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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAMON L. FRANKLIN,

Defendant and Appellant.

B232449

(Los Angeles County  
Super. Ct. No. GA071789)

APPEAL from a judgment of the Superior Court of Los Angeles County, Suzette Clover, Judge. Modified, and as modified, affirmed.

Mark S. Givens, 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, Steve D. Matthews and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

A jury found defendant and appellant Damon L. Franklin guilty of attempted murder, being a felon in possession of a firearm, and criminal threats. The jury also found true gun and gang allegations. Defendant contends on appeal that the trial court abused its discretion by excluding evidence he was not the shooter and by admitting certain gang evidence. We reject these contentions but modify the judgment to correct defendant's sentence. We affirm the judgment as modified.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background.

#### A. 2002: Defendant and Coleman fight in Ironwood State Prison.

In 2002, Kevin Eugene Coleman and defendant were housed together for about six to seven weeks in Ironwood State Prison. Coleman was a member of the Pasadena Denver Lanes, a Blood gang, and defendant was a member of the Raymond Avenue Crips. While in prison, Coleman and defendant had a pre-arranged "cell fight" outside the presence of guards. Coleman thought he had the upper hand in the fight.

#### B. June 7, 2007: Coleman is threatened.

Five years later, defendant and Coleman were no longer in prison. On the morning of June 7, 2007, Coleman was at Jim's Burger, a known Blood hangout, in Altadena. Coleman was talking to Ricky Pickens, a gang specialist for the Pasadena Police Department, when defendant drove up in a teal or blue car owned by his girlfriend.<sup>1</sup> Defendant, who wore a blue bandana, threw gang signs, made his fingers into a gun figure and " 'pulled' " the trigger, and yelled at defendant, " 'I'm going to kill you, cuz.' " Concerned, Coleman left.

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<sup>1</sup> Although Coleman identified defendant as the driver of the car, Pickens testified at trial that he did not know whether defendant was the driver.

C. *June 12, 2007: Coleman is shot.*

On June 12, 2007, five days after seeing defendant at the burger stand, Coleman was at home at 1675 Marengo. He walked outside and was shot multiple times. At the hospital, Coleman told his aunt and the police that Tank (defendant's moniker) from Raymond Avenue Crips shot him.

On the same day Coleman was shot, his neighbor, Gwendolyn Hall, who witnessed the shooting, identified defendant as the shooter from a photographic six-pack.<sup>2</sup>

After his hospitalization, Coleman returned to 1675 Marengo for nine months to recuperate, but he hasn't been to the house since then. Getting shot changed Coleman's life, causing him to renounce his gang lifestyle. A year after the shooting, he gave a class to gang officers about gangs.

D. *June 2007: Defendant's mother finds a gun in her house.*

In June 2007, defendant lived with his mother. She found a gun in her dresser. Defendant admitted at trial that the gun was his.<sup>3</sup>

E. *Gang evidence.*

Coleman belongs to a Blood gang, the Pasadena Denver Lanes, and he was an "Original Gangster" or "O.G." Coleman testified that he was jumped into the gang when he was 12, and that his gang's main rivals are the Altadena Block Crips and the Raymond Avenue Crips.

Los Angeles Sheriff's Department Detective Joel Nebel testified as the People's gang expert. The Raymond Avenue Crips has over 200 documented members, and the gang's primary activities range from loitering and public drinking to murder and attempted murder. The color blue is associated with the gang. Defendant is a Raymond

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<sup>2</sup> Hall initially did not make an identification from gang photographs officers showed her, although she thought one man had features similar to the shooter. Defendant wasn't in the gang books she was shown.

<sup>3</sup> No evidence was introduced linking the gun to the shooting of Coleman.

Avenue Crip, and his moniker is Tank or Little Tank. He has gang tattoos, including the letters “R” and “C” and “BK” for Blood Killer.

Detective Nebel also testified that the Altadena Block Crips and Raymond Avenue Crips have a violent relationship with the Pasadena Denver Lanes Bloods. From January 2006 to the end of December 2006, there were a lot of shootings between the Crips and Pasadena Denver Lanes Bloods, and 2007 was about the same. Officers believe that the catalyst for the violence was the murder by Crips of a respected Pasadena Denver Lanes Bloods member, Draper Manning, in January 2006. Thereafter, on Manning’s birthday, June 4, 2007, Laron Brown, a Crip, was shot and killed by, it is believed, a Pasadena Denver Lane. That same day, June 4, 2007, a Crip shot a Pasadena Denver Lanes member in the arm. The next day, Crips drove by a well-documented Blood hangout and shot Michael Pugh, a Blood, in the arm. Three days later, on June 7, defendant threatened Coleman at Jim’s Burgers, and five days after that, Coleman was shot.

According to Detective Nebel, respect means everything to gang members. To gain respect, gang members must “put in work,” which can be making money for the gang, and fighting and killing rival gang members. A gang member gets more respect for putting in violent work, and most of the Original Gangsters have a violent history.

## **II. Procedural background.**

On January 25, 2010, a jury found defendant guilty of count 1, deliberate, willful and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664);<sup>4</sup> count 2, possession of a firearm by a felon (former § 12021, subd. (a)(1));<sup>5</sup> and count 3, criminal threats (§ 422). The jury also found true gang allegations under section 186.22, subdivision (b)(1)(C), as to counts 1 and 3, and gun-use allegations under section 12022.53, subdivisions (b), (c), and (d), as to count 1.

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<sup>4</sup> All further undesignated statutory references are to the Penal Code.

<sup>5</sup> The jury found not true a gang allegation as to count 2.

On February 17, 2011, the trial court sentenced defendant, on count 1, to 15 years to life in prison, doubled to 30 years based on a prior strike that the court found true, plus 25 years to life for the gun enhancement. The court sentenced him, on count 3, to a consecutive two years, doubled to four years, plus five years for the prior serious felony (§ 667.5). The court imposed and stayed the sentence on count 2. The court gave defendant 1,513 days of custody credit.

## **DISCUSSION**

### **III. The trial court did not abuse its discretion by excluding evidence defendant was not the shooter.**

Defendant contends that the trial court abused its discretion by excluding evidence the victim, Coleman, said defendant was not the shooter. We disagree with this contention, because the court never made an order excluding the evidence.

Only relevant evidence is admissible. (Evid. Code, § 350.) “ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210; see also *People v. Lee* (2011) 51 Cal.4th 620, 642; *People v. Mills* (2010) 48 Cal.4th 158, 193; *People v. Williams* (2008) 43 Cal.4th 584, 633-634.) Relevant evidence, however, may be excluded, in the trial court’s discretion, if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352; *Lee*, at p. 643.) A trial court has broad discretion in determining whether evidence is relevant and whether Evidence Code section 352 precludes its admission. (*Mills*, at p. 195; *Williams*, at p. 634.) We apply the abuse of discretion standard to a trial court’s rulings on the admissibility of evidence, including those turning on the relevance or probative value of the evidence in question. (*Lee*, at p. 643.)

Gwendolyn Hall was defendant's neighbor and a percipient witness to the shooting. Before she testified, defense counsel disclosed that Hall told him about a conversation she had with Coleman, who said he couldn't testify truthfully about who shot him because the real shooter was a criminal confederate who could implicate Coleman in criminal conduct and send him to prison. The trial court said, "[o]bviously, that's not hearsay and could go to Mr. Coleman's credibility, depending on what she ultimately says." But because Hall had already proven to be a volatile witness prone to making inconsistent statements, the court asked defense counsel to make an offer of proof as to what Hall would testify.

Hall therefore testified at an Evidence Code section 402 hearing (402 hearing) that while she was on a three-way call with her uncle and Coleman, Coleman said he didn't know who shot him and he'd lied because he didn't want to go to jail. Believing that her uncle was behind the call, Hall told her uncle she would have him put in jail for witness tampering.<sup>6</sup> At the conclusion of the 402 hearing, the trial court and counsel had an extended conversation about what portions of Hall's testimony were admissible. At no time during that proceeding did the parties expressly discuss Coleman's statement to Hall that defendant wasn't the shooter. At no time did the trial court make an express ruling that Hall's testimony about Coleman's statement was inadmissible.

Defendant, however, appears to rely on this admonishment the trial court gave to Hall before she testified: "Miss Hall, I need to remind you that you are not going to talk about anything about your uncle." In the context of the entire proceedings involving Hall, however, the court was clearly referring to Hall's accusation that her uncle, in setting up the three-way call with Coleman, was tampering with a witness. Thus, the court said that "[t]he stuff about why she lied and the uncle is not relevant." The court did not say that Coleman's statements made during that three-way call about the shooter

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<sup>6</sup> Hall also testified about other matters, for example, she saw Coleman with a gun the day he was shot; he was a drug dealer; and Coleman, a detective, and an assistant district attorney threatened her.

were irrelevant. In fact, the court had previously clearly said that the statements were not hearsay and went to Coleman's credibility. The court never said anything to the contrary.

We conclude that the trial court did not exclude Hall's testimony about Coleman's statement. Therefore, the court neither abused its discretion nor deprived defendant of any federal constitutional right to present such evidence.

#### **IV. Gang evidence.**

Next, defendant contends that the trial court abused its discretion by failing to exclude excessive gang evidence that was irrelevant and unduly prejudicial and amounted to improper propensity evidence. We disagree that the trial court abused its discretion.

##### *A. The gang evidence.*

##### **1. Evidence of warfare between Bloods and Crips and defendant's tattoos.**

The prosecutor sought to introduce a "multi-page printout" delineating a history of various gangs and the warfare between Bloods and Crips. Defense counsel objected under Evidence Code section 352. After discussing the matter and agreeing that some of evidence was cumulative, the prosecutor suggested limiting the time frame to two months before the shooting through June 20, 2007 and to seven incidents. The trial court found that the probative value of that evidence outweighed any prejudice and admitted the evidence and a timeline of the seven incidents. (Peo. Ex. 15.)

Detective Nebel then testified about the gang warfare between the Raymond Avenue Crips (defendant's gang) and the Pasadena Denver Lanes (Coleman's gang). In January 2006, Crips killed Draper Manning, a Blood. On Manning's birthday, June 4, 2007, Pasadena Denver Lane killed Laron Brown. That same day, a Crip shot a Pasadena Denver Lanes member in the arm. The next day, Crips shot a Blood in the arm. Three days later, on June 7, defendant threatened Coleman at Jim's Burgers, and five days after that, Coleman was shot.

Detective Nebel also testified about defendant's tattoos and their significance.

## **2. Defendant's testimony.**

Defendant testified in his defense. On direct examination, defendant testified he was a member of the Raymond Avenue Crips and thought of himself as a current member "to some extent." He joined the gang when he was 16 or 17, and he associated primarily with Crips while in prison. On June 12, 2007, the day Coleman was shot, defendant was at Huntington Memorial Hospital, unaware Coleman was in the emergency room. Defendant encountered Blood gang members, and when Detective Okamoto responded to the scene, defendant told the detective he was a member of Raymond Avenue Crips. Officer Michael Gligorijevic, however, testified that defendant told him at the hospital that he was an ex-gang member.

On cross-examination, the prosecutor asked defendant what gang members do when they hang out, how he became a Raymond Avenue Crip, the color of clothing he wore, why and how gang members put in work, and about his tattoos. Defense counsel objected to the questioning, describing it as only marginally relevant, given that defendant wasn't denying he was almost a lifelong Raymond Avenue Crip. The prosecutor said he would question defendant a little more about his tattoos and how they relate to defendant's intent. The trial court cautioned the prosecutor not to extend his questions to past bad acts. Defense counsel argued, that the "stress being laid on gang membership is inherently prejudicial and involves the concept of guilt by association that courts and the Legislature has permitted under [section] 186.22 legislation." He therefore "federaliz[ed]" his objection. The court told the prosecutor he could go into the areas he had talked about but to move it along.

On resuming cross-examination of defendant, the prosecutor asked defendant about the "B" and "K" tattooed on his shoulders and the "R" and "C" on his calves. The "B" and "K" stand for Blood Killer, and the "R" and "C" stand for Raymond Crips. The prosecutor asked about respect, and whether respect is a form of currency on the streets. He asked whether putting in work includes shooting a rival.



B. *The trial court did not abuse its discretion by refusing to exclude the gang evidence.*

Defendant contends that this evidence should have been excluded, under Evidence Code section 352, because it was irrelevant and unduly prejudicial. We disagree.

“Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative. [Citations.] . . . [¶] However, gang evidence is inadmissible if introduced only to ‘show a defendant’s criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]’ [Citations.]” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193 (*Avitia*); see also *People Williams* (1997) 16 Cal.4th 153, 193.) Even where relevant, gang evidence should be carefully scrutinized before it is admitted because it may have a highly inflammatory impact on the jury. (*Avitia*, at pp. 192-193.) A trial court’s admission of evidence, including gang testimony, is reviewed for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 547.) The trial court’s ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9.)

Although defendant concedes here that some gang evidence was admissible, he argues that the evidence introduced was excessive. But where, as here, the case is gang-related and a gang enhancement is alleged, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect. (*People v. Williams, supra*, 16 Cal.4th at p. 193; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 [“But evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime”]; *People v. Samaniego* (2009) 172 Cal.App.4th

1148, 1167 [“Gang evidence is relevant and admissible when the very reason for the underlying crime, that is the motive, is gang related”].)

The history of warfare between the Pasadena Denver Lanes and the Raymond Avenue Crips was relevant to establish a motive for the shooting of Coleman. To prove this motive and intent for the shooting, the prosecutor introduced evidence that the two men fought while in prison together, for no apparent reason other than they were from rival gangs. Detective Nebel testified that the rivalry between the two gangs intensified when Crips shot a prominent Blood member in 2006. That shooting gave rise to subsequent incidents in 2006 and 2007, including the June 7, 2007 criminal threats to Coleman and the June 12, 2007 shooting of Coleman. Placing the shooting in this context explained why defendant would shoot Coleman.

The risk of undue prejudice was minimized by the trial court’s careful consideration of the proposed evidence. Although the prosecutor initially asked to introduce a more extensive history of the rivalry between the Crips and Bloods, the court limited the evidence in time and in scope—to a period of about one year before Coleman’s shooting to the date of his shooting and to seven incidents, including the criminal threats made to Coleman and the shooting of Coleman. Detective Nebel’s testimony about those incidents were limited to the bare facts, and there was no suggestion defendant was involved in any incident other than those concerning Coleman.

Defendant’s argument that his concession of membership in the Raymond Avenue Crips rendered evidence of his gang tattoos irrelevant ignores his attempt at trial to downplay the nature of his gang membership. Defendant testified that at the time Coleman was shot, he (defendant) was a member of Raymond Avenue Crips only “to some extent.” He also suggested that “BK” and “RC” tattoos are common. Those tattoos, however, were relevant to his active status in the gang. Therefore, even though the defense stipulated that photographs of defendant accurately depicted his tattoos, that stipulation did not render the prosecutor’s questions about the tattoos unnecessary or unduly prejudicial.

Given that the crimes at issue were possibly connected to a concerted effort to intensify the war between the Raymond Avenue Crips and the Pasadena Denver Lanes, we cannot say that the trial court abused its discretion by admitting evidence of that warfare or of defendant's active status in the gang. (Cf. *Avitia*, *supra*, 127 Cal.App.4th 185 [it was an abuse of discretion to admit gang evidence where there was no gang allegation or evidence the crime was gang-related]; *People v. Bojorquez* (2002) 104 Cal.App.4th 335 [gang evidence was admissible on the limited issue of bias, and the trial court abused its discretion by admitting wide-ranging gang evidence].)

Defendant also contends that the introduction of "excessive" gang evidence violated his federal constitutional right to a fair trial. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 70; *People v. Albarran* (2007) 149 Cal.App.4th 214.) In *Albarran*, the defendant was charged in connection with a shooting. Gang evidence was admitted to establish motive and intent with respect to the underlying charges and to prove gang-enhancement allegations. After a jury found Albarran guilty of the charges, the trial court found there was insufficient evidence to support the true findings on the gang-enhancement allegations and granted Albarran's new trial motion on that issue. The Court of Appeal found that the trial court should have granted the motion in its entirety, namely, as to the underlying charges as well as to the gang allegations, because admission of the gang evidence rendered the trial fundamentally unfair. (*Id.* at pp. 227-232.) In contrast to *Albarran*, we have found that the gang evidence was properly admitted. There was no improper or excessive use of highly inflammatory evidence and no undue prejudice.

#### **V. The gang expert's testimony.**

Defendant next contends that the prosecutor, in asking the gang expert hypothetical questions that closely tracked the facts of the case, improperly elicited testimony from the expert on the ultimate issue. Based on recent California Supreme Court authority, we reject this contention.

Generally, an expert may render opinion testimony on the basis of facts given in a hypothetical question that asks the expert to assume their truth. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) “It is required, not prohibited, that hypothetical questions be based on the evidence.” (*People v. Vang* (2011) 52 Cal.4th 1038, 1041, see also *id.* at p. 1046 [“the questions must be rooted in the evidence of the case being tried, not some other case”].) And although an expert’s opinion on a defendant’s guilt or innocence is inadmissible because it is of no assistance to the trier of fact, testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact. (*Id.* at p. 1048.) The jury still must determine whether to credit the expert’s opinion at all and whether the facts in the hypothetical questions are actual facts. (*Id.* at pp. 1049-1050.)

Here, the prosecutor asked hypothetical questions of the gang expert that closely tracked the facts of the case:

“[The prosecutor]: . . . I want you to assume a hypothetical. An individual is driving a teal-colored car. Person driving the car is wearing a blue bandana identified as a Crip gang member. He drives up to Jim’s Burger, pulls up, and threatens an O.G. Blood gangster there. O.G. gangster gets into his car and leaves. Is that disrespectful to the Blood gang?

“[Detective Nebel]: Yes; very disrespectful.

“[The prosecutor]: Why is that?

“[Detective Nebel]: As part of the intimidation that gangs have is they will drive around and drive into known gang member or rivals’ territories and try to provoke incidents and/or just taunt at the enemy.”

The prosecutor later asked:

“[The prosecutor]: I’ll take you back to my earlier hypothetical. I want you to assume there is a known Blood hangout. An individual rolls up with the Crib rag around his neck, drives up, points to an O.G. Blood, and threatens to kill him. Is that threat against an O.G. Blood for the benefit of the gang?

“[Detective Nebel]: Yes, it is.

“[The prosecutor]: How does that act benefit the gang?

“[Detective Nebel]: Based on the fact that the individual is first of all telling him and causing the fear or intimidation that he’s giving him, that benefits him and benefits the gang in general as the fear can continue.

“[The prosecutor]: I want you to assume another hypothetical. Assume there is an O.G. Blood gangster at his home. Assume that a Crip comes up to his home, goes up to him, shoots him six times, and he survives. Is the act of going up to the Blood gangster and shooting him at his home, is that benefitting or done for the benefit of the Crip gang?

“[Detective Nebel]: Yes.

“[The prosecutor]: What are you basing that opinion on?

“[Detective Nebel]: Also based on the fact that the individual is a Crip. He goes to a Blood’s rival’s house. It’s benefiting the gang on the fact that he was able to put work in on one of the enemies and benefited the Crips by getting the notoriety of having that crime. It also instills fear in the community which also benefits the Crips in the fact that they gain respect that way. So it also benefits them in that sense.”

Under *Vang*, these hypothetical questions were proper. In *Vang*, the only differences between the trial testimony and the hypothetical were the parties’ names: the prosecutor called the victim a “ ‘ “young baby gangster” ’ ” instead of his name and referred to the four defendants as “ ‘ “three baby gangsters and one O.G.” ’ ” (*People v. Vang, supra*, 52 Cal.4th at p. 1045.) “Hypothetical questions must not be prohibited solely because they track the evidence too closely, or because the questioner did not disguise the fact the questions were based on the evidence.” (*Id.* at p. 1051.) The prosecutor’s questions here were posed in the form of hypotheticals. The facts in the hypothetical questions were based on the evidence. There was evidence, for example, that the man who threatened Coleman at Jim’s Burgers drove a teal car and wore a blue

bandana, that Coleman was an “O.G.,” and that Coleman was shot multiple times. The hypothetical questions were therefore appropriate.<sup>7</sup>

In attacking the propriety of the hypothetical questions, defendant appears to suggest we should rely on Justice Werdegar’s concurrence in *Vang* stating that although an expert may properly testify on gang culture and practices, expert opinion is generally not necessary to explain how a crime might be gang-motivated. (*People v. Vang, supra*, 52 Cal.4th at pp. 1052-1055 [conc. opn. of Werdegar, J.].) We are, however, bound by the majority opinion in *Vang*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)<sup>8</sup>

#### **VI. Custody credits.**

The trial court found that defendant had 1,513 days of custody credit: 1,344 actual days plus 169 days of good-time/work-time. Defendant, however, was arrested on June 20, 2007 and presumably booked that day. He was sentenced on February 17, 2011. The actual days of custody therefore is 1,339. Fifteen percent of 1,339 is 200, and, adding those numbers is 1,539. (§ 2933.1.) Defendant is entitled to a total of 1,539 days of credit. (§ 2900.5, subd. (a); *People v. Ravaux* (2006) 142 Cal.App.4th 914, 919-921 [a defendant is entitled to credit for the day he was booked through and including the day he was sentenced].)

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<sup>7</sup> There being no predicate error on which to base defendant’s alternative federal constitutional claims, those claims also fail. (See *People v. Roybal* (1998) 19 Cal.4th 481, 506, fn. 2.)

<sup>8</sup> Defendant’s trial counsel did not object to the gang expert’s testimony. Defendant therefore contends that his trial counsel provided ineffective assistance. (See generally, *People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Ledesma* (2006) 39 Cal.4th 641, 745-746; *Strickland v. Washington* (1984) 466 U.S. 668, 687.) Because we have concluded that the gang expert’s testimony was proper, defendant’s trial counsel did not err by failing to object to it.

### **DISPOSITION**

The abstract of judgment is modified to reflect 1,539 days of credit. The clerk of the superior court is ordered to modify the abstract of judgment and to forward the modified abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed as modified.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.