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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DION DURRELL HAYES, Defendant and Appellant.	B236823 (Los Angeles County Super. Ct. No. BA287010)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed in part, reversed in part.

Peter Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Dion Durrell Hayes of the gang-related murder of Andre Williams and the attempted murder of Trayvon Blow and Spencer Thomas following an argument between Hayes and a rival gang member at a neighborhood party. On appeal Hayes contends the trial court committed prejudicial error in admitting Thomas's preliminary hearing testimony without an adequate demonstration the People had used reasonable diligence to secure his presence at trial, allowing amendment of the information at the beginning of the trial and refusing to instruct the jury Hayes could not be found guilty based on his gang membership alone. We affirm Hayes's murder conviction, but reverse the attempted murder convictions.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information and Amended Information*

In an information filed December 18, 2009 Hayes was charged with the July 5, 2005 murder of Williams (Pen. Code, § 187, subd. (a)) and the attempted willful, deliberate and premeditated murder of Blow and Thomas (Pen Code, §§ 187, subd. (a), 664, subd. (a)). The information specially alleged Hayes had personally and intentionally discharged a firearm causing great bodily injury or death in committing the murder (Pen. Code, § 12022.53, subd. (d)) and had personally and intentionally discharged a firearm in committing the attempted murders (Pen. Code, § 12022.53, subd. (c)). As to each count it was also specially alleged the crimes were committed to benefit a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)(C).) Hayes pleaded not guilty and denied the special allegations.

On May 6, 2011, the day after the jury had been empanelled, the People moved to amend the information to add as an alternative firearm-use enhancement allegation to each count that a principal had personally and intentionally discharged a firearm pursuant to Penal Code section 12022.53, subdivision (e)(1). Defense counsel objected, arguing it would be unduly prejudicial to allow the amendment because he had prepared Hayes's defense for 18 months based on the prosecution's theory Hayes was the shooter. The prosecutor responded that defense counsel had always been on notice the ballistic evidence in the case indicated more than one gun had been used in the shootings and

explained he still intended to argue Hayes was the shooter but wanted to permit the jury to return a guilty verdict with a firearm-use enhancement if it concluded Hayes had participated in the attacks but one of his fellow gang members had actually been responsible for firing the shots.

The court granted the motion, noting "the main issue has always been and continues to be identity, that he is not responsible," and concluding the amendment was not the kind that "significantly altered the complexion of the case such that it throws the defendant completely off from what he was attempting to do in trial."

2. *The Trial Court's Ruling the People Had Used Reasonable Diligence To Secure Thomas's Presence at Trial*

On May 4, 2011 the prosecutor informed the court the People would be seeking to introduce Thomas's December 3, 2009 preliminary hearing testimony because Thomas, a Seven Trey Hustlers gang member, was "being willfully evasive and subverting [the People's] attempts to serve him with a subpoena." At a hearing the following day Richard Collins, an investigator from the District Attorneys' office, testified he was first asked to serve Thomas on June 14, 2010. (The trial date at that point had been continued to June 28, 2010 as "0 of 10.") On June 17, 2010 Collins attempted to serve Thomas at the 73rd Street addressed listed in his Department of Motor Vehicles records, but no one was there. A few days later Collins checked departmental databases for other addresses, as well as jail bookings in Los Angeles and surrounding counties, but did not find anything.

Around 1:00 p.m. on June 28, 2010 Collins went back to the 73rd Street address and was told Thomas would be there later that afternoon. Collins left his card but did not return until the next morning. At that time Collins spoke with Thomas's mother, who told him Thomas was at work but would call when he could. Collins did not ask where Thomas worked or otherwise attempt to identify Thomas's employer. Thomas did not call. On July 1, 2010 Collins's partner visited the 73rd Street home, but nobody was

there.[1] On July 6, 2010 Collins spoke to Thomas's mother at the home. She said Thomas had not been seen for two days and there was no telephone number for him.

The trial date was thereafter continued multiple times until November 15, 2010. On November 8, 2010 Collins resumed his attempts to locate Collins and was subsequently joined in those efforts by the investigating officer on the case, Los Angeles Police Detective Gregory Stearns. Stearns testified he contacted the Employment Development Department and was provided the name of Thomas's employer for the third quarter of 2010 and Thomas's cell phone number. Stearns determined Thomas was no longer working with that employer, but Thomas answered his phone when Stearns called. Thomas agreed to meet Stearns on November 29, 2010 at the 73rd Street address, his mother's home, but failed to show up. Thomas's mother denied knowledge of the meeting or Thomas's whereabouts. When Stearns visited Thomas's mother's house again in late December 2010, she claimed she did not know how to contact Thomas and demanded Stearns stop harassing her.

From January through May 2011 trial was repeatedly continued with Detective Stearns and Collins sporadically making efforts to locate Thomas. For example, on January 27, 2011 Stearns called Thomas. Thomas told him he would not attend trial and refused to disclose where he was living. On May 2, 2011 Collins returned to the 73rd Street address, but Thomas's mother again said she had no information regarding Thomas. Collins waited around the corner for an hour to monitor activity at the house. Detective Stearns's partner also drove by the 73rd Street home two or three times during the evening to see if Thomas's car was there.

At the conclusion of this testimony, Hayes's counsel argued the People's efforts to locate Thomas were not reasonable because the investigator had failed to follow up on obvious leads: When Collins was told Thomas was at work, he should have asked where that was or otherwise acquired the information and served Thomas at that location.

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[1] As of July 1, 2010 a pretrial conference had been scheduled for July 19, 2010 as "0 of 15."

Additionally, Collins failed to go to the 73rd Street house at night when Thomas, who worked during the day, was more likely to be present.

The court found reasonable efforts had been made to secure Thomas's presence. The court explained, "I have to take into consideration what type of case it is, the nature of the charge, what witnesses may think about a particular case, and their willingness to come forward in deciding whether the effort by law enforcement is diligent. I think if you go too often to a location and you do too much, you cause the person to flee even more than if you attempt to more appropriately try to get the cooperation of someone who may be reluctant to testify. . . . [O]ne has to look at the reality of the type of case it is, that it's a murder case involving gangs, and clearly the mother wants to protect her son. . . . And I do agree perhaps that a door knock at night might have been helpful, but I'm not sure because the door knock didn't happen, that the efforts by the police department and by the district attorney investigator wasn't reasonable. . . . There's also timing as it relates to how one might try to secure the presence of a witness as it relates to the actual trial date. It sounds like the trial date moved around a couple of times, and because of the new trial dates, I can see in the type of efforts made that there were portions within the last 11 months where efforts were made and then there is a period of time when it sort of died down a little bit and then efforts were once again ratcheted up based on timing of the trial. . . . And when someone decides they're going to hide out and not be found, I think that in that instance it's a successful venture by the witness to not be found."

3. *Summary of the Evidence Presented at Trial*

a. *The People's evidence*

The Seven Trey Hustlers is a small criminal street gang that claims as its territory the area around McKinley Avenue and 73rd Street in Los Angeles. That area is part of a larger territory claimed by the 79 Swans, a Blood gang with at least 300 members. The Seven Trey Hustlers do not consider themselves affiliated with either the Crips or the Bloods.

On July 4, 2005 the Seven Trey Hustlers held their annual neighborhood party near the corner of 73rd and McKinley. Gang members, as well as nongang members, children and teenagers who lived in the neighborhood attended. Nikita Holden, a neighborhood resident, testified she joined the party in the early evening. Several hours later two men arrived on a red and black motorcycle. Holden identified Hayes, who was dressed in red (the Blood's colors), as the motorcycle's passenger from a photographic lineup, as well as during the preliminary hearing and at trial. Hayes got off the motorcycle and began yelling at one of the partygoers. Holden, who was only four or five feet away, described Hayes as "trying to get someone to fight with him. . . . He was saying . . . Seven somebody, Swan. . . . [A]nd after that they were arguing, whatever, he said he would be back." After Hayes left on the motorcycle, Holden ran to her house. About 10 minutes later Holden was standing outside her house with some family and friends when someone said, "Here they come." Holden turned and saw a car driving slowly. She ran into the house and then heard six or seven shots. She also heard a loud motorcycle.

Leo Wade, a Seven Trey Hustlers member, testified he was in a car parked near the party when the argument started. He saw Hayes, whom he had known for a few years, arguing with Delvin Smith, another Seven Trey Hustlers member. Wade heard Hayes say, "This our hood. We let you all do this . . . . I'll be back." As Wade was driving away, he saw a number of men dressed in black walking down the street. One of those men pointed a pistol at Wade's head, but let him leave after a passenger in Wade's car gave a gang identification.

Gloria Alarcon, who lived near 73rd Street and McKinley Avenue, was sitting in her car listening to music when the argument between Hayes and Smith started. She could see Hayes, who was wearing all red and had gotten off a motorcycle, arguing with someone. She heard Hayes repeatedly saying "blood." Thomas, who is the father of her baby, told her to take the children inside the house. As she did, she heard Hayes say "I'll be back."[2] A minute or two later Alarcon saw three men dressed in black running toward an alley on McKinley Avenue behind a man wearing a white shirt. Alarcon then heard five or six rounds of gunfire. A short while later, the passenger on the motorcycle fired a number of shots at her house. Thomas and her brother, Michael Raby, were outside when the shooting occurred.[3]

Blow testified he was in a house near the party when the argument between Hayes and Smith occurred. He went outside after the argument had finished. Blow saw Williams, his brother and a Seven Trey Hustler, and they started to leave the area together. Both were "really drunk and high." Just as they began walking down an alley near McKinley Avenue, Blow received a text message that members of the 79 Swans were in the neighborhood. When Blow turned around, he saw an African-American male wearing red running toward them. The man began shooting. Blow jumped over a wall; Williams continued running down the alley, where he was killed. Blow eventually made his way back to McKinley Avenue. While he stood in the driveway of a house with some friends, two people drove up on a dirt bike. One of them, dressed in red, fired 10 shots toward the house. Blow and others hid behind a car.

Blow testified he did not recognize the shooter as the same person who had shot at him in the alley. However, Blow, who knew Hayes from around the neighborhood, had definitively identified Hayes as the shooter in the alley and said he was probably the

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[2] Although Alarcon had identified Hayes from a photographic lineup, at trial she testified she did not see anyone's face and did not remember identifying him.

[3] Five years after the incident Alarcon told a defense investigator the shooter was dressed in black. She did not mention that detail during her police interview two days after the shooting. She had no explanation for the omission.

shooter in the second incident during an interview with Detective Stearns the morning of July 14, 2005. After the prosecutor refreshed Hayes's recollection by reading portions of the transcript from the interview, Blow explained he was hung over and had eventually told Stearns what he thought Stearns wanted to hear so Stearns would leave him alone. Blow acknowledged snitches "get beat up, they get shot, killed," but claimed he would nevertheless identify his brother's killer.

In a police interview Thomas had identified Hayes as the man who had shot at him. At the preliminary hearing, however, he testified he had been smoking marijuana and drinking for several hours before the shootings occurred and did not remember getting shot, Williams getting killed, or telling a police officer just after the shooting that Hayes had shot him. When shown the photographic lineup on which he had circled Hayes's picture and written, "I picked No. 2 in the lineup because that's the person that I saw that night," Thomas explained he had been "coached" to identify Hayes as the shooter by an officer who had brought him to the police station for possession of marijuana and threatened he would go to jail if Thomas did not cooperate.

Los Angeles Police Officer Mario Cardona, testifying at trial as a gang expert, stated Hayes was a high ranking member of the 79 Swans. Given a hypothetical based on the facts surrounding the shootings, Cardona opined the shootings were committed for the benefit of the 79 Swans.

b. *The defense's evidence*

Hayes, who did not testify on his own behalf, presented the testimony of several witnesses to support a defense of alibi/mistaken identity. Although Hayes's counsel ultimately conceded Hayes had briefly been at the neighborhood party and announced he would be back when he left, the defense contended Hayes never returned and the shootings had been done by someone else.

Ladrena Marshall testified Hayes was at a party near 83rd Street and Alvarado with his girlfriend. Although Hayes left the party on a motorcycle, he returned about five minutes later and did not leave again. Marshall, however, could not remember the name

of the friend who hosted the party or who the "authorities" were that she had contacted to "tell [her] side of the story."

Raby, a former Crip gang member and Alarcon's brother, testified he saw the motorcycle drive up from a distance and heard the commotion. After the motorcycle left, he grabbed his wife and children and went inside Alarcon's house. Contrary to Alarcon's testimony, Raby claimed he was still inside the house with Thomas when the shots were fired.

Cetherea Sigler testified she lived in a house behind the alley and described the shots she heard. After the first shots were fired, somebody yelled, "homey."

Ronald Helson, a criminalist with the Los Angeles Police Department, testified shoe prints found on the wall abutting the alley corresponded to a shoe size between 10 and 11½. Hayes, who is five feet six or seven inches tall, has an 8½ shoe size.

4. *The Jury's Verdict and Sentencing*

The jury found Hayes guilty of the first degree murder of Williams and the attempted willful, deliberate and premeditated murders of Blow and Thomas. With respect to the murder of Williams, the jury found true the special allegation a principal had personally and intentionally discharged a handgun causing great bodily injury or death but found not true the special allegation Hayes had personally and intentionally discharged a handgun. Regarding the attempted murders of Blow and Thomas, the jury found true the special allegations Hayes had personally and intentionally discharged a firearm. As to all counts the jury found true the criminal street gang enhancement allegations. The court sentenced Hayes to an aggregate state prison term of 50 years to life.[4]

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[4] The court sentenced Hayes to 25 years to life for first degree murder plus 25 years to life for the firearm use enhancement under Penal Code section 12022.53, subdivisions (d) and (e)(1). The court imposed a sentence of 15 years to life on each attempted premeditated murder count based on the true findings on the criminal street gang enhancement allegations (Pen. Code, §§ 664, 186.22, subd. (b)(5)), plus 20 years for the firearm use enhancements. Both attempted murder sentences were ordered to run concurrently with the murder sentence.

DISCUSSION

1. *The Trial Court Erred in Admitting Hayes's Preliminary Hearing Testimony*

a. *Governing law and standard of review*

The confrontation clauses of the federal and state Constitutions guarantee a defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) The right, however, is not absolute. (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*); *People v. Cromer* (2001) 24 Cal.4th 889, 892 (*Cromer*).) "'Traditionally, there has been "an exception to the confrontation requirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant [and] which was subject to cross-examination. . . ." [Citation.]' [Citation.] Pursuant to this exception, the preliminary hearing testimony of an unavailable witness may be admitted at trial without violating a defendant's confrontation right." (*Herrera*, at p. 621; see *Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) ["[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine"].)

Evidence Code section 1291, which codifies this traditional exception, allows the use of former testimony if the witness is unavailable and the party against whom the former testimony is offered was a party to the proceeding in which the former testimony was given and had the right to confront and cross-examine the now-absent witness "with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2); see *Herrera*, *supra*, 49 Cal.4th at p. 621.) The proponent of the evidence has the burden of establishing unavailability. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1296.) That burden is met when the witness is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5); see *People v. Byron* (2009) 170 Cal.App.4th 657, 671 ["finding of witness unavailability under [Evid. Code, § 240] satisfies the unavailability requirements of *Crawford*"].)

Reasonable diligence is "'incapable of a mechanical definition,' but it 'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.' [Citation.] Relevant considerations include '"whether the search was timely begun"' [citation], the importance of the witness's testimony [citation] and whether leads were competently explored [citation]." (*Cromer*, *supra*, 24 Cal.4th at p. 904; see *People v. Fuiava* (2012) 53 Cal.4th 622, 676 ["the reasonableness of the activities is supported by the circumstance [the witness's] testimony was not of critical importance"]; *People v. Louis* (1986) 42 Cal.3d 969, 991 (*Louis*) ["'"[T]he requirement of due diligence "is a stringent one for the prosecution. . . ."' [Citation.] It is more stringent still when, as here, the absent witness is vital to the prosecution's case and his credibility is suspect."].) Additional factors include "'whether [the proponent] reasonably believed prior to trial that the witness would appear willingly and therefore did not subpoena him when he was available . . . and whether the witness would have been produced if reasonable diligence had been exercised [citation].'" (*People v. Sanders* (1995) 11 Cal.4th 475, 523.)

"We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence." (*Herrera*, *supra*, 49 Cal.4th at p. 623; see *Cromer*, *supra*, 24 Cal.4th at p. 901.)

b. *The People did not exercise reasonable diligence in attempting to secure Thomas's presence at trial*

There is no question the People made numerous attempts to locate Thomas over the course of 11 months beginning in June 2010. The deficiency lies not with the ultimate amount of effort, but the failure to take immediate steps after the preliminary hearing to ensure Thomas's presence at trial and the lack of initiative in pursuing obvious leads after the People had begun to look for him. Thomas was an important witness. In interviews with Detective Stearns, only Thomas positively identified Hayes as the shooter during the second incident: Even though Blow had told Stearns he was sure Hayes was the shooter in the alley, he was only willing to say Hayes was "probably" the man who had shot at the individuals in front of Alarcon's house. Moreover, it was evident from

Thomas's and Blow's testimony at the preliminary hearing that they both were distancing themselves from their initial identification of Hayes, and Thomas had even expressed reluctance to testify at the preliminary hearing.

Under these circumstances, the People were obligated to take steps to ensure Thomas would not become absent. (See *Louis*, *supra*, 42 Cal.3d at p. 991 ["The obligation to use reasonable means to procure the presence of the witness has two aspects. The more obvious is the duty to act with due diligence in attempting to make an absent witness present. Less obvious, perhaps, but no less important 'is the duty to use reasonable means to prevent a present witness from becoming absent.' [Citation.] If the prosecution fails in this latter duty, it does not satisfy the requirement of due diligence."].) The People could have served Thomas with a subpoena immediately after the preliminary hearing, placed him under surveillance or invoked the provisions of Penal Code section 1332, which permit the court to order a reluctant material witness to enter into an undertaking to appear and testify and, in appropriate cases, detain him or her. (See *Louis*, at pp. 992-993; *In re Francisco M.* (2001) 86 Cal.App.4th 1061, 1064-1065 ["The law has long recognized that '[t]he duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness.'"]; *People v. Roldan* (2012) 205 Cal.App.4th 969, 981 ["courts have sanctioned the months-long detention of material witnesses when [he or she] possess[es] vital information about the alleged offenses"].)

The People argue serving Thomas with a subpoena after the preliminary hearing would not have secured his presence for a trial that was repeatedly continued for 18 months. To be sure, as the trial court observed, a witness who wants to evade testifying can often do so, but it becomes more difficult—the consequences and penalties are more severe—if the witness has been served with a subpoena or treated as a reluctant material witness under the Penal Code. Indeed, perhaps standing alone the failure to take these initial steps would not turn otherwise reasonable efforts into unreasonable ones. But, combined with the failure to follow-up on simple leads, the People's efforts cannot be viewed as reasonable. When Collins first made contact with someone at the 73rd

Street address in late June 2010, he was told Thomas would be there later that afternoon. Rather than return that day, Collins waited until the next morning. Then, Collins was told by Thomas's mother he was at work. Although Thomas was known to be a reluctant witness, Collins failed to ask where he worked or contact the Employment Development Department as Detective Stearns did months later so Thomas could be served at work. Even if the People did not suspect by then that Thomas's reluctance to appear was mounting, on July 6, 2010 the People had sufficient notice when Collins spoke to Thomas's mother and she said he had not been seen for two days and there was no telephone number for him. However, because trial was continued, the People stopped looking for Thomas until November. By that time, Thomas was no longer working for the employer on file with the Employment Development Department and finding him became exponentially more difficult.

In addition to failing to take reasonable efforts to serve Thomas at work, the People failed to take even minimal steps to contact him at night when he was not at work. Even Collins admitted on cross-examination he considered attempting service at night, but did not do so. That Stearns's partner may have driven by the 73rd Street home two or three times in the evening to see if Thomas's car was there during the period January through May 2011 was too little too late. Finally, the People's argument on appeal Thomas was an unlikely candidate to be home after dark because he was a gang member is an unconvincing stereotype wholly without factual support.

We are mindful of the Supreme Court's admonition that the People need not exhaust every possible means of locating a witness to establish his or her unavailability: "'That additional efforts might have been made or other lines of inquiry pursued does not affect [a due diligence determination]. [Citation.] It is enough that the People used reasonable efforts to locate the witness.'" (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) Thus, while we wonder why apparently no attempt was made to find Thomas through Alarcon, the mother of his child, that failure is fairly characterized as simply the absence of an additional line of inquiry. Yet, viewing the totality of the circumstances as we must, attempting to locate Thomas at his place of employment was just too fundamental

and basic to fall into the category of "additional efforts." (Cf. *People v. Fuiava, supra,* 53 Cal.4th at p. 613 [efforts to locate witness were reasonable; detective, who had no knowledge witness had ever been employed, began checking last known addresses two weeks before trial, checked hospital and jail records regularly, gave patrol officers photograph and physical description of witness and witness's testimony "was not of critical importance"].) In sum, the People failed to establish Thomas's unavailability as a witness as required by the confrontation clauses of the federal and state Constitutions and the Evidence Code. Accordingly, it was error to allow his preliminary hearing testimony to be read to the jury.

2. *The erroneous admission of Thomas's preliminary hearing testimony was harmless as to the conviction for murder but not the convictions for attempted murder*

Confrontation clause violations are subject to federal harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] (federal constitutional error requires proof of harmlessness beyond a reasonable doubt). (See *People v. Jennings* (2010) 50 Cal.4th 616, 652 [*Crawford* error does not require reversal of a conviction if it was harmless beyond a reasonable doubt]; *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 681 [106 S.Ct. 1431, 89 L.Ed.2d 674] [otherwise valid conviction should not be set aside for confrontation clause violations if, on the whole record, the constitutional error was harmless beyond a reasonable doubt]; see also *People v. Harrison* (2005) 35 Cal.4th 208, 239 [same].)[5] Thus, to avoid reversal of Hayes's

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[5] The People contend, because Thomas was subject to cross-examination at the preliminary hearing, any error in admitting his prior testimony was state law error only, subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836, which permits the People to avoid reversal unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." This argument, devoid of any citation to authority, ignores the United States Supreme Court's unambiguous holding in *Crawford, supra,* 541 U.S. at page 59, that, under the federal Constitution's confrontation right, the prosecutor may use testimonial statements of a witness who does not appear at trial only if the defendant had a prior opportunity for cross-examination *and* the witness is unavailable to testify. (Accord, *People v. Dungo* (2012) 55 Cal.4th 608, 616.)

convictions for murder and attempted murder, it is the People's burden to establish beyond a reasonable doubt that the error in admitting Thomas's preliminary hearing testimony did not contribute to the verdicts (*People v. Mower* (2002) 28 Cal.4th 457, 484; *Louis, supra*, 42 Cal.3d at pp. 993-994) or that a rational jury would have found Hayes guilty absent the error. (See *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) The People have met this burden with respect to Hayes's conviction for the murder of Williams, but not for the attempted murders of Blow and Thomas.

a. *The murder count*

The unchallenged testimony from a number of witnesses was that 79 Swans gang member Hayes arrived at the Seven Trey Hustlers' neighborhood party on a motorcycle, heatedly argued in a loud voice with rival Seven Trey Hustlers gang member Delvin Smith and, as he left, vowed he would be back. A short time later several men came to the scene, and the shootings occurred. When interviewed by Detective Stearns after the murder, Blow, who was with Williams in the alley when he was shot and killed, positively identified Hayes—a man he knew from around the neighborhood—as the individual who shot Williams. Thomas, on the other hand, did not witness the shooting in the alley and did not directly implicate Hayes in that crime although his positive identification of Hayes as the man who had shot in front of Alarcon's home reinforced Blow's statements to the police contradicting the defense contention that Hayes did not return to the Seven Trey Hustlers party after his argument with Smith. Nonetheless, there is no reasonable doubt a rational jury would have convicted Hayes of Williams's murder even if it had not heard Thomas's testimony.

Hayes argues the jury's not true finding on the personal firearm-use enhancement allegation with respect to the murder charge demonstrates it disbelieved Blow's testimony that Hayes had returned to the party and shot Williams, making Thomas's identification of Hayes as the shooter in front of Alarcon's home essential to the murder conviction. A jury's favorable findings, however, cannot be so readily construed. Favorable findings may be the product of confusion, a jury's desire to extend leniency or

the result of a need for compromise to reach a unanimous verdict. (See, e.g., *United States v. Powell* (1984) 469 U.S. 57, 67 [105 S.Ct. 471, 83 L.Ed.2d 461] [review of challenged jury finding independent of other jury findings even if considered inconsistent therewith]; *People v. Santamaria* (1994) 8 Cal.4th 903, 915 [favorable finding may be product of mistake, leniency, compromise, confusion or ennui]; *People v. Pettaway* (1988) 206 Cal.App.3d 1312, 1330-1331 [each count or enhancement must stand on own merits]; *People v. Lopez* (1982) 131 Cal.App.3d 565, 569-571 [rejecting claim that negative finding on enhancement allegation equivalent to special verdict on factual question whether defendant personally used a firearm].)

b. *The attempted murder counts*

Although definitely identifying Hayes as the man who had shot Williams, in his police interview Blow only stated that Hayes was "probably" the shooter in the second incident. He also testified he did not recognize that shooter as the same person who had shot at him in the alley. Thus, Thomas's positive identification of Hayes as the man who had shot at him while he and Blow were outside Alarcon's house, notwithstanding his subsequent effort to recant those statements, undoubtedly played a significant role in the jury's convictions for attempted murder. At the very least, we entertain a reasonable doubt whether the same verdicts would have been reached if the court had excluded Thomas's preliminary hearing testimony. Accordingly, the convictions for attempted murder must be reversed.

3. *The Trial Court Did Not Abuse Its Discretion by Allowing the People To Amend the Information To Add an Additional Firearm-use Enhancement Allegation*

The trial court may permit amendment of an information at any time during the proceedings, even after the evidence has closed, provided the amendment is supported by evidence at the preliminary hearing and does not prejudice the defendant's substantial rights. (Pen. Code, § 1009;[6] *People v. Birks* (1998) 19 Cal.4th 108, 129; *People v.*

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[6] Penal Code section 1009 provides, "The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing

Arevalo-Ireheta (2011) 193 Cal.App.4th 1574, 1581; *People v. Winters* (1990) 221 Cal.App.3d 997, 1005.) A trial court's decision to permit the amendment of an information will not be reversed absent a showing of a clear abuse of discretion. (*People v. Bolden* (1996) 44 Cal.App.4th 707, 716; *People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020.)

As discussed, immediately after the jury was selected and before opening statements, the court granted the People's motion to amend the information to add to the personal-use-of-a-firearm enhancement allegations on each count an armed principal allegation pursuant to Penal Code section 12022.53, subdivision (e). No amendment was proposed to the underlying murder or attempted murder charges themselves. Hayes argues on appeal, as he did in the trial court, that he had prepared his defense on the understanding the People would attempt to prove he had been the actual shooter during both incidents, not that he had aided and abetted the perpetrator of the crimes, and that the change in the prosecution's theory of culpability deprived him of fair notice of the charges.[7] Hayes insists, "[I]t is one thing to raise a reasonable doubt that Mr. Hayes

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of an amended complaint, for any defect or insufficiency, at any stage of the proceedings . . . . The defendant shall be required to plead to such amendment or amended pleading forthwith, . . . and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint."

[7] In his opening brief Hayes does not contend the amendment was not supported by evidence introduced at the preliminary hearing. In his reply brief Hayes challenges the Attorney General's "spin" on that evidence, which would support a finding that someone other than Hayes had actually shot Williams, by noting there was no testimony more than one assailant was present in the alley at the time of the murder. Hayes's presence during the commission of the crime, however, is not required to establish aiding and abetting liability.

himself committed the shooting, but quite another thing to have to show that he did not aid and abet the fellow gang member who did commit the shooting."

In granting the motion the trial court explained its understanding that Hayes's defense was mistaken identification—that is, as Hayes's counsel in fact asserted at trial, although Hayes may have been at the neighborhood party for a brief period and argued with Seven Trey Hustlers gang member Smith, he did not return and was not present during the shooting incidents. That defense was not impacted by the amendment. Defense counsel did not suggest the court was incorrect in its assessment of the defense to be presented, indicate how his trial preparation was actually impaired by the revised firearm allegations or request a continuance to allow him to meet the new allegations. (See *People v. Winters, supra,* 221 Cal.App.3d at p. 1005 [defendant entitled to reasonable postponement when amendment to information requires additional preparation or evidence to meet the change].) There was no abuse of discretion.

4. *There Was No Instructional Error*

Because the court intended to instruct the jury an individual who aids or abets the commission of a crime is equally guilty as an individual who directly and actively commits the act constituting the crime[8] and thus to define aiding and abetting liability,[9] Hayes requested a special instruction that gang membership is insufficient by itself to establish guilt as an aider and abettor. (See *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 940-941 [defendant cannot be prosecuted as an aider and abettor of a murder allegedly committed by his codefendant "merely because he is a member of the same gang"].) The court denied the request, explaining the general instructions it would give were sufficient on this point.

There was no error. (See *People v. Whisenhunt* (2008) 44 Cal.4th 174, 220 [trial court need not give pinpoint instruction "if it merely duplicates other instructions"]; see

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[8] The court instructed the jury with CALJIC No. 3.00 defining principals to include both active participants and those who aid and abet the commission of the crime.

[9] The court instructed the jury with a slightly modified version of CALJIC No. 3.01.

also *People v. Bolden* (2002) 29 Cal.4th 515, 558.) The court gave the jury a limiting instruction concerning its use of evidence of gang activity, pursuant to CALJIC No. 17.24.3, admonishing it that it could use the evidence, if believed, only to determine if the crimes charged were committed for the benefit of a criminal street gang, to assist on issues of identity and motive or to assess the credibility of witnesses. The court specifically instructed, "You are not permitted to consider such evidence for any other purpose." In addition, the court modified CALJIC No. 3.01 and instructed the jury Hayes could be found liable as an aider and abettor only if he had acted "with the specific intent or purpose of committing or encouraging or facilitating the commission of the crime," inserting the word "specific" in the pattern instruction and thereby imposing a requirement that precluded the guilt-by-association finding Hayes's counsel feared. The aiding and abetting instruction further advised the jury, "Mere presence at the scene of the crime which does not itself assist the commission of the crime does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." In light of these other instructions, the requested special instruction was duplicative and properly refused by the trial court.

DISPOSITION

The judgment of conviction for the murder of Williams (count 1) is affirmed. The judgment of conviction for the attempted murders of Blow and Thomas (counts 2 and 3) is reversed. The cause is remanded for retrial of the attempted murder charges should the People so elect.

PERLUSS, P. J.

We concur:

WOODS, J. ZELON, J.