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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY DOBY et al.,

Defendants and Appellants.

B233832

(Los Angeles County
Super. Ct. No. NA081778)

APPEALS from judgments of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed in part and reversed in part with directions.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Randy Doby.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant Trindel Wingate.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Randy Doby (Doby) and Trindel Wingate (Wingate) appeal from judgments of conviction entered after a jury trial. The jury found defendants guilty of second degree murder (Pen. Code, § 187, subd. (a)) and attempted murder (*id.*, §§ 187, subd. (a), 664), and found true the allegations a principal personally used and intentionally discharged a firearm causing great bodily injury or death in the commission of the crimes (*id.*, § 12022.53, subds. (b), (c), (d) & (e)(1)) and the offenses were committed for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)(c)). Each defendant was sentenced to state prison for a term of 74 years to life.

On appeal, defendants challenge the sufficiency of the evidence to support the judgment, and they claim evidentiary and instructional error. We agree the evidence is insufficient to support the gang and firearm enhancements, which must be reversed. In all other respects, we affirm.

FACTS

A. Prosecution

On the afternoon of April 8, 2009, Marquis Dixon (Dixon), a member of the Go Getters clique of the Harbor City Crips, was attacked near Lloyd's Market in Harbor City by members of the Mafioso clique of the same gang: James Franklin (Franklin), D'Ancee Carter (Carter), Demontae Lee (Lee) and John Miller (Miller).

Dixon called his cousin, Lunniesha Collier (Collier), and told her he had been “jumped” by some Harbor City boys. Dixon and Collier, joined by other family members, returned to the liquor store. Dixon demanded a fair, one-on-one fight, and got into one with Franklin. They fought for about 10 minutes. When Collier eventually tried to break up the fight, she was hit by Franklin.

Donte Blacksher (Blacksher) is another of Collier's cousins. Blacksher's brother told him that Franklin had hit Collier. Blacksher called Doby, who is the father of Collier's baby child and a member of the Go Getters clique. Blacksher asked if Doby knew what had happened; Doby did not. Blacksher told Doby that Collier had been hit, which caused Doby to be concerned. At one point Blacksher also said, "What's up, your homeboys are fighting with my family."

Doby asked Blacksher to pick him up and to pick up Wingate. When Blacksher picked Doby up, Doby had a blue duffle bag, which he put in the trunk of the car. They then picked up Wingate, who had a white shirt in his hand. Blacksher did not see either one of them with a gun.

They drove to Harbor City to find Collier. They eventually found her by a basketball court, sitting in a relative's car. She got into Blacksher's car. He asked how she was. She said she was fine and asked him to take her to her car. At some point, she told Doby what had happened, and he seemed to be angry about it.

Blacksher drove toward the front entrance of Harbor Village, intending to drop Doby and Collier off. However, Doby asked Blacksher to drop him and Wingate off at 256th Street and Marigold Avenue, at the back of Harbor Village near Lloyd's Market. Blacksher dropped them off and then drove away with Collier. Doby did not take the duffle bag with him.

Franklin, Carter, Lee and Miller were at the corner of 256th Street and Marigold Avenue, walking from Lloyd's Market to Harbor Village. Doby and Wingate walked toward them. As the groups passed one another, Doby and Wingate said something to Franklin. Franklin asked Lee for his cell phone, and then punched in a number. At that point, several gunshots came from behind Franklin's group. Franklin was shot and killed.¹ Carter was shot in the buttocks as he attempted to run away. He spent three days in the hospital as a result of his injuries.

¹ A bullet hit his leg, severing his femoral artery. He eventually bled to death despite medical treatment to repair the injury.

Blacksher received a phone call from Doby three to five minutes after he had dropped him off. Doby asked if Blacksher could come get him at a parking lot at Pacific Coast Highway and Normandie Avenue. Blacksher picked up Doby and Wingate from the parking lot. They did not say anything about what had happened. Blacksher's brother called him and said there had been a shooting in the Harbor Village area. Blacksher told his passengers, "I heard somebody got shot by the back gate." Nobody responded.

Doby and Wingate asked Blacksher to take them to Compton. On the drive, they were both talking on their cell phones. After dropping them off, Blacksher and Collier continued on. Neither one of them saw a gun in Doby's or Wingate's possession.

Later that night, Collier saw Doby at his father's house. They talked about the shooting. He said that he was involved in the shooting, but that Wingate was the shooter.

Detective Fernando Rivas of the Los Angeles Police Department spoke to Blacksher, who initially denied that Doby and Wingate had been in his car because he was scared. Blacksher later told the detective that he had dropped Doby and Wingate off near the back gate of Harbor Village.

Carter and Lee spoke to the police about the incident. Both identified Doby as one of the two men who approached them prior to the shooting.

When the police spoke to Collier, she initially lied to them because she feared for her safety and the safety of her child. She knew that Doby was a member of the Harbor City Crips; he had gang tattoos on his back and went by the monikers "Slim" and "Smoove." She eventually told the police the truth, which was what she testified to in court. She did not know if Wingate was a gang member.

Doby had previously been arrested two times. Both times, he told the arresting officer that he was a member of the Harbor City Crips, and his moniker was "Smoove."

Los Angeles Police Department Officer Scott Coffee testified as a gang expert. He explained how Doby's tattoos indicated that Doby was a member of the Go Getters clique of the Harbor City Crips. Officer Coffee believed that Franklin and Carter were

also members of the Harbor City Crips. While Wingate had an “HC” tattoo, Officer Coffee believed it represented Hub City, or Compton, and Wingate was not a member of the Harbor City Crips.

Officer Coffee also testified that Harbor Village was within Harbor City Crips territory and was subject to a gang injunction. He described the common symbols and hand signs used by members of the Harbor City Crips, and he explained that their primary activities consisted of all types of crimes, including murder.

Officer Coffee then testified regarding the various cliques within the Harbor City Crips. He testified that the cliques were generally composed of gang members in the same age group, friends who committed crimes together. The cliques themselves had a hierarchy, with the older gang members in charge and overseeing the younger gang members. Each clique tried to build its own reputation within the gang, with the Go Getters having the reputation for being violent and containing the most hardcore gang members.

The prosecutor then asked Officer Coffee to assume that an older gang member found out that a younger gang member hit or pushed his girlfriend, who was the mother of his child. The older gang member and a friend approach the younger gang member, who is with some friends in gang territory. After a brief exchange of words, the older gang member and his friend walk past the other group, then shoot a number of bullets towards the group, striking and killing the younger gang member and striking another member of the group. Under those circumstances, the prosecutor asked, was the shooting committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote criminal conduct by gang members?

Officer Coffee testified that it was. He explained that the crime was committed “within the gang’s territory,” “where the older gang member felt comfortable, where he felt that the fear . . . that he instilled in the community, would help benefit him in committing this crime, that he couldn’t get caught people[] wouldn’t snitch on him.” In addition, as an older gang member, he demanded respect from the younger members. For

a younger member to hit or push the older member's girlfriend would be a sign of disrespect. "It's everything he stands for, his clique and his gang, in general. He acts by committing a shooting, committing a murder, which is the ultimate act you can do in revenge" This would build up the older member's reputation within the gang, and "[o]ther gang members know they are not someone to be messed with because this could be the consequences of disrespecting that gang member."

Officer Coffee also opined that the older gang member's friend, who was not a member of the same gang, acted with the same intent. He responded, "Absolutely. And it falls along the same lines. . . . [T]hat friend is associating with this gang member who's going to commit this murder because he has been disrespected. And it falls along the same exact lines; you don't respect gang members, unless you deal with the consequences. And that act in fleeing and being there when the murder occurred is direct association with that gang."

B. Defense

Detective Rivas obtained a recording of an April 10, 2009 telephone call involving Jerome Downs (Downs),² his girlfriend, Lynnice Thomas (Thomas), and Doby. Downs called Thomas from jail, and she told him about the shooting. She said that "them new [guys] from the 'hood'" got shot because one of them "tried to beat [Doby's] baby mama up." She thought Doby "got tired of that" type of behavior. Downs asked Thomas to connect Doby on the line. After she did, Downs asked Doby if he was "good." Doby said he was "[f]or right now," but people were "telling." Doby explained that Franklin was dead, but Carter "made it" and he was "the one telling." Downs told Doby not to worry about being charged with murder. Doby responded that "it didn't last ten minutes before they was trying to say it was me." He told Downs that the police had questioned several people about the shooting, including Collier's aunt and Dixon.

² Downs and Doby had been arrested together in the past for violating a gang injunction.

Doby's mother, Wendolyn Johnson, testified that Doby moved out of her house in 2008 and enrolled in college pursuant to the terms of his probation. When Collier was pregnant, Doby spent a lot of time with her. Johnson never found any guns in her house and was not aware of Doby carrying a gun, although she knew he previously had pled guilty to possession of a firearm. She believed that Doby was not a violent person; he was never a "fighter" growing up. He was smart and got good grades in school.

DISCUSSION

A. Gang Enhancement

Defendants contended the evidence is insufficient to support the gang enhancement. Specifically, they claimed there is insufficient evidence that Harbor City Crips is a criminal street gang because the prosecution never presented evidence that the various cliques shared common activities or organization. At our request (Gov. Code, § 68081), the parties addressed the question whether, assuming *arguendo* that Harbor City Crips is a criminal street gang within the meaning of Penal Code section 186.22, there is sufficient evidence that the crimes were "committed for the benefit of, at the direction of, or in association with" the gang, and "with the specific intent to promote, further, or assist in any criminal conduct by gang members," within the meaning of subdivision (b) of that section. We conclude the evidence is insufficient to support a finding that the crimes were "committed for the benefit of, at the direction of, or in association with" a criminal street gang and reverse the enhancement on that basis.

In assessing the sufficiency of the evidence to support a criminal street gang enhancement, "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the

evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

The gang enhancement provided in subdivision (b)(1) of Penal Code section 186.22 "does not criminalize mere gang membership; rather, it imposes increased criminal penalties only when the criminal conduct is felonious and committed not only 'for the benefit of, at the direction of, or in association with' a . . . 'criminal street gang,' but also with the 'specific intent to promote, further, or assist in any criminal conduct by gang members.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 623-624.) Therefore, "the record must provide some evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez* (2004) 116 Cal.App.4th 753, 762, italics omitted.)

A trier of fact may rely on expert testimony about gangs and gang culture in determining whether a crime was committed for the benefit of a criminal street gang. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) However, "[a] gang expert's testimony alone is insufficient to find an offense gang related." (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Rather, the expert testimony must be accompanied by "some substantive factual evidentiary basis" (*id.* at p. 661) from which "the jury could reasonably infer the crime was gang related." (*Ferraez, supra*, at p. 931; see also *People v. Vang* (2011) 52 Cal.4th 1038 [""the expert's opinion may not be based 'on assumptions of fact without evidentiary support . . . or on speculative or conjectural factors'""]; *Ochoa, supra*, at p. 660 ["something more than an expert witness's unsubstantiated opinion that a crime was committed for the benefit of, at the direction of,

or in association with any criminal street gang is required to justify a true finding on a gang enhancement”].)

A case similar to the instant case is *People v. Albarran* (2007) 149 Cal.App.4th 214. In *Albarran*, the defendant and another man fired gunshots at a house where a birthday party was being held. The defendant was an admitted gang member, with gang tattoos and gang graffiti at his house. The shooting took place in the gang’s territory. The gang expert testified that the shooting was gang related because of the location in which it took place; there was more than one shooter; and it occurred at a party, and gang members often commit crimes at parties. In addition, the shooters would gain respect because it would be known on the street who the shooter were. (*Id.* at pp. 219-221.)

The prosecutor in *Albarran* “argued the motive for the shooting was to gain respect and enhance the shooter’s reputation—essentially to ‘earn one’s bones’ within the gang (i.e., the ‘respect’ motive).” (*People v. Albarran, supra*, 149 Cal.App.4th at p. 227.) This court found this was “insufficient evidence to support the contention that this shooting was done with the intent to gain respect.” (*Ibid.*) There was “nothing inherent in the facts of the shooting to suggest any specific gang motive.” (*Ibid.*, fn. omitted.) That the crime occurred in the defendant’s gang territory and there was more than one shooter “do not demonstrate one way or another that the crime was gang motivated.” (*Ibid.*, fn. 9.)

Here, there was clear evidence that Doby and/or Wingate shot Franklin because he hit Doby’s girlfriend, Collier, and Doby was angry about that. That Doby and/or Wingate spoke only to Franklin as the two groups passed one another prior to the shooting suggests that the shooting was personal, and not gang related. That Wingate was not a member of the Harbor City Crips also suggests that this was not a battle for respect between two cliques but rather a personal matter.

Officer Coffee’s testimony regarding Doby was unaccompanied by “some substantive factual evidentiary basis” (*People v. Ochoa, supra*, 179 Cal.App.4th at p. 661) from which “the jury could reasonably infer the crime was gang related” (*People*

v. Ferraez, supra, 112 Cal.App.4th at p. 931). The crime was committed in gang territory, but it was territory belonging both to Doby and his victims, all members of the same gang. It was the location in which Collier was hit and where Franklin was to be found. Nothing in the record suggests that Doby selected the location for any other reason.

Additionally, nothing in the record suggests that the shooting was intended to build up his reputation in the gang and prevent others from showing him disrespect. Doby was already a member of the clique having the reputation for being violent and containing the most hardcore gang members.

Officer Coffee's opinion that Wingate committed the crimes for the benefit of, in association with or at the direction of a criminal street gang was not only speculative but wholly insufficient to support a finding his crime was gang related. The officer testified in essence that Wingate was with a friend who was going to commit a murder because he was disrespected. Wingate's presence at the scene and flight thereafter was "in direct association" with Doby's gang. There was nothing in the officer's testimony regarding Wingate's commission of a crime.

Outside of Officer Coffee's testimony, the record does not provide any "evidentiary support, other than merely the defendant's record of prior offenses and past gang activities or personal affiliations, for a finding that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang." (*People v. Martinez, supra*, 116 Cal.App.4th at p. 762, italics omitted.) Therefore, the gang enhancements must be reversed.

B. Discharge of a Gun Causing Great Bodily Injury

Defendants next contend there is insufficient evidence to support a finding that in the commission of the attempted murder of Carter, a principal intentionally discharged a gun causing great bodily injury within the meaning of Penal Code section 12022.53,

subdivisions (d) and (e)(1). We need not resolve this contention in that, with the gang enhancements reversed, the gun use enhancement must also be reversed.

There was no evidence as to who fired the gun which killed Franklin and injured Carter. The gun use allegations were therefore based on a principal having used a gun in the commission of a gang-related crime. Subdivision (e)(1) of Penal Code section 12022.53 provides: “The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if *both* of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d).” (Italics added.) Since there was no violation of Penal Code section 186.22, subdivision (e)(1) of Penal Code section 12022.53 does not apply, and the gun enhancements must be reversed.

C. Failure to Instruct on Voluntary Manslaughter

Doby contends the trial court erred in failing to instruct the jury sua sponte on voluntary manslaughter based on heat of passion. We disagree.

It is well established that the trial court has a duty to “instruct on lesser offenses necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser. [Citation.] On the other hand, if there is no proof, other than an unexplainable rejection of the prosecution’s evidence, that the offense was less than that charged, such instructions shall not be given. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1063-1064.)

Voluntary manslaughter is the “unlawful killing of a human being without malice” “upon a sudden quarrel or heat of passion.” (Pen. Code, § 192, subd. (a).) Such a killing occurs “‘if the killer’s reason was actually obscured as the result of a strong passion aroused by a “provocation” sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.’”” (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

The offense has both a subjective and an objective component. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.)

The trial court correctly found that there was no substantial evidence to support a voluntary manslaughter instruction. While there was evidence that Doby was angry that Collier had been hit, there was no evidence that his reason was actually obscured by a strong passion. To the contrary, his actions were reasoned and orderly. Additionally, any provocation caused by his girlfriend being hit, but not injured, would not be sufficient to cause an ordinary person to act rashly without deliberation or reflection. Consequently, both objective and subjective elements of voluntary manslaughter were absent. (*People v. Steele, supra*, 27 Cal.4th at p. 1252; *People v. Lasko, supra*, 23 Cal.4th at p. 108.)

D. Confrontation Clause

Wingate contends his rights to due process and confrontation were violated by admission of Doby's statement implicating him as the shooter. We disagree.

Prior to trial, the prosecutor moved to admit Doby's statement to Collier that he and Wingate were involved in the shooting and Wingate was the shooter as a declaration against penal interest. Wingate opposed the motion on the grounds the statement was not admissible as a declaration against penal interest, and its admission would violate his right to confrontation. The trial court overruled his objections.

In *People v. Greenberger* (1997) 58 Cal.App.4th 298, on which the trial court relied, the court observed that "[t]he Sixth Amendment's confrontation clause, which is applicable to the states through the Fourteenth Amendment [citation], provides: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.' The confrontation clause 'reflects a preference for face-to-face confrontation at trial . . . ' which is accomplished through cross-examination of witnesses. [Citation.]" (*Id.* at p. 326.)

Nevertheless, "the [United States] Supreme Court has recognized that there are competing interests that justify dispensing with confrontation at trial in certain

circumstances and permitting the introduction of hearsay evidence.” (*People v. Greenberger, supra*, 58 Cal.App.4th at p. 326.) It has identified “two means by which the confrontation clause restricts the range of admissible hearsay. First, the proponent of the evidence must establish the necessity for the introduction of this evidence. This usually, but not always, means that the declarant is unavailable. Second, the hearsay must have adequate indicia of reliability to justify dispensing with the requirement of confrontation. ‘The Court has applied this “indicia of reliability” requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the “substance of the constitutional protection.” . . . [¶] . . . Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.’ [Citation.]” (*Id.* at p. 327.)

The court in *Greenberger* noted that a declaration against penal interest has “a high degree of trustworthiness justifying its admission into evidence,” in that “. . . a person’s interest in being criminally implicated gives reasonable assurance of the veracity of his statement made against that interest.”” (*People v. Greenberger, supra*, 58 Cal.App.4th at p. 327.) Admissibility is limited statements that are self-incriminatory and not merely collateral. (*Id.* at p. 329.) Additionally, “[e]ven the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.’ [Citation.]” (*Ibid.*) The Court ultimately concluded “that admission of a statement possessing sufficient indicia of reliability to fall within the hearsay exception of a declaration against penal interest does not deny a defendant the right of confrontation guaranteed by the United States Constitution.” (*Id.* at pp. 330-331.)

Wingate argues that “[t]here is utterly *nothing* about Doby’s statement that Wingate was the shooter, that was against Doby’s penal interest. In this statement, Doby accepts no responsibility himself and instead places the entire blame for the shooting on

[Wingate].” If all that Doby said was that Wingate did the shooting, this argument would be correct. But Collier’s testimony as to what Doby said involved more than just a single statement by Doby.

When asked if Doby indicated to her that he was involved in the shooting, Collier testified that Doby told her “[t]hat he didn’t do the shooting.” The prosecutor then asked if Doby told her that he was involved in the shooting. Collier said, “Yes.” The prosecutor asked if Doby told her who the shooter was, and she said that he did; he said the shooter was “Trini.”

Thus, Doby’s complete statement was that he was involved in the shooting—a self-inculpatory statement—but that he did not do the shooting, Wingate did. We decline to treat the two portions of Doby’s statement as completely separate, as Wingate would have us do. On the other hand, it reasonably can be argued that the statement regarding Wingate was collateral to the self-incriminatory portion of Doby’s statement and therefore inadmissible as a declaration against interest. (*People v. Greenberger, supra*, 58 Cal.App.4th at p. 329.)

We need not resolve this issue, because we conclude any error in admitting the statement that Wingate was the shooter was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; cf. *People v. Cage* (2007) 40 Cal.4th 965, 991-992.) First, Doby and Wingate were together during the incident—dropped off together, spoke to Franklin together, picked up together. There is no reasonable inference but that if one was involved, the other was involved. Second, both were charged and convicted as principals; it was not specifically alleged that one was the shooter and the other an aider and abettor. Thus, the result would have been the same whether or not Wingate was the shooter.

The same analysis applies to Wingate’s claims that admission of Doby’s statement implicating him violated *Aranda/Bruton* (*People v. Aranda* (1965) 63 Cal.2d 518, 530-531 [when the prosecution intends to offer the extrajudicial statement of one defendant which incriminates a codefendant, the trial court must either grant separate trials, exclude

the statement, or excise all references to the nondeclarant defendant]; *Bruton v. United States* (1968) 391 U.S. 123, 127-128, 136 [88 S.Ct. 1620, 20 L.Ed.2d 476]) and *Crawford* (*Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177] [out-of-court statements by witnesses that are testimonial are barred unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are reliable]). Admission of Doby's statement was not prejudicial.

E. Accomplices

Defendants contend the trial court erred in failing to instruct the jury that Collier and Blacksher were accomplices as a matter of law, and the evidence is insufficient to support the judgment because there is no evidence to corroborate the accomplice testimony of Collier and Blacksher. We disagree.

Penal Code section 1111 provides that “[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Where an accomplice testifies, the trial court must instruct the jury sua sponte that the accomplice's testimony is to be viewed with distrust and that the defendant cannot be convicted on the basis of the accomplice's testimony unless that testimony is corroborated. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

“An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (Pen. Code, § 1111.) To be charged with the identical offense, the witness must be considered a principal under Penal Code section 31, which provides, “All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission.” (See *People v. Fauber* (1992) 2 Cal.4th

792, 833.) The defendant has the burden “to prove by a preponderance of the evidence that a witness is an accomplice.” (*Id.* at p. 834.) If “the evidence at trial would warrant the jury in concluding that a witness was an accomplice in the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1270-1271; *People v. Felton* (2004) 122 Cal.App.4th 260, 268.)

Here, the trial court instructed the jury as to the definition of accomplice (CALJIC No. 3.10), the requirement that an accomplice’s testimony must be corroborated (CALJIC No. 3.11), the sufficiency of the evidence to corroborate an accomplice (CALJIC No. 3.12), that one accomplice may not corroborate another (CALJIC No. 3.13), the criminal intent necessary to make one an accomplice (CALJIC No. 3.14), that the testimony of an accomplice is to be viewed with caution (CALJIC No. 3.18), and defendant’s burden of proving a corroborating witness was an accomplice (CALJIC No. 3.19). Inasmuch as there was evidence from which the jury could conclude that Collier and/or Blacksher were accomplices, the trial court properly instructed the jury. (*People v. Hayes, supra*, 21 Cal.4th at pp. 1270-1271; *People v. Felton, supra*, 122 Cal.App.4th at p. 268.)

In arguing that Collier and Blacksher were accomplices as a matter of law, defendants rely on the “[e]xpert testimony [which] established that in gang culture, a shooting or murder is the response to the insult perpetrated against Collier in this case.” In other words, defendants rely on the very same evidence they claim was insufficient to establish that the crimes were gang-related. They cannot have it both ways; if the crime was not gang-related, then their argument that Collier and Blacksher were accomplices as a matter of law fails.

Defendants’ additional claim that there was insufficient evidence to corroborate the accomplice testimony also fails, in that it is based on the assumption that Collier and Blacksher were accomplices as a matter of law. They were not. We presume the jury followed the instructions given (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v.*

Delgado (1993) 5 Cal.4th 312, 331) and found that if Collier and/or Blacksher was an accomplice, there was evidence to corroborate the accomplice testimony.

DISPOSITION

The gang and firearm enhancements (Pen. Code, §§ 186.22, subd. (b), 12022.53, subds. (b), (c), (d) & (e)(1)) are reversed. In all other respects, the judgments are affirmed. The court is directed to prepare new abstracts of judgment and forward copies to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.