the hearsay basis evidence in the case before it was testimonial. Nor did *Gardeley* address whether the basis evidence should have been limited or excluded under Evidence Code section 352.[9]

Similarly, in *Thomas,* this court concluded that a gang expert, in opining that the defendant was a gang member, properly relied on and testified to hearsay statements by other gang members that the defendant was a gang member. (*Thomas, supra,* at pp. 1206, 1208-1210.) In effect, *Thomas* reasoned that the expert's recitation of the other gang members' hearsay statements did not violate the confrontation clause because the statements were not admitted as substantive evidence of their truth but for the distinct and permissible purpose of explaining and supporting the expert's opinion that the defendant was a gang member. (*Id*. at pp. 1209-1210.) *Thomas* relied on *Gardeley*'s application of

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[9] Though no claim of undue prejudice was presented in *Gardeley,* the court recognized that an expert's ability to recite hearsay evidence is limited by the trial court's "'considerable discretion'" to limit or exclude hearsay basis evidence under Evidence Code section 352, if the probative value of the hearsay evidence as basis evidence is substantially outweighed by "'the risk that the jury might improperly consider it as independent proof of the facts recited therein.'" (*Gardeley, supra,* 14 Cal.4th at p. 619.)

sections 801, subdivision (b) and 802 of the Evidence Code, and on *Crawford*'s admonition that the confrontation clause does not bar the use of out-of-court testimonial statements for purposes other than establishing their truth. (*Thomas, supra,* at pp. 1209-1210, citing *Gardeley, supra,* 14 Cal.4th at pp. 618-619 & *Crawford, supra,* 541 U.S. at p. 59, fn. 9.)

Earlier this year, our appellate court colleagues in *Hill* pointed out that *Gardeley* and *Thomas* are based on the "implied assumption that the out-of-court statements *may help the jury evaluate the expert's opinion without regard to the truth of the statements*. Otherwise, the conclusion that the statements should remain free of *Crawford* review because they are not admitted for their truth is nonsensical. But this assumption appears to be incorrect." (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1130, italics added.) This incorrect assumption, the *Hill* court pointed out, masks violations of both the hearsay rule and the confrontation clause. (*Id*. at pp. 1130-1132.)

To illustrate the point, the *Hill* court discussed *People v. Goldstein* (2005) 6 N.Y.3d 119 [810 N.Y.S.2d 100, 843 N.E.2d 727] (*Goldstein*). There, a forensic psychiatrist, in testifying as an expert for the prosecution, testified on direct examination to out-of-court statements to support her opinion that the defendant was not insane when he pushed a woman in front of a subway train. (*Hill, supra,* 191 Cal.App.4th at p. 1130.) The statements consisted of hearsay from a security guard and an acquaintance of the defendant that, prior to the murder, a woman who looked remarkably like the murder victim had "sexually frustrated" the defendant. (*Id*. at p. 1130, fn. 15.) *Goldstein*

concluded that the admission of the out-of-court statements as basis evidence violated the defendant's confrontation rights. (*Goldstein, supra,* at p. 730.)

In rejecting the prosecution's argument that the statements were not admitted for their truth but only to assist the jury in evaluating [the expert's] opinion, the *Goldstein* court reasoned: "We find the distinction the People make unconvincing. We do not see how the jury could use the statements . . . to evaluate [the expert's] opinion without accepting as a premise either that the statements were true or that they were false. Since the prosecution's goal was to buttress [the expert's] opinion, the prosecution obviously wanted and expected the jury to take the statements as true. . . . *The distinction between a statement offered for its truth and a statement offered to shed light on an expert's opinion is not meaningful in this context*." (*Goldstein, supra,* 843 N.E.2d at pp. 732-733, italics added.)

Hill agreed with *Goldstein*'s reasoning and noted that, "where basis evidence consists of an out-of-court statement, the jury will often be required to determine or assume the truth of the statement in order to utilize it to evaluate the expert's opinion." (*Hill, supra,* 191 Cal.App.4th at p. 1131, fn. omitted.) The court also pointed out that, since *Crawford* was decided in 2004, there has been "a heightened concern regarding an expert's disclosure of basis evidence consisting of out-of-court statements." (*Hill, supra,* at p. 1131.) And, though pre-*Crawford* California Supreme Court decisions, including *Gardeley,* had considered the hearsay implications of admitting out-of-court statements

as basis evidence, the cases had not considered whether admitting the statements as basis evidence "effectively admitted them for their *truth*." (*Hill, supra,* at p. 1131.)[10]

Nevertheless, the *Hill* court recognized that it was bound by *Gardeley* and similar state Supreme Court precedent: "But for the long line of California Supreme Court precedent supporting *Thomas*, we would reject that opinion and adopt *Goldstein*'s logic, which seems compelling. But our position in the judicial hierarchy precludes that option; we must follow *Gardeley* and the other California Supreme Court cases in the same line of authority." (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1132, 1135-1137, fn. omitted.) Thus, the *Hill* court concluded that the admission as basis evidence of several hearsay statements, one of which was testimonial, violated neither the hearsay rule nor the confrontation clause simply because none of the statements were offered as substantive evidence of their truth. (*Id*. at pp. 1131, 1137.)

We agree with *Hill* that it is often difficult if not practically or logically impossible for juries to disregard the truth of hearsay evidence when offered as basis evidence to expert opinion. (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1131.) But like the *Hill* court,

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10 *Hill* also noted that substantial academic commentary has been critical of the assumption that juries can avoid considering basis evidence for its truth when the expert relies on the evidence for its truth. (*Hill, supra,* 191 Cal.App.4th at p. 1130, fn. 16, citing, e.g., Kaye et al., New Wigmore Treatise on Evidence (2010 Cumulative Supp.) Expert Evidence, § 3.10.1, p. 59 ["'The factually implausible, formalist claim that experts' basis testimony is being introduced only to help in the evaluation of the expert's conclusions but not for its truth ought not permit an end-run around a constitutional prohibition.'"] & Mnookin, *Expert Evidence and the Confrontation Clause After* Crawford v. Washington (2007) 15 J.L. & Pol'y 791, 816 ["'To say that [inadmissible] evidence offered for the purpose of helping the jury to assess the expert's basis is not being introduced for the truth of its contents rests on an inferential error.'"].)

we also recognize that we are bound by *Gardeley* and similar state Supreme Court precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) And under this precedent, there is a long-established *legal* distinction between the use of a hearsay statement as substantive evidence of the truth of the matter asserted and its use as expert opinion basis evidence. (See *Gardeley, supra,* 14 Cal.4th at pp. 618-619.) *Crawford* also acknowledged the legal distinction between the use of hearsay evidence for its truth and for the distinct and permissible purpose of supporting an expert opinion. (*Crawford, supra,* 541 U.S. at p. 59, fn. 9; *Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210.) And given this legal distinction, the admission of hearsay evidence as basis evidence violates neither the hearsay rule nor the confrontation clause, even if the hearsay basis evidence must logically be understood for its truth in evaluating the expert's opinion. (See *Hill, supra,* at p. 1131.)[11]

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[11] Neither the United States Supreme Court or the California Supreme Court have ruled that the use of testimonial hearsay evidence as expert opinion basis evidence violates the confrontation clause. (Cf. *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [180 L.Ed.2d 610, 131 S.Ct. 2705] [nontestifying analyst's report that the defendant's blood alcohol content exceeded the legal threshold for driving under the influence offered as substantive evidence of the matter asserted]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [174 L.Ed.2d 314, 129 S.Ct. 2527] [out-of-court affidavit or certificate that substance seized from the defendant was cocaine of a certain weight offered as substantive evidence of the matter asserted]; *People v. Geier* (2007) 41 Cal.4th 555, 605-607 [nontestifying technician's report not testimonial].) Pending such a decision, we are bound by the long-standing legal, if illogical, distinction between the use of hearsay evidence for its truth and its use as basis evidence (see *Gardeley, supra,* 14 Cal.4th at p. 618) and *Crawford*'s admonition that the confrontation clause does not bar the use of testimonial hearsay evidence "for purposes other than establishing the truth of the matter asserted" (*Crawford, supra,* 541 U.S. at pp. 53, 59, fn. 9; *Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210).

To be sure, under current California law, the jury is neither expected nor required to disregard hearsay basis evidence for its truth in evaluating expert opinion testimony. (Evid. Code, §§ 801, 802.) CALCRIM No. 332, the current standard-form jury instruction on expert opinion testimony, instructs the jury that it "must decide whether information on which the expert relied was true and accurate," and it may "disregard any opinion" that it finds "unbelievable, unreasonable, or unsupported by the evidence." (See Pen. Code, § 1127b [sua sponte instructions required on expert testimony].) As is often said, "any expert's opinion is only as good as truthfulness of the information on which it is based." (*People v. Ramirez, supra,* 153 Cal.App.4th at p. 1427.)

2. Hearsay Basis Evidence and Evidence Code Section 352

Neither *Gardeley* nor *Thomas* addressed whether the hearsay basis evidence in the cases before them was testimonial or should have been excluded or at least limited as basis evidence under Evidence Code section 352. And though *Hill* appropriately criticized the assumption underlying *Thomas* and *Gardeley*—that juries will be able to consider hearsay statements as basis evidence without regard for their truth or falsity—*Hill* also did not address the role of Evidence Code section 352 in limiting or excluding hearsay basis evidence. (*Hill, supra,* 191 Cal.App.4th at p. 1131, fn 19, 1137.)

The admissibility of any hearsay evidence as basis evidence should, when properly challenged, be analyzed under Evidence Code section 352 and limited or excluded to the extent necessary to prevent undue prejudice to the adverse party. Trial courts have long had discretion to limit or exclude any hearsay basis evidence, whether or not testimonial,

under Evidence Code section 352 when necessary to prevent undue prejudice to the adverse party, confusion of the issues, or misleading the jury.[12] (*Coleman, supra,* 38 Cal.3d at pp. 92-93; *Gardeley, supra,* 14 Cal.4th at pp. 618-619.)

An expert may generally base his opinion on matter known to the expert, including hearsay, as long as the matter is of a type reasonably relied upon by experts "in the particular field" of expertise. (*Gardeley, supra,* 14 Cal.4th at pp. 618-619; *Thomas, supra,* 130 Cal.App.4th at p. 1209; Evid. Code, § 801, subd. (b).) In addition, "[o]n direct examination, the expert may explain the reasons for his opinions, including the matters he considered in forming them." (*People v. Montiel* (1993) 5 Cal.4th 877, 918 (*Montiel*); Evid. Code, § 802.) But "[w]hile an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible." (*Coleman, supra,* 38 Cal.3d at p. 92.)

To be sure, the expert's ability to relate hearsay statements in explaining the basis of his or her opinions has always been limited by Evidence Code section 352. As one court put it, though experts are "given considerable leeway as to the material on which they may rely, the rules governing actual communication to the jury of any hearsay matter reasonably relied on by an expert are more restrictive." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524.) The basis of this restriction is Evidence Code

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[12] Evidence Code section 352 states: "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."

section 352, which limits the general admissibility of hearsay basis evidence under Evidence Code section 802. (See *Gardeley, supra,* 14 Cal.4th at pp. 618-619.) Indeed, courts of this state have consistently recognized that "prejudice may arise if, '"under the guise of reasons,"' the expert's detailed explanation '"[brings] before the jury incompetent hearsay evidence."'" (*Montiel, supra,* 5 Cal.4th at p. 918; *People v. Catlin* (2001) 26 Cal.4th 81, 137; *Grimshaw v. Ford Motor Co., supra,* 119 Cal.App.3d at pp. 788-789; *People v. Campos* (1995) 32 Cal.App.4th 304, 308; *People v. Dean* (2009) 174 Cal.App.4th 186, 192-193 [Fourth Dist. Div. Two].)[13]

Gardeley noted that the risk of prejudice is that the jury will consider the hearsay basis evidence as "independent proof" of the matter asserted. (*Gardeley, supra,* 14 Cal.4th at p. 619.) But the risk of prejudice is not simply that the jury will consider the hearsay basis evidence for its truth, or as independent proof of the matter asserted. Instead, the risk of prejudice is that the probative value of the hearsay evidence as basis evidence will be substantially outweighed by the probability its admission will "create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *Gardeley, supra,* at p. 619.) Evidence Code section 352 thus

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[13] Courts have also consistently recognized that "a broader range of evidence may be properly used on cross-examination to test and diminish the weight to be given the expert opinion than is admissible on direct examination to fortify the opinion. [Citation.]" (*Coleman, supra,* 38 Cal.3d at p. 92; *People v. Gonzales* (2011) 51 Cal.4th 894, 923 ["The scope of cross-examination of an expert witness is especially broad."].) But even when hearsay evidence is used in cross-examining an expert, the trial court "must" exercise its discretion under Evidence Code section 352 to limit the inadmissible hearsay basis evidence to its "proper uses." (*People v. Gonzales, supra,* at p. 923; *Coleman, supra,* at p. 93.)

"'authorizes the court to exclude from an expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]' [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 403; *People v. Pollock* (2004) 32 Cal.4th 1153, 1172.)[14]

To be sure, "an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay . . . ." (*Montiel, supra,* 5 Cal.4th at p. 919.) Accordingly, courts have "discretion 'to weigh the probative value of inadmissible evidence relied upon by an expert witness . . . *against the risk* that the jury might improperly consider it as independent proof of the acts recited therein.' [Citation.]" (*Gardeley, supra,* 14 Cal.4th at p. 619, italics added.) Courts also have "'considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay.' [Citation.]" (*Ibid*.) But when "the risk of improper use of the hearsay outweighs its probative value [as basis evidence] it may be necessary to exclude the evidence altogether." (*Coleman, supra,* 38 Cal.3d at p. 93 [prejudicial error to allow prosecutor to question defense expert concerning letters containing prejudicial hearsay statements]; *Korsak v. Atlas Hotels, Inc., supra,* 2

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[14] It is in this sense that hearsay evidence has "'limited admissibility'" as basis evidence. (*Coleman, supra,* 38 Cal.3d at p. 91, quoting *People v. Chapman* (1968) 261 Cal.App.2d 149, 178-179 ["the doctor's use of Mrs. Chapman's . . . statement did not open the door to its being read to the jury."].) In other words, the court "must exercise its discretion under Evidence Code section 352 to limit the evidence to its proper uses." (*People v. Gonzales, supra,* 51 Cal.4th at p. 923; *People v. Stanley* (1995) 10 Cal.4th 764, 833.)

Cal.App.4th at pp. 1525-1527; see also *People v. Nicolaus* (1991) 54 Cal.3d 551, 582 ["It is well established that the court may, within its sound discretion, exclude the hearsay basis of an expert's opinion."].)[15]

3. Perez's Testimonial Hearsay Statement and Evidence Code Section 352

As indicated, Perez's statement that defendant directed the November 2008 gang-related robbery of a Victorville drug dealer did not violate the confrontation clause under current case law because it was not *offered* as substantive evidence of the matter asserted, namely, that defendant directed the robbery. (*Gardeley, supra,* 14 Cal.4th at pp. 618-619; *Thomas, supra,* 130 Cal.App.4th at pp. 1209-1210.) But as we next explain, the statement was testimonial and of suspect reliability. This rendered the statement a prime candidate for exclusion as basis evidence under Evidence Code section 352.

As explained in *Crawford*, the confrontation clause applies to "witnesses" who "bear testimony," and "'[t]estimony'" "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" (*Crawford, supra,* 541 U.S. at p. 51.) Though *Crawford* did not spell out a comprehensive definition of what

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[15] Current case law also recognizes that limiting instructions may reduce or eliminate the risk that the jury will consider hearsay basis evidence as independent proof of the facts asserted. (*Montiel, supra,* 5 Cal.4th at p. 919 ["Most often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth."].) But other pre-*Crawford* cases acknowledge that limiting instructions may not prevent the jury from considering hearsay basis evidence as independent proof of its truth. (See, e.g., *Coleman, supra,* 38 Cal.4th at pp. 92-93 ["[I]n aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem."].) Limiting instructions are not required to be given *sua sponte*. (*Grimshaw v. Ford Motor Co., supra,* 119 Cal.App.3d at p. 789.)

constitutes a testimonial statement (*id*. at p. 68, fn. omitted ["We leave for another day any effort to spell out a comprehensive definition of 'testimonial'"]), the high court explained that "some statements qualify [as testimonial] under any definition" (*id*. at p. 52). These include, "at a minimum," prior testimony, whether given at a preliminary hearing, before a grand jury, or at a former trial, and "police interrogations." (*Id*. at pp. 53, 68; *People v. D'Arcy* (2010) 48 Cal.4th 257, 290.) These statements fall within the "core class" of testimonial statements to which the confrontation clause was "especially" concerned. (*Crawford, supra,* at p. 51.) Thus, in the case before it, *Crawford* concluded that an out-of-court statement by the defendant's wife during a custodial police interrogation, implicating her husband in a crime, qualified as testimonial "under any conceivable definition." (*Id.* at p. 54, fn. 4.)[16]

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[16] The high court later clarified that not all statements given in response to police questioning are testimonial: "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 v. Washington* (2006) 547 U.S. 813, 822, fn. omitted; cf. *Michigan v. Bryant* (2011) ___ U.S. ___ [131 S.Ct. 1143, 1156-1157].) *Cage* distilled several basic principles from *Davis,* and concluded that "the proper focus," in determining whether a statement is testimonial "is not on the mere reasonable chance that an out-of-court statement might later be used in a criminal trial. (*People v. Cage, supra,* 40 Cal.4th at p. 984.) Instead, the confrontation clause is concerned with statements which, *viewed objectively,* are given and taken for the *primary purpose* of establishing or proving "some past fact for possible use in a criminal trial," "under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*Ibid.,* fn. omitted; cf. *People v. Romero* (2008) 44 Cal.4th 386, 422.)

Like the defendant's wife's statement in *Crawford*, Perez's statement that defendant directed him and other East Side Victoria gang members to commit the November 2008 robbery qualified as testimonial under any conceivable definition. (*Crawford, supra*, 541 U.S. at p. 54, fn. 4.) According to Deputy Conley, Perez made the statement "to investigators" following his arrest and charge for the apparent provocative act murder of his cohort Delonie, who was shot and killed during the robbery. The statement thus appears to have been made during a custodial interrogation. And, viewed objectively, the statement appears to have been given and taken "*primarily* for the *purpose*" of proving "past fact[s] for possible use in a criminal trial," "under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*People v. Cage, supra*, 40 Cal.4th at p. 984 & fn. 14, fn. 13 omitted; *Davis v. Washington, supra*, 547 U.S. at p. 822.)[17]

Perez's testimonial hearsay statement was also of suspect reliability. Indeed, all testimonial hearsay statements are generally of suspect reliability. (See *Crawford, supra*, 541 U.S. at p. 61 [the "ultimate goal" of the confrontation clause is to ensure the reliability of out-of-court testimonial statements by requiring that they be "test[ed] in the

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[17] Though defendant was not on trial for the murder of Delonie or for the robbery of the drug dealer, if he had been, the admission of Perez's statement for its truth would have constituted *Aranda/Bruton* error. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123) *Aranda* and *Bruton* "stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" (*People v. Jennings, supra*, 50 Cal.4th at p. 652.)

crucible of cross-examination"].) Perez apparently had every reason to implicate defendant as having directed the November 2008 robbery in order to curry favorable treatment for himself in connection with the robbery and murder charges he was facing when he made the statement. This presented a risk of undue prejudice to defendant, particularly if he did not have an opportunity to cross-examine Perez and wished to challenge the truth, falsity, or reliability of his testimonial accusation.

As the People acknowledge, Perez's statement was subject to being excluded in its entirety, or at least limited or redacted under Evidence Code section 352, if its unreliability or other potential for prejudice outweighed its "proper" probative value as basis evidence. (*People v. Pollock, supra,* 32 Cal.4th at p. 1172.) But because defense counsel did not object to the statement on these grounds,[18] the trial court was not called upon to determine whether the statement should have been limited or excluded under Evidence Code section 352. Thus it cannot be said that the trial court abused its discretion in refusing to exclude the statement, or in failing to limit or redact it. But had defense counsel challenged the admissibility of the statement under Evidence Code section 352, the fact it was testimonial and of suspect reliability would have constituted sufficient grounds for substantially redacting it or excluding it altogether.[19]

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[18] See footnote 5, *ante*. Defense counsel objected to Perez's statement solely on the grounds it constituted multiple hearsay and lacked foundation. These objections were off base; defense counsel should have objected to the hearsay statement on the ground it was more prejudicial than probative as basis evidence. (Evid. Code, § 352.)

[19] Additionally, as relayed to the jury, Perez's statement constituted multiple hearsay. (Evid. Code, § 1200.) Deputy Conley testified that Perez made the statement

[footnote continued on next page]

4. Guidelines for Trial Courts

We next offer guidelines for trial courts to follow when a party objects to the admission of hearsay evidence as basis evidence under Evidence Code section 352. First, the court should carefully consider excluding the hearsay basis evidence in its entirety. Juries will often, if not always, be unable to disregard hearsay basis evidence for its truth (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1131) and CALCRIM No. 332 instructs the jury to determine whether basis evidence, or the information on which the expert relied, is "true and accurate" in evaluating the expert's testimony.[20] Thus, a limiting instruction telling the jury not to consider the hearsay basis evidence as "substantive evidence" or as "independent proof" of its truth may conflict with CALCRIM No. 332, and may, in any event, be insufficient to cure any prejudice resulting from the admission of the hearsay basis evidence. (*Montiel, supra,* 5 Cal.4th at p. 919.)

Testimonial hearsay as basis evidence presents a particular risk of undue prejudice to criminal defendants and other adverse parties, because testimonial statements are criminally accusatory, formal statements, and are of suspect reliability generally. (See *Crawford, supra,* 541 U.S. at pp. 61-62; *People v. Cage, supra,* 40 Cal.4th at p. 984.) Thus, it is especially doubtful that a limiting instruction will cure any prejudice resulting from the admission of a testimonial hearsay statement as basis evidence. (See *Montiel,*

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"to investigators," but Deputy Conley did not explain how he learned of the statement or how many investigators it passed through before it got to him.

[20] See footnote 7, *ante*.

supra, 5 Cal.4th at p. 919.) Indeed, in criminal trials, the admission of testimonial hearsay as basis evidence can result in an "end run" around the confrontation clause. (*Hill, supra,* 191 Cal.App.4th at pp. 1129-1131 & fn. 16.) To avoid this problem, and to prevent undue prejudice to adverse parties in both criminal and civil cases, it is critical that trial courts employ Evidence Code section 352 to limit or exclude hearsay evidence, including testimonial hearsay evidence, as basis evidence.

Here, for example, it is doubtful that Perez's testimonial hearsay statement that defendant directed Perez and other gang members to commit the November 2008 robbery of a downtown Victorville drug dealer could have been redacted or paraphrased to eliminate its testimonial or accusatory character. Rather than allowing Deputy Conley to testify to the details of Perez's statement, the deputy may have instead been limited to testifying that he learned through speaking with other law enforcement officers that defendant directed other gang members to rob a Victorville drug dealer. But even that would not have eliminated the testimonial or accusatory character of Perez's apparently unconfronted and unreliable testimonial hearsay statement. Thus it appears that the only way to eliminate the risk of undue prejudice to defendant was to exclude Perez's statement in its entirety.

An expert may state on direct examination the matters upon which he or she relied in forming his or her opinion, as long as the matter is reliable and the expert is not precluded by law from using such reasons or matters as a basis for the opinion. (Evid. Code, §§ 801, 802; *Gardeley, supra,* 14 Cal.4th at p. 618 ["Of course, any material that

forms the basis of an expert's opinion testimony must be reliable."].) Concomitantly, the expert may not bring *unreliable*, i.e., totally inadmissible, hearsay evidence before the jury. (*Gardeley, supra,* at p. 618; *Coleman, supra,* 38 Cal.3d at p. 92.) Nor may the expert testify to hearsay evidence when its probative value as basis evidence is substantially outweighed by the probability its admission will result in undue prejudice to the adverse party, confuse the issues, or mislead the jury. (*Gardeley, supra,* at pp. 618-619; *Coleman, supra,* at pp. 92-93; Evid. Code, § 352.)

Ultimately, the trial court's determination of whether and if so to what extent hearsay basis evidence should be limited, redacted, or entirely excluded should be made in light of all the relevant circumstances. The court must *balance* the expert's need to explain the basis of his or her opinions, the jury's need for information sufficient to evaluate the expert's opinions, and the proponent's need to support its expert's opinions with sufficient evidence, against the interest of the criminal defendant or other adverse party in avoiding the substantive, prejudicial use of unreliable hearsay. (*People v. Montiel, supra,* 5 Cal.4th at p. 919 ["an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay"]; *In re Alexander L.* (2007) 149 Cal.App.4th 605, 614 [expert opinion that gang had been involved in certain crimes not supported by sufficient evidence].)

5. The Admission of Perez's Statement Was Harmless

Despite its testimonial, accusatory nature, defendant was not prejudiced by the admission as basis evidence of Perez's testimonial statement that defendant directed a gang-related robbery. Even though the jury was instructed to consider the testimonial statement for its truth, it is not reasonably probable that the statement affected the guilty verdicts on the simple possession or active gang participation charge in light of the records as a whole, including other evidence that defendant was an active high-ranking gang member when he committed the charged crimes. (*People v. Gonzales, supra,* 51 Cal.4th at p. 924 [trial court's determinations under Evid. Code, § 352 do not ordinarily implicate the federal Constitution, and are reviewed under "'reasonable probability'" standard of *People v. Watson, supra,* 46 Cal.2d 818].)

Regarding the simple possession charge, defendant admitted he was in possession of methamphetamine at the time of his December 5, 2008, arrest. He testified that the small bag of methamphetamine that officers found in his coin pocket was for his personal use, and he possessed that methamphetamine before Ramirez came to his house. He also admitted he accepted another bag of methamphetamine from Ramirez on December 5. Thus Perez's statement that defendant directed the November 2008 gang-related robbery could not have affected the guilty verdict on the simple possession charge.

By contrast, the prosecution sought to prove the active gang participation charge based on the circumstances surrounding defendant's meeting with Ramirez on December 5, 2008, and defendant's acceptance of a bag of methamphetamine from Ramirez as "tax"

payable to defendant as a high-ranking gang member. According to Deputy Conley, defendant was a high-ranking gang member to whom "taxes" or proceeds of criminal activities, including methamphetamine, were required to be paid. Perez's statement that defendant directed the gang-related robbery tended very directly to show defendant was a "high-ranking" member of the gang at the time of the November 2008 robbery, and shortly thereafter on December 5.

Nevertheless, much other evidence showed defendant was a high-ranking member of East Side Victoria, and had been for a long time, when he committed the charged crime of active gang participation with Ramirez on December 5. Defendant had a lengthy, documented history in the state prison system, and Deputy Conley testified state prison officials had "validated" him as a Mexican Mafia associate. The Mexican Mafia controlled all southern Hispanic street gangs, and subordinate gangs were required to pay "taxes" or a portion of the proceeds of their criminal activities, including drug sales, to the Mexican Mafia. Defendant's April 2009 letter to Ramirez, in which defendant directed Ramirez not to plead to the charges unless defendant also agreed, also tended to show defendant was a high-ranking gang member who directed the activities of other gang members.

Defendant also testified he helped found the East Side Victoria or Vario Victoria Rifa gang in the late 1970's, and its younger members looked up to him "with a great deal of respect." This also tended to show that defendant had long been a high-ranking member of the East Side Victoria. In sum, based on all the evidence presented, it is not

reasonably probable that Perez's statement that defendant directed the November 2008 gang-related robbery affected the guilty verdicts on either the methamphetamine possession charge or the active gang participation charge.

C. *The Court's Two Minor Ex Parte Communications to the Jury Were Harmless Beyond a Reasonable Doubt*

Shortly after the jury began its deliberations, it sent two notes to the court. One asked for a readback of defense counsel's closing argument, and the other stated: "Need a reading of the 602 what was it filled out for Fred Archuleta." The court called the counsel into the courtroom and advised them it had received the two notes.

Regarding the first note, the court said it had already sent the jury a return note stating that arguments of counsel were not evidence and would not be reread. Regarding the "602" note, the court advised counsel that the pertinent testimony had already been reread. Defense counsel objected to the court's refusal to order a readback of his closing argument, but he did not object to the court's "ex parte" order to have the 602 evidence reread.

Defendant claims the court's ex parte communications to the jury in response to both notes violated section 1138,[21] and also constituted a prejudicial violation of his right to counsel. We find no prejudicial error.

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[21] Section 1138 provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the

[footnote continued on next page]

1. The "602" Note and Readback

We first observe that defendant has forfeited his claims regarding the court's ex parte communication or ordered readback in response to the jury's 602 note, because he did not object to that communication or move for a mistrial based on it after he was informed it had occurred. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1048 ["A defendant may forfeit an objection to the court's response to a jury inquiry through counsel's consent, or invitation or tacit approval of, that response."].)

In any event, the court's ex parte communication concerning the 602 note was harmless beyond a reasonable doubt; reversal, therefore, is not required. (*People v. Jennings* (1991) 53 Cal.3d 334, 383-384 [court's unauthorized ex parte communication with jury does not result in reversal if the improper contact was harmless beyond a reasonable doubt]; *People v. Delgado* (1993) 5 Cal.4th 312, 330.)

As explained in *People v. Wright* (1990) 52 Cal.3d 367: "It is well settled that the trial court should not entertain, let alone initiate, communications with individual jurors except in open court, with prior notification to counsel. [Citation.] 'This rule is based on the precept that a defendant should be afforded an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant's case. [Citations.]' [Citation.]"

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presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

". . . '[T]here is scarcely a lengthy trial in which one or more jurors do not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial. The . . . conclusion that an unrecorded *ex parte* communication between trial judge and juror can never be harmless error ignores these day-to-day realities of courtroom life and undermines society's interest in the administration of criminal justice.' [Citation.] Although such communications violate a defendant's right to be present, and represented by counsel, at all critical stages of his trial, and thus constitute federal constitutional error, reversal is not required where the error can be demonstrated harmless beyond a reasonable doubt." (*People v. Wright, supra,* 52 Cal.3d at pp. 402-403.)

Though the record does not indicate exactly what evidence was reread or provided to the jury in response to the 602 note, the readback took all of two minutes, from 3:58 p.m. to 4:00 p.m. on May 28. We are satisfied that this two-minute readback could only have consisted of one thing: two pages of defendant's direct testimony concerning a 602 filing. The contents of that portion of defendant's testimony can be briefly summarized.

When asked whether he recalled objecting to a notation on the 2008 classification sheet indicating his moniker was "Payaso," defendant said he "filed a 602 on this Payaso and Joker thing" when he was in state prison. He explained that "a 602" is "an appeal process" that inmates use if they feel unjustly accused of something in state prison. Around 1998, defendant discovered that another inmate had provided confidential information that Payaso, or defendant, was a Mexican Mafia associate. Defendant said

he was known as "Joker," but had never been known as Payaso, so he "filed a 602" to correct or contest the allegation that he was known as Payaso, and "beat" the allegation. No 602 document was identified during trial or admitted into evidence.

Though we agree that the court should have deferred ordering the readback until after it conferred with counsel (*People v. Jennings, supra,* 53 Cal.3d at p. 384; § 1138), we find the error harmless beyond a reasonable doubt for three reasons. First, there is no indication that the readback contained any misstatement of the law. (Cf. *People v. Delgado, supra,* 5 Cal.4th at p. 331; *People v. Jennings, supra,* at pp. 384-385.)

Second, the court promptly advised counsel of the readback at 4:23 p.m., less than 25 minutes after the 3:58 p.m. to 4:00 p.m. readback occurred. The court recessed at 4:27 p.m., and the jury continued deliberating through the entire next day, May 29, and reached its verdicts on the following court day, June 1, after deliberating from 8:30 a.m. to 10:00 a.m. Defense counsel had plenty of time to inquire of the court concerning the 602 readback, and ask that the court correct, supplement, or otherwise modify the readback before jury deliberations concluded, if he felt the readback was somehow in error.

Third, defendant fails to articulate what might have happened had his counsel been advised of the readback in advance. (*People v. Delgado, supra,* 5 Cal.4th at p. 331.) During the remainder of its deliberations, the jury had no questions concerning its 602 note or the readback in response to it. Nor did the jury ask any other questions concerning the 602 filing.

"[I]t is questionable 'whether a defendant should be permitted to sit back, await a jury verdict, and then assert error based on the court's improper communication with the jury' [citation], at least when the improper communication was relatively minor." (*People v. Jennings, supra,* 53 Cal.3d at p. 384.) The 602 readback and the court's ex parte order concerning it was minor in the context of the entire trial, and for the reasons explained was harmless beyond a reasonable doubt.

2. The Request to Read Back Defense Counsel's Argument

In response to the jury's note requesting a readback of defense counsel's closing argument, the court returned the jury's note after writing on it: "Sorry, the arguments of counsel are not evidence and will not be provided to you." Defendant claims this ex parte communication also violated section 1138 and his right to counsel. Here, too, we find no prejudicial error.

The court's statement that "arguments of counsel are not [in] evidence" was a correct statement of the law (Evid. Code, § 140), and the court did not tell the jury to disregard the arguments of either side (see *People v. Gurule* (2002) 28 Cal.4th 557, 649 [a criminal defendant has a state and federal constitutional right to present closing argument to the jury]).

Further, the instructions told the jury that the opening statements, questions, and closing arguments of counsel were not evidence, and to base their decisions solely on the evidence. (CALCRIM No. 222.) In view of these factors and the record as a whole, the

court's failure to confer with counsel before responding to the note was harmless beyond a reasonable doubt. (*People v. Wright, supra,* 52 Cal.3d at pp. 402-403.)

D. *The Court Did Not Abuse Its Discretion in Refusing the Jury's Request for a Rereading of Defense Counsel's Closing Argument*

Defendant claims the court did not understand that it had discretion to order the readback of defense counsel's argument, and in any event abused its discretion in refusing to order the readback. We disagree. The court both understood that it had discretion to order the readback, and properly refused to exercise it.

After the court told counsel it had refused the jury's request for a readback of defense counsel's closing argument, defense counsel objected and the court invited counsel to direct the court's attention to some authority that it had discretion to order the readback. The following morning, at least one full day before the jury concluded its deliberations, defense counsel directed the court's attention to *People v. Gordon* (1990) 50 Cal.3d 1223 (*Gordon*).

Gordon and subsequent cases have made it clear that while section 1138[22] requires the trial court to reread evidence and instructions upon the jury's request, the statute does not extend to arguments of counsel. (*Gordon, supra*, 50 Cal.3d at pp. 1259-1260; *People v. Pride* (1992) 3 Cal.4th 195, 266; *People v. Gurule, supra*, 28 Cal.4th at p. 649.) Still, a court has *inherent* authority and discretion to reread arguments of counsel upon request. (*Gordon, supra,* at p. 1260; *People v. Sims* (1993) 5 Cal.4th 405, 453.)

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22 See footnote 21, *ante*.

Defense counsel pointed out that, while the trial court in *Gordon* also declined to reread defense counsel's argument, that court also told the jury it did not "mean to . . . imply" that the arguments of either side should be disregarded, but it was not appropriate for the court to "emphasize one argument." (*Gordon, supra,* 50 Cal.3d at p. 1259.) Defense counsel next asked the court to tell the jury it should not disregard the arguments of either side, if the court was not inclined to order defense counsel's argument reread.

Following this discussion, the court did not order the readback and did not admonish the jury not to disregard either side's argument. Without addressing why it was not ordering the readback, the court explained it was unnecessary to tell the jury not to disregard the arguments, because the instructions told the jury "what to do" with the arguments and the court never told the jury to disregard the arguments. This was a proper exercise of the trial court's discretion.

The trial court in *Gordon* did not abuse its discretion in refusing to read back the defense counsel's argument, because it would have risked diverting the jury's attention from the evidence and the instructions. (*Gordon, supra,* 50 Cal.3d at p. 1260.) To be sure, a rereading of one argument but not the other generally risks placing undue emphasis on the reread argument at the expense of the evidence, the instructions, and the other side's argument.

In addition, and as the trial court pointed out, the instructions told the jury that the opening statements, questions, and closing arguments of counsel were not evidence, and to base their decisions solely on the evidence. (CALCRIM No. 220.) Nor did the trial

court tell the jury to disregard the arguments. (See *People v. Gurule, supra,* 28 Cal.4th at p. 649 [a criminal defendant has "a state and federal constitutional right to present closing argument to the jury"].) There was therefore no need to tell the jury *not to* disregard the arguments.

Further, a court's refusal to reread an argument, if erroneous, is not prejudicial unless it is reasonably probable the jury would have reached a different result had the argument been reread. (*People v. Sims, supra,* 5 Cal.4th at p. 453; *People v. Watson, supra,* 46 Cal.2d at p. 836.) That is not the case here. Defense counsel's argument was not so complex that its repetition was necessary for defendant to receive the full benefit of the adversarial process. (*People v. Sims, supra,* at p. 453.) Also, the disputed issues addressed in the argument were fully covered in the instructions. (*Ibid*.)[23]

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[23] The key points of defense counsel's argument were the following: On count 1, counsel urged the jury to conclude that defendant did not possess the bag of methamphetamine that Ramirez gave him, because he never exercised control over it, though he knew it contained methamphetamine. He also argued that the methamphetamine found on defendant was not a usable quantity, an essential element of the possession charge.

Regarding count 2, counsel reminded the jury that during opening statement he told them defendant "*was* a member" of East Side Victoria when it was known as the "VVR," and defendant "told the truth" about the gang's history. He argued defendant was not a "shot caller" for the gang, though he mentored the gang's younger members about prison life and had no control over what the gang members did. In short, counsel argued defendant was not an "active participant" in the gang and had not been since he was a teenager.

Counsel also argued that defendant did not assist, promote, further, or facilitate any felonious conduct on the part of Ramirez or any other gang members. Ramirez was already in possession of the methamphetamine when he arrived at defendant's house, and there was no evidence the two men were planning a robbery or any other crime. They never even had a chance to talk about the stolen car Ramirez was driving.

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E. *The Court's Further Instructions on Count 2 Were Proper*

Defendant claims the court gave erroneous further instructions on the elements of the active gang participation charge, in response to the jury's questions during deliberations. Here, too, we find no error.

1. Relevant Background

After the jury returned from lunch at 1:30 p.m. on May 29, it sent the court a note stating it was deadlocked on count 2. In response to the court's questions, the foreman told the court the jury had reached a verdict on count 1 and had no further questions concerning the conviction dates. The jury was split seven to five on count 2.

Some jurors nodded their heads "yes" when asked whether more information could be helpful in reaching a verdict on count 2. The court ordered the jury to continue its deliberations and to discuss what additional information might be helpful. The jury then resumed deliberations at 2:26 p.m. and, at 4:00 p.m., sent the court a note asking three questions.

The first two questions were: (1) "Is the suspect on parole?," to which the court responded, "You may only consider evidence presented"; and (2) "Are we basing the

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Lastly, counsel argued defendant had no incentive to possess methamphetamine or actively participate in a gang because he was a three striker. Also, there was nothing defendant could do about the jail's classification of him as a gang member or the CDCR's validation of him as a Mexican Mafia associate. Defendant contested the CDCR's validation through the 602 he filed. The prosecution's case was built on circumstantial evidence, and it was more reasonable to conclude defendant was innocent rather than guilty.

active participation . . . only on the crime committed on Dec[ember] 5, 2008?," to which the court responded, "Active participation could be any felonious conduct on or about Dec[ember] 5, 2008." The third question concerned the "A" and "B" alternative prongs of the third element of the active gang participation charge as described in CALCRIM No. 1400.

As discussed above in connection with defendant's substantial evidence claim, CALCRIM No. 1400 told the jury the prosecution had to prove defendant willfully promoted, furthered, or assisted "felonious criminal conduct" by members of the gang *either by* (A) directly and actively committing a felony offense himself *or* (B) aiding and abetting a felony offense. (CALCRIM No. 1400.)

CALCRIM No. 1400 also told the jury: "[A] *willful act* is one done willingly or on purpose"; "*[f]elonious criminal conduct* means . . . [p]ossession of a [c]ontrolled [s]ubstance"; and "[s]omeone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose, and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

The jury was also originally instructed, pursuant to defense counsel's request, that "[i]f you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. *However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor*." (Italics added.)

The jury's third question was, "[i]f we agree on 1, 2 [and] 3a or b [*h*]*ow does or are we to bring into consideration* the 'However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor?'" (Italics added.) The court responded by writing on the note: "The material in quotes that you set forth applies only to alternative 3b and not to alternative 3a."

2. Argument and Analysis

Defendant claims the jury reasonably could have interpreted the court's instruction (in response to the second question) that "'[a]ctive participation could be any felonious conduct on or about Dec[ember] 5, 2008,'" as pertaining to either the first or the third element of the charge, and in either case the instruction incorrectly stated the law, lessened the prosecution's burden of proof, and violated the requirement of unanimity.

More specifically, defendant argues that if the jury understood the instruction as pertaining to the third element, then it conflicted with the court's original instruction that "'felonious criminal conduct means committing or attempting to commit . . . [p]ossession of a [c]ontrolled [s]ubstance . . . .'" In addition, defendant claims there was no evidence that either he or Ramirez were engaged in any felonious conduct on or about December 5 *other than possession of methamphetamine*. Thus, he argues, if the jury interpreted the instruction as pertaining to the third element, it is impossible to determine whether the jury unanimously agreed what felonious conduct defendant directly committed or aided and abetted when it found him guilty in count 2. (*People v. Smith* (2005) 132

Cal.App.4th 1537, 1545, fn. omitted ["If a jury . . . is permitted to amalgamate evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt to all of the jurors required to agree on the verdict, the prosecution's burden is lessened and defendant is denied due process."].)

Alternatively, defendant argues that if the jury interpreted the court's further instruction (in response to the jury's second question) as pertaining to the *first* element of the charge, then the instruction still incorrectly stated the law and lessened the prosecution's burden of proof. Defendant argues it is more reasonable to conclude that the jury understood the instruction as pertaining to the first element of the charge, in view of the text of CALCRIM No. 1400 and the context in which the jury's second question appeared in its note to the court. We agree the jury's second question was plainly directed to the first element of the charge, namely, the "active participation" element, but we disagree that the court's response to the question incorrectly stated the law or lessened the prosecution's burden of proof.

The first element of the charge is "active participation" in a criminal street gang "that is more than nominal or passive" (*People v. Castenada, supra,* 23 Cal.4th at p. 747), or, in the words of CALCRIM No. 1400, "in a way that is more than passive or in name only." Much evidence was presented that defendant had been an active participant in the East Side Victoria gang for many years. The jury's question, "[a]re we basing the active participation in a criminal street gang only on the crime committed on Dec[ember] 5, 2008?," indicates it was confused about whether defendant's *prior* participation in the

gang *before* the December 5 incident involving Ramirez could have served as the basis of the first element. The court answered the question in the negative by telling the jury: "Active participation could be any felonious conduct on or about Dec[ember] 5, 2008." This resolved the jury's question, and correctly stated the law. Active participation must be shown *at or near the time* of the crime. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Nor do we believe the jury could have confused the court's response to its second question with the third element of the offense. The jury asked an entirely separate question regarding the third element—whether the instruction that "the fact that a person is present at the scene of a crime or fails to prevent the crime does not by itself make him or her an aider and abettor" related to the "A" or "B" prong of the third element. The court correctly instructed the jury that the quoted phrase related only to the "B" element—that defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang by . . . *aiding and abetting* a felony offense.

Additionally, and as defendant points out, the jury was instructed that "*[f]elonious criminal conduct*" meant "committing or attempting to commit . . . [p]ossession of a [c]ontrolled [s]ubstance." Thus, in order to find defendant guilty of the charge, the jury had to find he willfully assisted, furthered, or promoted possession of methamphetamine by members of the gang either by (1) directly and actively committing a felony offense himself, or (2) aiding and abetting a felony offense. And for the reasons discussed above, substantial evidence supports each alternative finding.

F. *No Cumulative Error*

Lastly, defendant claims the cumulative effect of the court's errors requires reversal of his active gang participation conviction. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845.) We disagree. For the reasons discussed, the admission of Perez's testimonial hearsay statement to investigators that defendant directed the November 2008 gang-related robbery was harmless under the *Watson* standard. The court's two other minor errors in failing to confer with counsel before responding to the jury's notes requesting a readback of the 602 evidence and defense counsel's closing argument, were harmless beyond a reasonable doubt and did nothing to compound any error attributable to the admission of Perez's testimonial hearsay statement as basis evidence. There were no other errors.

IV. DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

/s/ King
J.

I concur:

/s/ Miller
J.

I concur in the judgment only:

/s/ Richli
Acting P.J.