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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. OLIVER DELANO GOODRIDGE, Defendant and Appellant.	B266061 (Los Angeles County Super. Ct. No. BA406893)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed as modified with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Oliver Delano Goodridge, of first degree murder committed for the benefit of a criminal street gang. (Pen. Code, §§ 186.22, subd. (b)(1)(C), 187, subd. (a).)[1] The jury further found defendant personally discharged a firearm causing the victim's death. (§ 12022.53, subd. (d)). The trial court sentenced defendant to 50 years to life in state prison. We modify defendant's presentence custody credit. We affirm the judgment as modified.

II. THE EVIDENCE

On September 27, 2012, defendant, a gang member, was at a McDonald's restaurant in another gang's territory. Defendant was accompanied by several fellow gang members. The two gangs were not rivals per se; they had what was characterized as a live and let live attitude towards each other. Nevertheless, a member of the other gang challenged defendant. A skirmish ensued during which a member of the other gang punched defendant. The incident was captured on surveillance videotape. Gang culture demanded that defendant retaliate. Defendant recruited several fellow gang members or former members to help him including Dayonte Hull, Quantel Nash and Robert Cobb. Mr. Cobb was on probation and was wearing a global positioning system ankle bracelet. Later that day, the four men returned to the scene of the earlier fight. They were in two cars, Mr. Nash's white Acura Legend and defendant's dark green two-door Lexus coupe. Mr. Hull drove defendant's Lexus.

As to the Acura, defendant concedes it belonged to Mr. Nash. Also, on September 28, 2012, Officer Christopher Soto stopped the white Acura Legend depicted in exhibit No. 63 as found in a salvage yard on November 5 or 6, 2012. Brittany Myvett, Mr.

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

Nash's girlfriend or wife, was driving the Acura. Mr. Nash was the passenger. Mr. Nash's gang moniker was carved into the car's upholstery. Detective Matthew Courtney testified the white Acura captured on surveillance video was the same one stopped by Officer Soto and later found in the salvage yard.

As to the Lexus, defendant concedes it was his. Further evidence regarding the Lexus is as follows. On October 28, 2012, Officer David Hernandez executed a traffic stop of the Lexus depicted in "exhibit [No.] 78," a likely misreference to exhibit No. 38. Defendant, the driver, had been speeding. The Lexus was impounded. Exhibit Nos. 69-72 depict the Lexus in a police tow yard. The license plate No. is 6UDJ833. Detective Courtney testified you can see the worn paint on the roof. The door to the gas cap is missing. A state benefits card in defendant's name was in the center console. The detective identified the Lexus as the one captured on surveillance video in the alley at the time of the shooting.

At the time the defendant was in the front passenger seat of his Lexus. Mr. Cobb rode in the rear of the two-seater Lexus. In an alley near the McDonald's restaurant, defendant shot and killed Sador Fessahaye. Mr. Fessahaye was a musician and a rapper. There was no evidence he was a gang member. The shooting was captured, albeit from a distance, on surveillance tape. Detective Courtney testified: "In viewing the video a number of times, when the second vehicle, which is the darker Lexus-style vehicle, comes to a stop, you can see a[n] individual emerge from the passenger side wearing a white T-shirt, and in my viewing of the video, it appeared that there was small distortions of possible puffs of smoke over the roof of the car at the time [the victim] was standing out next to the vehicle."

Two eyewitnesses saw Mr. Fessahaye's assailant emerge from the Lexus's front passenger side and fire his weapon over the car's roof. Mr. Hull subsequently pled no contest to attempted murder and voluntary manslaughter. He testified against defendant at trial pursuant to a cooperation agreement with the prosecution. Mr. Hull testified defendant was the person who shot Mr. Fessahaye. Mr. Hull's testimony was

corroborated by eyewitness statements, surveillance videotapes, cell phone records, and global positioning system records.

III. DISCUSSION

A. Jury Instructions on Accomplice Testimony

1. Instructions

Defendant challenges the instructions on accomplice testimony. Section 1111 states: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Consistent with section 1111, the jury was instructed: "An accomplice is a person who is subject to prosecution for the identical offense charged in Count 1 against the defendant on trial by reason of aiding and abetting. [¶] You cannot find a defendant guilty based upon the testimony of an accomplice unless that testimony is corroborated by other evidence which tends to connect the defendant with the commission of the offense. [¶] Testimony of an accomplice includes any out-of-court statement purportedly made by an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true. [¶] To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the

crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice is corroborated." (CALJIC Nos. 3.10, 3.11, 3.12.)

2. Fundamental fairness and due process

Defendant argues CALJIC Nos. 3.10, 3.11 and 3.12 "presume[] the jury's ability to disregard accomplice testimony" in determining the question of accomplice corroboration. Defendant argues these instructions are fundamentally unfair and violate the federal Fourteenth Amendment due process clause. He relies on *Jackson v. Denno* (1964) 378 U.S. 368, 376-380 (*Jackson*), and *Bruton v. United States* (1968) 391 U.S. 123, 131-136 (*Bruton*).

In *Jackson,* the United States Supreme Court found unconstitutional a New York procedure that required a jury to determine whether a non-testifying accomplice's confession was voluntary. The procedure potentially put a jury in the untenable position of having to disregard a truthful confession it found involuntary and assess only the other evidence in determining the defendant's guilt. (*Jackson, supra,* 378 U.S. at pp. 376-391.) The United States Supreme Court noted: "The jury . . . may find it difficult to understand the policy forbidding reliance upon a coerced, but true, confession . . . . That a trustworthy confession must also be voluntary if it is to be used at all, generates natural and potent pressure to find it voluntary. Otherwise the guilty defendant goes free. Objective consideration of the conflicting evidence concerning the circumstances of the confession becomes difficult and the implicit findings become suspect." (*Id.* at p. 382, fn. omitted.) Further, the high court explained: "If [the jury] finds the confession involuntary, does the jury—indeed, can it—then disregard the confession in accordance with its instructions? If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable

doubt actually result in acquittal when the jury knows the defendant has given a truthful confession?" (*Id.* at p. 388.) The high court emphasized the jury returned only a general verdict. Thus, there was no way to determine whether the jurors found the confession voluntary or even if it resolved the voluntariness issue at all. (*Id.* at pp. 379-380.)

In *Bruton,* a defendant and a codefendant were jointly tried. The codefendant's confession implicated the defendant. The codefendant did not testify and thus was not subject to cross-examination. The jury was instructed to consider the confession only with respect to the codefendant. But there was no way to determine whether the jury in fact ignored the confession in assessing the defendant's guilt. (*Bruton, supra*, 391 U.S. at p. 136.) The United States Supreme Court set aside the conviction. The high court disagreed with the basic premise that a properly instructed jury could ignore the codefendant's confession in determining the defendant's guilt. The high court explained: "'In joint trials . . . when the admissible confession of one defendant inculpates another defendant, . . . the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot "segregate evidence into separate intellectual boxes." . . . It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.'" (*Bruton, supra*, 391 U.S. at p. 131, quoting *People v. Aranda* (1965) 63 Cal.2d 518, 528-529.) The high court concluded: "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but there credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift

blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. [Citation.]" (*Bruton, supra*, 391 U.S. at pp. 135-136, fns. omitted.)

Jackson and *Bruton* concern narrow exceptions to the general rule that jurors are presumed to follow the trial court's instructions. That general rule is firmly planted in California jurisprudence. (E.g., *People v. O'Malley* (2016) 62 Cal.4th 944, 970; *People v. Charles* (2015) 61 Cal.4th 308, 324, fn. 8; *People v. Bryant* (2014) 60 Cal.4th 335, 412, 455; *People v. Pearson* (2013) 56 Cal.4th 393, 477; *People v. Aranda* (2012) 55 Cal.4th 342,387-388; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1321; *People v. Alexander* (2010) 49 Cal.4th 846, 921; *People v. Coffman* (2004) 34 Cal.4th 1, 73; *People v. Gamache* (2010) 48 Cal.4th 347, 376; *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Sanchez* (2001) 26 Cal.4th 834, 852; *People v. Kemp* (1961) 55 Cal.2d 458, 477; *People v. Gray* (1882) 61 Cal. 164, 182-183.) It is likewise firmly implanted in federal constitutional jurisprudence. (*Kansas v. Carr* (2016) 577 U.S. __, __ [136 S.Ct. 633, 645]; *Jones v. United States* (1999) 527 U.S. 373, 394; *Shannon v. United States* (1994) 512 U.S. 573, 585; *Greer v. Miller* (1987) 483 U.S. 756, 766, fn. 8; *Richardson v. Marsh* (1987) 481 U.S. 200, 206.)

We do not find *Jackson* nor *Bruton* controlling. There are distinctions between our case and *Jackson* and *Bruton*. First, neither the defendant who confessed in *Jackson* nor the codefendant who confessed in *Bruton* was subject to cross-examination. Mr. Hull was subject to cross-examination in the present case. Moreover, he was comprehensively cross-examined by defense counsel. Second, juror noncompliance in both *Jackson* and *Bruton* was immune from correction on appeal. In *Jackson*, there was no way to know whether the jury found the defendant's confession was voluntary or involuntary. In *Bruton*, there was no way to know whether the jury disregarded the codefendant's confession in finding the defendant guilty. On appeal in the present case, we can and will consider the sufficiency of the evidence corroborating Mr. Hull's testimony. Subject to that review, we presume the jury followed the corroboration instruction.

3. Accomplice as a matter of law

The trial court instructed the jury, "If the crime of MURDER was committed by anyone, the witness DEYONTE HULL was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." Defendant argues it was error to instruct the jury that Mr. Hull was an accomplice as a matter of law. We agree with the Attorney General that defendant forfeited this claim by failing to object to the instruction in the trial court. (*People v. Romero* (2015) 62 Cal.4th 1, 40; *People v. Bryant, supra,* 60 Cal.4th at p. 418.) Even if the issue were properly before us, we would not find any prejudicial error. As our Supreme Court held in *People v. Carrasco* (2014) 59 Cal.4th 924, 969: "[D]efendant could not have been prejudiced by the court's . . . instruction that . . . a witness adverse to defendant[] was an accomplice as a matter of law. Rather, the erroneous instruction could only have benefitted him by negating any import of [the witness's] testimony unless corroborated . . . ." Defendant also argues the accomplice, together with the aiding and abetting, instructions in effect directed the jury to find him guilty of express malice murder. We agree with the Attorney General that there is no reasonable likelihood the jury applied the instructions in the manner defendant suggests. (See *People v. Hardy* (1992) 2 Cal.4th 86, 151; *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1275-1277.)

4. Mere opportunity to commit the crime

Defendant asserts prejudicial error resulted from the failure to sua sponte instruct the jury that mere opportunity to commit the crime is insufficient to corroborate accomplice testimony. We find no error. As noted above, the trial court gave the standard instructions regarding accomplice testimony. The jurors were instructed that Mr. Hull's testimony must be corroborated. (CALJIC No. 3.11.) Further, the jurors were instructed that the corroborating evidence must, independent of the Mr. Hull's testimony, tend to connect defendant to the shooting of Mr. Fessahaye. (CALJIC No. 3.12). Those

instructions correctly stated the law. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 492.) In *Hillhouse*, our Supreme Court rejected an instruction to the effect that, "'It is not sufficient corroboration if the evidence merely shows an association between the accomplice and the person who committed the offense, or merely places the defendant at the scene of the crime, or merely casts a grave suspicion upon the defendant.'" Here, as in *Hillhouse*, "[I]t was not necessary additionally to describe any particular type of evidence that would *not* be sufficient." (*Id.* at p. 493.)

5. Sufficiency of the corroborating evidence

Defendant challenges the sufficiency of the corroborating evidence. Our Supreme Court set forth the standard of review in *People v. Romero, supra*, 62 Cal.4th 1, 32-33: "[F]or the jury to rely on an accomplice's testimony about the circumstances of an offense, it must find evidence that '"without aid from the accomplice's testimony, tend[s] to connect the defendant with the crime."' [Citations.] 'The entire conduct of the parties, their relationship, acts, and conduct may be taken into consideration by the trier of fact in determining the sufficiency of the corroboration.' [Citations.] The evidence 'need not independently' . . . corroborate every fact to which the accomplice testifies [citation], and '"may be circumstantial or slight and entitled to little consideration when standing alone"' [citation]. 'The trier of fact's determination on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' [Citation.]" (Accord, *People v. Nelson* (2011) 51 Cal.4th 198, 218.) As noted above, the jury was instructed: "In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime."

There was substantial evidence that reasonably tended to connect defendant with the commission of Mr. Fessahaye's murder. Around 2:30 p.m., prior to the shooting,

defendant engaged into a fight with members of another gang. The incident took place at a McDonald's restaurant in the other gang's territory. The fast food establishment was diagonally across the street from the alley where Mr. Fessahaye was shot later that day. As seen on surveillance video, defendant was wearing a white, short-sleeved T-shirt. Detective Courtney identified defendant. Cell phone records also placed defendant's cell phone in the vicinity of the McDonald's restaurant at the time of the fight.

From approximately 3:13 to 3:15 p.m., defendant's Lexus was parked at the Gilbert Lindsey Recreation Center, a place where members of his gang congregated. At approximately 4:30 p.m., surveillance video from two locations captured Mr. Nash's white Acura Legend followed by defendant's dark green Lexus coupe driving through an alley near the McDonald's restaurant. Defendant's Lexus was identified by: its color, make and model; the unusual location of the front license plate—in the windshield; oxidation marks on the sedan; and a partial license plate number provided by an eyewitness. On appeal, defendant concedes it was his Lexus. The front seat passenger in the Lexus was wearing a white, short-sleeved T-shirt, which was consistent with the clothing defendant was wearing two hours earlier. None of the Lexus's other occupants was wearing a short-sleeved white T-shirt. The driver was wearing a white, sleeveless T-shirt. Mr. Cobb, the rear passenger, was wearing a short-sleeved dark or black T-shirt. Cellular telephone records showed Mr. Hull's and Mr. Nash's cell phones were in the vicinity of the alley between 4:13 p.m. and 4:23 p.m. Mr. Cobb's global positioning system tracking placed him in the same area. The Lexus stopped partway through the alley, near where Mr. Fessahaye and two others stood. The front seat passenger fired a weapon over the roof of the vehicle striking the victim. Two eyewitnesses saw the front seat passenger fire a gun over the roof of the car.

Defendant's Lexus returned quickly and by a circuitous route to Gilbert Lindsey Recreation Center, arriving at about 4:35 p.m. The Acura also returned to the park a short time later. An individual wearing a white, sleeveless T-shirt emerged from the driver's side of the Lexus. An individual in a white, short-sleeved T-shirt emerged from the passenger side of the Lexus. Mr. Cobb, wearing a short-sleeved, dark colored or black T-

shirt, got out on the passenger side of the Lexus, after the other two had exited. Six days after Mr. Fessahaye was shot, defendant sent text messages stating, "Naw shanika jus call me talking abt I gotta leave la everybody kno she said she wunna meet with me nd talk but ima tell . . . Jus abt the fight not the shootn." A week after the shooting, defendant changed his cell phone number. Two months after Mr. Fessahaye was killed, defendant was detained. The license plate on defendant's Lexus had been changed.

B. Voluntary Manslaughter Instruction

Defendant asserts the trial court had a sua sponte duty to instruct on heat-of-passion voluntary manslaughter as a lesser included offense of murder. A heat-of-passion voluntary manslaughter instruction must rest on evidence of *both* objectively adequate provocation and subjective heat of passion. (*People v. Enraca* (2012) 53 Cal.4th 735, 759; *People v. Lee* (1999) 20 Cal.4th 47, 60.) The provocation must be caused by the victim or by conduct the defendant reasonably believes the victim has engaged in. (*People v. Souza* (2012) 54 Cal.4th 90, 116; *People v. Avila* (2009) 46 Cal.4th 680, 705.) The provocation must suffice to cause an ordinary reasonable person of average disposition to act rashly, without deliberation, and from passion rather than judgment. (*People v. Enraca, supra,* 53 Cal.4th at p. 759; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) The defendant must be actually influenced by a strong passion at the time of the homicide. (*People v. Enraca, supra,* 53 Cal.4th at p. 759; *People v. Moye* (2009) 47 Cal.4th 537, 550.) A trial court has no duty to instruct on a lesser included offense if it is not supported by substantial evidence. (*People v. Souza, supra,* 54 Cal.4th 90, 116; *People v. Avila, supra,* (2009) 46 Cal.4th 680, 705.) Our review is de novo. (*People v. Booker* (2011) 51 Cal.4th 141, 181; *People v. Avila, supra,* 46 Cal.4th at p. 705.)

Here, there was no substantial evidence of provocation. Defendant was subjected to a gang slur followed by a fight with members of another gang during which someone punched him. The punch was insufficient provocation to support instruction on voluntary manslaughter. As our Supreme Court has held, "Simple assault . . . does not rise to the

level of provocation necessary to support a voluntary manslaughter instruction." (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827; see *People v. Wright* (2015) 242 Cal.App.4th 1461, 1483.) That defendant was also the subject of a gang insult or challenge did not create sufficient provocation. (*People v. Enraca, supra,* 53 Cal.4th at p. 759; *People v. Avila, supra,* 46 Cal.4th 680, 706; *People v. Manriquez* (2005) 37 Cal.4th 547, 585.)

There was no evidence the provocation was caused by Mr. Fessahaye. There was no evidence the Mr. Fessahaye, who was never armed, and shot two hours later, had anything to do with the fight at the McDonald's restaurant. There was no evidence Mr. Fessahaye was: the person who punched defendant; present when defendant was punched; or even associated with the assailant's gang. There was no evidence Mr. Fessahaye did anything to cause defendant to act in the heat of passion. And there was no evidence defendant acted in the heat of passion. There was evidence defendant was angry in the immediate aftermath of the fight. Mr. Hull testified that when defendant first arrived at his house, defendant was angry. But there was no evidence defendant was motivated by anger or rage or any intense emotion two hours later when Mr. Fessahaye was shot. (*People v. Manriquez, supra,* 37 Cal.4th at p. 585; *People v. Wickersham* (1982) 32 Cal.3d 311, 327, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 201.) A desire for revenge does not satisfy the provocation requirement. (*People v. Gonzales* (2011) 52 Cal.4th 254, 301; *People v. Guiterrez* (2002) 28 Cal.4th 1083, 1143-1144.) And two hours was sufficient time for defendant's passion to have subsided and his reason returned. (See *People v. Beltran* (2013) 56 Cal.4th 935, 951; *People v. Wickersham, supra,* 32 Cal.3d at p. 327.)

C. The Alternate Juror

On the second day of deliberations, the parties stipulated to excuse a pregnant juror who had become ill. An alternate juror was sworn and seated with the jury. The trial court instructed the jury to begin its deliberations anew. Defendant contends, "Reversal is required because the trial court erred in failing to declare a mistrial inasmuch as the reconstituted jury was inherently incapable of being the impartial tribunal required by the federal and state Constitutions." Defendant's argument rests on the fact that the alternate juror was substituted after deliberations had commenced. Post-submission substitution is authorized by law in California. (§ 1089; *People v. Collins* (1976) 17 Cal.3d 687, 694.) Defendant argues that *Collins* should be reconsidered. However, as defendant recognizes, this court is bound by *Collins.* (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We decline defendant's invitation to "urge the Supreme Court to reconsider *Collins.*"

D. Cumulative Error

Defendant contends he is entitled to reversal because of cumulative error. We find no prejudicial legal error. Therefore, we reject defendant's argument the cumulative effect of all the errors requires reversal. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

E. Presentence Custody Credit

The trial court gave defendant credit for 857 days in presentence custody. However, defendant was arrested on January 22, 2013, and sentenced on May 29, 2015. The parties agree and we find defendant was in presentence custody for 858 days. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177

Cal.App.4th 454, 469.) The judgment must be modified and the abstract of judgment amended to so reflect.

IV. DISPOSITION

The judgment is modified to reflect 858 days of presentence custody credit. The judgment is affirmed in all other respects. Upon remittitur issuance, the superior court clerk is to amend the abstract of judgment to reflect 858 days of presentence custody credit. The superior court clerk is to then deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

BAKER, J.