Filed 11/3/17 P. v. Thomas CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JABAAR V. THOMAS, Defendant and Appellant.	B275495 (Los Angeles County Super. Ct. No. BA384433)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed as modified with directions.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Jabaar Vincente Thomas (defendant) was convicted after a jury trial of two counts of first degree murder (Pen. Code, § 187, subd. (a))[1] with special circumstances (§ 190.2, subds. (a)(3), (a)(17)), and firearm enhancements (§ 12022.53, subds. (b)-(d)), five counts of second degree robbery (§ 211), three counts of attempted second degree robbery (§§ 211, 664) and one count of firearm possession by a felon (former § 12021, subd. (a)(1)). After a penalty trial, the jury deadlocked on whether to impose capital punishment. The prosecution elected not to retry the penalty phase. The trial court sentenced defendant to two consecutive life terms without the possibility of parole plus two consecutive 25-year-to-life terms, plus 29 years and 4 months.

II. THE EVIDENCE

Viewed in a light most favorable to the judgment (*People v. Banks* (2015) 61 Cal.4th 799, 804; *People v. Manibusan* (2013) 58 Cal.4th 40, 87), there was substantial, overwhelming evidence of defendant's guilt.

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[1] Further statutory references are to the Penal Code unless otherwise noted.

A. *The Prosecution's Case*

1. Background

Beginning on April 29, 2011 defendant embarked on a week-long campaign of attempted robbery, robbery and murder. The jury never learned defendant's exact age, however, he was 26 at the time he committed these crimes.

Defendant had two accomplices, Destiny Young and Richard Anderson. Defendant and Young, his girlfriend, met in earlier April 2011. Defendant was an unemployed drug dealer. Young was employed as a security guard. Anderson, defendant's friend, was a crack addict. He bought drugs from defendant and procured customers for him. All three—defendant, Young and Anderson—frequented the Crenshaw area of Los Angeles, south of the 10 freeway, near Crenshaw Boulevard and 28th Street. Young met Anderson through defendant. Young owned a blue Crown Victoria vehicle.

Young and Anderson both testified against defendant at trial pursuant to plea agreements. They gave the details of each of the crimes in which they were involved. Both testified defendant was present during and directed Anderson to commit the robberies and attempted robberies discussed below.

In a recorded, post-arrest telephone conversation with a friend, Julia Cain, defendant admitted he owned a 12-gauge shotgun recovered from the trunk of Young's Crown Victoria following his arrest. The weapon was inside a black bag. Investigation revealed the weapon had defendant's and Anderson's DNA on it; Young was excluded as a contributor to the DNA sample retrieved from the shotgun. The weapon was

missing an ejector. As a result, spent shells could not be ejected after the gun was fired; they had to be removed manually. No shotgun shells were found at any of the crime scenes.

Two live Winchester 12-gauge shotgun cartridges were in the black bag with defendant's shotgun. The cartridges carried nine pellet double-ought buckshot. They had been cycled through, but not fired from, the shotgun.

2. Defendant's April 29, 2011 robbery of Edgar Abad and Marta Aquino (Counts 3 and 4)

Edgar Abad and his wife, Marta Aquino, were sitting in their parked car between 2 a.m. and 3 a.m. on April 29, 2011. A man approached the vehicle. Abad described the individual as African-American and between 25 and 30. The man hit the driver's side window with the butt of a shotgun. He opened the driver's door, pointed the gun at Abad and demanded money. Abad gave the man his wallet. Aquino handed over her purse. Abad identified defendant's photograph in a lineup, however, he was "not very sure" defendant was "the one." Abad did not identify defendant during the preliminary hearing. He was not asked to identify defendant at trial. At trial, Abad described the gun as a black shotgun with one barrel. On an earlier occasion, Abad had said he thought the shotgun had a wooden part to it.

3. Defendant's April 30, 2011 attempted robbery and murder of Marcelo Aragon (Counts 1 and 5)

At 3:30 a.m. on April 30, 2011, defendant was with Young who was driving defendant's rental car.[2] A shotgun was inside a black bag on the front seat. Defendant and Young saw Marcelo Aragon and two friends walking together. The men split up and went separate ways. Defendant, armed with the shotgun, confronted Aragon. The two men struggled. Young, who had remained in the car, heard the gun go off. In the ambulance on the way to the hospital, Aragon told a police officer he had been shot by "un Negro." (Defendant is African-American.) Aragon died from a gunshot wound to the chest.

The coroner recovered nine double-ought buckshot pellets from Aragon's body. As noted above, live double-ought buckshot was found in the Crown Victoria with the 12-gauge shotgun. The coroner also recovered two Winchester wad fragments that were consistent with a 12-gauge shotgun.

At 3:26 a.m., Young's cell phone was used to make a call to defendant's cell phone.[3] Both phones were in the area of the homicide. Young's call went unanswered.

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[2] Defendant's cousin rented four cars for defendant to drive between April 9, 2011 and May 6, 2011.

[3] Defendant had two cell phones. One had a number ending in 4528. Defendant was the subscriber of that phone. During the booking process, defendant also claimed as his a cell phone with a number ending in 9210. He had stolen it from a former girlfriend. We refer to both cell phones as defendant's cell phone.

4. Defendant's May 8, 2011 second degree robbery and murder of Gabriel Ben-Meir (Counts 2 and 14)

Shortly after 12:47 a.m. on May 8, Mother's Day, Young was driving her Crown Victoria with defendant as her passenger. He was looking for people to rob. Ben-Meir was returning home with groceries. Defendant, armed with the shotgun, approached Ben-Meir. The two men wrestled. Young, who was waiting in the car, first saw Ben-Meir on his knees with defendant standing behind him, and then saw Ben-Meir lying prostrate on the ground. When Young was looking away, she heard the gun go off. Defendant returned to the car with the shotgun and Ben-Meir's grocery bag. Young asked defendant whether he had shot the person. Defendant said, "No." Ben-Meir died of a single gunshot wound to the back of his head.

Ben-Meir's neighbor Wendi Warren heard a "loud pop" around 12:30 a.m. She looked out a window and saw an old, four-door, matte gray or blue four-door sedan slowly accelerating away. Several days later, she saw the same car on a television news report about defendant's arrest. On cross-examination, Ms. Warren testified the vehicle was a small sedan; it was not as big as a Crown Victoria.

Defendant began to panic when he realized he had dropped a batting glove at the scene of Ben-Meir's murder. Police officers found a left-hand batting glove with a Franklin logo 30 feet from Ben-Meir's body. Defendant's DNA was on the interior of the glove. DNA from at least two males was on the glove's exterior; Anderson was determined to be a possible contributor. The data was insufficient to reach any conclusion as to whether either defendant or Young were contributors to the DNA on the glove's

exterior. While incarcerated in the county jail, defendant had a phone conversation with his older brother, Gregory Kellman. Defendant said, "I'm not even worried about the glove."

At 12:23 a.m., defendant's cell phone was in the neighborhood where Ben-Meir was subsequently killed. At 1:17 a.m., defendant's cell phone was in the Crenshaw neighborhood.

Officers found Ben-Meir lying face-down on the ground with his arms above his head. At the base of Ben-Meir's hairline, there was a white granular substance usually expelled when a shotgun is fired. Defendant's shotgun would deposit such a substance if the shot was at close range. The coroner recovered Winchester wad fragments that were consistent with a 12-guage shotgun. The wad fragments were also consistent with those recovered at the Aragon murder scene. Thirteen recovered projectile fragments were consistent with either single-ought, double-ought or triple-ought buckshot. Because the projectiles were deformed, they could not be more specifically identified.

5. The May 8, 2011 accident involving Jose Vega (Count 8)

Later on May 8, 2011, around 9 p.m., Young, the driver, and defendant were involved in an automobile collision with Jose Vega. Vega backed his truck into Young's Crown Victoria causing damage to the hood. When Vega drove away, Young followed him in her car. When she reached Vega, defendant got out and confronted him. At defendant's direction, Young went to Vega's truck and stole his wallet, which contained $600. Young reported the accident to law enforcement. Defendant self-identified as the passenger giving his name and address. Vega's

cell phone was in Young's car when Young and defendant were later arrested. Defendant described the incident to a friend saying: "[N]igga end up coming up like $650 up out his wallet."[4]

Kimberly Parker lived in an apartment building in the Crenshaw area. On Saturday evening, May 7, around 8 p.m., prior to the accident, Parker saw a man and a woman near a sky blue Crown Victoria in the building's parking lot. They were "doing something in the trunk of the car." Parker gave a description of the two individuals that was consistent with defendant and Young. The following morning, around 7:40 a.m., the car was again in the parking lot, but it was backed into a different parking space. The windshield was cracked and the front bumper was hanging off. Parker had lived in the apartment building for three years. She had never before seen the two individuals or the car. Several days later, Parker saw a television news report about an arrest in the area. The same car was depicted in the report. Parker subsequently identified a photograph of the Crown Victoria as the vehicle she saw the evening of May 7 and a photograph of defendant as the person that was near it. When shown a lineup that included Young's photograph, Parker identified someone else.

6. The May 10, 2011 series of attempted robberies and second degree robbery (Counts 9-12)

Defendant pressured Anderson to commit robberies because Anderson owed defendant money. Directed by

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[4] The jury was unable to reach a verdict on the second degree robbery charges involving Vega.

defendant, Anderson committed several robberies or attempted robberies on May 10, 2011. Young, the driver, and defendant were both present at each of those crime scenes.

a. liquor store (uncharged)

At defendant's direction, Anderson walked into a liquor store armed with a shotgun inside a bag. Anderson removed and brandished the weapon. He demanded money from a female clerk. The clerk gave Anderson cash from the register. Anderson gave the cash to defendant. Defendant was not charged with any crime as a result of this robbery.

b. Francisco Sanchez/Savoy Liquor (count 9)

Around 6:15 p.m., at defendant's direction, Anderson entered Savoy Liquor store. He was wearing silver-framed sunglasses consistent with glasses later found in Young's car. At 6:17 p.m., Anderson used an ATM machine inside the store and left the receipt in the trash. Anderson then pulled a shotgun out of a bag, pointed it at a clerk, Pedro Francisco Sanchez, and demanded money. At trial, Sanchez described Anderson's shotgun as "large," about 30 inches long. Anderson held the weapon with both hands. Sanchez moved out of sight and Anderson left. At trial, Sanchez looked around the courtroom but did not see the perpetrator.

Defendant gave Anderson a cell phone just before Anderson entered the liquor store. Defendant told Anderson to call him when he was done. Anderson was talking on the cell phone while inside the store. At 6:20 p.m., defendant's cell phone was in the

vicinity of Savoy Liquor. It made a call to a number ending in 0026.

A surveillance camera captured the attempted robbery. In the surveillance video, a blue vehicle with hood damage can be seen outside the store at the time of the attempted robbery. During a recorded telephone conversation after his arrest, defendant admitted it was Young's car in the video. He noted that one could not see who was in the vehicle.

c. Lauanaia Toa (count 10)

At about 9:15 p.m., Lauanaia Toa was walking home carrying shopping bags and her purse. Anderson approached her carrying a shotgun wrapped in a bag. At trial, Toa testified the gun "looked like a shotgun as far as I could tell, because the barrel was very long." Anderson took Toa's purse and shopping bags, returned to the Crown Victoria, driven by Young, and gave the items to defendant.

Defendant's cell phone was used to make calls along the 10 freeway at 9:06 p.m., and in the area of the crime at 9:12 and 9:13 p.m. The last two calls were to a number ending in 0026.

Toa identified Anderson in a photographic lineup. She identified defendant as the perpetrator during the preliminary hearing, but later realized she was wrong.

d. Winchell's Donut Shop (count 11)

Anderson entered a Winchell's Donut Shop around 10:05 p.m. He was armed with a shotgun inside a black bag. He removed the shotgun from the bag and demanded that Reyna

Guerra give him money from the register. Guerra ran into a back room and Anderson left. The incident was captured by a surveillance camera. In the surveillance video, Anderson can be seen wearing sunglasses.

e. Danilo Bernese (count 12)

Defendant ordered Anderson to rob Danilo Bernese. At about 10:35 p.m., Bernese had just entered his parked car when Anderson approached. Anderson was carrying the shotgun in a bag. (Bernese thought the weapon was covered with a sweatshirt.) Bernese described Anderson's shotgun as "elongated," about three feet in length. Anderson and Bernese struggled over the weapon, the gun went off, and the bag fell to the ground. Bernese handed over his wallet. Anderson walked away leaving the bag on the ground. After picking Anderson up, Young drove back to the location so Anderson could retrieve the bag.

Bernese testified that as he walked to his car he saw a man standing on the corner. The man was "young," "in his twenties maybe," about 5-6 and 170 pounds. He was African-American. But the person who robbed him was probably 6 feet tall. The robber was a light-skinned African-American man. Bernese had no idea whether there was any connection between the man on the corner and the person who robbed him.

Bernese identified Anderson in a photographic lineup. Bernese testified: "That's the closest description of the person that robbed me. That's the closest that I can remember." Bernese's wallet was recovered from the Crown Victoria after defendant's arrest.

As noted above, Young drove back to the location so Anderson could retrieve the black bag he had dropped on the ground. Jennifer Ferro was awoken by a very loud sound like a shotgun blast. She looked out her window. She saw a man walking down the street holding a shotgun. While she was on the phone with the police, she saw a car approach. The passenger door opened and someone reached out and picked up a black object from the street. The lighting was poor but Ferro thought the car might be a dark blue or dark gray older Mercedes. It was not a new car. It looked like something was sticking up from the hood.

Defendant's cell phone was in the area of the Bernese robbery at 10:12 p.m. It was used to make a four-minute call to a number ending in 0026.

7. Defendant's and Young's May 11 arrests and the subsequent Crown Victoria search

Arresting officers had information Young's Crown Victoria had been involved in the above series of robberies. At 11:30 a.m. on May 11, 2011, Young (the driver) and defendant were stopped and arrested.

Officers searched Young's Crown Victoria pursuant to a warrant. It contained, among other things, defendant's 12-gauge shotgun in a black bag together with two shotgun cartridges, Bernese's wallet, six cell phones, a pair of silver-framed sunglasses, a folding knife, and a right-hand batting glove with a Franklin logo. The silver-framed sunglasses contained Anderson's DNA. At trial, Young testified the two batting gloves—the left-hand glove found at the Ben-Meir murder scene

and the right-hand glove found in her vehicle—belonged to defendant.

One of the six cell phones belonged to Vega. Another belonged to Young. The third belonged to defendant. And a fourth was subscribed in defendant's former girlfriend's name. During booking, however, defendant claimed that phone belonged to him. The ex-girlfriend testified her cell phone was stolen during the time she dated defendant and she never got it back. She also never disconnected it. Defendant's friend Cain had subsequently used that phone to call the ex-girlfriend. The remaining two phones recovered from the Crown Victoria belonged to individuals who were not identified.

On May 11, 2011, officers searched Anderson's residence as well as a van parked in front at the curb. They did not find any evidence tying Anderson to the crimes under investigation.

8. Defendant's post-arrest telephone conversations

During a May 12, 2011 telephone conversation between defendant, who was in custody, and Kellman, his brother, the two men discussed Young's potential testimony: "'[Defendant]: . . . [M]ake sure she's still straight. You feel me? That's my main little concern right now. As long as I know she still on a nigga corner, I'm good. [¶] [Kellman]: Yeah, fo sho. [¶] [Defendant]: Me en[]tiende? (translation: You understand me?) [¶] [Kellman]: Okay. Yeah. Yeah I do. I do. Te entiende (translation: I understand) okay. [¶] [Defendant]: Yeah. Yeah. [¶] [Kellman]: We need to, we need to get a hold of this bitch. No problem my nigga I'm on it. Don't trip. I'm on it. [¶] [Defendant]: Yeah. Yeah for real my nigga. Because, you know

she, she, she basically got, got a nigga life in her hands. [¶] . . . [¶] [Defendant]: You know what I'm saying? [¶] [Kellman]: Yeah, I know. [¶] [Defendant]: Yeah, her, "cause they uh, believe me, whether she do it for me or she do it for the police she goin" have to get on the stand, fo sho. [¶] [Kellman]: Right. [¶] [Defendant] You feel me? Because that was her car. So the bitch gonna have to get on the stand fo sho whether it's for me or it's for the police, but, you know, I wanna make sure it's gonna be for me." At the end of the conversation, Kellman assured defendant he would get in touch with Young: "[Defendant]: . . . [B]y next week, I wanna have gotten in touch with this bitch already. You feel me? [¶] [Kellman]: Yeah, don't trip. I'm on it my nigga, I'm on it. I'ma, I'ma handle that for you. I'ma get a[]hold of the bitch, you know what I'm saying? [¶] [Defendant]: Yeah. [¶] [Kellman]: I might just, I might just keep it on the level to where I, you know, you just want to talk to her okay man. I ain't gonna try to jerk her too much, you feel me? [¶] [Defendant]: Yeah, yeah. Just keep it on the level "cause you know a nigga was worried, you know a nigga worried, a nigga miss her, a nigga [want to] find out what's going on. [¶] [Kellman]: Yeah. Ok. Exactly. Exactly. [¶] [Defendant]: Yeah, that's it. And let her know, let her know what they tryin' to charge a nigga with in case she don't know. [¶] [Kellman]: Ok, fo sho."

Also on May 12, 2011, defendant telephoned Cain. Defendant told her that prior to his arrest he had returned a rental car and, "[S]ince then I just been riding around with [Young] in her shit. . . . [¶] . . . [¶] [Defendant]: She got . . . that Crown [Victoria] you seen." Defendant told Cain it would be better if the police did not have the shotgun, but, unlike a

handgun, "shotguns shells can't just be trace like that." Defendant acknowledged he was at risk for committing murder, but he believed he could not be connected with Anderson's crimes: "But as far as the robberies, they, that's the cold end of it. Because they try to say that I'm connected with the robberies, but my shit ain't got nothing to do with robbery, my shit just say 187, you feel me? [¶] . . . [¶] And ol boy shit, ol boy shit say 211. But once again now, this is my thing, I'm tryin' to get a hold of this bitch because . . . [¶] . . . [¶] I'm pretty sure she got released last night. . . . [¶] . . . [¶] From the one picture that they showed me, that the detective dude showed me, you feel me, like I said I seen her car sittin' in the corner by the liquor store, but you can't even see who in the [car], you feel me?" Defendant was concerned because Young was "new to all this" having only incurred a DUI in the past. Defendant said he had seen her the previous night and she was "waterworks," "a straight water fountain."

B. The Defense Case

Defendant's mother, Catalina Barrett, testified defendant visited her on Mother's Day, May 8, 2011. Defendant came to her house "between morning and noontime." He brought her flowers. His girlfriend was with him. He stayed for 30 minutes to an hour.

Defendant's brother, Kellman, testified he was playing video games with defendant on the day before Mother's Day, May 7, 2011. Defendant arrived at Kellman's house between 2 and 4 p.m. They played video games until sometime between 9 and 10 p.m. Kellman went to his room and eventually to sleep. Defendant was at Kellman's house at 6 a.m. on May 8 when

Kellman woke up. Defendant left shortly thereafter. In a statement Kellman gave in 2012, however, he said defendant came to visit him on May 7 in the morning, not in the afternoon.

As discussed above, the Ben-Meir murder occurred in the early morning hours of May 8, Mother's Day, around 1 a.m. And the collision with Vega's truck did not happen until around 9 p.m. that day.

Defendant had introduced Young to Kellman as defendant's "new girlfriend." During a subsequent telephone conversation between Kellman and defendant while defendant was in custody, defendant asked Kellman to find Young. Kellman testified, however, "I never spoke to her at all." Kellman admitted he had changed the PIN on defendant's cell phone. Kellman testified, "I changed the PIN to protect his rights."

C. Rebuttal

In rebuttal, the prosecution presented evidence that on May 7, 2011, at 7 p.m., defendant was at a religious ceremony in North Hollywood with Young.

III. DISCUSSION

A. Accomplice Corroboration

The trial court instructed the jury that Young and Anderson were accomplices whose testimony required corroboration.[5] Defendant argues there was insufficient

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[5] The jury was instructed: "You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense. [¶] Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true. [¶] To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborates every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice

corroboration as to the robberies and attempted robberies committed by Anderson. There is no merit to this claim.

The rule that accomplice testimony must be corroborated is codified in section 1111: "A conviction can not [*sic*] 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." Our Supreme Court has explained that "The requirement that accomplice testimony be corroborated is an "'exception[]" to the substantial evidence' rule. [Citation.] It is based on the Legislature's determination that "'because of the reliability questions posed by'" accomplice testimony, such testimony "'by itself is insufficient as a matter of law to support a conviction.'" [Citations.] . . . [¶] Thus, for the jury to rely on an accomplice's testimony about the circumstances of an offense, it

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is corroborated. [¶] The required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of [his] [her] accomplices, but must come from other evidence."

The jury was further instructed, "An accomplice is a person who was subject to prosecution for the identical offense charged in Counts 1, 2, 5, 8, 9, 10, 11, 12 and 14 against the defendant on trial by reason of aiding and abetting." The jury was directed that Young and Anderson were accomplices as a matter of law: "If the crimes of Murder, Robbery, and Attempted robbery was committed by anyone in Counts 1, 2, 5, 9, 10, 11, 12 and 14, the witness Destiny Young was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration. If the crimes of Robbery and Attempted Robbery were committed by anyone in Counts 8, 9, 10, 11, and 12, the witness Richard Anderson was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration."

must find evidence that, "'without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime.'" [Citations.] 'The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' [Citations.] . . . The evidence 'need not independently establish the identity of the victim's assailant' [citation], nor corroborate every fact to which the accomplice testifies [citation], and "'may be circumstantial or slight and entitled to little consideration when standing alone'" [citation]. 'The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' [Citation.]" (*People v. Romero* (2015) 62 Cal.4th 1, 32-33, fn. omitted.)

There was significant evidence apart from accomplice testimony that tended to connect defendant with the Anderson robberies and attempted robberies. First, there was evidence connecting defendant with Young's blue Crown Victoria in the relevant time frame. On May 7, 2011, Parker saw defendant with a woman standing near the Crown Victoria's trunk. On May 8, 2011, defendant and Young were involved in a collision while Young was driving the Crown Victoria. On May 10, a vehicle consistent with Young's blue Crown Victoria was captured on surveillance tape outside Savoy Liquor at the time Anderson attempted to rob a clerk there. An individual matching Anderson's description was walking in the vicinity of the car. And defendant later told Cain a detective had shown him a photograph of Young's car "sittin' in the corner by the liquor store." Defendant took solace in the fact one could not see who

was in the vehicle. Also on May 10, a witness to the aftermath of the Bernese robbery saw a vehicle consistent with the Crown Victoria at the scene of that crime. And on May 11, 2011, defendant and Young were arrested while occupying the Crown Victoria. On May 12, 2011, in a telephone conversation with Cain, defendant said he had returned a rental car and: "[T]hen I just been riding around with [Young]" in her "Crown Vic." Defendant returned his last rental vehicle on May 6, 2011. Anderson committed the crimes at issue on May 10.

Second, defendant admitted owning the 12-gauge shotgun found in the Crown Victoria's trunk. The weapon was consistent with that used by both defendant and Anderson. The shotgun was introduced in evidence. The jury was able to compare that shotgun with the one Anderson used as captured by surveillance cameras at Savoy Liquor and the Winchell's Donuts shop. Further, both men concealed the gun in a bag when committing their crimes. And both men's DNA was on the shotgun.

Third, a pair of silver-framed sunglasses containing Anderson's DNA were found in the Crown Victoria. The glasses were consistent with those worn by Anderson during the Savoy Liquor store incident and the attempted robbery at the Winchell's Donut shop. And a photograph of defendant wearing what appear to be the same sunglasses was introduced at trial.

Fourth, cell phone evidence linked defendant to three of the four May 10 robberies and attempted robberies. At 6:20 p.m., defendant's cell phone was in the vicinity of Savoy Liquor. Anderson was inside the store at that time. Defendant's cell phone was used to call a number ending in 0026. Anderson had been talking on a cell phone while inside the liquor store. Because defendant had given Anderson a cell phone just prior to

the Savoy Liquor store attempted robbery, this was circumstantial evidence the phone's number ended in 0026. Calls were also made from defendant's cell phone to the same 0026 number in the area and at the time that Anderson robbed Toa. And, defendant's cell phone was in the area where Bernese was robbed at the time of the robbery. Defendant's two cell phones were recovered from the Crown Victoria after his arrest.[6]

Further, the jury could reasonably conclude Young, who was connected to the Savoy Liquor and Bernese crimes through her vehicle, would not have committed the crimes with Anderson alone. Defendant and Young were in a relationship. Young knew Anderson only through defendant. Further, Anderson did not appear to be an experienced criminal. It was reasonable to conclude defendant was also present when Anderson committed the robberies and attempted robberies.

Moreover, defendant had commenced a robbery spree of his own little more than a week prior to Anderson's crimes, on April 29, 2011. That defendant was the driving force behind Anderson's conduct was consistent with his own behavior at the time.

B. Spillover Prejudice

Defendant argues spillover prejudice requires reversal of counts 1 through 5 and 14. He asserts, "An error involving one set of counts may spill over into, or taint, another set of counts,

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6 Anderson and Young both testified defendant called Anderson when he was in or near the donut shop. But no phone records admitted at trial corroborated that testimony.

requiring reversal on those counts as well." Because we conclude the accomplices' testimony was sufficiently corroborated, we need not consider whether any prejudice resulting from insufficient corroboration infected other counts.

C. Income Evidence

Defendant asserts the trial court erred in admitting evidence of Young's income to show defendant, who was unemployed and apparently homeless, was the motivating force behind the crimes. Our review is for an abuse of discretion. (*People v. Hartsch* (2010) 49 Cal.4th 472, 497; *People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) We conclude even if the trial court abused its discretion, defendant was not prejudiced.

The prosecutor asked how much money Young was making in April 2011. Defense counsel objected on relevance grounds. He argued the prosecutor was "just trying to establish she's of good character." The prosecutor argued: "She has no motive to rob anybody because she was duly employed and she was earning good money. It goes to our theory that defendant Thomas was the one who was unemployed, broke, needed money, and was the driving force behind these robberies, not her." The trial court ruled evidence of Young's income as compared to defendant's poverty was admissible as tending to show Young had no motive to commit robbery and it was defendant who sought monetary gain and was the person "in charge" of the crime spree. Young testified she was making $300-400 each week in April 2011.

Defendant relies on the rule that evidence of a defendant's poverty is not admissible to prove motive to commit a theft or robbery. (*People v. Cook* (2007) 40 Cal.4th 1334, 1356-1357; *People v. Koontz* (2002) 27 Cal.4th 1041, 1076.) However, such evidence is admissible when relevant for purposes other than to prove motive. (*Ibid.*)

We need not decide whether the trial court abused its discretion. This is because it is not reasonably probable the verdict would have been more favorable to defendant absent the challenged evidence. (*People v. Guerra, supra*, 37 Cal.4th at p. 1116; see *People v. Tully* (2012) 54 Cal.4th 952, 1009.) The evidence of defendant's guilt, including defendant's own words, the consistent testimony of two accomplices, firearm, DNA and cell phone evidence, was overwhelming.

D. Prosecutorial Misconduct

Defendant argues, "The prosecutor committed unforfeited, prejudicial misconduct on all counts, except possession of a firearm, in declaring to the jury that the presumption of innocence ended when the jurors began deliberating." Defendant asserts this was a violation of his right to due process and to an impartial jury under the federal Constitution.

Near the close of his final argument to the jury, the prosecutor stated, "Richard Anderson has been held accountable. Destiny Young has been held accountable. The only person who is yet to be held accountable for what went on back in 2011 is Mr. Thomas. As his attorney reminded you, he sits here, the presumption of innocence. *Well, once you go back in the*

deliberation room, that presumption goes away as you start to deliberate." (Italics added.)

We agree that the prosecutor's statement was inaccurate. (*People v. Cowan* (2017) 8 Cal.App.5th 1152, 1154 [presumption ends with the reading of the charges]; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1407 ["The presumption of innocence is over" prior to deliberation].) As our colleagues in Division Six have held, "It is misconduct to misinform the jury that the presumption of innocence is 'gone' prior to the jury's deliberations." (*People v. Cowan, supra*, 8 Cal.App.5th at p. 1159.) And as the Court of Appeal for the Sixth Appellate District observed in *People v. Dowdell, supra*, 227 Cal.App.4th at page 1408, "It is well established that the presumption of innocence continues into deliberations, and the presumption was in no sense 'over' [at the close of trial as] the prosecutor declared it to be so. [Citation.]" (Accord, *People v. Cowan, supra*, 8 Cal.App.5th at p. 1159 ["The presumption of innocence continues . . . during jury deliberations until the jury reaches a verdict"].)

However, defense counsel did not object to the prosecutor's statement on federal Constitutional, state law or *any* ground and did not request an admonition. As a result, defendant forfeited his prosecutorial misconduct claim. (*People v. Peoples* (2016) 62 Cal.4th 718, 797; *People v. Centeno* (2014) 60 Cal.4th 659, 674.) The point would be reviewable if an objection would have been futile or an admonition would not have cured the harm. (*Ibid.*)[7]

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[7] Defendant asserts that "an objection would have been futile because the court itself agreed with the prosecutor's formulation" when the judge responded to a question from a prospective juror.

Here, the prosecutor's misstatement could have been cured by an admonition explaining the error and reinstructing as to the presumption of innocence.

Moreover, even if the issue were properly before us, we would not find any reasonable likelihood the jury understood or applied the prosecutor's misstatement in any improper or erroneous manner. Our Supreme Court set forth this standard of review in *People v. Centeno, supra*, 60 Cal.4th at page 667: "When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]'

In this regard, he makes reference to the following colloquy that took place during jury selection:

"The Court: Are you willing to presume him innocent throughout the trial?

" Prospective Juror 10: Yes, until—

"The Court: If and until—

"Prospective Juror 19: I have to hear the evidence.

"The Court: *Yeah, until you hear enough evidence* to have him proven guilty beyond a reasonable doubt.

"Prospective Juror 19: Right, right."

This can hardly be construed as an agreement with the prosecutor's statement.

[Citation.]" (Accord, *People v. Winbush* (2017) 2 Cal.5th 402, 480.)

Here, prior to counsels' closing arguments, the trial court instructed the jury on the presumption of innocence.[8] The trial court also instructed the jury that if an attorney's statement conflicted with the law as stated by the court, the jury must follow the court's instructions.[9] We presume the jury followed those instructions. (*People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8; *People v. Bryant* (2014) 60 Cal.4th 335, 447.) In addition, defense counsel explained the presumption of innocence and advised the jury, "And that does not change until the People . . . convince you beyond a reasonable doubt that [defendant] is guilty." Defense counsel also emphasized the jury's responsibility was to either find defendant guilty beyond a reasonable doubt or acquit.[10] Moreover, the prosecutor's

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8 The trial court instructed: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt."

9 "You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."

10 Defense counsel argued: "Your job is to make sure that the People . . . have proven this case to you beyond a reasonable doubt. That's it. It's not close enough, it's not close enough. [¶]

erroneous comment was brief. It is not reasonably likely the prosecutor's isolated misstatement misled the jury about the presumption of innocence and its proper application to their task.

Further, any misconduct was not prejudicial. As stated above, the evidence of defendant's guilt was overwhelming. It is not reasonably probable the outcome would have been more favorable to defendant absent the prosecutor's brief misstatement of law or had an admonition been given. (*People v. Peoples, supra*, 62 Cal.4th at p. 799; *People v. Watson* (1956) 46 Cal.2d 818, 836.) And because there was no prejudice to defendant, his ineffective assistance of counsel claim also fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 697; *People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

E. Defendant's Mistrial Motion

Defendant asserts prejudicial error in failing to grant a mistrial or other remedial measures on grounds the prosecutor failed to disclose a critical revision to a jailhouse phone call transcript. The prosecutor edited the transcript of the phone call between defendant and Kellman, his brother, to reflect defendant stating, "I'm not even worried about the *glove*," instead of, "I'm not even worried about the *gun*." (Italics added.) The prosecutor

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It's like you guys got a lot of evidence and it's a pretty good case, that's not the standard. It's beyond a reasonable doubt. [¶] . . . [¶] The standard in a criminal case is whether or not the People have proved it beyond a reasonable doubt. That says nothing about innocence. [¶] And if [defense counsel] have not convinced you of that beyond a reasonable doubt, you have an obligation to vote not guilty."

did so without specifically advising defense counsel. Defense counsel first noticed the change during Kellman's testimony for the defense. A recording of the conversation earlier had been played for the jury, and the jurors had viewed the revised transcript at that time.

The trial court advised counsel it had listened to the tape at slow speed and concluded the word defendant used was "glove." The court ruled: "[Y]ou are permitted to indicate to the jury that you don't believe that the transcript is correct, that you believe that the transcript should have 'gun' instead of 'glove' there, and it will be up to the jury. [¶] . . . [T]his dispute about what the tape says . . .it goes to the weight and it's for the jury to ultimately decide. They will decide what the tape actually says. . . . [A]nd you as lawyers can argue to them what it actually says." In response, defense counsel moved to have an audio expert examine the recording. Counsel stated, "I have already discussed [it with an audio expert] and he'll have it back by probably tomorrow." The trial court denied that motion.

On appeal, defendant argues the trial court's ruling was an abuse of discretion and violated his due process rights under the federal Constitution. Defendant asserts that had he known about the change from "gun" to "glove," he could have: hired an audio expert to enhance the tape; submitted a defense version of the audio; arranged for a witness familiar with defendant's speech pattern to testify to what he said; or adjusted his strategy to account for the revised transcript. At the very least, defendant reasons, the trial court should have granted a continuance to allow defendant to have an audio expert review the tape.

Our review is for an abuse of discretion. (*People v. Panah* (2005) 35 Cal.4th 395, 444; *People v. Ayala* (2000) 23 Cal.4th 225,

282.) But, as our Supreme Court has held, "[A] motion for mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged.'"" (*People v. Ayala, supra*, 23 Cal.4th at p. 282; accord, *People v. Peoples, supra*, 62 Cal.4th at p. 802.)

Although a prosecutor is not required to highlight particularly damaging evidence to the defense, given when the change was made and the significance of it, the prosecutor would have done better to alert defense counsel to the revision from "gun" to "glove." We conclude, however, the failure to highlight the revision and the evidence defendant was not worried about the "glove" did not deprive defendant of a fair trial. Moreover, even if the trial court abused its discretion, the failure to grant a mistrial was harmless under any standard. (*People v. Smith* (2015) 61 Cal.4th 18, 52.) First, the recording was the evidence of what was said, not the transcript, and the jury was so instructed.[11] Second, defendant's statement he was not worried about the glove was of minimal significance in light of the evidence one glove—which contained defendant's DNA—was near Ben-Meir's body and the other was in Young's car; further, Young

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[11] The trial court admonished the jury: "You've been given a transcript of these conversations. The tape is the actual evidence. The transcripts are something as an aid to help you. You may use it as an aid. You may look at it and follow what is being said. But the actual evidence is the tape. [¶] The reason that I say this to you is: I cannot vouch for whoever transcribed this tape. So I don't know whether it doesn't have certain words or it somehow wasn't transcribed correctly. I'm not saying it was. But I have to tell you in the order of things, the tape is the actual evidence. The transcript is an aid."

testified the gloves belonged to defendant. And third, the evidence of defendant's guilt was overwhelming.

F. Cumulative Prejudice

Defendant argues the cumulative prejudicial effect of the following errors requires reversal of the judgment: admitting evidence of Young's income and defendant's poverty; the prosecutor's misstatement as to the presumption of innocence; and the trial court's denial of defendant's mistrial motion. We found no prejudice as to those contentions. Absent any prejudice to defendant, there was no cumulative prejudice. (See *People v. Melendez* (2016) 2 Cal.5th 1, 33; *People v. Contreras* (2013) 58 Cal.4th 123, 173; *People v. Edwards* (2013) 57 Cal.4th 658, 746.) Any error, assumed or otherwise, was harmless, even accumulated. (*People v. Melendez, supra*, 2 Cal.5th at p. 33.)

G. The Pitchess Hearing

Defendant requests independent review of his motion for discovery of a police officer's personal records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) to determine whether the trial court erroneously withheld from the defense discoverable information. Our review is for an abuse of discretion. (*People v. Winbush, supra*, 2 Cal.5th at p. 424; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228.) We have reviewed the sealed transcript of the in camera *Pitchess* hearing. The transcript contains an adequate record of the trial court's review and analysis of the documents presented to it. The trial court did not abuse its discretion in denying defendant's motion.

H. Presentence Custody Credit

The Attorney General concedes defendant is entitled to one additional day of presentence custody credit and we agree. Defendant was arrested on May 11, 2011 and remained in custody until he was sentenced 1856 days later on June 8, 2016. He was entitled to credit for the 1856 days. (*People v. Cardenas* (2015) 239 Cal.App.4th 220, 235-236; *People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48.) The trial court awarded defendant credit for only 1855 days. The judgment must be modified and the abstract of judgment amended to reflect 1856 days of presentence custody credit.

IV. DISPOSITION

The judgment is modified to reflect 1856 days of presentence custody credit. The judgment is affirmed in all other respects. On remand, the superior court clerk is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LANDIN, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.