Filed 11/15/16 P. v. Green CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JASON GREEN, Defendant and Respondent.	B256776 (Los Angeles County Super. Ct. No. BA396890)
THE PEOPLE, Plaintiff and Respondent, v. LYNETTE PENNINGTON, Defendant and Respondent.	B259139 (Los Angeles County Super. Ct. No. BA396890)

APPEALS from judgments of the Superior Court of Los Angeles County, George G. Lomeli, Judge. Affirmed as modified.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant Jason Green.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant Lynette Pennington.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez, Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Green and Lynette Pennington appeal from the judgments entered after a jury convicted them of conspiracy to murder Garry Dean, their codefendant, and found true a special criminal street gang enhancement allegation. Pennington was also found guilty, along with Dean, of the second degree murder of Alton Batiste.[1] Green and Pennington both contend the prosecutor engaged in prejudicial misconduct when he dismissed the case after receiving an adverse pretrial ruling and refiled it in a different district, a claim we rejected in Dean's appeal. (See *People v. Dean* (Apr. 25, 2016 (as mod. May 16, 2016), B253077) [nonpub.] at pp. 16-20.) Green further contends the trial court committed prejudicial error by admitting evidence of uncharged murders, by denying his motions to sever his trial from that of his codefendants and by improperly imposing a five-year prior serious felony sentence enhancement. Pennington also challenges the trial court's ruling admitting evidence of the uncharged murders and contends the evidence was insufficient to convict her of Batiste's murder or the conspiracy to murder Dean. We affirm

---

[1] Pennington, Green and Dean were charged in the same information and tried together. Dean's case was heard by one jury; Pennington's and Green's by a second jury. We reversed Dean's conviction based on errors committed by the court and prosecutor during closing argument that do not affect the appeals of Pennington and Green. (*People v. Dean* (Apr. 25, 2016) (as mod. May 16, 2016), B253077) [nonpub.].)

both judgments but modify Green's sentence to correct the statutory basis for his prior serious felony sentence enhancement and the sentences of both defendants to correct the statutory fines imposed.[2]

FACTUAL AND PROCEDURAL BACKGROUND[3]

1. *Overview of the Murders of Alton Batiste, Travon Powers and Dawan Banks*

The complicated facts presented at trial, as well as the evidentiary rulings and arguments of counsel at the center of Green's and Pennington's appeals, arise from three, perhaps related, murders.

a. *Alton Batiste*. At approximately 1:30 a.m. on September 23, 2002 a van crashed into the divider on the Santa Monica Freeway in West Los Angeles. Dean, a member of the Center Park Bloods, was one of the individuals in the van. Pennington, also a member of the Center Park Bloods, was the driver of the van, which was registered to Robert Burke, her incarcerated boyfriend. Batiste, severely injured by knife wounds, was in the van when it crashed. He died nine days later.

b. *Travon Powers*. Several hours before the van crash Batiste had been in a car with Powers, a member of Centinela Park Family, also a Bloods-affiliated criminal street gang. Powers's body was found shortly before midnight on September 22, 2002 in Center Park, the neighborhood claimed by the Center Park Bloods. The car, which belonged to Powers's

---

[2] After briefing was completed in this appeal, Green's appellate counsel filed directly with this court a petition for a writ of habeas corpus asserting a claim of ineffective assistance of counsel. That petition will be separately addressed by the court.

[3] With one exception, the evidence presented to Green and Pennington's jury was the same as that presented to Dean's. (See fn. 5, below.) We repeat our summary of the evidence from Dean's appeal here, modestly revised, to focus on the arguments made by Green and Pennington.

girlfriend, Tessy Kennedy, had crashed into a low fence nearby; blood stains were found on its front seats. According to Kennedy, Powers and Batiste had left an Inglewood motel together in her car around 10:20 that evening to look for drugs.

c. *Dawan Banks*. Powers's murder occurred several days before he was scheduled to testify at a preliminary hearing to identify three members of the Neighborhood Pirus, another Bloods-affiliated gang, as the individuals who had shot at Powers and Banks, also a Centinela Park Family member, in February 2002. Banks was killed; and, although Powers escaped, his finger was shot off.

The prosecution's theory was that Powers had been killed because he intended to testify against three Bloods gang members and that Batiste, who had been with Powers, had likely been killed by Dean and Pennington because he had been a witness to Powers's murder. An alternate possibility suggested by Dean's defense counsel was that Batiste had been stabbed in Kennedy's car and was simply being transported to the hospital in the van in which Dean was riding when it crashed. In connection with that theory, Dean's counsel questioned the source of the blood found on the front seats of Kennedy's car.

2. *The Murder of Alton Batiste*

In the early morning of September 23, 2002 a witness seated in a car overlooking the Santa Monica Freeway in West Los Angeles saw a van travel across the freeway lanes, hit the freeway divider and come to a stop. An African-American man wearing a light-colored shirt got out of the van, followed by another African-American man wearing a red shirt. The witness later identified Dean as the man in the red shirt. Dean and the second man pulled an individual out of the van and carried him across the lanes to the shoulder of the freeway. The first two men returned to the van, pulled out what could have been a small person or a duffel bag and carried it to the side of the freeway. The two uninjured men wandered around, looking confused. The man in

the light-colored shirt walked halfway up the embankment above the shoulder of the freeway and then returned to the van. The witness called the police emergency hotline.

By the time emergency personnel arrived, the two men had disappeared. The witness directed them to the injured man on the side of the freeway, who was later identified as Batiste. Batiste was lying on his back in a pool of blood. He was moving, although incoherent, and was transported to UCLA Medical Center. California Highway Patrol Officer Arthur Dye inspected the van. According to Dye, the rear passenger door of the van was inoperable. The front interior of the van was covered in blood; and, although the driver's side windshield was cracked, there was no glass in the van or any blood or hair on the windows. Blood was smeared on the dashboard in front of the passenger seat, and a red jersey soaked in blood lay in front of the passenger seat. The passenger seat was bent forward toward the steering wheel, and both the steering wheel and the key in the ignition were bent to the side. A purse on the floor of the van contained Pennington's checkbook and California identification card. Dye also found a key from an Inglewood motel in the fast lane of the freeway next to the van. Dye ordered the van towed from the freeway.

After CHP officers had arrived, the witness saw Dean using a pay phone near the intersection of National Boulevard and Westwood Boulevard and pointed him out. Dean wore a red jersey, dark pants and red Converse sneakers. Small drops of blood were on Dean's shirt and shoes, and he had a bloodstained red bandana wrapped around his right hand. Dean told the officers he had been in the van collision and was using the pay phone to call for help.[4] Although he initially told the officers he had been in the rear passenger seat, he later said he was in the

---

[4] All tapes of emergency calls concerning the incident were lost. The initial dispatch reported three to four Black men had emerged from the van, not including Batiste, who was carried from the van.

front seat.[5] He provided his name, address and telephone number at the officers' request. When asked about the injured passenger, Dean answered, "He's not my friend. I don't even know the guy." When Dean complained about pain in his hand and said he felt ill and dizzy, one of the officers called an ambulance. The officers left after receiving a radio call about another traffic collision.

Officer Dye went to UCLA Medical Center after leaving the accident scene and learned Batiste had suffered several puncture wounds.[6] The other officers returned to the pay phone but could not locate Dean. The case was assigned to Los Angeles Police Detective Joel Price for investigation.

3. *LAPD's Investigation of Batiste's Murder*

Later in the morning on September 23, 2002 Pennington sought medical treatment at a Gardena hospital, complaining of pain in her left shoulder and a laceration above her left eye. She reported she had been punched in the face by a man and had lost consciousness. After treating and discharging her, the hospital reported the assault to the police. Pennington told the police she had been carjacked that night while driving Burke's van. Detective Price spoke with Pennington two days later after learning she had reported the van stolen. According to Price, Pennington was vague about the details but claimed she had been carjacked between 12:30 and 1:00 a.m. She said she had been

---

[5] Dean's jury, but not Green and Pennington's, heard testimony that Dean had identified the driver of the van as his girlfriend, "Nette."

[6] Batiste suffered three stab wounds to his forehead that were forceful enough to penetrate his skull. Batiste also suffered stab wounds to the right front of his torso that penetrated his chest wall, diaphragm and liver and cuts to his right external jugular vein, trachea and esophagus. He had fractures of the eye socket and nose from blunt force trauma, scrape marks on his left shoulder and forearm that looked like road rash and abrasions on his knuckles. He died on October 2, 2002.

punched in the head, lost consciousness and was concerned she had been sexually assaulted. She did not explain why she waited to obtain treatment or to report the van as stolen. On September 26, 2002 Pennington called the yard where the van had been towed to ask if she could retrieve her belongings. She said her boyfriend, Burke, owned the van and asked when it would be released to her. At the time, no one at LAPD had told Pennington the van had been impounded.

On October 1, 2002 Detective Price accompanied an LAPD criminalist to the towing yard to search the Burke van. Price observed the van's rear door was hinged (rather than sliding) but fully operable and saw drops of blood inside the doorframe. The criminalist found 27 stains that tested presumptively positive for blood and collected the bloodstained red shirt, the purse, some keys on a chain, a sneaker with red stripes, two cameras, a phone and a phone battery. DNA profiling on various stains recovered from the van were linked to Batiste, Pennington and Dean.[7] A stain from the upholstery of the front passenger seat matched Batiste's profile; Dean and Pennington were excluded as contributors. A swab from the steering wheel was primarily attributed to Batiste, but Pennington could not be excluded. A stain on the middle bench seat contained primarily Dean's DNA but Pennington could not be excluded. A stain from the carpet between the middle and rear bench seats contained Dean's DNA. None of the tested stains contained a mix of Dean and Batiste's DNA. The drops in the interior doorjamb of the rear passenger door, as well as stains on the exterior of the door, were never tested.

---

[7] None of the swatches tested matched Green's DNA, although he could not be excluded as a contributor to a sample drawn from the red shirt. As the criminalist testified, the source of the DNA was not necessarily blood; it could have been saliva, sweat or any other DNA cell source.

In January 2003 Detective Price, who had unsuccessfully searched for the Batiste murder weapon in October 2002, returned to the freeway embankment with a CalTrans crew that cut the vegetation to facilitate the search. A seven-inch kitchen knife was found near the location described by the witness to the collision. Forensic tests did not recover any trace of fingerprints or blood from the knife.

4. *The Possible Powers Connection*

Early in the investigation Detective Price learned the Inglewood Police Department (IPD) wanted to question Batiste, who remained in a coma, about the Powers murder, which had occurred an hour or so before the van collision. Kennedy told Inglewood police she and Powers had gone at Batiste's invitation to an Inglewood motel that night to party with Batiste and his girlfriend. A few days earlier an IPD officer had relocated Powers to a downtown Los Angeles hotel and warned him not to return to Inglewood before the hearing. When Powers and Kennedy arrived at the motel, there was no party. Powers and Batiste then left together in Kennedy's car but did not return. According to Kennedy, Powers, known as "Lil J-Rock," had a reputation as a snitch. After a shooter who yelled "J-Rock" shot and killed a Rolling Crips gang member, Powers, who was supposed to "take the rap," was "green-lighted," or targeted, by Bloods-affiliated gangs because he told the police another Bloods gang member was known as "Big J-Rock." Big J-Rock was later convicted of murder for the shooting. Kennedy also testified Powers had told her Batiste's sister was dating one of the Neighborhood Piru gang members who had shot at Powers and killed Banks. Batiste's wife told Price that Batiste had received several phone calls from that person.

5. *The Wiretap Evidence*

Shortly after Batiste's death on October 2, 2002, LAPD and IPD detectives jointly obtained an order authorizing wiretaps on telephone numbers linked to the deaths of Batiste and Powers.

The numbers included Pennington's landline and cell phone and the number Dean had given the officer the night of the crash.[8] A Los Angeles County jail number was added when detectives realized Pennington was receiving numerous calls from someone known as "B-Lok," eventually identified as Green, who had been incarcerated following his negotiated plea to a charge of assault with a firearm for shooting at Tyrone Ravenel, another Inglewood gang member. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. (Detective Price believed that the moniker Shady Blood, which the gang expert testified would indicate someone in the gang is dirty, dishonest or a snitch, referred to Dean and that the other gang members were conferring about killing Dean.) Pennington told Green she had spoken with CKay the previous evening and he had said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Green told Pennington not to talk on the phone and agreed that lives were at stake. He said, "On Blood, this gonna be handled," and indicated he would have to trust CKay. After that call Pennington called other gang members to set up a meeting.

A wiretapped conversation on December 5, 2002 between Dean and Pennington revealed that Dean also believed his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington where she had heard this information, and Pennington replied she had been hearing it "a whole lot." Dean denied talking and said he wanted to know who

---

[8] Dean told Detective Price the number belonged to his girlfriend. The same number was listed in a phone book found in Pennington's purse under the name "Skoobee Red." On October 8, 2002 Price interviewed Pennington again about the carjacking and showed her a photographic lineup containing a picture of Dean. Pennington denied knowing anyone in the lineup.

was putting "mud" on him. When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing.

In a December 19, 2002 call Pennington told Green she would be visiting him the next day at the county jail. Green told her he had his "little flash cards" ready, and Pennington said she had hers as well. After listening to the call, Detective Price asked county jail deputies to seize any writings between Green and his visitor.[9] The next day Los Angeles County Sheriff's deputies monitored Pennington's visit with Green and approached him after she left. Green attempted to put several small pieces of paper in his mouth but failed when the deputies grabbed his hand. The deputies retrieved several pieces of paper, which Price reconstructed. The first note, written by Green, read, "The business is: To find out exactly where that nigga is at. . . . I'm sure you know by now. Shady in the Queen streets tellin' niggas I did that shit. On Bloods. Babe, that nigga got to be X'd quick." A second page read, "The business is: Ckay, Bo-Legs & Chip get'in Shady—Now! . . . As far as any pillow talkin Shady did, that would be considered 'hearsay' . . . in the court of law. So we'll get the hoe when we can. We need Shady X'd now!!! Like yesterday." The third page read, "Shady is trying to fuck us off for some reason! I assume because (he fucked up from the very start!) when he gave your name. Now he can't stop telling." The reverse side gave instructions on contacting a Bloods prison gang shot caller "to get his ass down here immediately . . . ." Later that day Green was recorded telling another girlfriend that the assault

---

[9] Visitor conversations were monitored, and jail rules prohibited the exchange of information in writing during visits.

charge for which he had been incarcerated was like a "speeding ticket" in comparison to "other bullshit" that was happening. He also expressed concern he was in custody when he should be preparing for his future with a lawyer such as "Shapiro" or "Johnny Cochran."

Meanwhile, after Dean was jailed for a probation violation, Detective Price met with him twice to warn him his life was in danger and to seek his cooperation. Dean denied being involved in, or knowing anything about, the freeway collision or the murders of Powers and Batiste. He also denied he had been the person questioned at the phone booth the night of the accident even after he was told he had been identified by the CHP officers.

6. *The Initial Filing and Dismissal of Charges*

An information filed on March 1, 2010 in the West District (Airport Branch) of the Los Angeles County Superior Court charged Dean and Pennington with one count of first degree murder (Pen. Code, § 187, subd. (a))[10] and Pennington and Green with one count of conspiracy to murder Dean (§§ 182, subd. (a)(1), 187, subd. (a)). As to both the murder and conspiracy charges, the information alleged the crimes had been committed to benefit a criminal street gang. (§ 186.22, subd. (b)(4).)

While the case was pending in the West District, several pretrial motions were heard by Judge James Dabney, who had deemed trial to have commenced on April 23, 2012. On April 25, 2012 Judge Dabney heard argument on the People's request to present evidence related to the murder of Powers and the shooting (attempted murder) of Ravenel. To establish that Batiste had been killed because he had witnessed Powers's murder and that Green wanted Dean dead because he feared Dean would implicate him in the murder of Powers, the prosecutor proposed introducing the following evidence: (1) Two men were seen running from the scene of Powers's murder, one wearing a white shirt and one

---

[10] Statutory references are to this code unless otherwise stated.

wearing a red shirt. Photographs developed from the camera found in the crashed van showed Green wearing a bright red jersey and throwing gang signs in Center Park. (2) A Bryco nine-millimeter handgun with an intact serial number was found in Kennedy's car after Powers was killed. The gun was loaded with rounds manufactured by the Fiocchi and Federal companies. Two expended Fiocchi rounds were found at the scene of Powers's murder. When Green and Pennington were detained leaving an apartment a few weeks after the murders of Powers and Batiste, the police found a gun box in the apartment with the same serial number as the gun found in the car, as well as a partially filled tray of nine-millimeter ammunition that included Fiocchi and Federal rounds. (3) The casings found at the scenes of the Powers and Ravenel shooting were fired from the gun found in Kennedy's car. (4) Powers was killed because he twice had provided information to the police, once when he told investigators there was more than one J-Rock, a comment that led to the other J-Rock's conviction of murder, and later when he was scheduled to testify at the preliminary hearings of the three Neighborhood Pirus charged with shooting him and killing Banks. (5) Powers and Batiste had left the Inglewood motel together the night of their murders.

All defendants opposed admission of the evidence proposed by the People, arguing there was no evidence the gun linked to Green had, in fact, been used to kill Powers[11] or that any of the defendants had been present at the Powers shooting. Defense counsel argued the People were simply seeking to bolster the weak Batiste case with inflammatory and prejudicial evidence from the uncharged murders. (See Evid. Code, § 352.) Judge Dabney agreed and ordered the People not to mention the gun evidence or the Ravenel shooting. He indicated he was still

---

[11] The only bullet recovered from Powers's body was damaged and yielded no usable identifying marks.

undecided about allowing evidence Powers had been murdered only hours before the van collision but instructed the prosecutor to assume that evidence would not be admissible.

After consulting with his supervisors, the prosecutor elected to dismiss the case: "[T]he People are unable to proceed . . . [and] will move to dismiss and immediately refile. I've informed counsel of our intention to file and to have the defendants arraigned tomorrow." Although the prosecutor did not mention the statutory ground for the dismissal, the minute order stated, "The People announce unable to proceed. On [the People's] motion, case is dismissed pursuant to section 1385."[12]

7. *Refiling of the Case in the Central District*

Instead of refiling the case in the West District, the prosecutor refiled it that same afternoon in the Central District under a new case number.[13] Green promptly moved to transfer the case to the West District, arguing the prosecutor had engaged in improper forum shopping after receiving an adverse evidentiary ruling from Judge Dabney in violation of defendants' right to a speedy trial and applicable dismissal statutes.[14]

---

[12] In accepting the People's request to dismiss, the court rejected a defense request the case be refiled under the same number "because [the People are] not dismissing and refiling under section 1387. . . . That's not the nature of the refiling here."

[13] The new information added an allegation Pennington had personally used a deadly or dangerous weapon in the commission of the offense, but the allegation was dismissed at trial.

[14] Counsel for all three defendants vigorously participated in the hearings addressing the defense motions related to prosecutorial misconduct and the People's effort to introduce evidence related to the Powers and Banks murders. Accordingly, none of these pretrial issues was waived for purposes of this appeal.

The motion was heard on June 20, 2012 by Judge George Lomeli. Asked the basis for the dismissal, the prosecutor asserted the People had moved to dismiss pursuant to section 1382, rather than section 1385, because they were unable to proceed at that time based on the court's rulings. Pressed by the court, the prosecutor, who acknowledged it had been his case, stated he could not identify any missing evidence or witnesses that might have justified dismissal under section 1382 without reviewing his notes. Judge Lomeli then asked, "Can you represent to this court that it was done or not done because the rulings were going against you?" The prosecutor answered, "I can say that was a factor in the People's decision; that because of the evidentiary rulings, there were going to be many . . . facts that were not going to be presented to the jury that went to the guilt of the defendants." Concerned, Judge Lomeli said, "Well, I've got to tell you that that doesn't sit well with the court. In terms of using that as a tactical . . . strategy, if you will, because rulings were going against you . . . , I hope that isn't the case. . . . I'm going to rule without prejudice. And if counsel can provide a more accurate record—I hope that isn't a factor, that you announced unable to proceed because rulings were going against you. I've never seen anything like that. . . . But hearing what you have to say, that it is a possible factor, that's disturbing. I will allow you an opportunity to further brief that part of it . . . ." As to the defendants' requested transfer back to the West District, Judge Lomeli ruled the case had been properly filed in the Central District because certain of the conversations relevant to the conspiracy had occurred at the county jail[15] and previous rulings

---

[15] Los Angeles Superior Court, Local Rules, rule 2.3(a)(3) requires the filing of a criminal complaint in the judicial district where the offense was alleged to have occurred and, within that district, at the courthouse serving the area where the offense allegedly occurred. However, when more than one offense is alleged to have been committed and the offenses were committed

were "irrelevant and non-binding." He repeated, however, he was not ready to rule on whether the prosecution had used the dismissal to gain a tactical advantage.

Following several continuances, Dean moved to dismiss the case based on prosecutorial misconduct and forum shopping. In opposition the prosecutor argued the People had originally dismissed the case to perform additional DNA testing and to transcribe additional conversations. The motion was heard by Judge Michael Abzug. When asked why the case had been dismissed, the prosecutor acknowledged the case was dismissed in part for reevaluation after the adverse evidentiary ruling. Judge Abzug concluded that, absent some showing of concrete prejudice, the prosecutor had acted within his discretion to dismiss and refile. Moreover, the possibility of a ruling more favorable to the People was speculative at this juncture. In denying the motion Judge Abzug found the dismissal had been motivated by the adverse ruling but was not made "to 'circumvent' it."

8. *Pretrial and Trial Proceedings*

a. *Judge Lomeli's pretrial rulings*

The case was assigned to Judge Lomeli for trial. After extensive argument over the admissibility of evidence relating to the Powers murder, Judge Lomeli ruled the evidence that Powers had been killed because of his intention to testify against three Bloods gang members, that he was in the company of Batiste when he was killed and that Batiste may have been killed because he was a witness to the Powers murder was admissible against all three defendants. Further, any evidence Dean had provided to the police about the murder of Powers was admissible against each defendant. Judge Lomeli concluded this evidence was relevant to the defendants' motives for the killing of Batiste and the conspiracy to kill Dean and would provide jurors with some

---

in different districts, the rule permits the complaint to be filed in any district where one of the offenses was allegedly committed.

context for the charges. The People's request to introduce evidence relating to the firearm and ammunition linked to Green and Green's use of the gun to shoot Ravenel was denied because there was no definitive proof that weapon had been used to kill Powers and none of the defendants had been charged with his murder. The court also denied Green's motions to sever his trial from those of his codefendants and to sever trial of the conspiracy charge from the murder charge.

b. *The People's case*

At trial the People first presented evidence of the crash of Burke's van on the freeway, the condition of the van at the scene, the CHP officers' encounter with Dean and Batiste's injuries. IPD detectives then testified about their efforts to protect Powers before the preliminary hearing for the Neighborhood Piru gang members charged with shooting Banks and Powers's murder. Kennedy testified she and Powers had met with Batiste and his wife at the Inglewood motel and acknowledged she had made certain statements, which she characterized as having been based on rumors, to an IPD officer about Powers's gang history. IPD Officer Kerry Tripp testified as an expert witness about Inglewood gangs. According to Tripp, Inglewood was generally a Bloods-dominated city. The Center Park Bloods or CPB, to which Dean, Pennington and Green all belonged, was a small gang allied with other Bloods gangs, including the Neighborhood Pirus, the Inglewood Family and its spin-off, the Centinela Park Family. Tripp also testified that a gang member who cooperates with police and provides information about other gang members (a "snitch") could be killed and that an order-to-kill (a "green light") had been put out on Powers before his death. Based on a hypothetical that included facts mirroring the evidence about Powers's reputation as a snitch and subsequent murder and Batiste's interaction with Powers before Batiste was found stabbed, Tripp opined the killing of Batiste had benefitted the CPB gang.

In addition to the forensic testing of items and material from the van, the clothing Batiste had worn the night of the collision and the blood-soaked shirt found inside the van were tested for DNA. A partial DNA profile from the back of Batiste's shirt matched Dean's DNA profile. The profile itself was very rare.[16] Another partial profile of an unknown male was found on the inside back collar of the bloody red shirt that also bore Batiste's DNA. Dean's DNA profile was excluded from all stains tested on the red shirt.

William Chisum, a retired criminalist and blood-pattern expert, reviewed evidence taken from the van and concluded Batiste had been sitting in the front when he was stabbed by a person sitting behind him. Chisum opined Batiste was not stabbed until he was seated in the van and, because his blood was found on the steering wheel, the collision probably resulted from a struggle after Batiste was attacked. Chisum believed the damage to the seats, which were pushed forward to the left, was caused by someone pushing forward on the seat. Dean's bloody handprint on the middle seat was most likely made when he was leaning into the van while standing outside.

9. *The defense case*

None of the defendants testified. Marc Taylor, a forensic scientist called by Dean, reviewed the reports and photographs in the case and concluded it was not possible to determine whether the stabbing of Batiste had occurred in the van or the cause of the collision. The impact of hitting the freeway divider could have injured the van's occupants and derailed the front seat when a rear passenger was thrown into it by the collision. Taylor also explained no DNA mixture had been found, despite the fact such

---

[16] The People's DNA expert testified only one in 22 quintillion unrelated individuals would be expected to share this profile; only one in one sextillion individuals in the African-American population would have it.

mixtures are usually present when a person cut his own hand while stabbing another person.

10. *The Verdicts and Sentencing*

Dean and Pennington were each convicted of second degree murder. The jury found the criminal street gang enhancement allegation true but was unable to agree on the deadly weapon allegation against Dean, which the court dismissed in the interest of justice.[17]

Green and Pennington were each convicted of conspiracy to commit murder, again with true findings on the criminal street gang enhancement allegation. During trial the People had amended the information to allege—and Green admitted—he had previously suffered a prior serious felony conviction within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d), 667 subds. (b)-(i)). The information also alleged the same offense was a prior serious or violent felony conviction within the meaning of section 667, subdivisions (b)-(i). The trial court sentenced Green to an aggregate indeterminate term of 35 years to life, calculated as 15 years to life for conspiracy to commit murder, doubled pursuant to the three strikes law, plus five years for the enhancement under "section 667(b)." Pennington was sentenced to consecutive terms of 15 years to life on each count for an aggregate indeterminate sentence of 30 years to life in state prison.

Both Pennington and Green were ordered to pay a $40 court operations assessment and a $30 criminal conviction assessment on each count. Pennington was ordered to pay a $300 restitution fine, and the court imposed and stayed a $300 parole revocation

---

[17] Dean was charged with, and admitted, he had suffered a prior serious felony conviction and was sentenced to an aggregate term of 35 years to life in state prison: 15 years to life on count 1, doubled pursuant to the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), plus five years for the serious prior felony conviction (§ 667, subd. (a)(1)).

fine. Green was ordered to pay a $300 restitution fine, with an imposed and stayed $300 parole revocation fine.[18]

DISCUSSION

1. *The Trial Court Did Not Err in Denying the Defense Motions To Dismiss the Case or Transfer to the West District Because of the Prosecutor's Alleged Forum Shopping*

Pennington and Green contend the prosecutor's refiling of the case in the Central District, rather than the West District, constituted either outrageous government conduct or prosecutorial misconduct in violation of their federal due process rights and state law. We address these contentions jointly.

a. *Governing law*

"A court's power to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution." (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1002, citing *Rochin v. California* (1952) 342 U.S. 165 [72 S.Ct. 205, 96 L.Ed. 183].) Under the standard first enunciated in *Rochin*, the conduct must have "'shocked the conscience' and [been] so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency." (*Breithaupt v. Abram* (1957) 352 U.S. 432, 435 [77 S.Ct. 408,

---

[18] The Attorney General concedes the minute orders entered following sentencing of Green and Pennington, as well as the abstracts of judgment, erroneously identify the amount of the restitution fine (§ 1202.4) and (stayed) parole revocation fine (§ 1202.45) as $280 each instead of $300, the minimum fine applicable when they committed the offenses. (See *People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189-1190.) Accordingly, we modify the written judgments to reflect restitution and stayed parole revocation fines of $300 for each appellant. Upon issuance of the remittitur the superior court is directed to correct the abstracts of judgment to reflect these modifications and to forward a copy of the corrected abstracts to the Department of Corrections and Rehabilitation.

1 L.Ed.2d 448]; see *U.S. v. Smith* (9th Cir. 1991) 924 F.2d 889, 897 ["[f]or a due process dismissal, the Government's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice"].)

When prosecutorial misconduct "impairs a defendant's constitutional right to a fair trial, it may constitute outrageous governmental conduct warranting dismissal." (*People v. Uribe* (2011) 199 Cal.App.4th 836, 841.) ""A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury."" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332.)

"'A defendant's conviction will not be reversed for prosecutorial misconduct' that violates state law, however, 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord, *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd,* at p. 61.) As the Supreme Court has explained, "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.'" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; accord, *Lloyd,* at p. 61.) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)[19]

---

[19] There is disagreement among the cases as to the standard of review applicable to allegations of outrageous governmental

b. *The prosecutor's alleged forum shopping did not constitute misconduct sufficient to warrant dismissal or a new trial*

Green and Pennington contend the prosecutor engaged in misconduct when he was allowed to dismiss the case pursuant to section 1385 and, instead of refiling it in the West District where it most likely would have been reassigned to Judge Dabney, filed it in the Central District, resulting in assignment to a new judge. According to Green and Pennington, this gamesmanship, even if otherwise permitted by the local rules, was improperly motivated by the desire to obtain a better in limine ruling on the scope of evidence the People could present at trial and thus constituted misconduct within the meaning of the principles discussed.

Unquestionably, forum shopping by a prosecutor is viewed with disfavor, and several provisions of the Penal Code were adopted to curtail its use. One of the primary purposes of section 1387, for instance, which limits the number of times a prosecutor may dismiss and refile a criminal complaint, is the prevention of forum shopping by prosecutors. (See, e.g., *Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1018 ["[s]ection 1387 . . . curtails prosecutorial harassment by placing limits on the number of times charges may be refiled . . . [and] also reduces the possibility that prosecutors might use the power to dismiss and refile to forum shop," citations omitted]; *People v. Traylor* (2009) 46 Cal.4th 1205, 1209 ["[i]n particular, the statute guards against prosecutorial 'forum shopping'—the persistent refiling of charges the evidence does not support in hopes of finding a sympathetic magistrate who will hold the defendant to answer"].)

---

conduct. (Compare *People v. Uribe, supra,* 199 Cal.App.4th at pp. 855-856 [independent review]; *People v. Guillen*, *supra*, 227 Cal.App.4th at pp. 1006-1007 [following *Uribe*] with *People v. Velasco-Palacios* (2015) 235 Cal.App.4th 439, 445-446 [abuse of discretion].) We need not address that question in light of our conclusion the prosecutor's conduct in this case did not "shock the conscience" or offend traditional notions of fair play.

More directly, when a defendant has successfully moved under section 1538.5 to suppress evidence obtained as the result of an unlawful search or seizure, any subsequent motion made after a dismissal pursuant to section 1385 must be heard by the same judge who originally granted the motion if that judge is available. (See *People v. Rodriguez* (2016) 1 Cal.5th 676, 679 ["[a] judge may be found unavailable for purposes of section 1538.5(p) only if the trial court, acting in good faith and taking reasonable steps, cannot arrange for that judge to hear the motion"]; *People v. Superior Court* (*Jimenez*) (2002) 28 Cal.4th 798, 807 [§ 1538.5's legislative history "'makes it clear the Legislature intended . . . to prohibit prosecutors from forum shopping.' [Citation.] To allow the prosecutor to make a judge unavailable to rehear the suppression motion simply by filing a peremptory challenge under Code of Civil Procedure section 170.6 would permit this prohibited forum shopping and 'essentially eviscerate[] the provisions of subdivision (p).'"]

Pennington and Green correctly assert a trial court should generally refrain from reconsidering and overruling an order of another court. As this court explained in *People v. Riva* (2003) 112 Cal.App.4th 981 (*Riva*), "[F]or reasons of comity and public policy . . . , trial judges should decline to reverse or modify other trial judges' rulings unless there is a highly persuasive reason for doing so—mere disagreement with the result of the order is not a persuasive reason for reversing it. Factors to consider include whether the first judge specifically agreed to reconsider her ruling at a later date, whether the party seeking reconsideration of the order has sought relief by way of appeal or writ petition, whether there has been a change in circumstances since the previous order was made and whether the previous order is reasonably supportable under applicable statutory or case law regardless of whether the second judge agrees with the first judge's analysis of that law." (*Id.* at pp. 992-993, fns. omitted; see *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1293 [quoting *Riva*];

see also *People v. Williams* (2006) 40 Cal.4th 287, 300 [citing *Riva* and the general rule]; *In re Alberto* (2002) 102 Cal.App.4th 421, 424-425, 427 [new judge was without authority to increase amount of defendant's bail; "even if correct as a matter of law, to nullify a duly made, erroneous ruling of another superior court judge places the second judge in the role of a one-judge appellate court"].)

In *Riva* the defendant successfully moved to exclude certain statements he had made to the police on the ground they had been obtained in violation of his right to counsel. After Riva's first trial ended in a mistrial, he renewed the motion before a different judge, who denied the motion. (*Riva, supra,* 112 Cal.App.4th at p. 988.) We concluded the statements were admissible and the judge at the second trial was not bound by the ruling of the first judge. We analogized proceedings after a mistrial to a new trial following reversal on appeal, a situation the Supreme Court has held "'permits [the] renewal and reconsideration of pretrial motions and objections to the admission of evidence.'" (*Riva*, at p. 991-992, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 849 [allowing relitigation of admissibility of a confession at second trial following reversal of judgment on appeal].) Also, like in limine motions, motions to suppress are "intermediate, interlocutory rulings subject to revision even after the commencement of trial." (*Riva,* at p. 992; see *Mattson,* at pp. 849-850 ["Absent a statutory provision precluding relitigation, a stipulation by the parties, or an order by the court that prior rulings made in the prior trial will be binding at the new trial, objections must be made to the admission of evidence (Evid. Code, § 353), and the court must consider the admissibility of that evidence at the time it is offered. [Citations.] *In limine* rulings are not binding."].) We concluded, "it is difficult to see why a new trial after a mistrial should be treated differently in this respect from a new trial after a reversal on appeal." (*Riva,* at p. 992.)

The circumstances presented here—dismissal of an action pursuant to section 1385 and refiling of the charges—closely resemble the proceedings after a mistrial at issue in *Riva*. As Judge Lomeli observed, the dismissal of the case by Judge Dabney vacated all preceding orders; there were no orders to which the general rule of comity continued to apply. Thus, Green and Pennington do not dispute Judge Lomeli had the authority to rule anew on the prosecutor's in limine motion. (Cf. *People v. Saez* (2015) 237 Cal.App.4th 1177, 1185 ["[t]o avoid the effects of [a pretrial § 995] ruling, the People could have either appealed it or filed a new accusatory pleading that would have required a new preliminary hearing, but they did neither," citations omitted].) Writing on a blank slate, some of Judge Lomeli's rulings tracked those made originally by Judge Dabney, but his rulings during trial evolved with the testimony of witnesses, reinforcing the similarity of the in limine rulings in this case to those of concern in *Riva*.

To be sure, in *Riva* we were not confronted with an allegation of forum shopping by the prosecutor,[20] as we are here. While we view the prosecutor's rationale for refiling the case in the Central District with skepticism, both Judge Lomeli and

---

[20] Justice Johnson, writing for this court in *Riva*, distinguished the decision in *Schlick v. Superior Court* (1992) 4 Cal.4th 310 on the ground "[t]he prosecutor's conduct in *Schlick* amounted to blatant forum shopping, a factor not present in the case before us." (*Riva*, *supra*, 112 Cal.App.4th at p. 990.) In *Schlick* the Supreme Court construed an earlier version of section 1538.5 to bar the People from relitigating a motion to suppress when an adverse result had led to the dismissal of the complaint under section 1385. The decision in *Schlick* was based on the text of former section 1538.5, subdivision (d), which the Legislature amended after *Schlick* to narrow the circumstances under which a dismissal bars relitigation of such a motion. (See generally *People v. Rodriguez*, *supra*, 1 Cal.4th at pp. 688-690 [discussing amendments to § 1538.5; *Soil v. Superior Court* (1997) 55 Cal.App.4th 872, 876-880 [same].)

Judge Abzug declined to find he had refiled it there for an improper purpose. Likewise, we have found no case suggesting, let alone holding, a prosecutor's permissible refiling of a complaint in compliance with state law and local rules constitutes misconduct, even if the purpose of the refiling was to avoid an adverse ruling. If the essence of prosecutorial misconduct is prosecutorial error (see *People v. Centeno, supra,* 60 Cal.4th at pp. 666-667), we cannot brand a permissible refiling as misconduct sufficiently outrageous to warrant retrial. Similarly, we cannot conclude the prosecutor's conduct fell within the scope of outrageous governmental conduct warranting dismissal.

2. *The Trial Court Did Not Abuse Its Discretion in Allowing Evidence of the Powers and Banks Murders*

The legitimacy of Judge Lomeli's ruling on the scope of evidence to be allowed at trial forms the basis for several of the arguments raised by Green and Pennington on appeal. While Judge Dabney tentatively ruled the evidence related to the murders of Powers and Banks was unduly prejudicial and only tangentially related to the People's case, Judge Lomeli permitted the People to introduce evidence that Powers was with Batiste the night both were killed; that Powers had been killed in retaliation for his planned testimony against the Neighborhood Piru gang members who murdered Banks; that Batiste had possibly been killed because he witnessed Powers's murder; and that Green and Pennington conspired to kill Dean because they believed he had provided information about either or both of these murders.[21]

---

[21] Judge Lomeli initially decided evidence related to Banks's murder or the motive for Powers's murder was inadmissible under Evidence Code section 352 but, after further argument, expanded his ruling to allow the People to show that Powers was murdered shortly before he was scheduled to testify against the Neighborhood Pirus who had shot him and killed Banks.

Like Judge Dabney, Judge Lomeli excluded the ballistics evidence proffered by the prosecutor.[22]

Green and Pennington argue that the trial court abused its discretion under Evidence Code sections 1101 and 352 by admitting this evidence and that Powers's statements to police officers and to his girlfriend about the death of Banks constituted inadmissible hearsay.

a. *Evidence of the Powers and Banks Murders Was Not Precluded by Evidence Code Sections 1101 and 352*

"'Character evidence, sometimes described as evidence of propensity or disposition to engage in a specific conduct, is generally inadmissible to prove a person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) Evidence that a person committed a crime, civil wrong, or other act may be admitted, however, not to prove a person's predisposition to commit such an act, but rather to prove some other material fact, such as that person's intent or identity. (*Id*., § 1101, subd. (b).)'"[23] (*People v. Leon* (2015) 61 Cal.4th 569, 597; accord, *People v. Harris* (2013)

---

[22] During pretrial proceedings the prosecutor sought permission to introduce evidence the gun used by Green to shoot Ravenel and shell casings for rounds similar to those found in Green's possession were also found at the scene of Powers's murder, thereby attempting to link Green to Powers's murder. The trial court excluded the evidence because the bullets recovered from Powers's body were too damaged for ballistic identification and any inference that could be drawn from Green's statements about his potential liability for other crimes was speculative.

[23] Evidence Code section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

57 Cal.4th 804, 841.) "The conduct admitted under Evidence Code section 1101[, subdivision](b) need not have been prosecuted as a crime, nor is a conviction required. [Citation.] . . . Specifically, the uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*Leon,* at pp. 597-598.) "We review the trial court's decision whether to admit evidence, including evidence of the commission of other crimes, for abuse of discretion." (*Leon,* at p. 597; accord, *Harris*, at p. 841.)

Green and Pennington argue that evidence of the Powers and Banks murders should have been excluded as uncharged acts made inadmissible by Evidence Code section 1101, subdivision (a). However, as the Attorney General points out, the trial court admitted this evidence not for its probative value as to Green and Pennington's character, but as highly probative evidence of their motive and intent. (See, e.g., *People v. Riccardi* (2012) 54 Cal.4th 758, 815 ["Evidence that 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive' is generally admissible. [Citation.] Although motive is normally not an element of any crime that the prosecutor must prove, 'evidence of motive makes the crime understandable and renders the inferences regarding defendant's intent more reasonable.'"]; *People v. McKinnon* (2011) 52 Cal.4th 610, 655 [""'because a motive is ordinarily the incentive for criminal behavior, its probative value generally exceeds its prejudicial effect, and wide latitude is permitted in admitting evidence of its existence'""]; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1129 ["we have frequently held that evidence of other offenses is cross-admissible to prove motive [citations] and in particular a motive to kill to prevent a witness from testifying"].)[24]

---

[24] Green's reliance on *People v. Alcala* (1984) 36 Cal.3d 604 is misplaced. There, the trial court allowed the People to introduce evidence the defendant had on three previous occasions abducted

Judge Lomeli concluded evidence of the Bloods' motive to kill Powers was crucial to understanding the motive to kill Batiste: "You can't give this case to the jury without that [motive evidence]."

Although Judge Dabney's tentative ruling was equally within the realm of discretion accorded a trial court, we cannot conclude Judge Lomeli's decision to allow evidence of the motive for Powers's murder was an abuse of that same broad discretion.[25] In addition to providing a plausible motive for the murder of Batiste, this evidence was highly relevant to the criminal street gang enhancement allegation against Green, Pennington and Dean, who were members of the same Bloods gang. Evidence of

---

and sexually abused young girls. The Supreme Court reversed under Evidence Code section 1101 because the prior crimes did not meet the strict requirements for similarity necessary for the admission of evidence of a consistent modus operandi to prove identity and were thus unduly prejudicial. (*Alcala*, at pp. 631-632.) In addition, the prosecutor's theory the accused's prior crimes may have increased his incentive to eliminate his victim as a witness, the Court explained, would permit the defendant's past criminal acts to be introduced at trial whenever the defendant was accused of premeditated murder during a subsequent offense: "The accused's mere status as an ex-criminal would place him under an evidentiary disability not shared by first offenders." (*Id.* at p. 635.) Here, evidence of the Banks and Powers murders was admitted to show that Batiste had been killed as part of a Bloods vendetta against Powers and did not purport to attribute responsibility for the Banks and Powers murders to Green or Pennington.

[25] "The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice."'" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

the chain of murders was critical to proving the pattern of gang retribution—that is, Powers had been "green-lighted" by the Bloods because they believed he had pointed the police to Big J-Rock; Banks had been killed when the Neighborhood Pirus attempted to murder Powers; Powers was lured back to Inglewood and killed when he was in the company of Batiste, who was in turn killed because he likely witnessed Powers's murder. Dean was then targeted by Green and Pennington because they feared he would implicate them in the murder of Batiste or Powers. (See *People v. Armstrong* (2016) 1 Cal.5th 432, 457 [defendant's desire to avoid prosecution for murder provided motive for shooting victim's brothers and to torture another victim; admissibility of other crimes depended not on application of Evid. Code, § 1101, subd. (b), but "derive[d] from the fact and sequence of their commission"]; *People v. Cage* (2015) 62 Cal.4th 256, 274 ["[w]here other crimes or bad conduct evidence is admitted to show motive, "'an intermediate fact which may be probative of such ultimate issues as intent [citation], identity [citation], or commission of the criminal act itself'" [citation], the other crimes or conduct evidence may be dissimilar to the charged offenses provided there is a direct relationship or nexus between it and the current alleged crimes"].)

Green contends that, even if the evidence was not specifically relevant to his own character (as contemplated by Evidence Code section 1101), the evidence amounted to character assassination of Bloods-affiliated gangs and improperly tainted all three defendants with the broad brush of inflammatory gang evidence only remotely connected to the Center Park Bloods. (See *People v. Leon*, *supra*, 61 Cal.4th at p. 599 [even if evidence of uncharged crimes is relevant under Evid. Code, § 1101, subd. (b), before admitting the evidence, trial court must also find it has substantial probative value that is not largely outweighed by its potential for undue prejudice under Evid. Code, § 352].) Green argues this evidence was particularly prejudicial to him because

he was identified by the People's gang expert as a "shot caller" or leader within the gang.

It is precisely because of that testimony, however, seen in light of Green's own statements attempting to direct Dean's murder and his acknowledgement he faced potentially far greater criminal liability if he did not succeed in silencing Dean, that made the testimony about the Bloods' motive to murder Powers exceptionally probative.[26] As a shot caller Green stood in the position to direct the murder of his fellow gang member Dean; and his attempt to communicate with members of other Bloods-affiliated gangs to accomplish that murder demonstrated his ability to coordinate with those gangs for the commission of a crime. "The prejudice which exclusion of Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638; accord, *People v. Merriman* (2014) 60 Cal.4th 1, 60.) Here, the prejudice to Green resulted from the persuasiveness of the evidence, not from the possibility it could be misconstrued or evoke an irrational emotional bias against Green.

The trial court also acted within its discretion when it rejected Green's argument the gorier details of Batiste's killing would improperly inflame the jury against Green and should be excluded under Evidence Code section 352. This evidence was necessary to establish where Batiste had been killed; without that

---

[26] Although evidence of Banks's murder was probably not necessary to establish the "green light" on Powers, there was no suggestion any of the defendants in this case killed Banks.

information the jury would have had an incomplete view of his murder and Dean and Pennington's culpability for it. Although the evidence did not link Green to the van (other than the generic testimony a third unidentified man was seen leaving the van and a criminalist's testimony about a DNA sample from the red shirt from which Green could not be excluded as a contributor) and he was not charged with Batiste's murder, Green was plainly motivated by those events to target Dean based on his fear Dean was talking to the police, whether the intent was to protect Pennington or himself.

In sum, although the trial court could have exercised its discretion in a different manner, we cannot conclude it abused its discretion by allowing evidence of the Banks and Powers murders.

b. *The admission of Powers's statements to police, even if erroneous, was harmless error*

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it qualifies under some exception to the hearsay rule. (Evid. Code., § 1200, subd. (b).) Green and Pennington contend the trial court erred in admitting hearsay statements made by Powers to the IPD to substantiate the Bloods' motive to kill him. IPD Detective Burton testified he interviewed Powers after he and Banks had been shot. Over defense objections Burton testified Powers said he and Banks had been sitting on a porch when three men approached. Powers yelled at Banks to run as the men began shooting at them. Powers showed Burton his bandaged hand and told him his finger had been shot off. In a subsequent interview Powers identified the three men who had shot at him and Banks and told Burton they were members of the Neighborhood Piru gang.

"Evidence of an out-of-court statement is . . . admissible if offered for a nonhearsay purpose—that is, for something other than the truth of the matter asserted—and the nonhearsay

purpose is relevant to an issue in dispute. [Citations.] For example, an out-of-court statement is admissible if offered solely to give context to other admissible hearsay statements." (*People v. Davis* (2005) 36 Cal.4th 510, 535-536; see *People v. Smith* (2009) 179 Cal.App.4th 986, 1003 [""[i]f a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence""].) "'A determination of relevance and undue prejudice lies within the discretion of the trial court, and a reviewing court reviews that determination for abuse of discretion.'" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1162; accord, *People v. Jones* (2013) 57 Cal.4th 899, 956.)

The Attorney General contends Detective Burton's statements were properly admitted for the nonhearsay purpose of showing Powers had cooperated with police and would have been considered a snitch for doing so and to provide context for Detective Burton's testimony Powers had been scheduled to testify against the Neighborhood Pirus when he was murdered. According to the Attorney General, whether the Neighborhood Pirus were the shooters and whether the shooting occurred as described by Powers was irrelevant.

The Attorney General's explanation is valid to a point, but the identification of the shooters as members of a Bloods-affiliated gang—the truth of Powers's statements to Detective Burton—was certainly relevant to the People's theory of the case. At most, the statements constituted hearsay admissible to provide context, as the Attorney General suggests, for the fact that Powers was killed after he had been green-lighted for cooperating with the police. Even were we to assume the trial court erred in admitting the evidence, however, any error was harmless under the *Watson* standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Seumanu*, *supra,* 61 Cal.4th at p. 1308 [*Watson* standard applies to the erroneous admission of hearsay evidence].) Detective Burton testified that Powers was scheduled to testify at

a preliminary hearing against the Neighborhood Pirus he had identified, thus establishing the Bloods' motive to kill him. Powers's earlier statements added little to that information and nothing that would cause additional prejudice to Green or Pennington. Accordingly, it is not "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson,* at p. 836.)

c. *Green and Pennington have forfeited their objections to statements attributed to Powers about the J-Rock incident*

Green and Pennington also assert the trial court erred in admitting statements Powers purportedly made to his girlfriend Kennedy. The testimony cited, however, most of which was elicited by Dean's counsel on cross-examination without objection from Powers and Green, refers to Kennedy's statements to IPD detectives about the shooter who yelled "J-Rock" that she attributed to rumors she had heard about Powers. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1248 [a party may not ask relevant questions, then "prevent all cross-examination (or redirect examination) responding to the same point by successfully asserting that its own question was improper"]; *People v. Parrish* (2007) 152 Cal.App.4th 263, 274-276 [otherwise inadmissible testimonial statement of unavailable witness properly admitted under Evid. Code, § 356 to put witness's statement in context after defense elicited portion of statement that "viewed in isolation, presented a misleading picture"].)

Moreover, a belated objection to some of Kennedy's statements was sustained by the court but, otherwise, the issue has been forfeited by Green and Pennington's failure to object promptly to the statements. (See *People v. Williams* (2008) 43 Cal.4th 584, 620 [""questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal""]; see generally Evid. Code, § 353, subd. (a) ["[a]

verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] . . . [t]here 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"].)

3. *The Trial Court Did Not Abuse Its Discretion in Denying Green's Motions To Sever His Trial*

Joint trials are favored because they promote efficiency and avoid the potential for inconsistent verdicts. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 378-379; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150.) "When the statutory requirements are met, joinder is error only if prejudice is clearly shown." (*People v. Scott* (2011) 52 Cal.4th 452, 469, 354.) Section 954 permits joinder when two or more different offenses are charged in the same pleading if the offenses are either "connected together in their commission" or "of the same class." (See *People v. Armstrong, supra,* 1 Cal.5th at p. 455 ["[t]his 'statute permits the joinder of different offenses, even though they do not relate to the same transaction or event, if there is a common element of substantial importance in their commission, for the joinder prevents repetition of evidence and saves time and expense to the state as well as to the defendant'"].) Similarly, "[w]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials." (§ 1098.)

In ruling on a severance motion, "'the court must assess the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of defendant's other criminal activity to tip the balance and convict him.' [Citation.] We review the trial court's decision to deny a severance motion for abuse of discretion. [Citation.] To establish an abuse of discretion, the defendant must make a "'clear showing of prejudice.'"" (*People v.*

Armstrong, supra, 1 Cal.5th at p. 456.) "'[W]e consider the record before the trial court when it made its ruling.'" (*Ibid.;* accord, *People v. Sanchez* (2016) 63 Cal.4th 411, 464.) "If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "'resulted in 'gross unfairness' amounting to a denial of due process.'"" (*People v. Avila* (2006) 38 Cal.4th 491, 575; accord, *People v. Letner and Tobin, supra,* 50 Cal.4th at p. 150.)

a. *Joinder of the murder and conspiracy charges under section 954 was proper and did not unduly prejudice Green*

Joinder of the charges here—murder and conspiracy to commit murder—was proper under section 954 for two reasons: The murder of Batiste provided the motive for the subsequent conspiracy to murder Dean; and, as assaultive offenses, the two charges fell within the same class of crimes. (See, e.g., *People v. Jackson* (2016) 1 Cal.5th 269, 298-299 [rape and murder are properly joinable under § 954 as ""offenses of the same class of crimes,"" because both ""are assaultive crimes against the person""]; *People v. Zambrano*, *supra*, 41 Cal.4th at pp. 1129-1130 [murder and attempted murder are both assaultive crimes against the person, and as such are "offenses of the same class" expressly made joinable by § 954; evidence that offenses are similar is "not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one"]; *People v. Valdez* (2004) 32 Cal.4th 73, 119 [murder and escape charges were "'connected together in their commission'" because "the motive for the escape was to avoid prosecution" on the murder charge].)

When charges are properly joined under section 954, the trial court retains discretion to try them separately, but "'[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.'" (*People v. Armstrong, supra,*

1 Cal.5th at p. 455.) The framework for analyzing prejudice in this context is well established: "'Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled.' [Citation.] 'If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over' effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses."' [Citation.] Three factors are most relevant to this assessment: '(1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case or another weak case so that the totality of the evidence may alter the outcome as to some or all of the charges; or (3) whether one of the charges (but not another) is a capital offense.'" (*People v. Jackson, supra,* 1 Cal.5th at p. 299; see *Armstrong,* at p. 456 ["if the evidence is cross-admissible, 'that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges'"].)

The trial court concluded the evidence relevant to the two crimes was cross-admissible with one exception: Dean's statement to the police the driver of the van had been his girlfriend, "Nette," which posed a potential violation of Pennington's Sixth Amendment right to confront and cross-examine witnesses as articulated in *Crawford v. Washington* (2004) 541 U.S. 36, 68 [124 S.Ct. 1354, 158 L.Ed.2d 177], as well as the *Aranda/Bruton* rule.[27] The court resolved that potential

---

[27] The *Aranda/Bruton* rule refers to *People v. Aranda* (1965) 63 Cal.2d 518 and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476]. Both cases, which predate the Supreme Court's decision in *Crawford,* recognize that a defendant is deprived of his or her Sixth Amendment right to

violation by seating two separate juries, one to decide the charges against Green and Pennington and the other to decide the charge against Dean. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1208 ["the problem addressed in *Bruton* and *Aranda* may be solved by the use of separate juries for codefendants, with each jury to be excused at appropriate times to avoid exposure to inadmissible evidence"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287 ["The use of dual juries is a permissible means to avoid the necessity for complete severance. The procedure facilitates the Legislature's statutorily established preference for joint trial of defendants and offers an alternative to severance when evidence to be offered is not admissible against all defendants."].)

As discussed, the trial court did not err in ruling the remaining evidence of the Banks and Powers murders was admissible against Green. Accordingly, any potential prejudice to Green was sufficiently dispelled, and severance of the murder and conspiracy charges was not required. We also reject Green's argument the evidence of those other crimes was unduly inflammatory compared to the conspiracy charge. As the Supreme Court recently explained, "the animating concern underlying this factor is not merely whether evidence from one offense is repulsive, because repulsion alone does not necessarily engender undue prejudice. [Citation.] Rather, the issue is ""whether strong evidence of a lesser but inflammatory crime might be used to bolster a weak prosecution case' on another crime."' (*People v. Simon* (2016) 1 Cal.5th 98, 124; see *People v. Sandoval* (1992) 4 Cal.4th 155, 173 [defendant failed to show requisite prejudice

---

confront witnesses when a facially incriminating statement of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the statement only against the declarant. In this situation the court must either grant separate trials, exclude the statement or excise all references to the nondeclarant defendant. (*Aranda,* at pp. 530-531; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1045.)

from joinder of other murder charges because any "inflammatory effect of defendant's gang membership as to the [other] case was neutralized by the fact that the victims were also gang members"].)

b. *Any error in the joinder of the three defendants under section 1098 was harmless*

Premised on many of the same principles as section 954, section 1098 requires a court to examine whether joinder of defendants (rather than charges) is appropriate in a particular case. Under section 1098, "a trial court *must* order a joint trial as the 'rule' and *may* order separate trials only as an 'exception.'" (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 190; accord, *People v. Mackey* (2015) 233 Cal.App.4th 32, 99.)

In arguing the court erred in denying his motion to sever his trial from that of Dean and Pennington, Green relies primarily on *People v. Ortiz* (1978) 22 Cal.3d 38 (*Ortiz*), in which the Supreme Court interpreted section 1098 to mean "a defendant may not be tried with others who are charged with different crimes than those of which he is accused unless he is included in at least one count of the accusatory pleading with all other defendants with whom he is tried." (*Ortiz*, at p. 43, fn. omitted.) Ortiz and an accomplice were accused of robbing a mini-mart and were jointly charged with two other codefendants, who, along with Ortiz's accomplice, were charged with robbing a drug dealer a few hours earlier. Reversing the trial court's denial of the defendant's motion to sever under section 1098, the Court emphasized the dangers of allowing a jury to hear evidence concerning a crime with which the defendant had no connection and found there was a reasonable probability he would have obtained a more favorable result at trial. (*Ortiz*, at pp. 47-48; see *People v. Burney* (2009) 47 Cal.4th 203, 237 ["[i]f we conclude the trial court abused its discretion, reversal is required only if it is reasonably probable the defendant would have obtained a more favorable result at a separate trial"].)

Several courts have recognized exceptions to the *Ortiz* rule. In *People v. Hernandez* (1983) 143 Cal.App.3d 936 (*Hernandez*) the court concluded a joint trial was appropriate for three defendants charged with different counts arising from the gang rape of a single victim: "We are convinced that the Supreme Court [in *Ortiz*] did not intend, in establishing a rule requiring separate trials of defendants not jointly charged, to include within the purview of that rule defendants charged with crimes arising out of a single set of circumstances. The evil sought to be avoided by *Ortiz* was the prejudicial impact of irrelevant evidence. In a joint trial of unrelated offenses, the jury would hear evidence concerning the conduct of [the] defendant's associates, which evidence would not have been admissible in a separate trial. [Citation.] Here, of course, evidence concerning the conduct of all of the victim's assailants would have been admissible in either a joint or separate trial. Furthermore, a requirement of separate trials could subject the victim and all witnesses to the ordeal of two complete trials, with no attendant benefit to [one of the codefendants]. We therefore conclude that the *Ortiz* holding does not extend to defendants charged with a crime or series of crimes committed as part of a single transaction." (*Hernandez,* at pp. 940-941, fn. omitted.) This holding was extended in *People v. Wickliffe* (1986) 183 Cal.App.3d 37, in which the court approved the joint trial of a defendant charged with driving under the influence and a codefendant charged with battery and assault where all of the crimes occurred during a joint operation of repossessing a vehicle. (*Id.* at pp. 40-41.)

Green is correct this case does not fall squarely within the "single transaction" exception to the *Ortiz* rule described in *Hernandez* and *Wickliffe*. Like the courts in those cases, however, we question whether the Supreme Court would adhere to the rigid line apparently described in *Ortiz* under the circumstances presented here. The defendants were members of the same gang, the two offenses were directly related to each other, and each offense

was allegedly committed for the benefit of the gang. The criminal street gang allegation provided the basis for much of the motive evidence admitted at trial. Moreover, Green was not entitled to a trial separate from that of Pennington under section 1098 because they were both charged with conspiracy to murder Dean, and severance of Pennington's murder charge was not required by section 954. Nor can Green identify any prejudice associated with the decision denying him a separate trial from Dean: By seating two juries, the trial court effectively eliminated any prejudice associated with trying Dean and Green together. Under these circumstances the trial court did not abuse its discretion by denying Green's section 1098 motion to sever.

Even if we were to conclude it was error to deny Green's motion to sever under section 1098, however, any error was harmless under the analysis presented in *Ortiz*. As *Ortiz* instructs, "The right to a separate trial is not so fundamental that its erroneous denial requires automatic reversal." (*Ortiz, supra,* 22 Cal.3d at p. 46.) The factors to be applied in determining whether a denial of severance was prejudicial "include whether a separate trial would have been significantly less prejudicial to defendant than the joint trial, and whether there was clear evidence of defendant's guilt." (*Ibid.*) We reverse "only upon a showing 'of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.'" (*Ibid.*; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 41; *People v. Mackey*, *supra*, 233 Cal.App.4th at p. 100.) The evidence contained in the recorded telephone calls and handwritten notes Green showed to Pennington during her visit to the jail left no doubt as to his guilt on the conspiracy charge.

c. *Green's due process right to a fair trial was not violated*

Even if, as we conclude, the trial court did not abuse its discretion in denying severance pretrial, we must also determine "'whether events *after* the court's ruling demonstrate that joinder

actually resulted in "gross unfairness" amounting to a denial of defendant's constitutional right to fair trial or due process of law.'" (*People v. Simon*, *supra*, 1 Cal.5th at p. 129.) "In determining whether joinder resulted in gross unfairness, we have observed that a judgment will be reversed on this ground only if it is reasonably probable that the jury was influenced by the joinder in its verdict of guilt." (*Id.* at pp. 129-130.) As discussed, the evidence of Green's culpability for the conspiracy to murder Dean was overwhelming. Consequently, there was no violation of his due process right to a fair trial.

4. *Substantial Evidence Supported Pennington's Convictions*

In considering Pennington's claims of insufficient evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval*

(2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The standard of review is the same in cases in which the People rely mainly on circumstantial evidence to prove one or more elements of their case. (*People v. Clark* (2016) 63 Cal.4th 522, 625; *People v. Tully* (2012) 54 Cal.4th 952, 1006-1007.) ""'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt.'"" (*People v. Story* (2009) 45 Cal.4th 1282, 1296.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*People v. Zamudio*, *supra*, 43 Cal.4th at p. 358; accord, *Clark*, at p. 626.)

a. *The murder conviction*

Pennington, who was convicted as the driver of the van of second degree murder on an aiding and abetting theory, contends there was insufficient evidence for the jury to conclude she shared Dean's intent to kill Batiste.

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 (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; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1118.) "'[A]n aider and abettor's guilt "is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state." [Citation.]' [Citation.] Establishing aider and abettor liability 'requires proof in three distinct areas: (a) the direct perpetrator's actus

reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.'" (*People v. Valdez* (2012) 55 Cal.4th 82, 146.) Direct evidence of the defendant's mental state is rarely available and may be shown with circumstantial evidence. (*Beeman*, at pp. 558-559.) "Mere presence at the crime scene is, by itself, not aiding and abetting, but it can be one factor among others that support conviction as an aider and abettor. [Citation.] 'Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense.'" (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1065; see *In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

The jury heard undisputed, albeit circumstantial, evidence Pennington was in the van when it crashed and direct evidence she was an active member, with Dean, of the Center Park Bloods. The jury also heard that Batiste was more than likely with Powers when Powers was killed (because he had talked to the police) and was then stabbed to death himself within hours, again, more than likely, in the van. Rather than attempt to obtain help for Batiste, Pennington, like Dean and the unknown third man in the van, disappeared. She lied to the police about the source of her injuries and claimed she had been carjacked. Soon after, she attempted to retrieve her purse and identification card from the impound facility. She then conspired with Green to kill Dean because he appeared to be talking to police about the incident. The wiretap evidence showed Pennington held an important position in a gang strongly allied to other Blood-affiliated gangs and confirmed her willingness to betray someone who considered her a friend for the benefit of the gang. The jury thus had ample

evidence—circumstantial and direct—from which to infer Pennington shared Dean's intent to kill Batiste.

b. *The conspiracy to commit murder conviction*

"'Conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act, by at least one of these parties, in furtherance of the conspiracy. [Citations.] A conspiracy requires (1) the intent to agree, and (2) the intent to commit the underlying substantive offense.' [Citation.] '"The punishable act, or the very crux, of a criminal conspiracy is the evil or corrupt agreement."' [Citation.] [¶] If the agreement between the conspirators is the crux of criminal conspiracy, then the existence and nature of the relationship among the conspirators is undoubtedly relevant to whether such agreement was formed, particularly since such agreement must often be proved circumstantially. '"The existence of a conspiracy may be inferred from the conduct, *relationship,* interests, and activities of the alleged conspirators before and during the alleged conspiracy."'" (*People v. Homick* (2012) 55 Cal.4th 816, 870.)

Pennington contends she was a passive observer of Green's conspiratorial comments and never entered into an agreement with Green to kill Dean. The evidence, however, is plainly susceptible to the interpretation that the agreement to kill Dean was made in early December 2002, well before Pennington's jail visit when Green gave her instructions on how the murder should be accomplished, and that Pennington was an active participant in the planning. On December 3, 2002 Green called Pennington, expressed concern about "Shady Blood" and told her to meet with "CKay" and "Nut" to discuss what to do about him. Pennington replied she had spoken with CKay the previous evening who agreed Dean was a problem and said, "That's on Blood. . . . You ain't fittin' to go down. I ain't fittin' to go down. It's too many lives at stake." Recognizing the implication of that conversation, Green told Pennington not to talk on the phone and said, "On Blood, this gonna be handled," and indicated he would have to

trust CKay. After that call Pennington summoned a meeting of gang members to discuss how Dean would be handled. The plan reflected by this conversation was apparently discovered by Dean, who called Pennington and told her he had heard his fellow gang members thought he had "spoke on somebody" and wanted him "gone." Dean asked Pennington who was putting "mud" on him, and Pennington replied she had been hearing it "a whole lot." When Pennington claimed she did not know what was happening, Dean said he was coming to the "turf" to find out. Pennington immediately called several other gang members, telling the first, "We got a problem," and then told all of them she had talked with "Shady Blood" and complained he knew he was being targeted because someone else was talking too much. The next day she spoke with Green and told him the same thing. Based on this evidence the jury could reasonably find the initial agreement to kill Dean began at this time, and Pennington went to the jail on December 20, 2002 to receive instructions on implementing the plan. Green's instructions included an exhortation that Dean must be killed immediately and a contact (Robby Tobby, a Bloods prison gang shot caller), who would be able to implement the plan.

Pennington additionally contends the alleged conspiracy never progressed beyond planning because no overt acts were taken to accomplish its purpose (the murder of Dean). An overt act is "'an outward act done in pursuance of the crime and in manifestation of an intent or design, looking toward the accomplishment of the crime.'" (*People v. Zamora* (1976) 18 Cal.3d 538, 549, fn. 8, quoting *Chavez v. United States* (9th Cir. 1960) 275 F.2d 813, 817.) "This act need not 'constitute the crime or even an attempt to commit the crime which is the conspiracy's ultimate object. Nor is it required that such a step or act, in and of itself, be a criminal or unlawful act.'" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 244.) "[I]nternal discussions and arrangements between coconspirators can easily constitute overt acts in furtherance of the conspiracy." (*Id.* at p. 244 [alleged overt

acts consisted of "solicitation of additional conspirators," "requests for information regarding the victim and the plan," "payments to secure a coconspirator's assent to the conspiracy," and "numerous phone conversations laying out the manner in which the conspiracy would be carried out"]; accord, *People v. Sconce* (1991) 228 Cal.App.3d 693, 699 [alleged overt acts consisted of defendant's pointing out the intended victim to a coconspirator, coconspirator's solicitation of another conspirator, and defendant's inquiries of one coconspirator to "to take care of and kill" the victim]; see *Van Villas,* at p. 245 ["[i]f the conspirators partake, among themselves, in arrangements, discussions, and preparation in regard to and for the criminal act, then they have ventured beyond a mere criminal intention and forgone the opportunity afforded them by the overt act requirement: '"to reconsider, terminate the agreement, and thereby avoid punishment for the conspiracy"'].) As discussed in these cases, Pennington's ongoing discussions with Green and other gang members amply supported her conviction for conspiracy.

5. *The Five-year Sentence Enhancement for Green's Prior Serious Felony Conviction Was Properly Imposed*

The amended information filed September 10, 2013 alleged Green had previously been convicted of a serious or violent felony pursuant to Penal Code sections 1170.12, subdivisions (a) through (d), and 667, subdivisions (b) through (i)—the three strikes law—and identified Green's April 2004 conviction for aggravated assault, Los Angeles Superior Court case no. YA053259 (assault with a firearm for the shooting of Tyrone Ravenel).[28] A separate paragraph in the amended information "further alleged . . . pursuant to Penal Code section(s) 667(b) through (i)" that Green had suffered a prior conviction of a serious or violent felony, again

---

[28] The original information filed July 11, 2012 did not allege that Green had previously been convicted of a serious or violent felony.

citing case no. YA053259. At Green's sentencing hearing the People introduced evidence Green had suffered two prior convictions, the April 2004 conviction for the Ravenel assault and an October 2008 conviction for possession of a controlled substance under Health and Safety Code section 11350, subdivision (a) (Los Angeles Superior Court case no. YA071118). Green, who at that time had obtained permission to represent himself, did not appear to be aware the possession charge had not been alleged in the amended information and admitted both prior convictions. After an extended discussion during which the court referred to case no. YA053259 as the "alleged strike" and case no. YA071118 as the "one-year prior," the court sentenced Green to 15 years to life for conspiracy to commit murder, "doubled . . . for the aforementioned strike conviction in case no. YA053259, plus an additional five years under 667(b) for his aforereferenced prior, and the court referenced that case."

Section 667, subdivision (b), however, does not provide for a sentence enhancement. The sentence enhancement for a prior serious felony conviction in addition to the provisions of the three strikes law—the further allegation contained in the amended information—is found in section 667, subdivision (a)(1). Compounding what appears to have been a misstatement by the trial court (most likely precipitated by the incorrect citation in the amended information), the minute order from Green's sentencing hearing mischaracterizes the enhancement as a five-year sentence under section 667.5, subdivision (b), a mistake repeated in the abstract of judgment. Section 667.5, subdivision (b), authorizes only a one-year sentence enhancement for a prior prison term—an allegation not contained in the amended information—and may not be imposed when a sentence enhancement under section 667, subdivision (a)(1), is imposed for the same offense. (See *People v. Jones* (1993) 5 Cal.4th 1142, 1149-1150.)

Green contends the sentence enhancement listed in the minute order and abstract of judgment was unauthorized and

must be stricken. The People contend the error should be addressed through remand to the superior court but note the same error was made at Dean's sentencing hearing and was corrected nunc pro tunc by the trial court to specify the correct basis for the five-year prior serious felony conviction enhancement—section 667, subdivision (a)(1).

We have the inherent authority to correct an unauthorized sentence (§ 1260; *People v. Scott* (1994) 9 Cal.4th 331, 354; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [appellate court may order correction of clerical error at any time]). Remand is unnecessary here to correct what was merely an inadvertent miscitation by the trial court, which plainly intended to impose the sentence enhancement alleged in the amended information for a prior serious felony conviction. Accordingly, the judgment in Green's case is modified to reflect imposition of a five-year sentence enhancement pursuant to section 667, subdivision (a)(1), for the prior serious felony conviction alleged in the amended information.

DISPOSITION

The judgment against Green is modified to provide that the five-year sentence enhancement was imposed under section 667, subdivision (a)(1), instead of subdivision 667.5, subdivision (b). The judgment is further modified to reflect the imposition of restitution fines of $200 and parole revocation fines (stayed) of $200 on each defendant. As modified, the judgments are affirmed. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.