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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERNEST LAMONT WILLIAMS et al., Defendants and Appellants.	B281118 (Los Angeles County Super. Ct. No. BA419591)

APPEAL from judgments of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed in part, reversed in part, and remanded.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant Ernest Lamont Williams.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Thomas Woodson.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Boochee.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Ernest Lamont Williams, Thomas Woodson, and Anthony Boochee, appeal from the judgments entered against them after a jury convicted Williams and Boochee of first degree murder with special circumstances and of conspiracy. Woodson appeals from his conviction of second degree murder, with true findings on gang and firearm enhancements. Woodson contends that his conviction was unsupported by substantial evidence. In addition to challenging several evidentiary rulings, all defendants contend that the gang enhancement allegation was unsupported by substantial evidence and that the gang and gang-related firearm enhancements should be stricken. Defendants also seek remand for resentencing under the amended firearm enhancement statute.

We affirm all three judgments of conviction. We reverse the gang enhancement finding as to Williams and Boochee as unsupported by substantial evidence, and strike the gang enhancement and gang-related firearm enhancements as to them. However, we find that substantial evidence supported the gang finding as to Woodson. We vacate the sentences of Williams and Woodson and remand for resentencing under Penal Code section 12022.53, subdivision (h).[1]

BACKGROUND

A second amended information charged defendants and a codefendant, Berlinda Green with murder and conspiracy.[2] The

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

[2] Prior to trial, Green entered into a plea agreement in which she pled guilty to a new count 3, manslaughter in violation of section 192, subdivision (a), and admitted the gang enhancement. The trial court sentenced her as agreed to the upper term of 11 years in prison, plus a consecutive gang enhancement of 10 years.

defendants and Green were charged in count 1 with the murder of Arlando Bryant on December 20, 1998, in violation of section 187, subdivision (a). Two special circumstances were alleged: that the murder was carried out by the defendants for financial gain (§ 190.2, subd. (a)(1)); and that defendants killed the victim by lying in wait (§ 190.2, subd. (a)(15)). In count 2, defendants and Green were charged with conspiracy to commit murder, in violation of section 182, subdivision (a)(1).

The information also alleged that the two crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)); that Williams personally used a firearm, and personally and intentionally discharged a firearm, proximately causing great bodily injury and death to the victim (§ 12022.53, subd. (b), (c) & (d)); that as to all defendants, a principle personally used and personally and intentionally discharged a firearm, proximately causing great bodily injury and death to the victim (§ 12022.53, subd. (b), (c), (d) & (e)(1)).

One jury (the "blue jury") was empanelled for Woodson, and another jury (the "green jury") was empanelled for both Williams and Boochee. Williams and Boochee were convicted of murder and conspiracy as charged. The murder was found to be in the first degree, and all the special allegations were found to be true. Woodson was convicted of second degree murder and acquitted of conspiracy. The special circumstance of lying in wait was found not true, and the blue jury could not agree on the financial gain allegation, but found true the gang and firearm allegations.

On January 10, 2017, Williams was sentenced to life imprisonment without the possibility of parole (count 1), plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivision (d). The remaining firearm enhancements and a 10-

year gang enhancement were imposed and stayed. As to count 2, Williams was sentenced to a term of 25 years to life, plus firearm enhancements, all stayed pursuant to section 654. Mandatory fines and fees and victim restitution to be determined, were ordered. Presentence custody credits of 1,119 actual days was also ordered.

On February 23, 2017, Boochee and Woodson were sentenced. Boochee was given life imprisonment without the possibility of parole (count 1), plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). The remaining firearm enhancements and a 10-year gang enhancement were imposed and stayed. Boochee was sentenced to a term of 25 years to life, plus firearm enhancements, all stayed pursuant to section 654 in count 2. The court ordered mandatory fines and fees and calculated presentence custody credits at 1,163 actual days.

Woodson was sentenced to 15 years to life in prison, plus a consecutive term of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1). The remaining firearm enhancements and a 10-year gang enhancement were imposed and stayed. The court ordered mandatory fines and fees and calculated presentence custody credits at 1,163.

Defendants filed timely notices of appeal from the judgments.

Prosecution evidence presented to both juries

The murder

On December 20, 1998, at about 9:35 p.m., Arlando Bryant (Bryant) was shot to death with a .45-caliber firearm as he sat in the driver's seat of his truck parked on the street outside his house on Dwight Avenue in Compton. A neighbor who lived on the next block, testified that he was inside his house when he heard three to five gunshots, one after another. Seeing nothing

out the window, he walked toward Bryant's house, were he found Bryant slumped over in his truck. The witness saw Bryant's wife (Berlinda Green) on the porch screaming.

Boochee's admissions

The murder was not initially solved and was eventually transferred to the Los Angeles County Sheriff's Department cold case unit. After Detectives Dean Camarillo and Gustavo Carrillo were assigned to investigate, they interviewed Boochee's longtime friend Anita Witherspoon (Witherspoon) in August 2013.

At trial Witherspoon testified that she met Boochee about 19 years before trial. They were friends who throughout the years, had an on-again-off-again sexual relationship. The sexual relationship was off in 1998 due to Boochee's relationships with other women. Still he would visit with Witherspoon, discussing his children, his problems, and his relationships, including his relationship with the married Green, who lived nearby on Dwight Avenue. Boochee and Green's relationship was off while she was in custody after pleading guilty to bankruptcy fraud and tax evasion in federal court. Sometimes Boochee would live with Green for a month or two at a time. In the early 2000's, after Boochee's wife died, his children lived with Green for while.

Witherspoon learned about Green's husband's death from Boochee's mother. She later asked Boochee if he had anything to do with it. When Boochee merely put his head down without replying, she told him, "You have messed up your whole life over a married bitch." He replied, "Yeah, I know." Months later, in response to Witherspoon's question whether Green had any involvement in her husband's death, Boochee replied, "All the way up to her eyeballs." In her interview with the detectives, Witherspoon claimed that Boochee told her that Green was the

mastermind, and that money was the reason Green wanted her husband dead.

Witherspoon testified that in another conversation with Boochee about whether anything could be traced back to him, he said, "Maybe on a bullet," and told her that the gun was on Atlantic Drive in Compton.[3] Boochee said the shooter hung out at Kelly Park in Compton. Sometime later Boochee told Witherspoon that Green was waiting to get money from her husband's insurance policy. Boochee also said he was in love with Green and had to be around her all the time. When Witherspoon spoke to Boochee after Green was interviewed in a news conference at the Compton Courthouse regarding rewards for murders committed in Compton, Boochee said Green was a good actress.

Witherspoon knew that at some time Green and Boochee lived together on Banner Drive. The owner of an apartment complex on Banner Drive testified that Green and Boochee moved into an apartment there on November 1, 1998, and that Green moved out in January 1999. Boochee left in April 1999.

The insurance proceeds

A Metlife Insurance Company operations manager who supervised claims for death benefits, testified that Green was a 75 percent beneficiary under Bryant's life insurance policy, and was paid benefits of $86,368 on April 3, 2000.

The investigation

Detective Camarillo testified regarding wiretap warrants for phones belonging to Williams, Boochee, Green, and Woodson. The operation lasted from mid-August to late October 2013. Detective Camarillo tried to stimulate the suspects'

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[3] Witherspoon did not know then that Atlantic Drive referred to a gang, but knew it sometime before speaking to detectives in August 2013.

conversations, first by contacting Green's tenant on Dwight Avenue and Green's mother, telling them both that he wanted to introduce himself to Green and let her know that the case was being reopened. He also sought her participation in an upcoming segment of television's "L.A.'s Most Wanted." Within hours the same day, calls between Green and Boochee were intercepted. Green told Boochee that it was "very, very, very, very, very, very, extremely, extremely, extremely, extremely important" that she talk him, because "they" had come by both her house and her mother's house that day. In a second call, Boochee said he would be there in 35 minutes, prompting a surveillance team to go to Green's apartment. Boochee arrived and spoke to Green for about two and a half minutes while sitting in the driver's seat of his car. Although records showed that there had been 123 calls between the phones belonging to Green and Boochee since January and that meeting, there were no more calls to each other on those phones after the meeting.

When the segment of L.A.'s Most Wanted was filmed in front of the Dwight Avenue residence, Green arrived just before filming was finished. Detective Camarillo told her that he had reopened the case, wanted her to take part in the segment which would air soon, and gave her his contact information. In early September, after the segment aired, flyers were created, containing a photograph of the victim and a sketch of Williams drawn from a 1998 photograph. The flyer mentioned a 2013 murder and claimed a description of a suspect was obtained as a result of the airing of L.A.'s Most Wanted. The flyers were distributed to residences in Williams's neighborhood, including one given to his girlfriend Myesha Carter and one to his mother.

The identification of Green

Bryant's father testified that his son was 42 years old when he died, worked for Boeing Aircraft, had three children, and was

married to Berlinda Ann Green Bryant. Green was then identified in the courtroom as Bryant's wife.

Carter's testimony and statements

Carter testified that after she took the flyer from the officer who brought it to her door in August 2013, she showed it to Williams, who crumpled it, threw it on the floor and said, "Get this flyer out of my damn face." Soon thereafter she saw the flyers at businesses in the neighborhood, and took them down after Williams's mother and aunt told her to do so. Williams told Carter that it felt like he was looking at himself in the sketch, and said that he had killed a D.A.[4]

Two or three hours after the flyer was delivered, Detective Camarillo monitored a call to Boochee's phone from Carter's phone. Carter was heard telling Boochee to hold on, that "Tiny" needed to talk to him. Williams then told Boochee that he needed to talk to Boochee about "some old shit" but could not talk over that phone.

Carter testified that Williams was known by the nickname "Tiny" or "Tiny Capone," that she lived with Williams for awhile during their three-year relationship which ended in 2013. Carter also knew Woodson, whose nickname was "Chops," and with whom she had a short "fling" while she was living with Williams. Williams and Woodson had been best friends, like brothers. Williams told Carter that he was a member of the Duccy Hood Crip gang, and although Woodson never said he belonged to a gang, it was Carter's understanding that he was "from" the Atlantic Drive Crip gang. She explained that "hood" meant gang, and that when someone is "from" a particular gang or hood, he is a member of that gang. Carter had a Duccy Hood gang tattoo on

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[4] The trial court admonished jury that this last statement could not be used against codefendants Boochee and Woodson.

the back of her neck, put there by Williams. It was an image of Daffy Duck, the gang's symbol, with "Tiny Capone" written in gang script. Carter was with Williams occasionally while he interacted with other members of the Duccy Hood gang. Carter identified photographs of Williams "throwing" gang signs with his hands, such as a C for "Crip." She explained that the Duccy Hood gang was a part of the Crip gang.

Carter testified that even before the flyer came out, Williams had told her he had killed a D.A. 15 years earlier because "Tone" told him he needed help to avoid arrest on a case which the D.A. was handling, which could get Tone locked up for a long time. Carter did not know Tone, but had seen him many times. She then identified Boochee in court as Tone. Williams told Carter that he had known Boochee his entire life, and that Boochee had essentially raised him.

Williams had also described the events of that night in 1998, as follows: Boochee drove a van in which Williams was in the front passenger seat and Woodson was in the back, pretending to be asleep. Williams did not say why Woodson went along, but they "hung out" a lot. Boochee drove to Dwight and Rosecrans Avenues in Compton, which was an area where Williams would say, "bad memories," whenever Carter and Williams went nearby. Williams said when they arrived that night he got out of the van, walked past the target's car, doubled back, knocked on the window, and shot the victim, who was reading a newspaper, through the driver's side window. The victim slumped over into the passenger side of the car. Williams said that he wore a hoodie and a do-rag over his face.

Carter described a time when she heard Williams and Woodson arguing. Williams said something about killing the D.A. and getting paid for it; and although Williams was supposed to give some money to Woodson, he was always asking to borrow

money from him, so Woodson said, "You owe me money." Williams replied, "No, I don't. You were playing like you were asleep." She heard no reply from Woodson.[5] Once she heard Williams say that Boochee promised to pay him $10,000. Williams and Woodson often argued over money.

After the flyer came out, Carter heard Williams say, "If I'm going down, then Chops and Tone are going down too." She also heard Williams talking to Woodson and Boochee over the phone, once on speaker when she heard a bit of the conversation: Williams said there were flyers around, and Boochee responded, "Don't worry about it, Tiny. Leave it alone. It's nothing." Afterward, Williams told Carter that he wanted to kill Boochee, without saying why. He seemed upset with Woodson too, and said something to the effect that because the flyers had just popped out of nowhere, Williams thought the other two were both telling on him. Williams changed his behavior. He got a haircut so that his hair would be different from the sketch on the flyer, and stayed at home more. About two weeks later, Carter and Williams broke up and she moved out. It was in October 2013, after a warrant was issued for her arrest, that she met with Detective Camarillo.

After Carter had a short "fling" with Woodson, Williams and Woodson stopped talking to each other. Carter testified that her sexual encounter with Woodson took place while she was still living with Williams and while Woodson had a girlfriend, Ana. Carter described an incident during which she was with Woodson at a motel when Ana broke the door down, entered the room, and

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[5] In her October 2013 interview with Detective Camarillo, Carter said that Williams indicated that Woodson was pretending to be asleep, but then testified at preliminary hearing that Williams had said that Woodson was asleep in the back when he got out of the van and when he returned.

grabbed Carter by the hair. Carter responded by stabbing Ana in the arm with a knife. Ana then took the knife and left. When Carter and Woodson followed, about 30 minutes later, they found all of Woodson's car's tires "popped."

During their relationship Carter had seen Williams with guns and thought he was crazy. She was afraid of him. He hit her once in the eye, causing a bone fracture. Although Carter testified that Williams never threatened to kill her, she also testified that once Williams said to her, "I killed a D.A. once so I'll kill you too." Carter was concerned that she would be considered a "snitch," and explained that a snitch was someone who cooperated with the police, and that testifying was snitching. After Williams was arrested, his teenage son chased Carter's car screaming, "You told on my dad," frightening Carter. She found being involved in this trial was frightening because "[i]t's a murder trial. And these are gang bangers." Carter also received a text message from Williams's son, which read: "He hope you be alive when he makes it back. May God bless you"; and "He said and he's going to pray for you. Good night." She took the message as a threat.

Carter identified a video of Williams rapping lyrics about the life of a member of the Duccy Hood gang. In the video Williams wore a uniform jacket of a Ducks athletic team. Carter identified another video which she recorded showing Williams rapping such lyrics as "Don't snitch. Ima put you in the ditch." Carter explained that to be put in the ditch was to be killed, that gangster street code prohibited snitching or talking to the police, and that the murder rate for snitching in a murder trial was higher than for a robbery trial. Carter had been relocated for her

safety with the help of detectives.[6] Carter admitted that she had been charged in Riverside with petty theft and felony vandalism, but claimed that no one had promised her any benefits for her testimony, that all she got from testifying was being "scared as hell."

Gang evidence

Deputy Telly Johnson testified that he conducted a traffic stop of a car containing Williams in December 2008. Williams then admitted to Deputy Johnson that he was a member of the Duccy Hood Crip gang, and gave his gang moniker as Tiny. The deputy observed gang-related tattoos on Williams, including "DHCC" which signified Duccy Hood Compton Crip, "LHK," meaning Lime Hood killer, and "BK."

Deputy Anthony Federico testified that he came into contact with Williams in December 2011, at which time Williams admitted to the deputy that he was a member of the Duccy Hood gang, with the moniker, Tiny Capone. Deputy Federico also noted gang-related tattoos on Williams, including "DH" for Duccy Hood.

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[6] When Carter left the courtroom for the break, she was scared and crying. During much of her testimony she kept her head down so that she would not see Williams's relatives in the audience. Once, a recess was taken when Carter began crying and was upset that another relative of Williams had come into the courtroom during her testimony, and put her arm around Francine, Williams's aunt, who was sitting in the audience. At the same time, another man was staring at her through the window in the door. Once the men were gone, Carter testified that the man who had entered was a cousin of Williams and a member of the same gang. She described him as a dangerous man.

Sergeant Jason Bates testified as the prosecution's gang expert that Duccy Hood and Atlantic Drive were both Crip gangs which had some 20 members each in 1998. The two gangs were allies in 1998, and both gangs were territorial, each claiming a specific area in Compton. Sergeant Bates explained that gang territory was like a safe zone where gang members could conduct and control illegal activities without being assaulted. The 1000 block of Dwight Avenue, where the 1998 shooting occurred, bordered the territories of the Cedar Block Piru and Neighborhood Piru, Blood gangs, and rivals of the Duccy Hood and Atlantic Drive gangs.

In 1998, the primary activities of the Duccy Hood gang were theft crimes, residential burglary, robbery, murder, vandalism, narcotic sales, receiving and selling stolen property, weapons possession, illegal shooting, and assault. Motives varied from financial gain to elevating the gang member's personal status within the gang and the status of the gang in the community. Respect and status are important to gangs, as gang members want to be feared by a community so that residents do not testify against the gang or provide information to law enforcement. Gang tattoos, symbols, and clothing, as well as gang graffiti, or tagging, are also meant to spread fear and intimidation within the community.

Sergeant Bates explained some of the common signs, symbols, and tattoos of the Duccy Hood and Atlantic Drive gangs, including the many gang tattoos worn by Williams. Since the Lime Hood Piru gang is a rival of Duccy Hood, a "Lime Hood Killer" marking would signify that the wearer is a killer of rival Lime Hood gang members. Rival Piru gangs are Blood gangs, thus, Williams's "BK" tattoo means Blood killer. In gang culture, members must earn the right to have tattoos related to the gang.

Multiple gang tattoos indicate that a member is active in his gang.

Sergeant Bates testified that for one to become a member of a gang, that person is expected to commit a violent crime or a crime for the financial benefit of the gang, or to "jump in," meaning getting beaten up by members of the gang. Gang members are then expected to "put in work" for their gang, meaning to commit crimes to further and benefit the gang. Such work consists of shootings and other acts of violence, robberies, and burglaries. Sergeant Bates presented three certified records of conviction as predicate offenses of the Duccy Hood gang as a criminal street gang: the conviction of Wilson Mays of robbery and receiving stolen property, committed July 18, 1995; the conviction of Terrence Lee Bracks of robbery, committed July 29, 1997; and the conviction of Rupert Thomas Lewis, possession for sale of cocaine, committed October 28,1997.

Sergeant Al Garcia testified that in August 2003, he came into contact with Rupert Lewis, who told the sergeant that he was member of the Duccy Hood Compton Crip gang. Sergeant Garcia observed tattoos on Lewis's body related to the Duccy Hood gang, including DHCC for Duccy Hood Compton Crip. In August 2008, Deputy Stephen Medina came into contact with Terrence Lee Bracks, who admitted to him that he was a member of the Duccy Hood Compton Crip gang. Sergeant Jose Gonzalez came into contact with Wilson Mays in May 2003. Mays told the sergeant that he was a member of the Duccy Hood gang, with the moniker, "Jay Bone."

Prosecution evidence presented only to the green jury (Williams and Boochee)

The gang expert's opinion

Sergeant Bates was asked to assume the following facts: A Duccy Hood gang member is hired by the lover of a woman to kill

her husband; the lover tells the Duccy Hood member that the person to be killed is a district attorney; neither the husband nor the lover are gang members; the lover picks up in a van the Duccy Hood member, who brought along an Atlantic Drive gang member; the Duccy Hood gang member sits in the front passenger seat, while the Atlantic Drive gang member sits in the rear passenger seat; the lover drives to a specific address on Dwight Avenue, where they sit in the van for hours before the Duccy Hood member gets out, shoots the victim who was sitting in his truck, and then returns to the others in the van; the lover then drives back to a location in their own territory and later pays the shooter a sum of money as payment.

When asked if the hypothetical crime outlined above was committed in association with the gang and to benefit and promote the gang, Sergeant Bates opined that it was and explained the basis of his opinion. Killing an individual employed in law enforcement is to commit the highest ranking criminal act among gangsters, and shows that the Duccy Hood member is fearless, willing to commit any act of violence, not afraid of rival gang members who claim that territory, and not afraid to go into rival gang territory, sit in a car for hours, and wait for the target to be murdered. The association by a Duccy Hood and an Atlantic Drive member serves to promote criminal conduct by gang members because it shows that the two allies are willing to work together to strengthen both gangs. However, gang members commonly have personal as well as gang motivations for committing a crime.

Prosecution evidence presented only to the blue jury (Woodson)

Woodson's first interview

Detectives taped their interview with Woodson on October 29, 2013. The interview was played for the jury. In the interview

Woodson confirmed that he was about 21 years old in 1998. He admitted that he was then affiliated with the Atlantic Drive gang and that he was known as "Little Chops." Woodson identified a photograph of Williams as depicting Tiny, who Woodson said he had stopped talking to about a year earlier because Woodson was "messing" with Myesha Carter. Until then, he and Williams had been "pretty tight" since Woodson was about 17 years old. When they met, Tiny was already from Duccy Hood.

When shown a photograph of Boochee, Woodson said he had never seen the man before, although he knew that his name was Tone because had heard it at the detail shop where Woodson bought weed. Later in the interview, Woodson picked Boochee's photograph from a six-pack photographic lineup, and said Boochee was the van driver the night of the shooting.

Woodson was told that the detectives had already talked to Tone and Tiny, and he was urged to tell the detectives how he ended up in the car with them the night Bryant was killed. Woodson said he was with Tiny but not "in it." He was with Tiny in Tiny's car and "this guy" picked them up in a Chevy Astro van. Woodson jumped into the van and then fell asleep in the back. He claimed that he did not wake up until they returned to Tiny's car. A short while later, however, Woodson was able to describe where they parked with a view of the victim's house. He said that they waited there for hours, watching the house, and he slept until he heard the shooter get back into the van. When Tiny returned, Woodson was awakened by the sound of the van's sliding door opening. He claimed to have heard no gunshots.[7] When they returned to Tiny's car, Woodson saw Tiny pass a chrome semiautomatic handgun to the driver of the van.

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[7] Detective Camarillo later testified that gunfire from a .45-caliber handgun is loud, louder than a van door closing.

Woodson believed that Tiny was the shooter because someone at the shop was paying him money. Woodson knew the money was for killing the man "because nobody was going to give me money just to give me money." While in Tiny's car waiting for the van, Tiny told him they were going to handle some business. Tiny said, "I did it man, feelin to get this money." Tiny went to the shop to get the money, and he bought a car, but gave Woodson no cash, just bought him some dope and some shoes. Woodson claimed he thought it was a robbery, and that he would not have gone with Tiny if he knew Tiny was going to kill someone. Woodson offered that this robbery "was the first time we ever did anything like it." At other times during the interview, Woodson claimed he was in jail on the night of the murder. He also said he was with his girl, and that they were going to steal a car.

Following the interview Woodson showed deputies the route the van took to the crime scene the night of the murder, including where the van parked.

Woodson's second interview

On December 19, 2013, Woodson was arrested and interviewed again the same day. This time he admitted he had previously committed robberies with Williams, four or five times, and that he was usually the lookout. Woodson agreed that ordinarily he would ask questions beforehand, such as where were they going and who would they would be "hitting." Woodson explained that he did not ask questions this time, because he thought it was a robbery, and that they were going to get a duffel bag full of weed. When Williams returned to the van, Woodson did not ask him how much money he got, but when they reached their destination, Williams told him it was a few thousand. Throughout the interview, Woodson continued to insist that he

thought they were going to commit a robbery, and knew nothing about murder.

The gang expert's opinion, presented only to the blue jury (Woodson)

Sergeant Bates was given essentially the same hypothetical facts before the blue jury as he had before the green jury, with the addition that the Duccy Hood member and Atlantic Drive member were crime partners, and when the Duccy Hood member was paid for the crime, he gave the Atlantic Drive member clothing as payment. Sergeant Bates gave his opinion that such a crime was committed in association with the Duccy Hood gang and with the intent to promote criminal conduct by its members.

Defense Evidence presented to both juries

Williams called Ana Becerril (Becerril) to testify regarding an incident involving Carter, whom she considered a friend until the incident. Woodson was Becerril's boyfriend in 2013. In early October, Becerril saw her own car parked at what she considered a "prostitute motel." She searched for the room occupied by Woodson and Carter, including pulling a fire alarm in an unsuccessful effort to catch them coming out. When the manager appeared, Becerril told him, "My husband is in one these rooms with a prostitute." Becerril then knocked on random doors until the manager gave her the room number. She then broke down the door and attacked Carter, hitting her as Woodson tried to intervene. Carter then stabbed Becerril in the arm, leg, and knee. Becerril left when she heard sirens, and as she exited she slashed the tires of her car.

Called by Boochee, Yvonne Davis (Davis) testified that she met Boochee in November 1999 at the car repair shop where he worked. They developed an intimate relationship in 1992, married in 1996, and lived together in Compton from 1994 until he moved out in May1998. In December 1998, Davis suffered an

emotional trauma and Boochee stayed with her until December 21. On December 20, he was with her the entire night beginning no later than 6:00 p.m. She remembered the dates because she and Boochee were wrestling and he popped her knee.

At that time Boochee drove a Chevy Astro van, which they jointly owned. After Boochee moved out, Davis, a tax preparer, discovered that he was trying to commit tax fraud using a mortgage statement that belonged to Arlando Bryant, who lived on Dwight Avenue. Boochee asked Davis to help him.

Davis acknowledged that when she spoke to Detective Camarillo she did not mention that Boochee was at her house the night of December 20, 1998, although the detective gave her his card and asked her to call if she remembered anything that might be helpful. She also acknowledged that when she spoke with the detective, Boochee was still paying her bills and utilities.

Boochee also called his daughter, Tyjuana Boochee, who testified that she met Witherspoon about 22 or 23 years ago, and lived with her for about five months. During the time they lived together Witherspoon always seemed angry with Tyjuana's father. Witherspoon said he was no good and had multiple women.

DISCUSSION

I. Substantial evidence supports Woodson's conviction

Woodson contends that his murder conviction was not supported by substantial evidence. In particular, he gave two reasons that there was insufficient evidence to establish that he aided and abetted the commission of the crime by Williams: (1) because Carter's testimony admitted against Woodson did not provide substantial evidence that he was only pretending to be asleep, or that Williams was the shooter; and (2) evidence that Woodson was sleeping in the van during the shooting was not probative of aiding and abetting.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

"[B]ecause 'we must begin with the presumption that the evidence . . . was sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"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 . . . are principals in any crime so committed." (§ 31.) "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and [with] (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

Woodson argues that other than Carter's testimony which was limited to Williams, there was no evidence that Williams or anyone else committed a murder that night. Apart from Carter's testimony, both juries heard evidence that Bryant was shot to death with a .45-caliber firearm as he sat in the driver's seat of his truck parked on the street outside his house on Dwight Avenue in Compton on December 20, 1998. Sergeant Jeff Slutske, who was on the scene by 9:35 p.m., testified that he found the unresponsive Bryant lying across the seat of his truck, shattered glass on the ground, bullet holes in the door, and .45-caliber bullet casings in the area. The medical examiner testified that Bryant died of a gunshot wound to the aorta and lung inflicted by a .45-caliber bullet.

In testimony by Carter which *was* admitted against Woodson, Carter told the jury that Woodson and Williams were like brothers and constantly together until she had sex with Woodson. Woodson's own statements to detectives established that Williams was the shooter and that Woodson knew he was going to kill someone on Dwight Avenue that night. Williams and Woodson had been best friends since they were teenagers. Although Woodson claimed that the intended crime was robbery, he admittedly knew that he was accompanying Williams to commit a violent felony for money. When the two men were waiting for the van to arrive, Williams told Woodson they were going to "handle some business," and he said, "I did it, man, feelin to get this money." Woodson also knew he was being paid to play a role in the crime, as he explained to the detectives that "nobody was going to give me money just to give me money." Woodson admitted that he and Williams had in the past committed multiple robberies together in which Williams was the main actor and Woodson was the lookout. On those occasions Woodson usually asked Williams beforehand where they were

going and who they would be "hitting." Evidence of repeated instances of similar conduct implies that the same practice was followed at the time in question. (See *People v. Memro* (1985) 38 Cal.3d 658, 681; Evid. Code, § 1105.) As it was Woodson's usual practice to discuss the crime and the intended victim before committing a crime with his best friend, acting as lookout, the jury could reasonably infer that he did so on this occasion. We thus reject Woodson's claim that he did not know what was going on.

Jurors are not obligated to believe a defendant's self-serving version of events. (See *People v. Casares* (2016) 62 Cal.4th 808, 846.) Just as the jurors could reasonably reject Woodson's claim that he did not know Williams's purpose, they were not required to believe that Woodson slept through the crime. As respondent notes, in testimony not limited to Williams, Carter recounted a conversation she overheard in which Woodson told Williams, "You owe me money" and Williams replied, "No, I don't. You were playing like you were asleep." Carter testified that Woodson responded by not saying anything. We agree with respondent that the jury could reasonably have construed Woodson's silence as an adoptive admission. (See Evid. Code, § 1221.) Taken together with Woodson's own statements, his claim to have been asleep is belied. He was able to give the detectives a detailed description of the route Boochee took to Bryant's house and where he parked. He told deputies about hearing Williams leave and reenter the van, and about seeing Williams pass the gun to Boochee when they were dropped off. We agree with respondent's point that Woodson's claim of hearing the van doors but not five gunshots from a nearby .45-caliber handgun strained credulity. We assume that the jury was of the same view.

We, like respondent, also find support in Woodson's probable gang-related motive for a finding that he shared his companions' intent to kill the victim. "[E]vidence of motive is often probative of intent to kill." (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Contrary to Woodson's argument otherwise, it may reasonably be inferred from Woodson's statements that in 1998 he and Williams were both gang members. As a youngster, Woodson had begun associating with the Atlantic Drive gang, and "got in there" when he was 15 years old. Woodson told the detectives that he met Williams at age 17, when Williams was already a member of the Duccy Hood gang. As Woodson and Williams then became close friends, we reject Woodson's suggestion that the prosecution was required to prove that their two gangs were allies in 1998. Instead we consider that by 1998, Woodson and Williams had been affiliated with their respective gangs for at least four years. In addition, Williams admitted to sheriff deputies in 2008 and 2011 that he was a member of the Duccy Hood gang, and had apparently earned the right to have many Duccy Hood tattoos, a sign that he was an active member of the gang. It is reasonably probable that he was a member of the gang in 1998. Woodson admitted having served as lookout for Williams in multiple prior robberies. In 1998, the primary activities of the Duccy Hood gang included robberies, murders, shootings, and other armed assaults. Gang expert Sergeant Bates gave his opinion that a crime based on these facts was committed in association with the Duccy Hood gang, with the intent to promote criminal conduct by its members. Thus Woodson's gang motive to assist Williams as he had done a number of times before, provided support for the reasonable inference that Woodson intended to assist Williams in the commission of the crime on this occasion, most likely as a lookout. We conclude that Woodson has failed to show that insufficient

evidence supported the jury's finding that he aided and abetted a murder.

II. Boochee's challenge to Carter's testimony

Boochee contends that the trial court erred in admitting testimony in which Carter recounted statements made by Williams which incriminated Boochee, and that the court erred in instructing the jury that such statements were not limited to Williams. He argues the admission of these hearsay statements resulted in a violation of his constitutional right of confrontation, and that the error should therefore be reviewed de novo on appeal.

Boochee acknowledges that he did not object to the testimony at trial. A judgment may not be reversed, by reason of the erroneous admission of evidence unless: "There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).)

Nevertheless, Boochee argues that his failure to object should be excused on the ground that any objection by him would have been futile because the trial court had already overruled two hearsay objections made by Williams during Carter's testimony.[8] Not only did Boochee fail to object, he did not join in

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[8] Boochee also contends that Woodson's counsel objected to hearsay statements in Carter's testimony, but he refers to a discussion between counsel and the court after Carter's direct examination. The prosecutor asked for clarification of the court's previous ruling that a portion of Carter's testimony was limited to Williams, and asked that there be no limitation. The court refused. Woodson's counsel did not interpose an objection, but said, "That's an admission. It's not an admission against Mr. Woodson or Mr. Boochee. It's an admission." The trial court stated, "I didn't say I'm changing my mind." Woodson's counsel

the objections made by Williams, despite the trial court's prior express refusal to grant a request that all objections be deemed joined by all defendants. "'Generally, failure to join in the objection or motion of a codefendant constitutes a waiver of the issue on appeal.' [Citations.] [¶] A litigant need not object, however, if doing so would be futile. [Citation.]" (*People v. Wilson* (2008) 44 Cal.4th 758, 793.)

Boochee has not quoted the challenged questions, testimony, or objections, and the only objections by counsel for Williams found on the cited pages in the record were not hearsay objections. Indeed, other than one objection that a question was compound, counsel objected to the following question:

> "[Prosecutor]: Now, did either one of them ever tell you how much money they were supposed to get from Tone?"
>
> "[Williams counsel]: Objection as to either one of them for defendant Williams, only defendant Williams's statements."

As Boochee observes here, the trial court seemed to express confusion by saying, "I don't know. I don't know," just before overruling the objection. The court could not be faulted for being confused by such an objection. Whatever counsel meant, the ground was not clearly stated, as is required to preserve it. Furthermore, hearsay was not mentioned in the objection. Overruling an objection on one ground does not demonstrate the

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replied, "Okay." Thus, the court was refusing the prosecutor's request that a statement that was limited to Williams be instead admitted against all defendants. There was no objection made by any counsel in this discussion.

futility of making an objection on a different ground. (*People v. Valdez* (2012) 55 Cal.4th 82, 138-139.)

Boochee also contends that any objection was futile because the trial court instructed, "This last statement, ladies and gentlemen, is not limited to defendant Williams." The statement the court was referring to came after the prosecutor asked: "So what did [Woodson] say after [Williams] said, 'No, you were playing like you were asleep?'" Carter replied, "He didn't say anything." There was no objection or motion to strike by any counsel, and none of the defendants requested a clarifying instruction. "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly. (Evid. Code, § 355, italics added.) As Woodson's adoptive admission clearly was not an admission adopted by Boochee, we cannot assume that the trial court would not have followed the law and clarified its instruction, if it had been asked.

Relying on his claim of futility, Boochee also challenges later portions of Carter's testimony to which there was no objection by any counsel. In that testimony, Williams told Carter that if he was going down, then Woodson and Boochee were also going down. Boochee also cites Carter's testimony that Boochee set up the murder, that Boochee drove the van to Dwight and Rosecrans Avenues, that Williams shot Bryant and said something about killing a D.A., and that Boochee was supposed to pay Williams and Woodson $10,000 to carry out the hit. Boochee also relies on his futility claim to challenge for the first time on appeal, Detective Camarillo's testimony and Carter's recorded interview in which she told the detective that Williams said Boochee drove the van.

Boochee's arguments fail to demonstrate futility. We conclude that Boochee has failed to preserve his hearsay contentions for review, and has failed to show error. "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) Boochee has made no attempt to demonstrate that the challenged testimony was inadmissible, other than the bare assertion that it constituted hearsay. Hearsay is not inadmissible if it falls within one of the many exceptions enumerated in division 10, chapter 2 of the Evidence Code, commencing with section 1220. In essence, Boochee failed to determine whether the challenged statements are in fact hearsay, whether they failed to fall within an exception to the hearsay rule, and if so, what exception that might be. Even if we had not found forfeiture, we would decline to make that analysis for Boochee, as we do not reach undeveloped claims. (See *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.)

Boochee also fails to show a Confrontation Clause violation. He relies on *Bruton v. United States* (1968) 391 U.S. 123, and *People v. Greenberger* (1997) 58 Cal.App.4th 298, to argue that the admission of a codefendant's extrajudicial statement implicating the defendant violates the defendant's right to confrontation, unless the statement is shown to be reliable. However, the *Bruton* rule, like the Confrontation Clause on which it relies, applies only to testimonial hearsay, and "[r]eliability is no longer the touchstone for determining violations of the Confrontation Clause." (*People v. Almeda* (2018) 19 Cal.App.5th 346, 362.) As Boochee has made no effort to identify which of the challenged statements were testimonial, he has failed to demonstrate error.

III. Other evidentiary rulings

Boochee claims that he was prejudiced by the admission of several instances of irrelevant evidence or evidence which was more prejudicial than probative.

The first objection was to Witherspoon's testimony that Boochee was confident nothing would go amiss during Green's meeting with the police in Compton "because she was a big liar." The trial court overruled Boochee's objection, made on the ground of speculation, because it "goes on this witness's knowledge."

The second objection was to the following question by the prosecutor to Carter after she testified that she was afraid: "Who do you think is going to hurt you?" The objection was made by counsel for Williams on the grounds of speculation and vagueness, and was overruled, as it "goes to the witness's credibility."

The third overruled objection came after Carter was asked what threats had been made against her and she replied that Williams's son had texted her. Boochee's counsel objected on the ground of no foundation for how she knew whose son it was.

The remaining challenged objection was the only one made on the ground of relevance. It was made by counsel for Williams after the prosecutor asked Carter whether she was afraid of Williams. The objection was overruled and Carter testified regarding an incident of domestic violence. The trial court ruled that the testimony was relevant to explain her demeanor and state of mind on the stand.

"Relevant evidence is evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) The trial court has broad latitude in determining the relevance of evidence. [Citations.]" (*People v. Scott* (2011) 52 Cal.4th 452, 490.) In addition, the trial court in its discretion

may exclude evidence under Evidence Code section 352 if its probative value is substantially outweighed by its potential to cause undue prejudice. (*People v. Valdez, supra*, 55 Cal.4th at p. 138.) A relevance objection does not preserve an objection under Evidence Code section 352. (*Ibid*.)

It is the defendant's burden to demonstrate not only that the ruling was erroneous, but also that the error resulted in a miscarriage of justice. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; Evid. Code, §§ 352, 354; Cal. Const., art. VI, § 13.) To demonstrate a miscarriage of justice, the defendant must do so under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, which asks whether there is a reasonable probability of a different result absent the trial court's error. (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.) The trial court's discretion will not be disturbed unless it was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*Rodrigues*, at pp. 1124-1125.)

We initially observe a myriad of obstacles to Boochee's claims. Boochee objected in just two of the four instances, one on the ground of speculation, rather than relevance or Evidence Code section 352, and the other on the grounds of a lack of foundation, not hearsay as Boochee claims.[9] Boochee did not join in the other two objections made by Williams's counsel, one on the ground of speculation, and the other on the ground of relevance. He has thus not preserved these two objections for appeal. (*People v. Wilson*, *supra*, 44 Cal.4th at p. 793.) In addition, as none of the objections was made on the ground of

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[9] Ordinarily, a foundation objection does not preserve a hearsay claim. (*People v. Burroughs* (2016) 6 Cal.App.5th 378, 408.)

Evidence Code section 352, he has not preserved a claim under that statute. (See Evid. Code, § 353.)

Regardless of forfeiture, the claims are without merit. The prosecutor asked Witherspoon whether Boochee "sounded happy" while discussing Green's involvement in the murder. Counsel for Boochee objected on grounds of speculation. The court overruled that objection, since Witherspoon had known Boochee intimately for years. Witherspoon went on: "It didn't sound like a happy. It sounded like a confident. He had confidence in her because she was a big liar."

Counsel again objected on grounds of speculation. The objection was misplaced, since Witherspoon was merely restating her testimony of moments earlier that Boochee had called Green "a very good actress." No error can be found in the court's reliance on Witherspoon's knowledge. Furthermore, Boochee failed to move to strike Witherspoon's answer, as subdivision (a) of Evidence Code section 353 required.

Boochee's foundation objection, regarding how Carter knew the identity of the person who had texted her, was resolved when it became clear in Carter's later testimony that she knew Williams's son, and that she determined that the text message was sent from Williams's phone.

With regard to Carter's fear, Boochee cites *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369, and *People v. Burgener* (2003) 29 Cal.4th 833, 869, and concedes that a witness's fear and evidence of a third-party threat is admissible and may be relevant to evaluating the witness's credibility. His new contention that the testimony was cumulative is made without analysis or citations to what other evidence made it cumulative.

We conclude that Boochee has failed to preserve these issues for appeal, and has not demonstrated that the trial court exercised its discretion in an arbitrary, capricious or patently

absurd manner. Moreover, Boochee fails to demonstrate that any of the claimed errors resulted in a miscarriage of justice. Instead, he merely offers his conclusion that the rulings were prejudicial, argues that the cumulative effect of four rulings amount to a denial of due process, and invites this court to make the analysis for him under the test of *Chapman v. California* (1967) 386 U.S. 18, 24, which applies to constitutional error. Boochee has not met his burden to demonstrate that the court erred or shown a reasonable probability that he would have achieved a different result absent any errors. As we reject his claims of error, we also reject his claim of a cumulative prejudicial effect of any errors.

IV. Carter impeachment

All three defendants contend the trial court erred in excluding evidence offered to impeach Carter's credibility.[10] They contend that the court should have admitted evidence to show that Carter had worked as a prostitute and that she lied about that in her preliminary hearing testimony. In addition, Williams contends that the court should have admitted proffered evidence to show that she had failed to appear in court after posting bail in a pending case. All defendants contend that the ruling resulted in a denial of their federal constitutional right to confront and cross-examine a witness against them.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Citations.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931, fn. omitted.) "[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases

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10 The trial court did allow inquiry into the stabbing incident at the motel, Carter's pending charges in Riverside for petty theft and felony vandalism, and whether she expected any benefit from her testimony.

is broad." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296.) "'[T]his court will not disturb a trial court's exercise of discretion under Evidence Code section 352 unless it is shown the trial court exercised its discretion "'in an arbitrary, capricious or patently absurd manner.'" [Citations.]' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 865.)

"'Although we recognize that a criminal defendant has a constitutional right to present all relevant evidence of *significant* probative value in his favor [citations], "[t]his does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than 'slight-relevancy' to the issues presented." [Citation.]' [Citation.]" (*People v. Homick, supra*, 55 Cal.4th at p. 865.)[11] "[A] matter is 'collateral' if it has no logical bearing on any material, disputed issue. [Citation.] A fact may bear on the credibility of a witness and still be collateral to the case. [Citation.]" *People v. Contreras* (2013) 58 Cal.4th 123, 152.)

"[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance. [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1051, citing *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678-679.)

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[11] Relying on *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640-641, Boochee contends that we may not consider whether the impeachment evidence proffered here was collateral, because the prosecution did not make that argument below. Boochee's reliance is misplaced. In *Lorenzana*, the California Supreme Court rejected a new legal theory based on *contested* evidence to support the admissibility of illegally seized evidence. There is no discussion of impeachment in that case.

Moreover, the United States Supreme "Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes. [Citation.] . . . (. . . '[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to . . . expose [testimonial] infirmities through cross-examination.') [Citations.]" (*Nevada v. Jackson* (2013) 569 U.S. 505, 511.) "Furthermore '[a] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207-208, quoting *People v. Quartermain* (1997) 16 Cal.4th 600, 623-624.)

With these principles in mind, we first consider Woodson's contention that evidence of Carter's failure to appear in court on pending charges should have been admitted. The evidence of Carter's failure to appear was attached to Williams's written motion and consisted of a felony complaint alleging felony vandalism and petty theft, as well as minute orders concerning Carter's arraignment and bail, her subsequent failure to appear, the issuance of a bench warrant, Carter's arrest, and finally, bond documents showing that Carter made bail three days after her arrest on the bench warrant. Nothing in the exhibits explained Carter's failure to appear or showed that she was charged with or convicted of a *willful* failure to appear. As there was no evidence that Carter's failure to appear was willful, the trial court did not abuse its discretion in refusing to allow impeachment with this incident. (*People v. Cloyd* (1997) 54 Cal.App.4th 1402, 1408-1409; see *People v. Maestas* (2005) 132 Cal.App.4th 1552, 1557.)

We next consider the contention of Boochee and Williams that the court should have admitted evidence to show that Carter had committed acts of prostitution, and that she perjured herself in her preliminary hearing testimony by denying that she was a prostitute. Williams refers to page 122 of the clerk's transcript of the preliminary hearing, where the following exchange relating to prostitution took place:

"[Defense counsel]: You are a prostitute? . . .

"The court: Rephrase your question, counsel.

"[Defense counsel]: You have committed acts of prostitution in the past? . . .

"[Carter]: Four years ago before I was with Mr. Williams, yes.

"[Defense counsel]: And when did you start your acts of prostitution?

"[Carter]: I was a kid, 15. . . .

"[Defense counsel]: How old are you now?
"[Carter]: I am 23.

"[Defense counsel]: And from the age of 15 to 23, when I say 'prostitution,' that means exchanging money for sexual intercourse with other individuals, correct?

"[Carter]: Yeah.

"[Defense counsel]: And approximately how many times did this occur?

"[Carter]: I don't know."

First, Carter did not say that she was or was not a prostitute. She thus could not have lied about *being* a prostitute, as defendants suggest. As for having committed *acts* of prostitution in the past, she replied that she had. Unless that statement was false, known by the witness to be false, and willfully made with regard to a material matter, it was not perjury. (See § 118.)

Furthermore, it is not perjury to give "'an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.' [Citation.]" (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 735, 737-738, quoting *Bronston v. United States* (1973) 409 U.S. 352, 353) When "'a witness' answers are literally true he may not be faulted for failing to volunteer more explicit information. Although such testimony may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness' failure to volunteer testimony to avoid the misleading impression does not constitute perjury because the crucial element of falsity is not present in his testimony.' [Citation.]" (*Cabe*, at p. 738.) This appears to be the case here. Carter was not asked whether she engaged in acts of prostitution *after* she met Williams, and she was not asked whether or when she had *resumed* committing such acts. Indeed, there was no follow-up to clarify the question in the manner now interpreted by defendants. Under such circumstances, later acts of prostitution would not establish perjury, and the trial court did not abuse its discretion in excluding such evidence.

Boochee and Williams also contend that evidence that Carter committed acts of prostitution should have been admitted to impeach her credibility because prostitution has been held to be a crime of moral turpitude. (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 708-709.)[12] The trial court's inquiry under Evidence Code section 352 does not stop, however, simply because the conduct may involve moral turpitude. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.)

The trial court has an obligation "to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment." (Evid. Code, § 765.) Testimony from a witness about her acts of prostitution has an obvious potential for embarrassing or unfairly discrediting her, and the "degrading impact of such questions has long been recognized. [Citation.]" (*People v. Phillips* (2000) 22 Cal.4th 226, 234.) Impeachment with such evidence is highly prejudicial, and is properly excluded unless it is substantially outweighed by its probative value. (*Ibid.*) For example, similar evidence was properly excluded in *Phillips*, where it was marginally relevant to the issue of the defendant's alibi. (*Ibid.*)[13] Here, evidence of

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[12] Carter was 15 years old when she began engaging in acts of prostitution. A change in California law, effective just over three weeks after Carter's testimony, made it clear that a child is a victim, not a criminal. (See § 647, subd. (b)(5).) We also note that Carter's minority could have raised issues of coercion or duress by a trafficker, leading to exclusion of evidence of any acts of prostitution committed as a minor, and possibly as an adult, under law existing at the time of her testimony. (See Evid. Code, § 1161.)

[13] Boochee claims that this case is akin to *People v. Varona* (1983) 143 Cal.App.3d 566, 569-570, because there, "the court

Carter's acts of prostitution had little probative value with regard to her credibility and no value regarding any other issue in the case. (See *People v. Chavez* (2000) 84 Cal.App.4th 25, 28-29.)

We conclude that the trial court acted well within its discretion by excluding cross-examination of Carter on matters having no logical bearing on any material, disputed issue. Further, defendants have not demonstrated that "'a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citation.]" (*People v. Whisenhunt*, *supra*, 44 Cal.4th at pp. 207-208.) Boochee merely states his conclusion that more thorough impeachment would have destroyed all semblance of her credibility. Woodson merely joins in Boochee's arguments. And Williams makes no argument on the issue at all.

V. Witherspoon impeachment

Although the jury heard that Witherspoon had been convicted in federal court of bankruptcy fraud in 2007 and tax evasion in 1986, Boochee contends that the trial court erred by not permitting him to ask Witherspoon whether she had made a false social security claim by claiming Boochee's children as her own, or to bring out that an element of bankruptcy fraud is perjury. Boochee contends that these restrictions on impeachment resulted in a denial of his right to present a complete defense.

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held the trial court abused its discretion when it excluded evidence of an adult sexual assault victim's history of prostitution." The court in that case did no such thing, and in fact, the court expressly declined to pass on the admissibility of such evidence. (See *id*. at p. 568.) Moreover, unlike here, there was no issue in *Verona* relating to impeachment, and the evidence was offered in direct support of an affirmative defense. (*Ibid*.)

The right to present a defense is fundamental element of due process. (*Washington v. Texas* (1967) 388 U.S. 14, 19.) However, "[a]s a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury. [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327.) Thus "the Constitution permits judges 'to exclude evidence that is "repetitive [and] only marginally relevant," as the trial court did here. (*Id.* at pp. 327-328; see also *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 679.) "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

The Constitution thus does not afford Boochee the right to make "'an unlimited inquiry . . . into collateral matters,'" as his arguments suggest. (*People v. Homick*, *supra*, 55 Cal.4th at p. 865.) Impeachment with prior conduct involving moral turpitude remains subject to the court's discretion. (See *People v. Clark*, *supra*, 52 Cal.4th at p. 931.) The trial court's discretion will not be disturbed unless the defendant demonstrates that it was exercised "'in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues, supra*, 8 Cal.4th at pp. 1124-1125.)

Boochee points out that a witness may be impeached with evidence of prior acts of misconduct affecting his credibility, even where there has been no conviction. (See *People v. Wheeler*, *supra*, 4 Cal.4th at pp. 291-292.) He suggests that the only reason the trial court excluded the question was that counsel could present no evidence to substantiate the social security allegation if Witherspoon replied in the negative. Counsel acknowledged that if Witherspoon denied the allegation, he would have no follow-up questions and no evidence to present. Boochee's reliance on *People v. Kennedy* (2005) 36 Cal.4th 595, disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459, suggests an argument that such questions may not be excluded so long as counsel has a good faith belief in the existence of the facts.

Kennedy provides no support for Boochee's suggestion. Contrary to Boochee's characterization of that case, the California Supreme Court held that a character witness may be cross-examined "about acts *inconsistent with the witness's testimony* as long as [counsel] has a good faith belief that such acts actually occurred. [Citation.]" (*People v. Kennedy*, *supra*, 36 Cal.4th at p. 634, italics added; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1170.) The facts in the authorities cited by Boochee bear no resemblance to those in this case, as Witherspoon did not testify inconsistently with regard to prior misconduct.

Moreover, the trial court did not rely solely on the ground that counsel could not substantiate the allegation, but explained that it had insufficient probative value for that reason. The court also ruled that it was cumulative to the other impeachment evidence. As respondent points out, not only did Witherspoon admit that she had pled guilty in federal court to tax fraud and bankruptcy fraud, she testified about her incarceration in 1986

and 2007 and 2008. She also testified that she lived in a halfway house upon her release.

Boochee suggests that the trial court should not have excluded the social security allegation or the perjury element of bankruptcy fraud because courts "routinely" admit multiple uncharged bad acts as impeachment evidence. As an example, he cites *People v. Whisenhunt, supra*, 44 Cal.4th at pages 193-194, which contains no discussion of cumulative impeachment evidence, and nowhere in the opinion does the California Supreme Court favorably mention a routine admission of cumulative evidence. However, elsewhere in that opinion, the court upheld the *exclusion* of additional impeachment evidence, as its "value . . . was minimal in relation to the major areas of impeachment already raised by the admitted evidence, and a reasonable jury would not have received a significantly different impression of [the witness's] credibility even if the excluded evidence had been admitted." (*Id*. at p. 208.)

Again, Boochee has failed to demonstrate any reasonable probability that the jury would have a significantly different impression of Witherspoon's credibility if the two excluded questions had been asked. Boochee merely asserts the conclusion that additional impeachment evidence would have destroyed Witherspoon's credibility. We discern no abuse of discretion or constitutional violation.

VI. Green's appearance in jail clothing

Boochee and Williams contend that the trial court erred in permitting Green to be brought in to the courtroom for identification by the victim's father while she was dressed in jail clothing. They contend that the error resulted in the denial of their constitutional rights to a fair trial and due process.

The day before the victim's father's testimony, Boochee's counsel indicated "a problem with" bringing Green into the

courtroom for identification. Counsel for Williams stated that he was "joining in on this." Boochee's counsel's basis for concern was that because Green would be in jail garb, the jurors would think that she had already been convicted, or they would speculate why she was not there on trial. Counsel argued that instructing the jury with CALJIC No. 2.11.5 would "kind of [do] the obverse of what that jury instruction precludes."[14] The trial court disagreed, found the instruction applicable, and overruled the objection. Defense counsel did not suggest a different instruction or request that Green be clothed in civilian attire.

Neither Williams nor Boochee contends that it was error to instruct the jury with CALJIC No. 2.11.5. Indeed Boochee concedes that CALJIC No. 2.11.5 is generally applicable, but argues that such an instruction cannot dispel the prejudice caused by having a "nontestifying codefendant, escorted by a deputy, . . . presented to the jury clad in jail clothes so the prosecutor can point the finger at her via the decedent's grieving father." Williams argues for the first time on appeal that displaying Green in jail attire should been excluded under Evidence Code sections 350 and 352 as irrelevant and more prejudicial than probative.

An objection to evidence must clearly set forth the specific ground of the objection. (Evid. Code, § 353, subd. (a).) At no time

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[14] After oral arguments, the court read CALJIC No. 2.11.5 as follows: "There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial. There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether she has been or will be prosecuted. Your sole duty is to decide whether the people have proved the guilt of each defendant on trial."

during the discussion of Boochee's objection did counsel utter the words, relevant, prejudice, probative, or any related words. Neither Evidence Code section 210, 350, nor 352 was mentioned. Counsel merely expressed a concern that the jury would think that Green had already been convicted or speculate why she was not there. As the prosecution was never given the opportunity to argue the relevance of Green's appearance, establish its admissibility under Evidence Code section 352, or to have Green dressed in civilian clothing, defendants have forfeited a relevance or Evidence Code section 352 challenge. (*People v. Partida*, *supra*, 37 Cal.4th at pp. 433-434.)

Respondent aptly observes that any speculation by jurors was averted with the court's instruction with CALJIC No. 2.11.5. Jurors are presumed to have understood and followed the trial court's instructions, unless there is evidence of confusion or the jury requested further guidance on the issue at hand. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) As defendants have pointed to no such evidence, we presume that the jurors followed the instruction and avoided any speculation due to Green's jail clothing, and any prejudice was thus dispelled.

We also agree with respondent that Green's brief appearance at trial did not amount to constitutional error. Defendants compare the court's ruling to the denial of a defendant's request to wear ordinary clothes at trial. A defendant who has entered a timely and proper objection to wearing jail clothes at trial has a constitutional right to wear civilian clothes; and a denial of that right violates constitutional guarantees of due process and a fair trial by undermining the presumption of innocence. (See *Estelle v. Williams* (1976) 425 U.S. 501, 512-513; *People v. Taylor* (1982) 31 Cal.3d 488, 495-496.) Circumstances involving jail clothing worn by others do not undermine the presumption of innocence; for example, there is no

constitutional right to require that defense witnesses dress in civilian clothes, although it may be an abuse of discretion to refuse a timely request. (See *People v. Froehlig* (1991) 1 Cal.App.4th 260, 264.)

In extreme circumstances, displaying a former codefendant in jail clothing despite a proper and timely objection may deprive a defendant of a fair trial, and thus amount to constitutional error. (See, e.g., *People v. Williams* (1979) 93 Cal.App.3d 40, 67.) For example, if the prosecution caused three former codefendants to be displayed in jail attire together before the jury on three separate occasions throughout the trial, including during the prosecutor's closing argument, and other significant occasions during trial, that would be egregious in the extreme. (*Id*. at pp. 64-65.)

Here by contrast, there was a single, brief viewing, a cautionary instruction not to engage in speculation regarding the former codefendant's status, and no indication in the record that the jury did not heed or understand the instruction. The evidence against these defendants was compelling and well established by their own admissions to Witherspoon and Carter, whose testimony was extensive and evidently believed by the jury. It is unlikely, under such circumstances, that the jury credited their testimony only or mostly because they briefly saw Green in jail garb. Even if defendants had preserved the issue with a proper and timely objection or request that Green be clothed in civilian clothing, we would conclude that under the circumstances presented here, the trial was not rendered fundamentally unfair.

VII. Sufficiency of the gang evidence

A. Defendants' contentions

All three defendants contend that the gang enhancement was not supported by substantial evidence. They argue that the

prosecution failed to prove that any of the defendants was a gang member at the time of the murder. In addition, defendants argue that the prosecution failed to prove that either the Duccy Hood gang or the Atlantic Drive gang was a criminal street gang in 1998.[15]

B. Substantial evidence standard of review

A finding of a gang enhancement is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Thus, "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, 59-60 (*Albillar*).) A gang finding may be based upon circumstantial evidence, and "[i]t is well settled that expert testimony about gang culture and habits is the type of evidence a jury may rely on to reach a verdict on a gang-related offense or a finding on a gang allegation.

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15 Woodson seeks to incorporate by reference much of the factual arguments on this issue set forth in his codefendants' briefs. Because some evidence material to the gang enhancement was presented to Woodson's jury but not to the Boochee/Williams jury, only those arguments which Woodson has shown to applicable to his claims are discussed.

[Citation.]" (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.) It is the burden of the party challenging a finding as unsupported by substantial evidence to overcome the presumption that the evidence was sufficient. (*People v. Hamlin*, *supra*, 170 Cal.App.4th at p. 1430.)

C. Criminal Street gang element

A sentence is enhanced for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) "'[C]riminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated acts], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in, or have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f).) Defendants challenge only the element that its members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

"A gang engages in a 'pattern of criminal gang activity' when its members participate in 'two or more' specified criminal offenses (the so-called 'predicate offenses') that are committed within a certain time frame and 'on separate occasions, or by two or more persons.' [Citations.]" (*People v. Loeun* (1997) 17 Cal.4th 1, 4; § 186.22, subd. (e).) The specified period of time requires the last of the predicate offenses to have occurred within three years after a prior offense. (§ 186.22, subd. (e).) We apply a deferential standard of review to evaluate whether the evidence was sufficient to satisfy the statutory definition. (*People v. Prunty* (2015) 62 Cal.4th 59, 71.)

Gang expert Sergeant Bates testified that in 1998, the primary activities of the Duccy Hood gang included robberies, murders, shootings, and narcotic sales. The predicate offenses consisted of the conviction record of Mays, Bracks, and Lewis, showing convictions for robbery and receiving stolen property in 1995, robbery in 1997, and possession for sale of cocaine in 1997. In 2003, Mays and Lewis admitted to law enforcement to being members of the Duccy Hood gang. Bracks admitted in 2008 that he was a member of the Duccy Hood gang. Defendants contend that this was insufficient to show a pattern of criminal gang activity, because there was no evidence that the three men were members of the gang at the time they committed the predicate crimes.

As Woodson acknowledges, the identical argument was made and rejected in *People v. Augborne* (2002) 104 Cal.App.4th 362, 374-375 (*Augborne*). In that case, the Court of Appeal found no language in the gang enhancement statute that required the persons committing the predicate crimes be gang members at the time the offenses were committed. (*Id.* at p. 375.) Woodson contends that the *Augborne* court's reasoning failed to follow the plain language of the statute which defines "criminal street gang" as an association "whose *members* . . . have engaged in, a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added.) Woodson reads into this language as not including evidence that *future* gang members committed the offenses. However, Woodson has pointed to no language, plain or otherwise that states that the predicate offenses must have been committed by the gang members at the time they were members of the gang, and we have found none.

The *Augborne* court pointed out that the California Supreme Court had held the statute did not require the predicate offenses to have been gang-related. (*Augborne, supra*, 104

Cal.App.4th at p. 375, citing *People v. Gardeley* (1996) 14 Cal.4th 605 (*Gardeley*), disapproved on another point by *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).) Our high court explained that the "clear and unambiguous" language of the statute defined "'pattern of criminal gang activity' as 'the commission, attempted commission, or solicitation of two or more' enumerated offenses occurring within a specified time period, and 'committed on separate occasions, or by two or more persons.' Nothing in this statutory language suggests an intent by the Legislature to require the 'two or more' predicate offenses to have been committed 'for the benefit of, at the direction of, or in association with' the gang." (*Gardeley*, *supra*, at p. 621.) As the *Augborne* court concluded: "It reasonably follows then that the prosecutor need not demonstrate that the two or more individuals who committed the predicate crimes were gang members *at the time* the offenses were committed." (*Augborne*, *supra*, at p. 375.)

We agree. As substantial evidence established that the three named Duccy Hood gang members "have committed" the predicate offenses, it was sufficient to demonstrate a pattern of criminal gang activity. As defendants do not challenge the sufficiency of other evidence supporting the gang enhancement, we conclude that they have not met their burden to overcome the presumption that the evidence was adequate.

D. Gang membership

1. Woodson

Positing two reasons to show that the gang evidence against him was insufficient, Woodson contends that the evidence failed to show that he or Williams was a gang member in 1998.

A gang finding has two "prongs": (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any

criminal conduct by gang members. (*Albillar*, *supra*, 51 Cal.4th at pp. 59, 67-68; § 186.22, subd. (b).) The jury may reasonably infer the association element of the first prong from the very fact that the defendant committed the charged crime with a known gang member. (*Albillar*, at pp. 61-62, 67-68.) In addition, if substantial evidence establishes that the defendant intended to commit the crime with a known gang member, a reasonable inference arises that the defendant had the specific intent to promote, further, or assist criminal conduct by gang members. (See *Albillar*, at pp. 61, 67-68.) This is so regardless of whether defendant is or is not also a member of the gang. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) "'Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime.' [Citations.]" (*People v. Miranda* (2011) 192 Cal.App.4th 398, 412.)

Woodson told the detectives that he and Williams had been close friends since Woodson was 17 years old, and remained so until about a year before his arrest in this case. In 1998 he was 21 years old. Carter testified the two men were like brothers and constantly together until she had a "fling" with Woodson. Woodson also told detectives that Williams was a member of the Duccy Hood gang at the time they met. Thus, the evidence shows that Williams had been a Duccy Hood member since at least 1994. Williams admitted to deputies in 2008 and 2011 that he was a member of the Duccy Hood gang. There was no evidence of a hiatus in his affiliation. We thus conclude that Woodson's knowledge of his close friend's gang affiliation, coupled with his admitted membership in 2008 and 2011, provide substantial evidence from which the jury could reasonably infer that

Williams was a member of the Duccy Hood gang at the time of the murder in 1998, and that Woodson knew of his membership.

Substantial evidence thus supports a finding that Woodson committed the crime in association with the Duccy Hood gang, and that Woodson intended to assist a gang member (Williams) in the crime. The jury could reasonably infer that Woodson had the specific intent to promote, further, or assist criminal conduct by gang members. (See *Albillar*, *supra*, 51 Cal.4th at pp. 61, 67-68.)

2. Boochee and Williams

Boochee and Williams also contend that there was no substantial evidence proving that any one of the three defendants was a gang member in 1998.

As respondent observes, a perpetrator may associate with a gang or benefit a gang without being a gang member, as membership is not an element of the enhancement. (See *People v. Albillar*, *supra*, 51 Cal.4th at pp. 67-68; *People v. Garcia* (2016) 244 Cal.App.4th 1349, 1369-1370.) However, while a defendant's gang membership is not an element which the prosecution is required to prove, it may provide the evidence necessary to prove an essential element of section 186.22, subdivision (b). (*Sanchez*, *supra*, 63 Cal.4th at pp. 698-699.) In *Sanchez*, for example, the only evidence of the defendant's gang affiliation was inadmissible hearsay, while admissible evidence showed that the defendant, acting alone, possessed drugs for sale and a gun in gang territory. The gang expert opined that if the defendant were not a gang member, selling drugs in gang territory might incite gang retaliation. (*Id.* at p. 699.) The California Supreme Court held that without admissible evidence of the defendant's gang affiliation, the prosecution had failed to show that the crime was committed in association with the gang or for the benefit of the gang. (*Ibid.*)

Here, the two elements the prosecutor was required to prove were that that the crime was committed for the benefit, at the direction of, or in association with a criminal street gang, and that it was committed with the intent to promote, further, or assist in any criminal conduct by gang members. (*Albillar*, *supra*, 51 Cal.4th at pp. 59, 67-68; § 186.22, subd. (b).) To do so, testimony of gang expert Sergeant Bates was presented in which he opined with regard to the first element that the crime was committed in association with a gang and for the benefit of the gang. He testified that the hypothetical crime with which he was presented, was committed in association with a gang because *two gang members* committed it together. He testified that the crime was committed for the benefit of the Duccy Hood gang because killing a district attorney, a law enforcement individual, is the highest ranking act among gangsters, and brings notoriety to *the gang member perpetrator* and to the gang. He gave no opinion regarding whether the crime was committed at the direction of the gang. Thus, the basis of the expert's opinion was that there was at least one member of a criminal street gang among the accomplices.

Assumed facts are not evidence, and "a hypothetical question must be rooted in facts shown by the evidence . . . . [Citations.]" (*People v. Gardeley, supra*, 14 Cal.4th at p. 618.) The issue thus presented is whether there was substantial evidence of the assumed facts to support the basis of expert's opinion that the crime was committed in association with a criminal street gang member to benefit that gang. Here, the status of the Duccy Hood gang as a criminal street gang was demonstrated with evidence of predicate crimes. There was no such evidence to demonstrate the status of the Atlantic Drive gang. We thus look for substantial evidence that one of the

perpetrators was affiliated with the Duccy Hood gang at the time of the crime.

It was not alleged that Boochee was a gang member, and no evidence was presented to show that he was. There was, however, ample evidence before the green jury that Williams was a member of the Duccy Hood gang in and after 2008, based on his admission of his gang membership to Deputy Johnson in December 2008, and to Deputy Federico in December 2011. In addition, Williams gave the deputies his gang monikers, Tiny and Tiny Capone, and the deputies observed multiple Duccy Hood gang-related tattoos on his body. However, respondent concedes that no direct evidence was presented to the green jury to prove that Woodson or Boochee were members of a gang at the time of the murder.

Despite respondent's citation to Witherspoon's statements to Detective Camarillo, which respondent paraphrases as an admission by Boochee that he contracted with a gang member to kill Bryant, our review of the cited pages yields no such admission. Instead, Witherspoon's response to the detective's question whether Boochee was a gang member "back in the day," was "He just hung out with gang members." She did agree with Detective Camarillo that it would not be impossible for him to contract with a gang member to kill, explaining, "No because . . . all these guys were gang members that hung at the shop."

Respondent also cites Carter's testimony that Woodson and Williams were best friends, that Williams told her he was a member of the Duccy Hood gang, and that although Woodson did not tell her he was a member of the Atlantic Drive gang, it was her understanding that he was. However, Carter was clearly referring to a time long after the murder, as she first met Williams six years before trial, which was about 12 years after 1998; and she said she met Woodson through Williams.

Respondent further cites Woodson's admission of gang membership in his interview with detectives. We found no indication in the record, however, that the interview was played for the green jury, which heard the evidence relating to Boochee and Williams. Thus, Woodson's statements regarding his knowledge of Williams's gang status and his assistance in this crime and prior crimes was not before the green jury.

Respondent argues that other circumstances that provided evidence that Williams and Woodson were gang members in 1998 included the circumstances of the crime. First, the location of the murder. Sergeant Bates testified that the crime scene bordered the territories of two Blood gangs, both rivals of the Duccy Hood and Atlantic Drive Crip gangs. Reference was also made to Carter's testimony that Williams expected Boochee to pay him $10,000 for the murder, and that Williams believed that he had killed a district attorney. Respondent concludes: "If Williams had not been a gang member, it would not matter whether the victim was a prosecutor or whether the murder happened on rival gang turf." It appears this argument is linked to the expert's testimony that the notoriety of killing a prosecutor would benefit the gang and the gang member. In testimony limited to Williams, Carter testified that Williams told her he had killed a "D.A." But she went on to explain that that Boochee told Williams to kill the man because he was the prosecutor on a case in which Boochee would be prosecuted. Thus, the motive evidence showed only that Williams intended to help a friend avoid an arrest and to earn money. Furthermore, following the logic of the expert's explanation of the basis for his opinion, it follows that killing a prosecutor would benefit a gang member and his gang only if he were in fact a gang member. Sergeant Bates did not testify that such a crime would benefit the gang even if none of the perpetrators were members of the gang.

We find this conclusion speculative, not an inference reasonably drawn from the evidence. A reviewing court must draw all reasonable inferences in favor of the judgment; however a reasonable inference is a deduction logically drawn from proven facts. (*People v. Massie* (2006) 142 Cal.App.4th 365, 373-374.) "[S]peculation, conjecture, [and] surmise . . . cannot rise to the dignity of an inference. [Citations.]" (*Id*. at p. 374.)

Since proof of an element of the gang enhancement was not supported by substantial evidence presented to the green jury, we reverse the gang enhancement imposed on Boochee and Williams, as well as firearm enhancements dependent upon a true finding of the gang allegation, as hereinafter discussed.

E. Spillover effect

All three defendants seek reversal of their convictions, claiming that the unproven gang enhancement had a prejudicial "spillover" effect on guilty verdicts, rendering the trial fundamentally unfair. As we affirm the gang enhancement imposed on Woodson, we confine our discussion to the contentions of Boochee and Williams.

Williams contends that the gang evidence was unduly prejudicial in light of the failure of proof of the gang enhancement. He argues that since the gang evidence was not relevant to prove any of the underlying charges and thus inadmissible for any proper purpose, it was unduly prejudicial. He also argues that the gang evidence was particularly prejudicial here because the prosecution relied on it to bolster the credibility of Carter, whose testimony was critical to his conviction. Similarly, Boochee contends that the gang evidence was unduly prejudicial because the evidence failed to prove that Williams was a gang member in 1998, and because the case against Williams was weak, as it depended upon what Boochee

characterizes as "the impeached testimony of Myesha Carter, a prostitute and consummate liar."

"[G]ang evidence, even if relevant, can be '"highly inflammatory."' [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 125.) The risk of undue prejudice arises when the evidence of guilt is weak, as "a jury not otherwise convinced beyond a reasonable doubt of the defendant's involvement might use gang evidence to tip the scales and convict . . . . [Citation.]" (*Id.* at p. 126.) However, the prejudicial effect of relevant gang evidence is dispelled where the case against the defendant is strong. (*Ibid.*)

First, we disagree that evidence of Williams's current membership in a criminal street gang should have been excluded as irrelevant. '"'"Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible."'" [Citations.]" (*People v. Williams* (2013) 58 Cal.4th 197, 270.)

Carter was not an eyewitness to the crime, and her testimony consisted primarily of Williams's admissions made to her and the charges pending against her. Thus, Carter's testimony was indeed key to Williams's conviction, and her credibility was important to the prosecution. She testified that she was "scared as hell," and frightened that that she would be considered a "snitch" because of her testimony in this case. She explained that "[i]t's a murder trial[,] these are gang bangers," that gangster street code prohibited snitching, and that the murder rate for snitching in a murder trial was high. Carter identified a video in which Williams rapped lyrics about the life of

a member of the Duccy Hood gang, and another in which Williams rapped, "Don't snitch. Ima put you in the ditch." After Williams was arrested, his son screamed at her, "You told on my dad," and sent her a threatening text. Thus, evidence that Williams was a gang member at the time of his arrest and trial and that his gang was a criminal street gang whose primary activities included murder placed Carter's fear for her life in context and was effective in bolstering her credibility.

Boochee also contends that the evidence was unduly prejudicial because the case against him was weak.[16] On the contrary, the testimony of Carter and Witherspoon provided compelling evidence of his guilt. Some of Williams's comments made to Carter implicated Boochee. For example, Williams told her that Boochee promised to pay Williams $10,000, and upon seeing the flyer Williams said, "If I'm going down, then Chops and Tone are going down too." Carter also overheard Williams and Boochee talking about the flyers soon after they were distributed. Witherspoon testified regarding Boochee's statements to her, such as his admission that ballistics evidence could implicate him; his acknowledgement of his relationship with Green and her involvement as the mastermind; and his statement that the reason Green wanted her husband dead was to obtain the insurance proceeds.

In sum, the evidence of defendants' guilt was not weak and gang evidence may have been admissible at trial on the topic of

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[16] As support for this position, Boochee cites the prosecutor's argument in opposition to a defense motion for separate trials, made a year before trial began, where the prosecutor agreed with the court that a shooting case is always weaker when the alleged shooter is not tried with the other defendants. Obviously such an argument does not show that the actual evidence presented at trial was weak.

Carter's fear, even without the gang enhancement allegation. Under these circumstances, the gang evidence was not unduly prejudicial. (See *People v. Simon, supra*, 1 Cal.5th at p. 126.)

VIII. Gang and firearm enhancements

Defendants contend that their gang enhancements, imposed under section 186.22, subdivision (b), should be stricken. As insufficient evidence supported the gang enhancement against Williams and Boochee, we will strike the enhancement. Boochee additionally contends that all firearm enhancements imposed against him must be vacated, as they were charged under section 12022.53, subdivision (e)(1), which is dependent upon a true finding under the gang enhancement statute, section 186.22, subdivision (b). We agree and strike all enhancements imposed against Boochee.

Those enhancements imposed upon Williams pursuant to section 12022.53, subdivisions (c)/(e)(1), and (d)/(e)(1),will also be stricken. This ruling has no affect on those enhancements imposed under section 12022.53, subdivisions (c) and (d) without application of subdivision (e)(1).

Woodson contends that rather than imposing and staying the 10-year gang enhancement under section 186.22, subdivision (b)(1)(C), the trial court should have stricken the enhancement under section 186.22, subdivision (b)(5). (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1004, 1007-1009.) Respondent agrees. We will strike the enhancement.

Woodson and Williams both ask that their sentences be vacated with remand for resentencing under the recent amendment of section 12022.53, subdivision (h),[17] which grants

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[17] "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any

the trial court the discretion to strike that firearm enhancement in the interests of justice. (See Stats. 2017, ch. 682, § 2.) Unless the record clearly indicates that the trial court would not have exercised its discretion to strike or dismiss any or all the firearm enhancements if it had discretion to do so at the time of sentencing, the appropriate remedy is to remand for resentencing. (*People v. Chavez, supra*, 22 Cal.App.5th at p. 713.) Finding no such indication in the record, we thus vacate Woodson's and Williams's sentences and remand to allow the trial court to exercise its newly granted discretion.

DISPOSITION

As to defendant Boochee: The true finding under section 186.22 is reversed, and the enhancements imposed under that section and section 12022.53 are stricken. The superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting this modification. As so modified, the judgment is affirmed.

As to defendant Williams: The true finding under section 186.22 is reversed, and the enhancements imposed under that section and section 12022.53, subdivisions (b) and (e)(1), (c) and (e)(1), and (d) and (e)(1) are stricken. Enhancements imposed under 12022.53, subdivisions (b), (c) and (d), but not pursuant to subdivision (e)(1), remain unaffected by this ruling. Williams's sentence regarding the gun enhancement is vacated, and the matter is remanded to the trial court for the opportunity of the court to exercise its discretion under section 12022.53,

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resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Since the judgments were not final on January 1, 2018, when the amended statute took effect, the amendment applies retroactively to each defendant. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712.)

subdivision (h), and to then resentence accordingly. The judgment of conviction is otherwise affirmed.

As to defendant Woodson: Woodson's sentence on the gun enhancement is vacated and the matter is remanded to the trial court for the opportunity of the court to exercise its discretion under section 12022.53, subdivision (h), and to then resentence accordingly. The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST