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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEONTE ANTHONY WALKER, Defendant and Appellant.	B283945 (Los Angeles County Super. Ct. No. BA453408)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed as modified.

Thomas T. Ono, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn MaGahey Webb, Supervising Deputy Attorney General, Nima Razfar, Deputy Attorney General, for Plaintiff and Respondent.

Joshua Brown (Joshua) was shot and killed in a Los Angeles neighborhood claimed by a rival street gang. Police arrested DeOnte Anthony Walker (defendant)—a member of that rival gang—as the shooter and the police found photos of various automatic and semi-automatic handguns on his cell phone. The gun used to kill Joshua was never recovered, but at trial the prosecution introduced evidence to show certain of the guns depicted in the cell phone photos could have been the murder weapon. Defendant contended Joshua's friend's description of the murder weapon as a "cowboy gun" with a "revolver thing" ruled these guns out. We consider whether the gun photos were properly admitted, whether the trial court should have instructed the jury that photos from defendant's phone were admitted for a limited purpose, and whether there was substantial evidence that defendant was the shooter and that the killing was premeditated and deliberate.

I. BACKGROUND

A. The Evidence at Trial

1. Johnson's testimony

On May 24, 2015, Kennisha Johnson (Johnson) and Joshua were near 84th Street and Main Street in Los Angeles, a neighborhood claimed by the Main Street Mafia Crips. Johnson and Joshua, who were involved in a casual sexual relationship, were out looking to buy methamphetamine.

As Johnson and Joshua walked along the sidewalk, Joshua exchanged pleasantries with a stranger, Tonna Brown (Tonna),[1]

[1] There is no relation between Joshua and Tonna. We refer to them by their first names to avoid confusion.

who was sitting in or standing near a parked car. Johnson spotted Thomas Neal (Neal), another friend with whom she occasionally used drugs, and asked him whether there was anyone around selling drugs. Johnson and Joshua continued walking when Neal said no, but turned back when Neal waved and pointed to someone outside a liquor store near 84th and Main. That person had left by the time Johnson and Joshua returned, but Johnson and Joshua went into the store to get change.

Three men entered the liquor store as Johnson and Joshua were leaving. Johnson recognized one of them as a man nicknamed Frank-Frank (later identified as Kyrin Maloy (Maloy)) but did not recognize the other who she thought had a head shaped like a peanut (Peanut). At trial, Johnson identified defendant as the third man and noted his hairstyle—worn in "little individual . . . ponytails" or "individual braids" on the day of the murder—had changed since then.

When Maloy and Peanut asked Joshua where he was from, Joshua answered, "I'm Sin Deuce [from] Eight-Four Swan." Johnson understood this to mean he was a member of the Eight-Four Swan Bloods, a rival gang to the Main Street Mafia Crips.[2] Johnson was not aware of Joshua's gang affiliation and thought Joshua's response would get them killed because they were in Main Street Mafia Crips territory. Peanut's response to Joshua was, "Fuck Swans, fuck Sways. This is Main Street and this is what we do—I'm going to tell you what we do with Sways . . . ."[3]

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[2] Joshua's sister, Waynnisha Brown, testified Joshua was a member of the "Swan Bloods," but had "changed his life."

[3] Johnson explained that "Sway" is a "diss for Swan."

Peanut then told defendant to "go get that" or to "go get the strap," and defendant "took off jogging across the street."

After defendant jogged away from the store, Johnson addressed Peanut. She explained they were in the neighborhood "to get some drugs," not for "gang-banging stuff." She also mentioned she was raised by people affiliated with the Main Street Mafia Crips. Peanut told her to "get this dude up out [of] here," indicating he was "giving [them] a pass." Johnson and Joshua left the store and crossed the street with Peanut and Maloy following at a distance.

Defendant jogged back across the street toward Johnson and Joshua, stopping about 12 feet away. Johnson and Joshua saw he had a gun. Johnson's familiarity with guns was limited, and she did not get a "real, real good look at it, but [she] knew it was a gun." Johnson tried to reason with defendant, saying, "Please, baby, don't do that, you don't want to do that. It's not worth it, we're addicts." Joshua also addressed defendant, saying, "[W]hy don't you fight like a man, you want to put a gun on me, you can't fight like a man."

With Johnson pleading and Joshua defiant, defendant hesitated, seemed "confused," and "just kept looking back." Johnson "really didn't think he was going to shoot because [of] how long it took," and she and Joshua had "started to turn around." Once they turned away from defendant, however, Johnson heard gunshots. She ran at the sound of gunfire, but when she realized Joshua was hit, she stopped and tried to help him. Bystanders, including Tonna, told Johnson not to move Joshua. Johnson did not see defendant after the shooting started.

Police officers interviewed Johnson after the shooting. She identified Maloy from a "six-pack" photo lineup, but she was unable to identify defendant when presented with another lineup that included his picture. Johnson also could not recall whether the shooter had any tattoos. (Defendant had tattoos on his neck, chest, and arms at the time of the shooting; after the shooting he got a tattoo on his face of an image of two hands praying with the accompanying text "Pray IV Me.")

During her police interview, Johnson described the gun used in the shooting as looking "like a pistol" and said "it was black, kind of like this, like the little revolver thing on it, but it kind of was, like long. Like long. The[ ] front part like long, like skinny, like kind of like long gun." When asked whether it looked "kind of like a cowboy gun" and had "that little thing that spins," Johnson said yes. At trial, Johnson clarified she characterized the gun as a cowboy gun "because of the—the barrel wasn't short."

2. Medical examiner and law enforcement testimony

Medical Examiner Paul Gliniecki (Gliniecki) testified Joshua sustained eight gunshot entrance wounds and seven exit wounds. Five of the entrance wounds were on the front of Joshua's body, one was on his back, and two were on his hands. The bullets that struck Joshua's hands passed through and might have accounted for some of the other entrance wounds, but Gliniecki saw nothing to suggest this and opined it was "[m]ost likely" Joshua was hit with eight separate bullets. Gliniecki determined at least two of the shots, which passed through Joshua's heart and lungs, were fatal. Significantly, Gliniecki also

recovered one bullet from Joshua's body. It was "a medium-size bullet," meaning "somewhere around a 9 millimeter, plus or minus."

Los Angeles Police Department Detectives Eric Crosson and Fernando Cuevas were the investigating officers assigned to Joshua's homicide. Detective Cuevas was on the scene shortly after the shooting and documented seven 9-millimeter casings on the ground. One fired bullet (in very good condition, meaning not deformed) was also recovered. When Detective Crosson visited the scene a couple days later, he found an eighth 9-millimeter shell casing. The casings all looked "clean" and "relatively freshly put there." Detective Crosson testified the casings were not submitted for fingerprint analysis because any oils present before the shots were fired would have burned off. The shell casings were submitted to the National Integrated Ballistic Identification Network (NIBIN). Investigators discovered the same gun appeared to have been used in another shooting, but Detective Crosson was unable to learn who the shooter was in that case.

The first officers on the scene after Joshua's killing gave Detectives Crosson and Cuevas the names of two potential eyewitnesses: Neal and Johnson. When the detectives visited the scene a few days later, they found Neal riding a bicycle nearby. Detective Crosson testified Neal was reluctant to speak with them and said, "You guys are going to get me killed if people see me talking to you out here." Neal did say, however, that the shooter was "the youngster, the light-skinned youngster with braids."

About a week after the killing, Detective Crosson received a call from Tonna, which he recorded (the recording was played for

the jury). Tonna recounted her brief exchange with Joshua just before the shooting and said she saw a "commotion" at the liquor store Joshua and Johnson had entered. She did not see the actual shooting, but saw a "light-skinned boy" she knew as "Menace" running away and putting a gun in his pocket. Tonna did not know Menace's real name because he was "new over here." She described him as about 18 or 19 years old with "kinda long" hair "shooting over his head." She said it could be worn in a ponytail, "but it was just like bushy" on the day of the shooting.

A few days later, Detective Crosson spoke to Tonna again. Tonna said "Menace" had since cut his hair in "a little fade." She also disclosed her nephew, Maloy, is "with them"—i.e., the Main Street Mafia Crips—but Tonna said she did not see him the day of the shooting. Tonna called Detective Crosson about a week later to report the address where Menace was living.

Detective Crosson and other police officers arrested defendant at the address provided by Tonna on June 10, 2015. Photos taken by police inside the apartment depicted graffiti including an "8 and roman numeral 4 and 'M' at the right side" with "Menace" and "gang" written beneath. Investigators also recovered two cell phones from the apartment. They were able to download many photographs saved on one of the phones. Among those photos introduced in evidence at trial were:

- Four photos depicting guns. In one, three semi-automatic handguns rest on someone's lap. Detective Crosson testified all three "could be" 9-millimeter handguns, but he could not say "for sure that they are or not." In another, two guns rest on someone's lap; one appears to be a Tec-9, which Detective Crosson explained is "a 9 millimeter automatic, usually an automatic[, but with] semi-automatic

capability"; the other is an unidentified handgun that Detective Crosson testified "could be" a 9-millimeter. The third photo depicts one of the guns from the first photo resting on a mattress next to a box of ammunition that could be 9-millimeter.[4] The last photo shows defendant holding what Detective Crosson identified as "a Tec-9 and another semi-automatic handgun of some sort . . . ."

- Several photos of defendant "displaying four fingers." One of these featured defendant with a blue bandana over his nose and mouth. The same photo appeared in a screenshot of an Instagram post by "lilmafia_menace84."
- A screenshot from Instagram of a photo posted by "mr_8iv" showing defendant with Maloy and others.
- A photo of a wall tagged in blue spray paint with the word "Menace" above "84st" and "MSMC."
- Several "selfies" of defendant with short hair last modified between May 27, 2015, and June 9, 2015, as well as selfies of defendant with longer hair last modified on May 25, 2015.[5]

After police arrested defendant, Tonna called Detective Crosson and said she was watching when the arrest took place;

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[4] Detective Crosson testified the gun was distinctive because it "appears to be missing its grips" and because of "the orangish-red base of the magazine that's protruding from the weapon."

[5] Recall that Joshua was shot on May 24, 2015. The date on which a photo was last modified does not necessarily reflect the date on which it was originally taken.

she confirmed the police had arrested the right person.[6] Detectives Crosson and Cuevas also spoke with Neal (the conversation was recorded and played during trial). Neal was reluctant to speak with the detectives, suggesting he was likely to "come up dead." When he was first presented with a six-pack photo array that included defendant, Neal said "[n]ot one of them is the guy." Detective Crosson pressed: "Which one is it, man? Which one is it so we can leave you alone?" Neal responded, "Man, y'all going to get me killed" and then said, "Man, he look like number one, man."[7] Defendant's photo was in the "number [one]" position.

3. Gang expert testimony

The prosecution's gang expert at defendant's trial was Los Angeles Police Department Officer Christian Peraza. He was assigned to the 77th Division's gang enforcement detail and had experience investigating the Main Street Mafia Crip and Swan Blood criminal street gangs.

Peraza opined defendant was a member of the Main Street Mafia Crips based on the hand signs defendant made in photos saved to his phone, Peraza's observation of defendant at Main Street Mafia Crips strongholds with known gang members, and

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[6] At trial, Tonna testified she did not recall: seeing the shooting, calling Detective Crosson, telling him the shooter had cut his hair, telling him the address at which the shooter could be found, or telling him police had arrested the right person.

[7] At trial, Neal denied telling Detective Crosson the shooter was a young man with braids, Neal said he did not recall looking at a photo array, and he said he did not recognize any of the voices in the recording of his police interview.

the tattoo on defendant's face featuring the words "pray IV me" because "[t]he roman numeral number 4 is commonly used by Main Street gang members."

When presented with a hypothetical designed to track the evidence the prosecution introduced during trial, Peraza opined the murder would benefit the Main Street Mafia Crips because "[y]ou take one of your rivals out" and "show[ ] the community that the Main Streets are—their territory, they're going to protect it at all costs . . . ." He also opined that for someone in defendant's position, "a new member, you have senior members that are going to watch if you're going to go through [with] what they directed you to do or—or not. They want to see with their own eyes to see if it's going to happen and if you're following the orders that they gave you."

B. Verdict and Sentencing

During jury deliberations, the jury submitted questions concerning the meaning of premeditation. The trial court permitted both the prosecution and defendant to deliver supplemental closing argument on premeditation. The jury thereafter found defendant guilty of first degree murder, with additional true findings on associated firearm and gang allegations.

The court sentenced defendant to prison for 50 years to life. He was given credit for 762 actual days in custody.

II. DISCUSSION

Defendant contends the trial court violated his "rights to a fair jury trial under the [D]ue [P]rocess [C]lause of the Fourteenth Amendment" by admitting the photos of guns found

on his phone. Relatedly, he also asserts the trial court should have instructed the jury with CALCRIM No. 303 (Limited Purpose Evidence) after admitting the gun photos in evidence. Both claims are meritless. The constitutional argument is overblown because "the admission of evidence, *even if* erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*" (*People v. Partida* (2005) 37 Cal.4th 428, 439, first italics added)—and there was no such unfairness here. While that alone is enough to reject defendant's contention, we further observe the evidence was properly admitted: defendant's access to 9-millimeter handguns was relevant in light of the 9-millimeter casings found at the scene and the "9 millimeter, plus or minus" bullet lodged in the victim's body. And as for the instructional error claim, there was no error, much less prejudicial error: the defense never asked for limiting instructions the trial court said it would be willing to give (not CALCRIM No. 303) and both sides agreed during closing argument about the issues on which defendant now says an instruction was needed.

Defendant additionally contends there is insufficient evidence to support his conviction because there was no substantial evidence supporting the jury's findings that he was the shooter and that Joshua's murder was premeditated and deliberate. Viewing the evidence in the light most favorable to the verdict, there is ample evidence for both conclusions. With regard to the former, three witnesses identified defendant as the shooter and that certainly constitutes substantial evidence. In addition, defendant had a motive for the crime, there was evidence defendant changed his appearance after the shooting, and the apparent 9-millimeter gun photos found on defendant's

phone suggested he had access to what may have been the murder weapon. With regard to the latter (the jury finding of deliberation and premeditation), there was strong evidence of planning activity (retrieving a firearm and then returning to shoot), motive (benefitting the Main Street Mafia Crip gang after perceived disrespect by Joshua, a member of the rival Swan Blood gang), and a manner of killing suggestive of a preconceived design to kill (eight gunshots at fairly close range).

A. The Trial Court Properly Admitted Photos of the 9-Millimeter Handguns Found on Defendant's Phone

1. Pertinent proceedings in the trial court

Defendant filed a pretrial motion to exclude photos saved to his phone featuring firearms and gang signs. (The only issue raised on appeal concerns the trial court's ruling on the gun photos.) The prosecution argued the photos it sought to introduce featured "weapons [that] appear to be semi-automatic or automatic . . . and all could be chambered 9 millimeter" and therefore "[a]ny one . . . could be the murder weapon."[8] The four photos ultimately admitted had last-modified dates between April 20, 2015, and April 28, 2015.

Defendant contended none of the guns in the photos could be the murder weapon because Johnson described the gun as a revolver or "cowboy gun." Defendant also argued "we have no idea whether they are real guns, [and] we have no idea whether or not they were the guns used in this incident," in part because

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[8] The prosecution emphasized it did not plan to use photos featuring an "AK-47 and . . . shotgun and even some other guns" that it determined did not use 9-millimeter ammunition.

there was no testing to confirm the 9-millimeter casings found at the scene were connected to the shooting.

The trial court ruled the four photos depicting what appeared to be 9-millimeter weapons were admissible. The court found it significant that the photos came "directly, purportedly, from the defendant's cell phone." The court recognized "the proposed evidence [wa]s prejudicial" but concluded the photos were "material, . . . relevant and more probative than prejudicial" because "the murder was committed [with] an automatic or semi-automatic weapon." Relying on *People v. Cox* (2003) 30 Cal.4th 916 (*Cox*), the court reasoned a weapon that is "not the actual murder weapon" may be admissible if it is "of a character which could have been used . . . ." The court further stated it was willing "to give a limiting instruction that the weapon[s] shown in the photographs have not been linked directly to the weapon utilized in the alleged offense" and, "if the evidence so comes out . . . that there is no evidence that the weapons displayed in the photographs are authentic[ ] and it is—they could be replicas."

2. Analysis

The sole challenge defendant raises to the admission of the gun photos is a constitutional due process challenge; he does not assert the trial court's evidentiary ruling ran afoul of state law principles, including Evidence Code section 352. The foundation of his constitutional argument is the belief that the gun photos were not relevant, i.e., that the photos do not tend to support the conclusion that defendant had access to the gun used to kill Joshua because "the recovered 9-millimeter casings were linked to another unrelated shooting," because investigators did not

perform tests to link the recovered bullets and shell casings to defendant, and because Johnson testified the murder weapon was a revolver or "cowboy gun" rather than an automatic or semi-automatic handgun.

"Evidence Code section 350 provides that only relevant evidence is admissible. Evidence Code section 210, in turn, defines relevant evidence as that 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' """"The test of relevance is whether the evidence tends "'logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive."""" [Citation.] [¶] 'Inferences drawn from the evidence must be logical and reasonable, not merely speculative.' [Citation.]" (*People v. Ghobrial* (2018) 5 Cal.5th 250, 282.)

Even if we agreed that the trial court abused its discretion in concluding the photos were relevant (though we do not, see *post*), reversal still would be unwarranted. As our Supreme Court has repeatedly held, "the admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida*, *supra*, 37 Cal.4th at p. 439; see also *People v. Covarrubias* (2011) 202 Cal.App.4th 1, 20 ["[E]ven the improper admission of evidence of uncharged crimes committed by the defendant does not ordinarily amount to constitutional error"]; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 696-697 [state and federal statutes and rules ordinarily govern the admissibility of evidence; only evidence that """is so extremely unfair that its admission violates fundamental conceptions of justice,""" like the knowing use of false evidence or evidence procured by improperly suggestive police procedures, rises to the level of a due process violation].)

The use of the gun photos in this case, particularly in light of the wealth of other incriminating evidence adduced at defendant's trial, did not render the trial fundamentally unfair.

The Attorney General reads defendant's briefs as if he also argues the trial court erred as a matter of state law, i.e., that the gun photos were irrelevant and should have been excluded under Evidence Code section 352 even if relevant. Although we believe that goes beyond even a charitable reading, we shall also undertake a brief analysis of the merits of the state law question for the benefit of the parties and to explain why there was no error even on that legal ground.

The first argument defendant makes, i.e., that the casings recovered at the scene were "actually found to be linked to another unrelated shooting," rests on an implausible interpretation of Detective Crosson's testimony. He testified one of the casings was entered into the NIBIN database and was found to be linked to another shooting.[9] Defendant suggests this

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[9] Here is the relevant testimony:

"A The report that's generated from Firearms just documents the casings, the casing that they actually entered into the [NIBIN], because they look at all of them and insure that they all came from the same gun and they just pick one to enter into the system.

"If they have multiple, if they had—if they were fired from separate guns, if they had casings from separate guns, they would enter each of the ones that they believe were separate guns into the system and they only entered the one. If that makes sense. [¶] . . . [¶]

"Q So when the bullet, the bullet casing that was sent to this organization, they were able to find a potential link?

"A Yes.

"Q To another shooting?

means the specific casings recovered at the scene of Joshua's murder fell to the ground during another shooting. But this is not the sort of relationship that would be discovered by comparing casings in a database. Although Detective Crosson did not specify the nature of the "link" to another shooting, the only plausible reading of his testimony is that these casings had characteristics indicating they were ejected from the same gun as another set of casings found at the scene of another shooting.

We are also unpersuaded by defendant's contention that "there was no forensic nexus between the eight 9-millimeter shell casings and the charged crime." All but one of the casings were recovered at the scene within hours of the murder, they looked "relatively clean" and "relatively freshly put there," and medical examiner Gliniecki testified Joshua's wounds were consistent with 9-millimeter bullets. Gliniecki further testified a 9-millimeter bullet "plus or minus" was found still inside Joshua's body from the shooting. That factual foundation establishes the gun photos were admissible as photos of the possible murder weapon, which the prosecution contended was a 9-millimeter gun (although never recovered). (*Cox*, *supra*, 30 Cal.4th at pp. 956-957 ["[W]hen weapons are otherwise relevant to the crime's commission, but are not the actual murder weapon, they may still be admissible"]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1052 [evidence the defendant possessed a gun that "might have been"

"A Yes.

"Q And did you do any follow-up with that other shooting to determine if there was indeed a connection?

"A I obtained a copy of the report and I spoke to the investigator that was handling that shooting. But other than that, that's the only investigation that was done on my part."

the murder weapon but was not "necessarily" the murder weapon was admissible as relevant circumstantial evidence]; compare *People v. Riser* (1956) 47 Cal.2d 566, 577 [acknowledging there "need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon" but excluding evidence of gun possession that was *inconsistent* with the prosecution's theory of the weapon used to commit the murder].) Even if investigators could have done additional testing on the casings and bullets (Detective Crosson believed that at least some of the testing defendant proposes on appeal was impossible[10]), the absence of such testing goes merely to the evidentiary weight to be accorded to the gun photos, not the threshold issue of their relevance. (See *People v. Neely* (1993) 6 Cal.4th 877, 896 [rifle found in the defendant's vehicle shortly after commission of the crimes was admissible because "there was no direct evidence as to the fatal shooting that would render this evidence irrelevant to establish facts material to proof of the charged offenses"].)

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[10] Defendant suggests the casings should have been "submitted for DNA or fingerprint testing" and tested "to determine what gun fired them." With respect to fingerprint testing, Detective Crosson explained that "when a bullet is fired, the heat that's generated from that explosion would burn off any oils that would be present for fingerprints." Defense counsel did inquire about the availability of testing to determine the type of gun that fired a particular *bullet*, but there was no testimony that such testing was available for *casings*. Defendant also contends investigators failed to perform tests to determine the caliber of the two recovered bullets and whether they "came from" any of the recovered casings, but Detective Crosson explained he was "not aware of a test that would tell [him] if those bullets came from those casings."

Finally, defendant contends the gun photos are not relevant because none depict a revolver and Johnson said the murder weapon had "like the little revolver thing on it" and could be characterized as "kind of like a cowboy gun." The jury, however, could have reasonably understood Johnson's testimony as consistent with the Tec-9 featured in two of the four gun photos. Her emphasis on the relatively long barrel with a "skinny" "front part" is consistent with that firearm. Furthermore, Johnson had limited knowledge of guns and conceded she did not get a "real good look" at the murder weapon; the jury could have concluded she was, at worst, mistaken on this point. (CALCRIM No. 105 ["You may believe all, part, or none of any witness's testimony"].)

The trial court's decision to admit the gun photos in evidence was also fully consistent with Evidence Code section 352, which permits courts to exclude relevant evidence if the evidence's "'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.'" (*People v. Linton* (2013) 56 Cal.4th 1146, 1181.) All of the gun photos the trial court ultimately admitted were, at least by appearance, consistent with the casings found at the scene. The photos' last-modified dates were also near in time to the date of the murder. Both features made them quite relevant, and there was no danger of undue prejudice that substantially outweighed their probative value. (*People v. Case* (2018) 5 Cal.5th 1, 43 [the prejudice Evidence Code section 352 seeks to guard against "'is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence'" but prejudice "'in its

etymological sense of "prejudging" a person or cause on the basis of extraneous factors'"].)

B. The Court Properly Declined to Instruct the Jury with CALCRIM No. 303

When conferring regarding jury instructions toward the end of trial, defendant's attorney asked the trial court to give CALCRIM No. 303. That instruction provides: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

The trial court said it was "not sure we had any limited-purpose evidence." Defendant responded, "When we were doing all those 402's about the photos [from defendant's cell phone], that was when the court had said that, you know, when you are allowing the photos in that they would be in for a limited purpose . . . ." The court disagreed: "Well, I think what I was saying was not that they were being admitted for a limited purpose, because they weren't addressed for a limited purpose. [¶] What I was addressing was why they should be admitted going to the various purposes, why I believe they were admissible in front of the jury which was that some of the photographs went to the issue of the gang allegation and I think I was further indicating that certain of the photographs went to the issue of access to weapons since there was a weapon[s] charge. [¶] I don't think I ever addressed they would be limited—they be admitted for a particular limited purpose. I was trying to indicate the overall issue of why I believed they were going to be admissible and to what issues those exhibits addressed." Defendant suggested that "it went in line with the whole authentication and lack of foundation argument," but the court ultimately ruled that,

"[i]n terms of the limiting instruction on CALCRIM 303, I don't think any evidence was directed for a limited purpose. So I don't think it should be given."

Now on appeal, defendant argues CALCRIM No. 303 should have been given, but his theory as to why is difficult to pin down. At its clearest, defendant's argument is that "the trial court erred in failing to give the two limiting instructions it previously offered to give: a limiting instruction that the weapons shown in the photos had not been directly linked to the weapon used in the charged crime; and, a limiting instruction that no evidence showed the weapons in the photos are authentic and they could be replicas." But those, of course, are not instructions that would be covered by the text of CALCRIM No. 303.

With respect to that instruction, nothing in the record indicates the photos from defendant's phone were admitted for a limited purpose. The gun photos, for example, were admitted because they were relevant to show defendant had access to several 9-millimeter automatic or semi-automatic handguns, any one of which might have been used to kill Joshua. Although the trial court recognized defendant's concern that the prosecution might not be able to establish foundational facts to support this theory—i.e., that the murder weapon was a 9-millimeter automatic or semi-automatic handgun and that the weapons in the photos were real—it never suggested this concern limited the purpose(s) for which the photos were admitted. Under these circumstances, a CALCRIM No. 303 instruction was neither necessary nor appropriate.

With respect to the limiting instructions the trial court offered to give "if . . . requested"—i.e., that the guns in the photos "have not been linked directly" to the murder weapon and might

be replicas—no such request was ever made. "Because defendant[ ] did not specifically request a limiting instruction at the appropriate time, the court had no sua sponte duty to give one." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052 (*Hernandez*); see also *People v. Cowan* (2010) 50 Cal.4th 401, 480 [quoting *Hernandez* and holding the trial court had no duty to give limiting instruction when "defense counsel did not remind the court that it had agreed to give [the instruction]" or "submit any proposed written limiting instruction"].) Defendant's argument that "trial counsel repeatedly objected [to photo evidence], citing relevance, authentication, and Evidence Code section 352 grounds" is beside the point.[11] There is no dispute that defendant preserved objections to the photos' admissibility, but none of these objections was a request for a limiting instruction.

Even assuming for the sake of argument that the trial court should have sua sponte instructed the jury that the guns in the photos could be replicas and were not necessarily linked to Joshua's murder, the absence of such an instruction was harmless because neither issue was taken for granted at trial. Detective Crosson testified the guns depicted in the photos

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[11] We note, in particular, that authentication requires a prima facie showing that the item of evidence is what the proponent of evidence claims it is. (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266-267.) The gun photos found on defendant's phone were properly authenticated as just that—gun photos found on defendant's phone. The significance of those photos, i.e., the questions of whether defendant possessed the firearms shown, whether they were real firearms, and whether one of the firearms was the murder weapon, was appropriately left to counsel to argue.

"appear[ed] . . . to be real firearms" based on "the things that are on them, the markings, the bullets that were with them," but also conceded "[w]hat they actually are, I can't tell you . . . ." Both the prosecution and the defense also agreed on this point during closing argument: The prosecution argued "[w]e don't know for certain if the guns that [defendant] had in those photos were real, although that's a pretty good assumption"; the defense argued there was "no evidence" the guns "were even real" and suggested "[the prosecution] is going to show you the picture with [defendant] holding two guns . . . and say, well, this gun is that gun. It might be. It might not." The jury was therefore keenly aware of the dispute concerning the probative value of the gun photos and equipped to resolve it. Sua sponte limiting instructions along the lines first suggested by the trial court would have been superfluous, and there is accordingly no reasonable probability defendant would have achieved a better result if such instructions had been given. (See generally *People v. Watson* (1956) 46 Cal.2d 818, 836.)

C. Substantial Evidence Supports the Jury's First Degree Murder Verdict

1. Substantial evidence identifying defendant as the shooter[12]

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in

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[12] In his opening brief, defendant argues under different headings that there was insufficient evidence defendant was the shooter and insufficient evidence to support an enhancement based on his personal use of a firearm. Both issues concern the same evidence, and we consider them together.

the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.) "'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.'" (*People v. Brooks* (2017) 3 Cal.5th 1, 57.)

Defendant contends Johnson's in-court identification and Tonna's out-of-court identification of defendant as the shooter are inherently unreliable and he implies that, without these identifications, there was no substantial evidence to support his conviction. He is wrong on both counts. Neither Johnson nor Tonna was inherently unreliable and, regardless, there was still substantial evidence to support the jury's finding that defendant shot Joshua.

Defendant asserts Johnson and Tonna "never claimed to have seen the shooting" and "never [saw] the gunman's face." Johnson, however, testified she spoke to defendant while he was holding the gun and he began shooting when she and Joshua "started to turn around." Tonna saw defendant, whom she recognized as a "light-skinned boy" named Menace, putting a gun in his pocket as he ran from the scene of the shooting. Nothing in this testimony is physically impossible or inherently

improbable—to the contrary, both witnesses readily conceded what they did not see. A witness to a shooting need not have seen the muzzle flash to provide reliable testimony regarding the shooter's identity.

Defendant also questions Johnson's and Tonna's identifications because they did not mention his various tattoos to investigators. Defendant notes he has the word "loyalty" tattooed across his chest, a large tattoo of the word Chicago and a skyline on his neck, and several tattoos on his arms. (Defendant did not yet have a face tattoo on the day of the shooting.) Johnson testified defendant wore a "short sleeve white t-shirt" during the killing, so it is no surprise neither Johnson nor Tonna saw his chest tattoo. With respect to the other tattoos, Johnson explained she was "too distraught imagining something about—about to happen" to notice tattoos; Tonna explained she "wasn't on him like that," i.e., not close enough to notice tattoos. That the witnesses did not notice defendant's tattoos under these circumstances does not meaningfully undermine their testimony, at least for purposes of evaluation on appeal.[13] (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031 ["It is well settled that, under the prevailing standard of review for a sufficiency

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[13] It also does not matter that Johnson identified defendant only at trial, and not in a prior six-pack photospread, and that Tonna did not identify defendant at trial but rather only to detectives before being subpoenaed to court. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 ["[A] testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the [individual's] guilt even if the witness does not confirm it in court"]; *In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497 [eyewitness identification in court sufficient to sustain conviction].)

claim, we defer to the trier of fact's evaluation of credibility. [Citation.] Moreover, the testimony of a single witness is sufficient for the proof of any fact"]; *People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.)

Even if there were any basis to reject Johnson's and Tonna's identifications of defendant, the remaining evidence would still be sufficient to support the jury's finding that defendant was the shooter. For one thing, Johnson and Tonna were not the only witnesses to identify defendant as the shooter. Neal also told investigators the shooter "look[ed] like" defendant. (See, e.g., *People v. Wiest* (1962) 205 Cal.App.2d 43, 45 ["In order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that a defendant 'resembles' the robber [citation] or 'looks like the same man' [citation] has been held sufficient"].) Circumstantial evidence corroborates Neal's identification, including defendant's gang motive for the crime; the recovery of 9-millimeter casings at the scene that were consistent with Joshua's wounds; the photos on defendant's phone taken or modified shortly before the shooting that suggest defendant had access to 9-millimeter guns; and defendant's decision to alter his hairstyle and get the "Pray IV Me" face tattoo after the shooting, which permits at least an inference of a consciousness of guilt. In short, there was ample evidence from which the jury could conclude defendant was the shooter.

2. Substantial evidence the murder was premeditated and deliberate

To support a conviction for premeditated and deliberate first degree murder, there must be sufficient evidence defendant

carefully weighed considerations in choosing a course of action and thought about his conduct in advance. (*People v. Cage* (2015) 62 Cal.4th 256, 276 (*Cage*).) ""'"The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."'" [Citation.]" (*Ibid.*)

Relying on the seminal decision in *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), courts generally look for three types of evidence in evaluating whether a murder was premeditated and deliberate: planning activity, motive, and the manner of killing. (*Cage*, *supra*, 62 Cal.4th at p. 276.) When evidence of all three categories is not present, courts generally require "'either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.' [Citation.] But these categories of evidence . . . 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) Considering the record here in light of the *Anderson* factors, there was well more than sufficient evidence that defendant's killing of Joshua was premeditated and deliberate.

First, regarding planning, Peanut directed defendant to get a gun after the initial confrontation. Defendant "took off jogging across the street" and approached Johnson and Joshua (who were then in retreat) once he had the gun. Defendant's trip to get the gun was undoubtedly "activity directed toward, and explicable as intended to result in, the killing." (*Anderson*, *supra*, 70 Cal.2d at

p. 26.) Defendant's assertion to the contrary, that there was no planning because he was not armed when Joshua entered the liquor store, fails because "'[p]lanning activity occurring over a short period of time is sufficient to find premeditation.' [Citation.]" (*People v. Disa* (2016) 1 Cal.App.5th 654, 666.)

Second, regarding motive, the killing was the culmination of a conflict that began with Joshua announcing his affiliation with the Eight-Four Swan Bloods in Main Street Mafia Crips territory. Defendant was relatively new to the neighborhood and demonstrated his loyalty to the Main Street Mafia Crips by killing Joshua and getting a gang tattoo on his face in the weeks that followed. Contrary to defendant's claim, no prior relationship between a killer and his victim is necessary to prove motive where rival gangs are concerned. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208 [gunman's belief his intended victims were members of a rival gang provided motive]; *People v. Rand* (1995) 37 Cal.App.4th 999, 1002 ["Defendant had an admitted motive for the killing; he also had the driver slow the car and virtually stop while he aimed deliberately at the stranded persons he believed were rival gang members"].)

Finally, regarding the manner of killing, the evidence indicated defendant murdered Joshua by firing at least eight shots at him from about 12 feet away. This barrage of gunfire from relatively close range supports a finding of premeditation and deliberation, especially considering (1) defendant had time to consider (and appears to have considered) Johnson's plea that she and Joshua were harmless, and (2) defendant decided to begin firing only when Johnson and Joshua had turned to walk away. (*People v. Manriquez* (2005) 37 Cal.4th 547, 577 ["several shots to the victim's head, neck, and chest areas" suggested killing was

premeditated and deliberate]; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192.)

D. Presentence Custody Credits

Defendant was arrested on June 10, 2015, and sentenced on July 12, 2017: He spent 762 full days and two partial days in custody prior to sentencing.

Defendant contends he is entitled to two additional days of presentence custody credit. The Attorney General agrees. We concur. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48 ["A defendant is entitled to actual custody credit for 'all days of custody' in county jail and residential treatment facilities, including partial days. [Citations.] Calculation of custody credit begins on the day of arrest and continues through the day of sentencing"]; *People v. Taylor* (2004) 119 Cal.App.4th 628, 647 ["A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered"].)

DISPOSITION

The clerk of the superior court shall prepare an amended abstract of judgment that gives defendant 764 days of presentence custody credit and deliver the amended abstract to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, Acting P. J.

We concur:

KIM, J.

SEIGLE, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.