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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.

KEVIN DEON JOHNSON et al.,

Defendants and Appellants.

B279405

(Los Angeles County  
Super. Ct. No. BA437495)

APPEAL from judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed in part, remanded in part, with directions.

Kathy R. Moreno, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Deon Johnson.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Kanasho S. Johns.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior

Assistant Attorney General, Margaret E. Maxwell,  
Supervising Deputy Attorney General, Marc A. Kohm,  
Deputy Attorney General, for Plaintiff and Respondent.

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This case involves the murder of a mentally challenged, small in stature, 19-year old young man. The victim made the fatal mistake of wearing the wrong color shirt and shoes in an area frequented by a street gang. Although the trial court committed error in allowing the investigating officer to testify to several matters that were within the purview of the jury and to explain the significance of certain evidence, we conclude the errors were nonprejudicial and affirm the convictions, with directions.

The jury convicted defendants and appellants Kevin Deon Johnson and Kanasho Shadrick Johns in count 1 of first degree murder. (Pen. Code, § 187, subd. (a).)<sup>1</sup> It found true the allegations that the murder was committed for the benefit of a criminal street gang as to both defendants (§ 186.22, subds. (b)(1)(C), (b)(5)); that Johns personally and intentionally discharged a firearm, proximately causing great bodily injury and death (§ 12022.53, subd. (d)); and that as to Johnson, a principal intentionally discharged a firearm in the commission of the murder, proximately causing great bodily injury and death (§ 12022.53, subds. (d),

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(e)(1)). The jury found Johns guilty of felon in possession of a firearm in count 2. (§ 29800, subd. (a)(1).)

Defendants were each sentenced to 50 years to life in count 1, comprised of 25 years to life for the murder and 25 years to life for the firearm use enhancements. Johns was additionally sentenced to the upper term of three years in count 2, to run consecutively with the sentence in count 1. The trial court struck the section 186.22, subdivision (b)(1)(C) and (b)(5) gang enhancements as to both defendants.

Johnson contends: (1) the trial court erred by admitting the investigating officer's improper opinion testimony; (2) the evidence is insufficient to support the gang enhancement; (3) the trial court erred by denying his motion to disclose the identity of a confidential informant; and (4) the trial court erred by failing to instruct the jury that the confidential informant's statements were not to be considered for their truth.

Johns also argues that the trial court erred by admitting the investigating officer's improper lay testimony and that the evidence is insufficient to support the gang enhancement. He additionally contends: (1) the trial court erred by admitting Johnson's hearsay statements against Johns; (2) the prosecutor committed misconduct; and (3) the trial court miscalculated his actual custody credits.<sup>2</sup>

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<sup>2</sup> Both defendants join in all arguments made by the other that inure to their benefit. (Cal. Rules of Court, rule 8.200(a)(5).)

In supplemental briefs defendants further contend that the cause must be remanded to allow the trial court to consider exercising its discretion under section 1385 to strike the section 12022.53, subdivision (d) and (e)(1) firearm use allegations under recently enacted Senate Bill No. 620 (2017–2018 Reg. Sess.).

We remand the matter to the trial court to consider whether to exercise its discretion to strike the section 12022.53, subdivision (d) and (e)(1) firearm use enhancements under section 12022.53, subdivision (h), as to both defendants, and to determine whether Johns is entitled to additional custody credits. In all other respects, the judgment is affirmed.

## **FACTS**

### ***The Murder***

On May 29, 2015, Tavin Price, a mentally disabled 19-year-old, was shot to death at a car wash on Florence Avenue. Price was accompanied to the car wash by his mother, Jennifer Rivers, and close family friend, Hilary Wade. The car wash is in territory claimed by the Rollin' 60's Neighborhood Crips gang.

While Rivers was washing the car in the back of the car wash, Wade went into a smoke shop located in front of the same building. Former co-defendant Dwight Smith asked Wade for her phone number, which she declined to

give. Wade left the smoke shop, but returned shortly with Price, who was wearing red tennis shoes and a red T-shirt. Smith said to Price, “I’m 6-0. You’ve got on all this red.”<sup>3</sup> He asked Price where he was from and “banged” on him to determine whether Price belonged to a rival gang. Wade and Price responded that Price was from “nowhere”—i.e. that he was not affiliated with a gang.<sup>4</sup> Smith told Price, “Well, you are going to have to come out of your shoes.” Wade responded, “Well, we are not about to do that.” She explained that Price was mentally disabled. Smith replied that he “did not give an ‘F’” about that. The conversation ended and Price and Wade returned to the car wash area. Wade sat in the back seat of the car. Price stood by the car door and told his mother about the confrontation in the smoke shop.

After about five minutes, Rivers heard gunshots. She turned and said, “You just shot my son.” The shooter fled, with Rivers in pursuit. Rivers returned to her son when she saw Price collapsing.

Police responded to the scene and medical personnel transported Price to the hospital. Price sustained two

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<sup>3</sup> Wade did not recall telling officers that Smith identified himself to her as a Rollin’ 60’s gang member, but she was impeached with a transcript of a recording of her statement to officers. She did recall telling officers that she knew they were in Rollin’ 60’s territory.

<sup>4</sup> Rivers testified that Price had never been in a gang and was afraid of gangs.

gunshot wounds to his chest and one to his arm. He died of his injuries.

Antheyst Jarrett approached Rivers at the car wash and threatened her, calling her a “snitch ass bitch.” Jarrett intimated that she would make sure there were no video surveillance recordings of the incident in the smoke shop. Rivers spoke to officers about securing the smoke shop surveillance video right after the encounter. Jarrett, who was a gang associate and close friend of Smith’s, was arrested for intimidating Rivers.<sup>5</sup>

During proceedings in this case, Rivers was accosted as she was leaving the courthouse. Three women threatened to beat her. One of the women called her a “snitch.” They indicated they were affiliated with the Rollin’ 60’s gang.

## ***The Investigation***

### **Surveillance Video**

Detectives Fernando Cuevas and Eric Crosson obtained surveillance videos taken from four different camera angles from the car wash, videos taken from three different camera

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<sup>5</sup> Smith testified that Jarrett and Johns also knew each other and had had sexual relations.

angles from the smoke shop, and videos taken from two different camera angles from a beauty shop located nearby.<sup>6</sup>

The videos showed Rivers, Price, and Wade pulling into the car wash at approximately 10:48 a.m. on May 29, 2015. After a few minutes, Wade left the car wash area and entered the smoke shop.

Johnson and Johns arrived at the smoke shop together in a black Lexus less than a minute after Rivers, Price, and Wade arrived at the car wash. Johnson exited from the driver's door and entered the smoke shop. He purchased a cigarette and stood inside the shop smoking for several minutes. Immediately after Wade walked past the black Lexus, Smith exited the vehicle. He walked closely behind Wade as she entered the smoke shop, and then leaned

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<sup>6</sup> The detectives gave different estimates for the time difference between the car wash videos, which bear the correct timestamps, and the smoke shop videos. Detective Cuevas, who verified the accuracy of the timestamps when he obtained the videos, testified that the smoke shop videos were an hour slow. Detective Crosson testified that the smoke shop videos were 58 minutes slow. Our own calculations, after careful review of all the videos, differ from both detectives' calculations. In this section of the opinion, we use our calculation that the smoke shop video is 59 minutes 21 seconds slower than the car wash video for the smoke shop video times. We utilize the detectives' estimate that the beauty shop videos are 9 minutes slow, as there are no overlapping views between those cameras and any of the others, and therefore no independent means for confirmation. All times are given in real time.

against a beverage display, looking in her direction as she purchased a drink.

Around the same time, Price left the car wash bay and walked to the car wash entrance, which was visible from just outside the smoke shop. Smith moved to the smoke shop doorway and lingered there, facing east toward the area where Price was standing. Price wore a red shirt and red tennis shoes. Price remained within view for 31 seconds, as Smith continued to look in his direction. Wade began to leave the smoke shop and appeared to have a brief interaction with Johnson, who had been standing further back in the smoke shop, and a short exchange with Smith in the doorway. Just after Wade left, Jarrett entered the smoke shop, and looked in Wade's direction. Smith walked into the smoke shop and spoke briefly to Johnson. He then walked to the doorway with Jarrett. They had a conversation during which both pointed outside a few times in the direction of the car wash entrance.

About a minute later, Wade returned to the smoke shop with Price. Smith walked back into the smoke shop doorway just after they entered. Smith looked in Price's direction, as he spoke and gestured toward the ground. As soon as Smith began speaking, Jarrett exited the smoke shop while talking on her cell phone. Johnson leaned against a column further back in the shop and smoked his cigarette. He looked in the direction of Price, Wade, and Smith. They were approximately five or six feet away from Johnson. After Wade paid for her purchases, she and Smith



talked in the doorway as she and Price exited. Wade and Price then returned to the car wash bay, where Rivers was still washing her car.

As Price and Wade walked back to the car wash, Smith and Johnson exchanged a few words. Johnson left the shop and got back into the black Lexus. He made a right turn out of the smoke shop parking lot and drove east on Florence Avenue. After driving a little over a block east of the car wash, he made a left turn and drove north.

As Johnson drove away, Jarrett reentered the smoke shop. Smith stood outside the smoke shop, then walked toward the car wash entrance and looked to his right, where Rivers was cleaning her car with Price standing nearby. Smith then walked back toward the smoke shop and talked with his cousin, Latisha Poole, in the parking lot. After talking to Poole, Smith walked north, away from the smoke shop, jogged across Florence Avenue, and continued jogging north on 11th Avenue. Poole took two cell phones out of different pockets and appeared to manipulate them as she watched Smith jog away. She then returned to the smoke shop.

A man later identified as the shooter came into view on 11th Avenue. As the shooter walked very slowly down 11th Avenue and crossed Florence Avenue, Jessica Darthard walked east toward the smoke shop along Florence Avenue. Darthard's back was turned to the shooter while he was within camera view. After about 20 seconds, a black car drove south on 11th Avenue and stopped at the intersection

of 11th Avenue and Florence Avenue. Darthard entered the smoke shop as Poole exited. Poole walked northeast, facing the shooter as he stepped onto the sidewalk on the south side of Florence Avenue. Poole neared the shooter, but then changed direction, moving west with her back to him as he continued to walk toward the car wash. At the same time, Smith reappeared, walking south on 11th Avenue from the same direction as the shooter. He stopped at the corner on the north side of the street across from the car wash, and walked back and forth in a parking area. The shooter walked into the carwash bay, raised his left arm, and shot Price, who was facing away from him. Both Rivers and Wade were inside the car and not visible at the time of the shooting. After the shots were fired, Rivers ran out of the frame in the direction the shooter ran. Price fell to the ground almost a full minute after he was shot.

Just after the shots were fired, Poole ran west toward the smoke shop, as Smith ran east across 11th Avenue behind the black car stopped at the intersection, and continued running along Florence Avenue toward 10th Avenue. Darthard leaned out of the smoke shop door and looked in the shooter's direction. The shooter ran north across Florence Avenue and continued running up 11th Avenue, preventing the black car from turning right onto Florence Avenue. The shooter moved out of the camera's view within eight seconds after Darthard looked outside. The black car turned right and proceeded west on Florence

Avenue.<sup>7</sup> Twenty-five seconds later, video taken two blocks north of Florence Avenue depicts a black Lexus driving north on 11th Avenue and then turning east onto 67th Avenue without stopping at a stop sign.

Officers began to arrive at the scene of the shooting within about eight minutes. A few minutes later, Johnson appeared on 11th Avenue, walking south toward the smoke shop with another man. He moved in and out of the camera's view in the parking area in front of the smoke shop. An ambulance arrived 30 seconds after he appeared, and a fire truck pulled up within another 10 seconds. A minute later, Johnson walked back across Florence Avenue and continued north on 11th Avenue.

### **Witnesses**

#### *Latisha Poole*

Detective Eric Crosson questioned Poole in a recorded interview played for the jury. Poole saw Smith and Johnson inside the smoke shop.<sup>8</sup> Smith was talking with a boy wearing red shoes. Poole stood by the door during the

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<sup>7</sup> The black car was fully stopped for 40 seconds during the shooting. Fourteen cars passed the black car in the far right lane of Florence Avenue while it remained stopped.

<sup>8</sup> During the interaction between Smith and Price, Poole was standing at the edge of the door near the counter, which is not visible in the videos.

conversation, and did not hear what was said. She did hear Smith talking to a girl who was there with the boy. Smith explained to the girl that he did not intend to “bang on” the boy. He wanted to warn him about wearing red. Poole told the detective it was dangerous for the boy to wear red because the smoke shop was in a Crips neighborhood.

Smith and Johnson spoke after the boy and girl left the smoke shop, but Poole could not hear what they were saying. She saw Johnson leave the smoke shop and drive away. Poole walked outside after a few minutes and saw Johns walking south across Florence Avenue toward the car wash. Right after she saw Johns she heard gunshots and began running. She did not see Johns after the shooting.

Poole saw Johnson’s car return to the area. It was stopped across the street on Florence. Johnson’s car came from a different direction than Johns did. The car was stopped on Florence Avenue, but Johns was walking on 11th Avenue.

Poole identified Johns, and showed the detective the last place where she saw him in a photograph of Johns walking toward the car wash entrance. Poole knew Johns because he lived in her apartment complex for about a year, where Johns stayed with the mother of his child. Poole saw him in the building on a regular basis. She was certain the person she saw was Johns. She knew Johns was probably “in the neighborhood” but did not know if he was a Rollin’ 60’s gang member. Poole also identified Johnson. Poole did not recognize Jarrett when the police showed her Jarrett’s

photograph. She knew Jarrett, but could not remember if Jarrett was in the smoke shop on the day of the shooting.

The day after the shooting Smith told Poole he was scared. He told her he asked the boy wearing red if he knew what neighborhood he was in. He was trying to help the boy. Poole and Smith spoke again when Smith was in jail. He did not tell her anything about the shooting. He just asked her to say that he was trying to help the boy.

Poole passed Johns in lockup on her way to the interview with the detective. Johns warned her, "Don't say nothing."

At trial, Poole did not remember if she saw Johnson in the smoke shop or saw him driving away. She may have seen his car pass by. When she saw Johns he was in the middle of the street. She did not know where he was coming from or where he was going. Smith had asked Poole to help him out by saying that he was trying to be helpful when he warned Price about wearing red shoes, which was the truth.

### *Jessica Darthard*

Jessica Darthard testified that she was inside the smoke shop at the time of the murder. She looked outside just after the shooting and saw someone running but she could not identify the person. She did not tell anyone that Johns was the shooter or that she knew who she saw running after the shots were fired.

### *Tajuana Lewis*

Tajuana Lewis testified that she did not remember telling the police that Darthard told her she saw the shooting. She did not recall Darthard telling her she saw Johns running across the street afterwards. Lewis gave a recorded statement to Detective Crosson. In that statement, she said that Darthard told her she saw the shooting and saw Johns running across the street afterwards.

Lewis is Jarrett's cousin. She became aware of the murder after Jarrett was arrested for witness intimidation. Lewis told Detective Crosson that she spoke to Darthard at Jarrett's request.

### **Johnson's Statements to Detectives**

Johnson was arrested and his apartment searched on June 17, 2015, about two and a half weeks after the murder. Detectives Cuevas and Crosson questioned him. A recording of the interview was played for the jury.

When the detectives asked for his phone number, Johnson said that he did not know it because he had just gotten a new phone the day before. Johnson explained that his other phone had been turned off because he did not pay the bill. He admitted he owned both of the phones confiscated in the search of his apartment. Johnson told the detectives that he joined the Rollin' 60's gang when he was young. He was known on the street as Twin or Bang.

Johnson could not remember who had been inside the smoke shop with him when Smith was talking to Price. Jarrett was there the day of the shooting and may have been inside the shop, but he was not sure. He did not know Jarrett by name, but he recognized her. Johnson identified Smith in a photograph, and admitted that he knew him, but not “like that.” He was “no big fan” of Smith; if Smith’s phone number was in his phone it was because he bought marijuana from Smith. Johnson did not recognize Johns in a photograph, and did not know Johns’s street name. He did not see Johns in the area of the smoke shop the day of the murder. Johns had never been in his car.

Johnson drove Smith to the smoke shop on the day of the shooting. Johnson spoke to Wade the first time she entered the smoke shop because he liked her tattoos and wanted to get her phone number. He did not speak to her the second time she came into the smoke shop, and he did not say anything to Price. He insisted Wade would tell the detectives that he did not say anything if they asked her about him, and said the cameras would corroborate his statements. Although he noticed that someone came into the smoke shop wearing a red shirt, he did not pay attention to it because he was thinking about getting his girlfriend’s car fixed. He talked to Smith briefly before he left the smoke shop to let him know that he was going to the mechanic. Johnson’s girlfriend’s car was a black Lexus. He drove it to the smoke shop and took it straight to the repair shop when he left.

The repair shop was located on Long Street, just off Florence Avenue. Although the repair shop was west of the car wash, Johnson took a right and went east to go around the block before returning to Florence Avenue and driving west. He turned right on Florence Avenue, left on 10th Avenue, left on 71st Street, left on 11th Avenue, and right on Florence Avenue. Johnson explained that he always drove around the block when he left the smoke shop because there was usually an officer on a motorcycle in the area. Johnson did not have a driver's license and did not want to risk being pulled over. After returning to Florence Avenue, he drove a few blocks west and made a right on West Street, then made a "quick left" onto Redondo Boulevard. The repair shop was on the corner of Redondo Boulevard and Long Street. It was very close to the smoke shop, so it did not take long for him to drive there. The detectives questioned Johnson repeatedly about the route he drove to the mechanic, and how long it took him to drive there. They intimated that he was lying. Finally, the detectives allowed Johnson to show them where the shop was located on a map, a short distance from the car wash.

Johnson saw a helicopter while he was at the repair shop and knew something had happened. He started to get phone calls about the shooting, so he went back to the smoke shop to make sure that no one he knew had been shot. He did not drive the Lexus back to the smoke shop. He thought a friend may have picked him up, but he could not recall. There were a lot of people in the area when Johnson



returned, including police and paramedics. Johnson said that if the detectives talked to the mechanic, he would tell them that Johnson had been there. The detectives said that they had not seen Johnson return to the scene and would have to look at the video to see if it corroborated his story.

Detective Crosson asked Johnson if he knew what time the murder happened. Johnson said, “Probably right when I left. If I ain’t mistaken, it was probably before or right after.” He denied seeing anyone run in front of his car when he returned to the car wash after the shooting. He had seen a person run by his car when he was stopped at 11th Avenue. He honked the horn so that the person in the street would get out of his way. Johnson told the detectives that he did not know who ran by his car. After much questioning on the issue, Johnson said “Yeah. Man, y’all know.” When the detectives asked what he meant, Johnson explained that the detectives, who had shown him multiple photographs and referenced several videos during the interview, knew more than he did.

When asked whether anyone got in his car when he was stopped at 11th Avenue, he said no, and encouraged the detectives to check for fingerprints.<sup>9</sup> Detective Cuevas questioned Johnson regarding the length of time he remained stopped at the corner of 11th Avenue. Johnson explained that there was traffic and if he had turned earlier he might have hit someone.

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<sup>9</sup> Fingerprints were lifted from the black Lexus after the shooting. They did not match Johns or Smith.

### **Johnson's Statements to a Confidential Informant**

After Johnson was interviewed by the detectives, he was placed in a holding cell with a paid confidential informant.<sup>10</sup> Their two-hour conversation was recorded and played for the jury. The sound quality of the recording was poor because the informant was wearing the recording equipment and moved around the room throughout the conversation. There were approximately 210 instances in which the conversation was inaudible.

Throughout the conversation, Johnson maintained he was not involved in the shooting, did not say anything to Price at the smoke shop, and did not pick anyone up or drop anyone off. He told the informant that the police had his phone, but that it had been turned off. There were not many texts on it because he mostly sent texts to his girlfriend "about little nothing shit." He did not make any phone calls that morning. The informant suggested that the detectives were trying to get Johnson to say, "I gave boy a ride." Johnson responded that it did not make sense because the police had everything on video camera. If they had the shooter on camera they would see he went in a different direction. Johnson was bewildered that the police were arresting the people who had been inside the smoke shop,

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<sup>10</sup> The informant was not the subject of an active criminal case.

but none of the other people who had been there. He knew the police arrested “the girl” on the day of the murder. He knew that Smith’s house was raided right after his.

After about an hour, Johnson asked the informant if he knew what basis the police could have for charging him with the murder. The informant said that he could be charged with conspiracy if he had “knowledge of that shit going down.” Johnson responded that he was not even paying attention in the smoke shop. The informant said that if his phone records showed him calling anyone at that time it would “link him to the next person.” Johnson said he heard “[t]hey both got new phones.” The only time he texted with anyone was when “they” told him the police were looking for him. He had kept the same phone that he had the day of the murder until the day before he was arrested.

Johnson told the informant the weapon was “out of the hood.” He said the murderer shot four rounds. The informant asked if the gun was “a big strap or a little one.” Johnson said he honestly did not know. He had no idea what was going on. Johnson said he heard “they” cut the wires on the meat market cameras across the street from the car wash on the day of the murder.

Johnson told the informant that the victim’s mother told him she saw the murder and “the girl” said she saw it, too. He said they had “seen enough.” He did not know “[h]ow they gonna put everybody in there and say we all called him up there.” He said the detectives “were asking me . . . you know him? You know her? Do you know her?

And I'm, like, shit. Yeah. Like, I grew up there all my life. Like, of course I seen him. Like, I know him, sure. But I ain't no big fan of hanging with him like that. . . . I knew of him." "[T]hen I'm asking them, like, do y'all -- did y'all see the old ladies and shit that was out there? They, like, no. I'm, like, so y'all only seen us?" The detectives kept showing him a photo and asking him if he knew the shooter. He told them he did not recognize the man in the picture. Johnson was worried that the detectives would tell Smith he identified him as the shooter because he told the detectives he bought marijuana from Smith.

### **Former Codefendant Smith's Testimony**

Smith was arrested after Johnson. He was charged with Price's murder, but pleaded guilty to manslaughter and received a 12-year prison sentence in exchange for testifying truthfully at trial. Smith had been attacked three times while in custody. In one instance, Johns and several other people attacked him in a holding cell.

Smith became a Rollin' 60's gang member about 15 years before the trial when he was jumped in at age 15 or 16. He was known by the moniker Tiny Manson. Smith was a Rollin' 60's gang member, as opposed to a gang banger. Gang bangers commit crimes. If you are just a member you are no longer active, and do not commit crimes on the gang's behalf. Smith sold marijuana at the smoke shop, which is a

known Rollin' 60's hang out. He had been convicted for selling marijuana and cocaine.

Smith identified Johnson and Johns by their gang monikers at trial. Smith had known Johns for approximately two years. Johns was a 5-8 Neighborhood Crips member. Smith did not know either defendant well, and did not have problems with them.

On the day of the murder, Johnson drove Smith to the smoke shop. Smith was on 11th Avenue talking with his girlfriend when Johnson drove up and asked him if he would go with him to get an estimate to get his car fixed. Johnson's black Lexus had damage to the rear panel on the driver's side. Smith's uncle knew the mechanic who Johnson wanted to use, so Smith was going to try to get Johnson a good deal on the repair. After Johnson talked to the mechanic, he agreed to bring the car back as soon as he could find someone to drive him home. Johnson and Smith then drove over to the smoke shop. Johnson went inside to buy cigarettes, but Smith stayed in the car until he saw Wade. He went into the smoke shop after Wade and joked with her briefly inside before she left. Smith remembered Johnson and Jarrett being in the smoke shop while he and Wade were talking.

After a few minutes, Wade returned to the smoke shop with Price. Smith noticed that Price was wearing red shoes with red laces and a red shirt. He asked Price which gang he was from. Price responded that he was from "nowhere." Smith told him that he should take his shoes off because it

was not safe for him to wear them there. Wade told Smith that Price was her brother. She said he was from “nowhere” and that he was “kind of slow.” Smith responded, “You shouldn’t have him up here like that because there’s too much going on up here.” He asked Price, “Why you got on all that red?” It was not safe for Price to wear the red shoes in Neighborhood Crips territory. Smith did not beat Price down because he did not think the boy was a threat; Price just did not know better. Smith banged on Price to warn him. He did not want the situation to escalate. After they talked, Price and Wade left.

Smith admitted he was the only person who banged on Price; Johnson did not say anything to Price or Wade. After they left, Johnson told Smith that Price was lying. He said he knew Price from jail and fought with him in camp. He said Price was from the Inglewood Family street gang. Johnson told Smith to watch out because he thought Price had a gun. Then Johnson said he was going to go get a gun, and he jumped in his car and left. Smith did not take him seriously. He stayed at the smoke shop “doing [his] same routine.”

At one point Smith walked toward the car wash to see if Price had a gun because he was concerned for his safety. Smith did not call or text anyone to come and do something to Price. He did not tell anyone a rival gang member was at the smoke shop. Smith told Poole that Price might be armed, but Poole didn’t call or text anyone about Price, either. Smith left the car wash after he talked to Poole.

As he was walking up 11th Avenue, Smith saw Johns jump out of Johnson's car with a hoodie on. When Smith saw the hoodie, he was immediately concerned that something bad would happen, and that he would be blamed because he banged on Price in the smoke shop. Smith did not see a gun, but he still thought something was going to happen. He told Johns, "No. Don't do nothing to him. Y'all are going to go to jail." Johns did not answer him. Johnson then said to Johns, "Watch out. Go kill him. Go kill him." Smith asked Johns not to do anything and told him to come back. Johns was on 71st Street "walking towards that way" when Smith made the request of Johns.<sup>11</sup> They were about 20 feet apart.<sup>12</sup> Johns did not respond. Johnson said to Smith, "Let him go kill him."

Smith tried to go after Johns, but Johns crossed the street. Smith watched Johns walk into the car wash from

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<sup>11</sup> Smith first testified that he saw Johns get out of Johnson's car at 71st Street and 11th Avenue. He knew Johns got out of Johnson's car because he saw the door open and close. He later testified that when he first saw Johns, Johns was walking down 11th Avenue. He also testified that "at the red light, the car was open, and he was getting out, and he started walking." There was no stoplight at the corner of 11th Avenue and 71st Street or at the corner of 11th Avenue and Florence Avenue.

<sup>12</sup> The court initially estimated the courtroom distance indicated by Smith as being 27 feet, but later revised this to 20 feet. Smith's testimony about the distance was consistent.

the mini market on the northwest corner of 11th Avenue and Florence Avenue. He was standing beside Johnson's car. Smith asked Johnson, "Why did you do that? Why would you go get him?" Johnson responded, "Watch out. Get away from my car. Get away from my car." Smith saw Johns shoot Price. He heard between three and four shots, and saw Price fall to the ground. As soon as Smith heard the shots, he ran east on Florence and then north up 10th Avenue to his grandmother's apartment. He did not see Johnson or Johns again after the shooting.

Smith had seen Wade before "on Fig." She was a prostitute. He did not have any problems with Wade. Smith denied saying, "I don't give a fuck about none of that" when Wade told him Price was slow in the smoke shop. He never told Wade he was a 6-0. He was not challenging Price by banging on him. Smith just suggested that Price take his shoes off. He did not say, "You got to come up out of your shoes." Smith stayed at the corner and watched the shooting because he was trying to prevent it. He did not tell Johnson to get someone to shoot Price, or tell anyone where to find Price. Smith admitted that he did not take the same route back to his grandmother's apartment when he first left the smoke shop that he did when he ran there after the shooting. Although he testified that he did not have any tattoos, "R 6 0" for Rollin' 60's was tattooed on his left hand, and "Neighborhood Crip" was tattooed on his right hand. Smith explained he forgot about the tattoos because they were old.



Smith was arrested for Price's murder on June 18, 2015. Smith did not speak to police between the time of the shooting and his arrest. He was interviewed by detectives for the first time that day, after he had been charged with murder and believed that he was facing a life sentence. The interview lasted approximately one and a half hours. Smith knew that he was being arrested for murder, and he wanted to clarify that his only role in the incident was his initial conversation with Price. The arrest occurred about 20 days after Price was killed, and Smith had gone over the events in his mind numerous times by that point. He told the detectives the truth. Smith was not represented by counsel at the time of the interview. Smith testified that his statements in the first interview, his proffer statement, and his statement at trial were exactly the same.

On the day he was arrested, Smith told Detective Crosson that Johnson and Johns murdered Price. He told the detectives he had not been a gang member for nine years. Smith repeatedly denied going by the moniker Weezy. He initially told the detectives he had never had a cell phone because he did not remember having one. He had his aunt's cell phone with him, which he borrowed for a day or two. He left the phone at his grandmother's apartment. He did not dispose of it. Smith had a different phone with him the day he was arrested. Smith admitted he did not tell the detectives that he banged on Price—he said that Wade spoke first and told him that Price was her brother, that he did not gang bang, and that he was kind of slow. Smith

admitted that he lied to the detectives during the interview, telling them four times that he did not tell Price to take his shoes off. He also admitted that he told the detectives, "I didn't never approach the little boy. I never said two words to him." He did not tell them Johnson told him Price might have a gun. Smith told the detectives that he left the smoke shop at the same time Johnson left, but on foot. In fact, he stayed and talked to Poole for a while and walked over to the car wash area to look at Price to see if he had a weapon. He went back and spoke to Poole again and then jogged across Florence. While doing so he looked back toward Price again.

Smith signed a proffer agreement on April 26, 2016. Smith had no offer of leniency or immunity when he gave the detectives his proffer statement. It was his understanding at the time that he would receive a sentence of 12 years, which he received after he pleaded guilty to manslaughter.

Smith testified that he was completely honest and open with the detectives when he gave his proffer statement. At the proffer, Smith stated that he told Price to "come out his shoes." Smith also said that when he first saw Johns he was walking "on the side of" Johnson's car, and that Johnson did not have anyone in the car with him. He never saw Johns and Johnson speak to each other. When asked if he ever saw Johns in Johnson's car, Smith stated, "I mean, at this point, I believe he went to go pick him up. How else was he going to--." Later he said, "I don't know. I don't really think he got out of his car." When questioned again, Smith stated, "I -- I mean, as I was walking, I -- I seen him. I seen the door

close, so yeah, yeah, I seen him get out the car.” He next said, “But I couldn’t really see because it was so down there. You feel what I’m saying? I seen him get out of the car. You feel me?” At trial, after much questioning, Smith testified that he saw Johns standing next to Johnson’s car with the door open.

### **Johns’s Flight**

A phone belonging to Johns’s girlfriend was tracked leaving Los Angeles on or about June 3, 2015, and arriving in Texas on June 5, 2015. Johns was arrested in Texas on June 23, 2015. Johns was on probation, and was required to obtain written permission from the his probation officer before leaving the county. Johns did not request permission to travel outside the county before traveling to Texas. One of Johns’s listed addresses with the probation department was 6811 10th Avenue.

### **Expert Testimony**

A gang expert explained that the Rollin’ 60’s and 5-8’s are both part of the Neighborhood Crips gang. They share a common origin and share gang symbols. The Neighborhood Crips include several subsets named for the streets members live on, but those subsets are part of a single gang: “It’s the same gang. The only thing that represents them is just the blocks that separate them, but they are the same gang.” The

primary activities of the Neighborhood Crips include robberies, burglaries, felony weapons violations, narcotics sales, witness intimidation and felony vandalism. The Neighborhood Crips commit violent crimes to claim territory, terrorize the community, and facilitate their sale of narcotics. Reputation is paramount to gangs. The more the community and rival gangs fear them, the easier it is to commit crimes with impunity and gain territory. Individual gang members increase their reputations within the gang and their gang's reputation generally by committing crimes. The Neighborhood Crips wear blue. Their rivals, the Bloods, wear red. If someone wears red in Neighborhood Crips territory, they are likely to be questioned about their gang affiliation. Wearing rival colors is a sign of disrespect.

Several officers testified that Johnson was a Rollin' 60's Neighborhood Crip member known as Bang and Twin, and Johns was a 5-8 Neighborhood Crip member known as Bone or Tiny S-Bone.

## DISCUSSION<sup>13</sup>

### ***Investigating Officer's Narration of Audio and Video Recordings***

Detective Crosson was questioned at length<sup>14</sup> by the prosecutor regarding what was shown on the various video

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<sup>13</sup> We do not consider Johns's contentions that the trial court erred by refusing to disclose the identity of the confidential informant who spoke with Johnson, or that the trial court erred by failing to instruct the jury that the confidential informant's statements were not to be considered for their truth. Although joinder in argument is broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), each defendant must demonstrate error and prejudice (*People v. Coley* (1997) 52 Cal.App.4th 964, 972; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"]). The jury was instructed under CALCRIM No. 305 that it was not permitted to consider Johnson's out of court statements in determining Johns's guilt. "We presume jurors understand and follow the court's instructions." (*People v. Vasquez* (2015) 239 Cal.App.4th 1512, 1518.) Johns's sole reliance on Johnson's arguments and reasoning is not sufficient to satisfy his burden on appeal.

<sup>14</sup> Detective Crosson gave testimony on 8 of the 10 days of trial. He testified regarding 17 video recordings, over a span 205 pages of reporter's transcript, including the three

recordings, and in some instances, why Detective Crosson thought facts were significant. Johnson argues Detective Crosson's testimony regarding what is shown on the video recordings, what defendant meant during his interrogation, and the significance of certain evidence was inadmissible as either lay opinion or expert opinion. Johns argues the detective's testimony that he was depicted as the shooter in videos was inadmissible. The Attorney General responds that Johnson's claims are forfeited for failure to raise specific objections at trial, but that regardless, both defendants' claims fail on the merits.

We conclude that the claims were preserved for appeal. We agree that some of the detective's characterizations of what the videos showed, his interpretations of statements and movements, and his opinions on what was significant, were improperly admitted. The one time Detective Crosson testified that Johns was the person in a video does not warrant reversal under the circumstances of the case. However, any errors were nonprejudicial as to both defendants. (*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).)

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smoke shop camera views, four car wash camera views, two beauty shop camera views, an interview with Poole, two interviews with Lewis, Johnson's custodial interview, Johnson's conversation with the confidential informant, a recreation of the view along the path Darthard took to the smoke shop, Smith's custodial interview, and Smith's proffer statement, which were all played during the detective's testimony.

## Law

Generally, the testimony of a witness is limited to matters of which he or she has personal knowledge. (Evid. Code, § 702, subd. (a).) Lay opinion testimony is admissible if it is both rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800; *People v. Bradley* (2012) 208 Cal.App.4th 64, 83.) "A lay witness generally may not give an opinion about another person's state of mind" (*People v. Chatman* (2006) 38 Cal.4th 344, 397), nor is "[l]ay opinion about the veracity of particular statements by another [admissible] on that issue" (*People v. Melton* (1988) 44 Cal.3d 713, 744). "Matters that go beyond common experience and require particular scientific knowledge are not a proper subject of lay opinion testimony. (*People v. Williams* (1988) 44 Cal.3d 883, 915; *People v. Williams* (1992) 3 Cal.App.4th 1326, 1333.)" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131 (*DeHoyos*).)

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) ""The decisive consideration in determining the admissibility of expert opinion evidence

is whether the subject of the inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” [Citations.]’ (*People v. Hernandez* (1977) 70 Cal.App.3d 271, 280.)” (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39 (*Sergill*).)

“A trial court’s ruling on the admission or exclusion of evidence is reviewed for abuse of discretion.” (*DeHoyos, supra*, 57 Cal.4th at p. 131.) Where testimony has been erroneously admitted, “we must examine the entire cause, including the evidence, and determine whether it is reasonably probable that a result more favorable to appellant would have been reached had this evidence not been admitted. (*Watson*[, *supra*,] 46 Cal.2d [at p.] 836; Evid. Code, § 353.)” (*Sergill, supra*, 138 Cal.App.3d at p. 41.)

### **Proceedings**

The court and parties discussed the propriety of allowing Detective Crosson to testify regarding the content of the videos. Johnson’s counsel objected, stating: “The best evidence what’s on the videos is the video itself. What I think the detective would be doing here is interpreting what is on the video, and in fact, the video speaks for itself.” The prosecutor argued that it was necessary to have the detective clarify what was occurring on the videos because



“there were different witnesses that talked about different parts of the videos, and cohesively, it may not be clear to the jury as to the series of events and what happened. . . . [¶] . . . [W]hen the detective says that the video shows Dwight Smith pointing at what -- appears to be pointing at the victim’s shoes and what appears to be speaking in a direction of where the victim is standing, I don’t think those are objectionable points to be made because the detective can talk about his lay opinion as to what is being shown on the video.” Johnson’s counsel did not object to “putting everything in context,” “[b]ut when the detective is going to be asked ‘what is Mr. Smith doing there’ and Mr. Smith is pointing, that again -- and pointing downward at the shoes, that is an interpretation . . . by the detective. The best evidence, again, really is the video or videos themselves. It’s up to the jury to decide what is going on in those videos.”

The court opined that “much of what is on the video appears to be uncontested between both sides.” It ruled, “there’s nothing that precludes Detective Crosson from given [*sic*] a lay opinion as to what he believes he is seeing. And the videos are at different locations at the same time frame from different camera angles . . . and video that is being shown that is real time that is all about the same time frames to have put that in context. . . . [¶] With that said, there is a point where this also becomes cumulative and unduly time-consuming. If you want the detective to give his lay opinion as to what he is seeing on the videos, get to the videos.”

In the ensuing direct examination, Detective Crosson identified a car shown in the videos as Johnson's vehicle. The detective testified that he recognized the car by the damage on the left-rear portion of the bumper, because he had watched the videos "many, many times." The court interjected and requested that the prosecutor rephrase the question to indicate that this was the detective's opinion. The prosecutor did so, and asked the detective if he was able to see the damage to the vehicle in a specific frame. The detective responded, "Yes."

Detective Crosson testified that the timestamps on the car wash videos were accurate, and that the smoke shop cameras were 58 minutes slower. He knew this "[j]ust from the course of my investigation, I know that the car wash camera is accurate, and I know that [the smoke shop camera] is slow. By merging the two and looking at the frames and seeing what is happening on the smoke shop camera at the same time something is happening on the car wash camera, I can look at the time difference, and I know it to be approximately 58 minutes."<sup>15</sup> The detective verified the "real time" for the jury numerous times as the videos were played.

Detective Crosson identified the individuals in the smoke shop on the day of the murder. He testified that after

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<sup>15</sup> As we previously noted, the detective's calculation of the timestamp differences is not consistent with our view of the evidence. However, the timing of the videos is not an issue on appeal.

Price entered the smoke shop, Smith “appear[ed] to be gesturing either toward the feet or legs of Tavin Price” “repeatedly,” while facing Wade.

The prosecution switched camera views, and asked Detective Crosson to describe Johnson’s reaction to Price entering the smoke shop. In this view Johnson was fully visible and Smith was visible to just below the waist. The video only captured part of Price’s shirt for much of the encounter, although his face moved into view occasionally. Wade could not be seen during the conversation except for a brief moment when she passed Smith to move into the doorway with her back facing the camera.

The detective testified: “I noticed, as Mr. Price is walking in, [Johnson’s] head turned toward Mr. Price, and he appears to be looking at him.” Detective Crosson observed Johnson’s head moving during Smith’s encounter with Price and Wade: “He appeared to be tracking Mr. Price. He is staring at him. You see his head go up and down as if he is looking Mr. Price up and down.” Johnson’s counsel objected, and the court struck “the latter portion” of the detective’s testimony. The prosecutor directed the detective to “focus on where Mr. Johnson is, where his head is turned and where it appears his eyes are looking at.” He then asked Detective Crosson if he noticed Johnson’s “attention drawn to anybody.” The detective responded “Yes.” He elaborated, “I saw him towards the end, splitting his attention between Ms. Wade and Mr. Price.” When asked which way Johnson was facing, Detective Crosson

responded, “Well, he was facing Mr. Price, but I could see the whites of his eyes move, and he shifted his gaze just with his eyes over to Mr. Smith twice during that exchange.” He opined that Johnson and Smith were standing approximately five to six feet apart. After the detective estimated the distance, the trial court admonished the jury: “[T]he detective is giving his opinion as to what it appears to be on the video. If you see something different, it is for you to interpret and come up with your own decision. This is the detective’s opinion.”

When the questioning resumed the prosecutor asked Detective Crosson whether he could see Johnson speaking to Smith after Price and Wade left the smoke shop. The detective said he could: “You can see his eyebrows moving up and down and his mouth moving at the same time. It looks like maybe three different times where his mouth was moving.”

The prosecutor played video of Johnson’s car leaving the parking lot. The prosecutor asked Detective Crosson to describe what Johnson’s vehicle was doing:

“[Detective Crosson]: He’s just entered the roadway into the number 1 lane on Eastbound Florence, and the vehicle accelerated away and then makes a left turn going northbound on what I know to be 10th Avenue.

“[Prosecutor]: Does that turn -- is that something, during your investigation, that you determined to be an act that was significant?

“[Detective Crosson]: Yes.

“[Prosecutor]: Why?

“[Detective Crosson]: Because that’s the -- that would take you to location of 6811 10th Avenue where I knew Mr. Johns to be residing.”

The prosecutor then played the portion of the video showing the shooter crossing Florence Avenue. He asked the detective whether there were two things that were “of significance.” Detective Crosson answered, “Aside from the shooter going out of frame, you will notice that at the corner, at the intersection of southbound 11th Avenue and Florence, a black vehicle has just stopped past the limit line here at Florence. [¶] . . . [¶] . . . This vehicle here has just pulled up and stopped just past the limit line out on Florence, and the person I believe to be Dwight Smith has come into view on -- from the same location we had seen the shooter walk from, from the wall of that mini market, wearing the white shirts and dark pants.”

The prosecutor rewound the recording and asked the detective to stop him at the time he first saw the black car appear in the frame. The detective testified that the vehicle was plainly in view at 10:01:29 a.m. per the timestamp and 10:59:29 a.m. in real time. When asked whether that would be 22 seconds after the shooter came into view at 10:59:07 a.m. per the timestamp, the detective responded, “That seems like a lot of time . . . . Twenty seconds seems like a long time for somebody to walk.” Johnson’s counsel objected that the video spoke for itself. The court admonished the jury, “The video does speak for itself. As far as the math

goes, the jurors can also do that for themselves.” The court then asked the prosecutor if he needed a pencil and paper. Detective Crosson interrupted the prosecutor’s next question to state that he concurred with the prosecutor’s math.

The prosecutor continued:

“[Prosecutor]: . . . At the time that the car stops at the limit line -- [¶] . . . [¶] -- The black car that you had previously identified at [timestamp] 10:01:36, I want you to pay attention to the traffic going westbound on Florence. I really just want you to focus on the opportunity for that car to turn right. Okay?

“[Detective Crosson]: Yes.

“[Prosecutor]: I have paused it at 10:01:42. Would it appear that that car had the opportunity to turn right?

“[Johnson’s Counsel]: Objection. He can testify there is no traffic there, but he can’t talk about opportunity.

“The Court: Sustained. The video speaks for itself.

“[Prosecutor]: Did it appear at this time frame that there is no traffic --

“The Court: The video speaks for itself, and the entire street is not in the video.”

The detective then described Smith and the shooter as “sprinting” from the scene, and Johnson “pull[ing] out in front of another oncoming vehicle” and proceeding west on Florence.

The prosecutor stated:

“[Prosecutor]: . . . Having paused the video at [timestamp] 10:02:27, was there something of significance in that black car when you saw this portion of the video?”

“[Detective Crosson]: Yes. And I believe the frame right before that actually gives better contrast.

“[Prosecutor]: And that’s [timestamp] 10:22:07 [*sic*]?”

“[Detective Crosson]: Yes. It will show it on the large monitor. It doesn’t appear very clear here, but I can see a piece of the bumper that appears to be hanging down on that left side at the rear of the car.

“[Prosecutor]: That would be at [timestamp] 10:02:27?”

“[Detective Crosson]: Yes.

“[Prosecutor]: Which in real time would be what time?”

“[Detective Crosson]: 10:58 -- sorry -- 11:00:27.”

The prosecutor then played the video recordings taken from the beauty shop, which Detective Crosson estimated to be nine minutes slow. The camera views covered the intersection of 11th Avenue and 67th Street. The prosecutor played the beauty shop video beginning at timestamp 10:53:05 a.m., which the detective testified was real time 11:02:05 a.m. Detective Crosson testified that about eight seconds later “a black vehicle that appear[ed] to have failed to stop for a posted stop sign” made a turn from northbound 11th Avenue to eastbound 67th Street.

The detective recognized the car as being the one Johnson was driving from the physical features and also “knowing the plate, when you’re utilizing that system -- it has a zoom feature -- I was able to compare the license plate.

It wasn't a perfectly clear image. But knowing what the plate was after the fact, I was able to say, 'Yes, that's the same plate.'" The detective testified that he was able to zoom in and determine that the driver was a Black male in a white shirt. He could "only verify for sure" that there was one person in the vehicle. The prosecutor asked if the shooting had already occurred in the time frame of 11:02:05 a.m. Detective Crosson responded yes, that the black car made the turn at the corner where the beauty shop was located after the shooting occurred.

The prosecutor played a recording of the same time frame from a slightly different angle, and again asked Detective Crosson if he recognized the black car depicted in the video. The detective responded, "This is that same Lexus driven by Mr. Johnson. This one, when you zoom in, the plate is actually a little bit more clear." Johnson's counsel objected. The court sustained the objection "as to who it was driven by," and struck that portion of the testimony. The prosecutor told Detective Crosson to continue. The detective testified, "This is actually the best view of that damage to the rear bumper from any of the cameras that we have, and it's right here on the left-bottom piece of the vehicle's bumper."

Later, the prosecutor sought to elicit testimony from Detective Crosson regarding a video recording that he made by taking the path that he believed Darthard took when walking over to the smoke shop to "gain a perspective of what she could see as she is walking westbound along



Florence Avenue to see if it would be reasonable for her to be able to identify the shooter.”<sup>16</sup> Johnson’s counsel objected, and the court released the jurors for a recess.

After the jurors exited the courtroom, the court admonished counsel that she allowed the detective to “describe what he appears happening [*sic*] based upon his investigation” over defense counsel’s objection because of the many different camera angles. The detective could not speculate as to whether a car could turn onto a roadway because “[i]t’s based upon him looking at the video and making a determination.” The detective was also prohibited from stating his “opinions that Mr. Johnson would be the driver . . . because you can’t say who the driver was based upon the video” or “what Ms. Darthard would have been able to see because that is speculation.”

When the jury returned, the prosecutor questioned Detective Crosson regarding his June 18, 2015 interview of Johnson as the video recording of the interview was played:

“[Prosecutor]: So when defendant -- when you are interviewing a suspect -- because he was a suspect at this time; correct?

“[Detective Crosson]: Yes.

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<sup>16</sup> Defense counsel did not object to admission of the video recording on this basis, but there were no facts in evidence suggesting that Darthard saw the shooter as she was walking to the smoke shop. Lewis’s testimony was impeached with her prior statement to Detective Crosson that Darthard told her she saw John running away *after* the shooting when she was inside the smoke shop.

“[Prosecutor]: When you are interviewing a suspect and you have seen on a video something that you might consider inconsistent with what he is telling you, what is your reaction as a detective?

“[Johns’s counsel]: Objection. Relevance.

“The Court: Overruled. But this is limited to explaining how the detective conducted the questioning of Mr. Johnson or the questions that he chose to ask Mr. Johnson.

“[Detective Crosson]: I’m sorry. Repeat the question.

“[Prosecutor]: When you come across a situation where you have video evidence that is inconsistent with what a suspect is telling you, how does that affect how you view this interrogation?

“[Detective Crosson]: I believe that he is lying to me at that point.

“The Court: Well, that is stricken as improper opinion evidence.

“So, ladies and gentlemen, you are to ignore that.”

The prosecutor continued playing the video, and then paused to ask the detective to interpret something Johnson said:

“[Prosecutor]: When Defendant Johnson says, ‘If I was on, I would have been on it,’ and then you reply with, ‘Who was on it then?’

“What does that mean, ‘If I was on it’?”

“[Detective Crosson]: To me, that meant I wasn’t worried about the red shirt, just meaning that he wasn’t

concerned with it. He knew what we were talking about. He wasn't worried about it."

The court excused the jury and admonished the detective that even if the prosecutor's questioning was "inartful" he could not give his opinion as to whether Johnson was lying.

The trial resumed, and the prosecutor questioned Detective Crosson regarding the route Johnson took after leaving the smoke shop:

"[Prosecutor]: For the description Defendant Johnson gave of going down Florence, that would be heading eastbound on Florence?

"[Detective Crosson]: Yes.

"[Prosecutor]: And then making a left on 10th Avenue; correct?

"[Detective Crosson]: Correct.

"[Prosecutor]: Was that consistent with what you saw on the videos?

"[Detective Crosson]: Partially, yes.

"[Prosecutor]: Okay. When you say 'partially consistent,' what was inconsistent about that?

"[Detective Crosson]: Well, he is describing his route coming back as if he came right back to Florence on 11th Avenue, and it took him way too long to have done that."

The prosecutor then asked the detective to confirm that Johnson made inconsistent statements in the interview:

“[Prosecutor]: When Kevin Johnson says, ‘When did I say I didn’t see nobody run by me,’ did you hear him ask that question?

“[Detective Crosson]: Yes.

“[Prosecutor]: Had you, previous to him seeing [*sic*] that, brought up whether he saw anybody run by his car that day?

“[Detective Crosson]: Yes.

“[Prosecutor]: And in response to that question, what did he say?

“[Detective Crosson]: He said he hadn’t.

“[Prosecutor]: And then he is saying, ‘I didn’t see nobody run by me’?

“[Detective Crosson]: Yes.

“[Prosecutor]: And is that inconsistent from what he told you before?

“[Detective Crosson]: Yes.

The court interjected that the recording spoke for itself.

The prosecutor returned to the smoke shop and car wash videos and questioned the detective regarding Johnson’s actions when he returned to the smoke shop about 10 minutes after the shooting. He asked Detective Crosson if he saw “Defendant Johnson almost peeking his head into where the tobacco store is?” Johnson’s counsel objected and the court directed the prosecutor to rephrase the question. The prosecutor then asked, “Do you see what appears [*sic*] defendant Johnson just did in the video?” Johnson’s counsel

objected again on the ground that “[t]he video speaks for itself,” but the court overruled the objection.

The court broke for the day and asked the parties to remain after the jury left. Out of the presence of the jury, the court admonished the prosecutor, “[O]bviously the tape speaks for itself. There does need to be some clarification because the tape is not high resolution, like we are sitting down and watching a movie, so the court is allowing clarification, and you know, Detective Crosson’s opinion as a lay opinion as it relates to some of the actions taken, and obviously, as the investigator as to what he knows to be around that area and having walked it and whatnot. But [prosecutor], you need to refrain from characterizing what is going on as opposed to the observation of what someone is doing.”

On the next day of trial, Detective Crosson described Johnson’s movements as shown on the car wash and smoke shop videos approximately 10 minutes after the shooting occurred. The prosecutor then asked the detective if it was “important in [his] investigation to determine how long it took defendant Johnson to drive from the car wash to the body shop?” Detective Crosson explained that it was “[b]ecause that I would explain the time -- I knew he wouldn’t have been gone very long, for one, and I didn’t want that to be -- or that was his alibi, you know. I knew where -- from the video, where he was.” Johnson’s counsel objected. The court sustained the objection as to the answer, and asked Detective Crosson to “rephrase [his] answer as to why

it was important without characterizing.” The detective responded, “Just to establish a timeline.”

The prosecutor asked Detective Crosson if he had the opportunity to review the smoke shop and car wash videos before interviewing Johnson, and if he could identify the two people who ran near Johnson’s car as it was stopped at 11th Avenue just before the shooting.<sup>17</sup> Detective Crosson responded that he was able to see Dwight Smith and Kanasho Johns running near Johnson’s car. Johnson’s counsel objected, but the court overruled the objection. The prosecutor then asked whether Smith ran behind the car and whether “the shooter” ran in front of the car. The detective responded yes, but clarified that the shooter ran alongside the car. The prosecutor followed up:

“[Prosecutor]: And at this point, when defendant Johnson tells you . . . ‘Have you ever seen that guy before, the guy you honked at,’ and his response was, ‘Yeah, man, y’all know,’ was that important to you?”

“[Detective Crosson]: Yes.

“[Prosecutor]: Why?”

“[Johnson’s counsel]: Objection. The tape speaks for itself.

“The Court: Overruled. And I’ll allow him to answer this question.

“[Detective Crosson]: Because I had shown him pictures of the other two people who I believed to be involved

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<sup>17</sup> The prosecutor misspoke. No one ran near the car before the shooting, only afterward.

in the case, and he only identified Dwight Smith out of those two people.”

The prosecutor then asked if, despite knowing that Johnson was being truthful when he said he did not speak to Wade or Price in the smoke shop, the detective “still ha[d] other reasons to believe he was involved?” Detective Crosson stated that he did. When the prosecutor asked what those reasons were, Johnson’s counsel objected. The court stated that there would be a break soon and the parties could take up the issue outside the jury’s presence.

At the break, the prosecutor explained:

“[Prosecutor]: I think it was an important point to make out that defendant Johnson was still being investigated, not because he didn’t say anything, but because of the other information they had from the videos.

“The Court: Your question was ‘what other evidence did you have that he was involved?’ And that is an inference that the jurors should draw. You can ask him what other evidence was significant in his investigation or as he investigated it, but to phrase it as to that he was involved in the crime is actually for the jurors to determine that that is evidence, particularly since he is not alleged to be the shooter in this particular incident. [¶] . . . [¶]

“[Johnson’s counsel]: Even asking the detective what is significant, this is not a probable cause hearing. This is a hearing -- a trial and it’s for the jury to decide what evidence is important. [¶] The state of mind of the detective, frankly, as to what evidence he has is not relevant because if he gets

into that -- I mean, there's multiple hearsay. There's videos. I can come back and spend two or three hours with him in saying, 'Well, here's this evidence. Did you take this into consideration? Did you take this into consideration?'"

The court explained that although the prosecutor could not ask what other evidence there was that Johnson was involved in the crime, he could elicit "what actions he took in the course of his investigation" because the detective's credibility was at issue. Johnson's counsel responded that he would not be attacking the officer's credibility. The court replied that every witnesses' credibility was at issue, and informed the prosecutor that he could "ask him what information was significant to him as he was conducting the investigation . . . and bring up those facts which do not bring in hearsay." The court ordered the prosecutor not to use the word "suspect" when referring to Johnson, but emphasized that "you can ask him if those facts that you just enumerated were significant as it related to his questioning of Mr. Johnson as we saw on the tape."

The prosecutor resumed the line of questioning:

"[Prosecutor]: When you were speaking with defendant Johnson and he was adamant to you that he never said anything to the victim, was that consistent with what you had seen on the video?

"[Detective Crosson]: Yes.

"[Prosecutor]: And was that consistent with all portions of your investigation?

"[Detective Crosson]: Yes.



“[Prosecutor]: Now, even despite that, did you have other information suggesting he was involved that caused you to then investigate him?

“[Detective Crosson]: Yes.

“[Prosecutor]: What is that?

“[Detective Crosson]: The fact that he was present when the victim was being confronted and the actions from the video that show the way in which he left and returned at approximately the same time that the shooter crossed the street, and that he stayed at that intersection while the shooting took place and remained there until after the shooter ran past his vehicle.

“[Prosecutor]: And in addition to that information going into the interview, were there things that he said during the interview that assisted you in determining whether he was involved or not?

“The Court: Rephrase your question.

“[Prosecutor]: Were there things that he said to you during his interview that assisted you in your investigation?

“[Johnson’s counsel]: Objection. Irrelevant.

“The Court: Overruled.

“[Detective Crosson]: Yes.

“[Prosecutor]: Like what?

“[Detective Crosson]: Well, he said he knew who the person was that ran by his car. I showed him pictures during that interview where he said that he knew one person and didn’t know the other one, the statement about that he went to get his car fixed and was there at the time

the helicopter was overhead and that is what caused him to return back to the car wash.”

On redirect examination the prosecutor asked if Johnson “refuse[d] to tell you who ran by his car?” Detective Crosson responded, “Yes.”

The prosecutor asked Detective Crosson if Johnson was “refusing” to tell the detective what Smith had said to Wade and Price, although he was in the smoke shop when the conversation occurred. Johnson’s counsel objected on the basis that the question called for speculation, and the objection was sustained.

The prosecutor continued:

“[Prosecutor]: Let’s talk about the photograph of defendant Johns that you showed to defendant Johnson.

“[Detective Crosson]: Okay.

“[Prosecutor]: What did he say about how he knew defendant Johns?

“The Court: That is beyond the scope.

“[Johnson’s counsel]: Objection.

“The Court: That is beyond the scope.

“[Prosecutor]: I believe -- my notes have that there was a question along the lines of what was -- which photographs were shown to him.”

The court released the jurors for lunch. It admonished the parties that they could not use Detective Crosson to “connect all the dots for the jury and draw those inferences for them in your questioning . . . . [¶] . . . I understand it’s important to your theory or your case, but it’s for you to

argue those inferences. . . . Okay? The witnesses are to bring forth the facts, and then the jurors draw the inferences from them.” She warned the prosecutor that the detective “can’t sit there and give his opinion as to why he thinks Mr. Johnson is a co-conspirator or an aider and abettor because his opinion is irrelevant. He can say what he did in the investigation, why he did certain things as it may be relevant to other actions that he took, but his opinion as to who committed this crime is irrelevant.”

Johns’s counsel then raised the issue of Detective Crosson identifying Johns as the person running in front of Johnson’s car, and by implication as the shooter, who he described as the person running in front of Johnson’s car. Although counsel had not heard this testimony, and the court did not recall it, Johns was adamant that the detective had named him. The court reviewed the transcript and verified that Detective Crosson had identified Johns, but that the court had not heard it because Johnson’s counsel was objecting to other testimony at that time. The court offered to strike the answer as it related to Johns, or to have the detective clarify that his statement was based on witness interviews. Johns’s counsel moved for mistrial. The court denied the motion for mistrial because “Ms. Darthard did say that in an earlier statement that she saw Mr. Johns run across the street, Florence, just immediately prior to the shooting and run toward the car wash.”<sup>18</sup> The court

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<sup>18</sup> In her interview with Detective Crosson, Lewis said Darthard saw Johns running away after the shooting, not

reasoned that the facts were in evidence, the problem was that Detective Crosson could not personally identify Johns in the video. The court summarized, “So I think we just need to make clear that this detective is not identifying that figure as being Mr. Johns from the videotape, that that came from witness interviews.” Johns’s counsel maintained that there was no foundation for Detective Crosson’s statement, and because the jury had already heard his testimony it would be impossible to “unring” the bell. He asked that the court order that none of the parties mention the identification, which the court did.

When the trial resumed, Detective Crosson testified that Johnson’s only response to the photo of Johns was that he did not know him.

### **Analysis**

#### *Forfeiture*

We reject the Attorney General’s assertion that Johnson forfeited his challenges to Detective Crosson’s testimony regarding specific portions of the videos and recorded statements because he failed to object every time Detective Crosson gave improper testimony. Prior to Detective Crosson testifying, defense counsel objected to the

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running across the street before the shooting. Poole stated that she saw Johns walking across the street prior to the shooting.

admission of all testimony that interpreted the videos as inadmissible lay opinion. The objection preserves the issue for appeal. (*People v. Hall* (2010) 187 Cal.App.4th 282, 292 [“Once an objection has been fully considered and overruled, it is not necessary to repetitiously renew the objection in the same trial to preserve the issue on appeal”].) Our conclusion that there was no forfeiture is bolstered by the trial court’s statement that “there’s nothing that precludes Detective Crosson from given [*sic*] a lay opinion as to what he believes he is seeing,” a seemingly overbroad statement suggesting the testimony in question would be admissible.

### *Error*

We address separately the portions of the detective’s testimony that defendant specifically relies upon as error, but begin with some general observations. First, we disagree, in general, with the trial court’s statement that “there’s nothing that precludes Detective Crosson from given [*sic*] a lay opinion as to what he believes he is seeing.” As a general proposition, it is for the jury to decide what is depicted in a video. Second, it is settled that a peace officer cannot express an opinion on guilt. This would, in many circumstances, include a prohibition against testimony of an officer explaining why the officer believes particular evidence is significant. Third, a detective may explain the relationship of different items of evidence in the context of his investigation, particularly where, as here, there are

multiple video recordings from different views and several witnesses were interviewed by the detective.

The Attorney General contends Detective Crosson's testimony was admissible as expert testimony because "Detective Crosson had studied the seven camera angles provided by the car wash and store video cameras, and accounted for the differing timestamps. . . . He demonstrated that expertise throughout his testimony." The trial court did not admit the detective's testimony as expert opinion, and nothing in the record qualified Detective Crosson as an expert on video recordings. The videos did not require special expertise to understand. "[M]en of ordinary education could reach a conclusion as intelligently" as the detective did. (*Sergill, supra*, 138 Cal.App.3d at p. 39.) The jury did not require assistance to decide what Johnson intended by his statements, or to assign meaning to his and others' movements. Any layperson is equipped to form an opinion as to whether a car is accelerating or has pulled out in front of an oncoming vehicle. Detective Crosson formed his opinions by simply reviewing the evidence, which is exactly what the jury was charged to do. (*People v. Smith* (1989) 214 Cal.App.3d 904, 915 ["With limited exception, the fact finder, not the witnesses, must draw the ultimate inferences from the evidence"].) The argument has no merit.

The Attorney General's argument that Detective Crosson's testimony was proper lay opinion fares no better. The videos that the detective narrated at trial were admitted into evidence. The detective was not a percipient witness to

the crime, and although he did have personal knowledge of Johnson's custodial interview, he did not testify to anything that was not captured in the recording. His opinions on Johnson's mental state and guilt were clearly inappropriate, as was his identification of Johns, which was based on his investigation rather than on his perceptions. The jury was just as able to see, hear, and interpret the videos as Detective Crosson.<sup>19</sup>

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<sup>19</sup> The cases that the Attorney General cites in support of the argument that the detective could properly give lay testimony about the content of the video recordings are distinguishable. In those cases, witnesses testified regarding persons and objects with which they were personally familiar. (*People v. Leon* (2015) 61 Cal.4th 569 [detective who had personally seen defendant's jacket permitted to identify person wearing an identical jacket as defendant in video]; *People v. Larkins* (2011) 199 Cal.App.4th 1059 [witness who had viewed video not presented to the jury permitted to identify defendant as the person depicted in the video]; *People v. Ingle* (1986) 178 Cal.App.3d 505 [robbery victim who viewed video of robbery in progress permitted to identify defendant as the robber].) Johnson does not contest the propriety of Detective Crosson's identification of clearly identifiable individuals of whom the detective had independent personal knowledge. The decisions in *Leon*, *Larkins*, and *Ingle* are inapplicable.

*1. The detective's description of what  
Johnson is doing inside the smoke shop*

Detective Crosson identified the individuals in the smoke shop on the day of the murder. He testified that after Price entered the smoke shop, Smith “appear[ed] to be gesturing either towards the feet or legs of Tavin Price” “repeatedly,” while facing Wade.

Detective Crosson also testified: “I noticed, as Mr. Price is walking in, [Johnson’s] head turned toward Mr. Price, and he appears to be looking at him.” Detective Crosson observed Johnson’s head moving during Smith’s encounter with Price and Wade: “He appeared to be tracking Mr. Price. He is staring at him. You see his head go up and down as if he is looking Mr. Price up and down.” Johnson’s counsel objected, and the court struck “the latter portion” of the detective’s testimony. The prosecutor directed the detective to “focus on where Mr. Johnson is, where his head is turned and where it appears his eyes are looking at.” He then asked Detective Crosson if he noticed Johnson’s “attention drawn to anybody.” The detective responded, “Yes.” He elaborated, “I saw him towards the end, splitting his attention between Ms. Wade and Mr. Price.” When asked which way Johnson was facing, Detective Crosson responded, “Well, he was facing Mr. Price, but I could see the whites of his eyes move, and he shifted his gaze just with his eyes over to Mr. Smith twice during that exchange.” He opined that Johnson and Smith were standing approximately five to six feet apart. After the



detective estimated the distance, the trial court admonished the jury: “[T]he detective is giving you his opinion as to what it appears to be on the video. If you see something different, it is for you to interpret and come up with your own decision. This is the detective’s opinion.”

The court erred in several respects. Detective Crosson’s testimony that Smith “appear[ed] to be gesturing either toward the feet or legs of Tavin Price” “repeatedly,” while facing Wade was not proper opinion testimony, either as a lay or expert witness. The detective could arguably testify that Smith’s hands were moving, but indicating what Smith was gesturing toward was mere speculation. The jury did not need Detective Crosson’s testimony to see the movement of Smith’s gestures, nor did it need the detective’s interpretation of where Smith was gesturing; these issues were for the jury, not the investigating officer. Although this was error, the topic was relatively innocuous in the case. The only explanation for the murder was the gang motivation, and whether Smith was gesturing at Price’s legs or feet was of little, if any, significance at trial.

Detective Crosson’s additional testimony that Johnson was “tracking” Price in the smoke shop was speculation and not a proper subject of lay or expert opinion testimony. The court properly struck the portion of Detective Crosson’s testimony that Johnson was “looking Mr. Price up and down.” But the court erred in allowing the detective to testify that Johnson was splitting his attention between Wade and Price and that he could see the whites of

Johnson's eyes shifting. The jury could see whatever the video depicted as well as Detective Crosson. Whether Johnson was "tracking" Price or splitting his attention between Wade and Price was a matter for the jury to decide, and the detective's opinion on that subject was improper and should have been excluded.

The prejudice resulting from this error is arguably greater than that flowing from the improper conclusion that Smith was gesturing toward the feet or legs of Price. Johnson made no threats to Price, unlike Smith. He was not the shooter, unlike Johns. And while there is certainly substantial evidence of his involvement in this gang-related murder, the case against him was not overwhelming, as argued by the Attorney General. Nonetheless, this error was not of a magnitude to warrant reversal under *Watson*. It is undisputed that Johnson was nearby as Smith "banged" on Price. He made no attempt to intervene on Price's behalf, nor did he tell his associate to leave Price alone. He spoke with Smith thereafter and the murder occurred in short order. His guilt was dependent on factors other than where he was looking while in the smoke shop. Johnson's guilt was established by the combination of his gang affiliation (and gang retaliation was the sole motive for the killing), Smith's testimony, inconsistent statements Johnson made during the interrogation, several statements he made to the confidential informant, and the timing of his presence at the car wash immediately before, during, and shortly after the murder.

*2. Testimony that the detective “could only ‘verify’ for sure there was one person (the driver)” in appellant’s car as it drove away*

We see no error or potential for actual prejudice in Detective Crosson’s testimony that he could only verify that there was one person in the Lexus driving past the beauty shop after. The black Lexus, which defendant admitted he drove, was present at the scene before the murder, and it returned right as the shooter arrived, and it remained nearby until after Price was killed. There appears to be no material issue questioning that only one person was visible in the car (or that Johnson was that person). We note, too, that the trial court struck Detective Crosson’s testimony that defendant was driving on the basis that the video did not permit an identification of the driver.

*3. Detective Crosson’s opinion about what Johnson “meant” when he made certain remarks during his interrogation session*

When Detective Crosson asked Johnson during the interrogation which smoke shop he was referring to, Johnson answered, “Shit. You know which one. Y’all know more than me.” The prosecutor sought to elicit what the detective understood Johnson to mean by that statement. Defendant objected on the ground the question called for speculation. The trial court overruled the objection, but instructed the

jury that this was the detective's "interpretation." Detective Crosson testified that "[Johnson] knew what the subject of my investigation was," because they were talking about the same smoke shop.

There was no error in allowing Detective Crosson to testify that they were talking about the same smoke shop. There is nothing in the record to suggest any confusion on this point. The trial court could reasonably conclude that defendant understood which smoke shop was being discussed in the context of the interrogation. And even if this ruling was in error, the answer given is not prejudicial under *Watson*.

The prosecutor also asked the detective for his "reaction as a detective" when a suspect makes a statement that is "inconsistent" with a video. The trial court overruled Johnson's relevance objection, but stated it was "limited to explaining" how the detective conducted the questioning or what questions he chose to ask Johnson. Detective Crosson answered, "I believe that he is lying to me at that point." The trial court struck the answer as "improper opinion evidence" and told the jurors "you are to ignore that."

As the trial court recognized, a detective's reaction that a suspect is lying is irrelevant and improper opinion testimony. The court should have sustained the original relevance objection by Johnson, but the court permitted the questioning to go forward to explain how the detective conducted the interrogation. Once the answer was given, the court immediately struck it and ordered the jury to

disregard it. We presume the jury followed the instruction to disregard the statement. (*People v. Clark* (2011) 52 Cal.4th 856, 958–959; *People v. Gonzales* (2011) 51 Cal.4th 894, 921; *People v. Smithey* (1999) 20 Cal.4th 936, 961.)

The prosecutor also asked Detective Crosson what it meant to him when appellant said, “If I was on, I would have been on it.” Without objection, the detective testified that to him it meant Johnson was not worried about Price wearing a red shirt, and Johnson was not “concerned with it. He knew what we were talking about. He wasn’t worried about it.” Outside the presence of the jury, the trial court described the prosecutor’s questioning as “inartful” and stated that “you can’t give your own opinion whether or not somebody is lying.” There was no objection to the specific question.

There was no error or prejudice in allowing this testimony. Johnson had been questioned by Detective Crosson about what happened in the smoke shop, where Smith confronted Price in Johnson’s presence. The detective’s testimony regarding what Johnson was referring to did no more than place Johnson’s statement in the context of what was being discussed in the interrogation. Doing so was not harmful to the defense, since the video is consistent with Johnson’s position that he did not speak to Price, which would explain why Johnson would not be worried about the smoke shop confrontation with Price.

*4. Detective Crosson's description of the  
route Johnson took in driving away from  
the car wash*

Detective Crosson testified that Johnson's description of driving east on Florence and turning left on 10th Avenue was "partially consistent" with what the detective saw on the video, but stated that Johnson "is describing his route coming back as if he came right back to Florence on 11th Avenue, and it took him way too long to have done that." The following day Crosson testified he wanted to determine how long it took to drive from the car wash to the body shop, because he knew he would not have been gone very long, he did not want that to be Johnson's alibi, and he knew from the video where he was. The court sustained Johnson's objection and directed the detective to rephrase his answer without "characterizing." Detective Crosson answered, "Just to establish a timeline."

Defendant fails to demonstrate prejudicial error. The court sustained the objection to Detective Crosson's testimony that it took too long for Johnson to return under the route he described and the detective's desire to negate an alibi. What the jury was left with was Detective Crosson's testimony that he was establishing a timeline, which merely described the purpose of his investigation and was nonprejudicial.

Detective Crosson also testified regarding the video of Johnson's car leaving the parking lot. Based on the video, Detective Crosson testified that the black Lexus entered the

roadway into the number 1 lane on Eastbound Florence, and the vehicle accelerated away and then made a left turn on 10th Avenue. The prosecutor asked if that act was significant. Detective Crosson replied “that’s the -- that would take you to location of 6811 10th Avenue where I knew Mr. Johns to be residing.” The only argument Johnson makes on appeal regarding this testimony is a single parenthetical phrase that the testimony was given “even though this was not portrayed in the video.” We deem the undeveloped argument forfeited for failure to cite authority, explain the error, or discuss prejudice. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Beltran* (2000) 82 Cal.App.4th 693, 697 fn. 5.)<sup>20</sup>

*5. Johnson’s statement that “Yeah. Man, y’all know” in response to Detective Crosson’s question if Johnson knew the man who ran by his car*

Detective Crosson asked Johnson if he had ever seen the man who ran by his car. Johnson answered, “Yeah. Man, y’all know,” but he did not identify the man. The prosecutor asked the detective if Johnson’s answer was important. Johnson objected that the tape spoke for itself, but the court overruled the objection. Detective Crosson testified it

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<sup>20</sup> There is evidence in the record, independent of Detective Crosson’s testimony, that Johns lived on 10th Avenue, an address he had provided to the probation department.

was important because “I had shown him pictures of the other two people who I believed to be involved in the case [Smith and Johns] and he only identified Dwight Smith out of those two people.”

The trial court did not err in allowing Detective Crosson to testify that he had shown Johnson a photo of Johns but Johnson did not make an identification. But if there was error, there was no prejudice. There is no dispute that Johnson identified Smith, but not Johns, even though Johns ran right by his car in a neighborhood where defendant professed to knowing everyone. The jury was aware of this fact without additional testimony by Detective Crosson. Johnson’s refusal to identify Johns, who happened to be a member of the same street gang, was consistent with Johnson’s consciousness of guilt of his own involvement and with an attempt to assist Johns in avoiding being identified. This evidence also undercuts any defense argument at trial that Johnson just happened to be at the wrong place at the wrong time. His willingness to identify Smith, who was not the shooter, while at the same time not identifying Johns, who was the killer, served to rebut any claim that Johnson was a mere victim of circumstance. Johnson has not demonstrated prejudicial error.



*6. Testimony that Detective Crosson possessed “other information” suggesting Johnson was involved in the murder*

The prosecutor asked Detective Crosson if he “still ha[d] other reasons to believe [Johnson] was involved,” despite knowing that Johnson was being truthful when he said he did not speak to Wade or Price in the smoke shop. Detective Crosson testified that he did, but when the prosecutor asked what those reasons were, Johnson’s counsel objected. The court stated that there would be a break soon and the parties could take up the issue outside the jury’s presence.

After a hearing outside the presence of the jury, the trial court permitted the prosecution to ask the detective what other evidence was significant in his investigation, but not to phrase it in such a way as to indicate that Johnson was involved in the crime. The court allowed the prosecutor to ask “what actions he took in the course of his investigation” because the detective’s credibility was at issue, and to “ask him what information was significant to him as he was conducting the investigation . . . and bring up those facts which do not bring in hearsay,” without using the word “suspect” when referring to Johnson.

In the presence of the jury, the prosecutor asked if Johnson was adamant that he never said anything to the victim, and whether that was consistent with what Detective Crosson had seen on the video, which Detective Crosson conceded it was. The prosecutor then asked if the detective

had “other information suggesting he was involved that caused you to then investigate him?” Detective Crosson testified that he did, and identified “[t]he fact that he was present when the victim was being confronted and the actions from the video that show the way in which he left and returned at approximately the same time that the shooter crossed the street, and that he stayed at that intersection while the shooting took place and remained there until after the shooter ran past his vehicle.” The prosecutor asked if Johnson made statements that assisted in his investigation. A defense relevance objection was overruled, and Detective Crosson testified: “Well, he said that he knew who the person was that ran by his car. I showed him pictures during that interview where he said that he knew one person and didn’t know the other one, the statement about that he went to get his car fixed and was there at the time the helicopter was overhead and that is what caused him to return back to the car wash.”

Defendant complains that Detective Crosson was allowed to testify that he had reasons to believe Johnson was involved. The detective’s explanation of the additional facts, according to Johnson, “was certainly very effective in shoring up the case against [Johnson].”

We agree that the testimony was inconsistent with the ruling of the court, which clearly prohibited testimony by Detective Crosson that Johnson was involved in the killing. The prosecution was entitled to introduce evidence of what the investigation revealed, but not Detective Crosson’s

summary of what additional evidence existed of Johnson's guilt. Had Detective Crosson mentioned evidence that was not before the jury, we would have little trouble finding prejudice. But the evidence he discussed was consistent with the trial record. In addition, we have carefully reviewed the prosecution's argument to the jury, which made no reference to any of the improper testimony elicited for Detective Crosson. To be clear, the trial court should not have permitted this testimony—which was inconsistent with its own ruling—but which ultimately does not rise to the level of prejudicial error under *Watson*.

*Prejudice as to Johns*

Johns argues it was prejudicial error to allow Detective Crosson to identify him as the person running from the shooting. The parties agree that the video was not of a quality that permitted an identification of Johns. But the trial court denied a mistrial and offered to strike the testimony and admonish the jury, an offer rejected by Johns at trial. The court did order the parties not to mention the identification, and Johns does not argue that this order was violated. The issue is forfeited. Johnson makes no separate argument that a mistrial was required, and he expressly declined the court's offer to admonish the jury. (*People v. Turner* (2004) 34 Cal.4th 406, 434–435.) We are also satisfied that any error was mitigated by the court's ruling, particularly since it was obvious from the video recordings

that Johns could not be identified, and no party mentioned the detective's reference to Johns as the shooter later in the proceeding.

Moreover, error, if any, was harmless. At the time the detective named Johns as the person running across the street, the jury had already heard Poole and Darthard's testimony regarding identification of Johns, and impeachment evidence had been admitted against both witnesses. Poole lived in the same building as Johns for a year or more and saw him frequently. She had no doubt that he was the person she saw crossing Florence Avenue. To the extent that she was inconsistent about where Johns was heading when she saw him, the video very clearly showed that the shooter was the only person who crossed the street in that direction near the time of the murder, and that Poole was facing the shooter and was within a short distance of him seconds before the shooting occurred. Evidence had also been admitted that Johns told Poole not to talk, that he resided a short distance from the car wash at the time of the murder, and that he violated the terms of his probation and fled the state days after Price's killing. Later in the trial, Smith testified in detail about Johns's involvement. Johns had a gang-related motive to commit the murder. In light of the evidence presented, it is not reasonably probable that the jury would have returned a verdict more favorable to him absent the identification.

### ***Identity of Confidential Informant (Johnson)***

Prior to trial, Johnson moved to disclose the identity of the confidential informant. Counsel argued the informant “created evidence,” making “comments about what the evidence may show [and] what the law is,” and it was necessary for the defense to have an opportunity to cross-examine the informant to expose “the bias and the unfairness.” According to Johnson’s counsel, it was necessary to question the informant regarding whether he was given leniency or payment for working with the police, and to elicit the informant’s reaction to Johnson’s statements during the conversation, “based on his marching orders.” Counsel argued that nondisclosure of the informant’s identity was a violation of Johnson’s constitutional right to confront witnesses.

The prosecutor responded that the conversation was recorded and would be played for the jury, and the jurors could make their own determination. The defense could question Detective Crosson regarding whether the informant had been offered leniency or payment, and what his “marching orders” were. The informant’s interpretations were not relevant to determining Johnson’s state of mind. Johnson’s statements were the evidence.

The trial court denied the motion to disclose the informant’s identity because Johnson failed to make a showing that the informant could provide exculpatory evidence. The informant was not a percipient witness to the

crime, and the prosecution did not intend to call him to testify. Cross-examination of the informant would only serve to move the focus from Johnson to the informant, and the informant's intentions were irrelevant. The detective could answer any questions about payment and leniency. Defense counsel would be able to argue bias regardless of whether the informant's identity was disclosed.

### **Analysis**

Johnson contends that the prosecution's refusal to disclose the identity of the confidential informant violated his constitutional rights to confrontation and due process and his statutory right to disclosure under section 1054.1. We conclude the constitutional and statutory arguments fail because Johnson has not shown that the informant could have provided any impeaching or exculpatory evidence, material or otherwise. The trial court did not abuse its discretion in denying the motion to disclose the informant's identity because Johnson failed to present "some" evidence that there was a reasonable possibility the informant could give evidence on the issue of guilt that might exonerate him.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*)). "There are three components of a true *Brady*

violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282.) Evidence is exculpatory if it “‘could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ [Citation.]” (*Id.* at p. 290.) Section 1054.1, subdivision (e), requires that the prosecutor disclose “[a]ny exculpatory evidence.” In contrast to *Brady*, the evidence that must be disclosed under section 1054.1 need not be material. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) “If [the defendant] can show he has a reasonable basis for believing a specific item of exculpatory evidence exists, he is entitled to receive that evidence without additionally having to show its materiality.” (*Ibid.*)

Johnson failed to establish that the informant could provide any impeaching or exculpatory evidence under either *Brady* or section 1054.1. Johnson’s recorded statements were the evidence, and any interpretation by the informant would be irrelevant. It was the jury’s task to draw inferences from the facts. Defense counsel was able to elicit that the informant was paid and did not have an active case, although the informant had presumably been in custody previously. Counsel had the opportunity to question the detective regarding the instructions that the informant was given prior to his conversation with Johnson, but chose not

to question the detective on that issue. The jury was aware of the informant's motive for working with the detectives, and any issues of bias would go to the weight of the evidence, which was for it to decide. We conclude that the prosecution neither violated the constitution nor section 1054.1 by refusing to disclose the informant's identity.<sup>21</sup>

***Failure to Instruct Regarding Confidential Informant's Statements (Johnson)***

Johnson next contends that the trial court committed constitutional error by admitting the informant's statements in the absence of an instruction to the jury that they were not to be considered for their truth. This argument rests on his conclusion that the informant's statements were inadmissible as adoptive admissions. The Attorney General argues, and we agree, that defendant has forfeited this contention, but in any event, the trial court had no obligation to either instruct the jury as Johnson argues or to exclude the evidence, and Johnson suffered no prejudice.

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<sup>21</sup> The prosecution's written opposition to the informant disclosure motion referenced Evidence Code section 1041's privilege against disclosure for identify of an informer. Because the trial court never ordered disclosure of the informant's identity, the issue of privilege from disclosure was not reached in the trial court.



## **Forfeiture**

Johnson asserts that his contention is not forfeited because he argued admission of the informant's statements was "fundamentally unfair" and would deprive him of a fair trial. Although these statements were made in the context of his request for disclosure of the informant's identity, Johnson claims the issues were "inextricably entwined." We reject Johnson's attempt to avoid forfeiture by parlaying his motion to disclose the identity of the informant into an instructional objection. Johnson did not request an instruction stating that the informant's statements were not to be considered for their truth or object to the admission of the statements on the ground that such an instruction must be given. "An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. [Citations.] In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented. [Citations.]" (*People v. Scott* (1978) 21 Cal.3d 284, 290.) The trial court was not presented with the issue Johnson now raises, and had no opportunity to address it. The claim was forfeited. Nonetheless, we consider the merits because Johnson argues that his substantial rights were affected. (*People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7 ["defendant's failure to object to the peace officer instruction does not preclude our review for constitutional error"]; § 1259 ["The appellate court may . . . review any instruction given, . . . even though no

objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby”].)

### **Adoptive Admissions**

For the first time on appeal, Johnson perfunctorily concludes that statements by a confidential agent of the police are not admissible as adoptive admissions. He bases his conclusion on *People v. Sanders* (1977) 75 Cal.App.3d 501, at page 508 (*Sanders*), which held that where a police officer makes “narrative statements [] containing several facts as well as theories and inferences” during the interrogation of a murder suspect, the statements are inadmissible as adoptive admissions, because it would be “fundamentally unfair” to expect the suspect to make point-by-point denials of the narrative statements. (*Ibid.*) Johnson does not cite to any authority extending the holding in *Sanders* to a confidential police informant conversing with a defendant in a non-interrogational setting. He also fails to adequately develop his argument by providing excerpts from the record indicating which portions of the conversation he challenges. Johnson’s failure to cite authority or develop an argument with reference to any specific alleged deficiencies in the record constitutes a waiver of the issue on appeal. (*Magic Kitchen LLC v. Good Things Internat., Ltd.* (2007) 153 Cal.App.4th 1144, 1161.) The argument is also forfeited because Johnson failed to raise it below. (*People v. Williams* (1999) 20 Cal.4th 119, 129 [defendants must inform the

prosecution and the court of the specific basis for their motion to suppress under section 1538.5, or forfeit the omitted basis as an issue on appeal].)

Even if the claim had been preserved, it would fail. “In determining whether a statement is admissible as an adoptive admission, a trial court must first decide whether there is evidence sufficient to sustain a finding that: (a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true.’ (*People v. Davis* (2005) 36 Cal.4th 510, 535.) ‘For the adoptive admission exception to the hearsay rule to apply, no “direct accusation in so many words” is necessary. [Citation.] Rather, it is enough that the evidence showed that the defendant participated in a private conversation in which the crime was discussed and the circumstances offered him the opportunity to deny responsibility or otherwise dissociate himself from the crime, but that he did not do so.’ (*Id.* at p. 539.)” (*People v. Charles* (2015) 61 Cal.4th 308, 322–323.) “[W]hether defendant’s conduct actually constituted an adoptive admission becomes a question for the jury to decide.’ [Citation.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1189–1190.) We review the trial court’s decision to admit statements as adoptive admissions for abuse of discretion. (*People v. Carter* (2003) 30 Cal.4th 1166, 1196 [applying the abuse of discretion standard].)

In closing argument, the prosecutor defined adoptive admissions for the jury and argued that two of the

informant's statements should be considered for their truth as adoptive admissions. In one instance, the prosecutor argued that Johnson adopted the informant's statement that Johnson dropped off his "boy." The informant asked, "[W]hen they showed your boy's picture that you dropped off, where was he standing in? Would've been a camera there somewhere?" Johnson replied, "It's in the back." The statement meets the requirements of admissibility for an adoptive admission. The informant effectively asked whether cameras in the meat market would have captured Johnson dropping off his "boy," and Johnson responded that the cameras were in the back of the market without denying that he dropped someone off. Johnson had the opportunity to deny involvement, but instead gave the informant more details relevant to the crime. Although he claimed not to have dropped anyone off at other points in the conversation, it was up to the jury to decide whether this particular exchange constituted an adoptive admission. The trial court did not err in admitting the statement.

The second adoptive admission argued by the prosecutor came after defendant said the gun was gone and the police would not find it. The confidential informant said, "[Y]ou covered your tracks. You guys are smart doing that. You know what I mean? As long as you cover your fucking tracks. Me, I thought I covered mine." The crucial aspect of this evidence is defendant's statement acknowledging knowledge of the weapon after the murder, not the informant's response. Because Johnson had already

associated himself with the crime prior to the informant's statement, there was no reasonable probability that the outcome of the trial would have been more favorable to Johnson absent the error. (*People v. Lewis* (2008) 43 Cal.4th 415, 500 [applying the standard articulated in *Watson*, *supra*, 46 Cal.2d at p. 836, to a statement improperly admitted as an adoptive admission], overruled on other grounds as stated in *People v. Black* (2014) 58 Cal.4th 912, 919–920.) Moreover, the trial court instructed the jury under CALCRIM No. 357 that if “someone made a statement outside of court that accused the defendant of the crime or tended to connect the defendant with commission of the crime and the defendant did not deny it,” the statement may be considered an adoptive admission under specific conditions, but that if the statement did not meet the requirements of an adoptive admission, the jury could not “consider either the statement or the defendant’s response for any purpose.” We presume the jury followed the court’s instructions and considered only the statements that qualified as adoptive admissions for their truth. (See *People v. Davis* (2005) 36 Cal.4th 510, 537 [jury is presumed to understand and follow instructions].)

### **Instructional Error**

Johnson relies on *People v. Maciel* (2013) 57 Cal.4th 482 (*Maciel*), to argue that the confidential informant’s statements could only be admitted if the court also

instructed the jury that the statements could not be considered for their truth. *Maciel* held that a police officer's statements, which were admitted as context and not for their truth, were properly admitted. The *Maciel* court noted that "the court instructed the jury that law enforcement officers were permitted to misrepresent evidence in their possession in order to motivate a suspect to confess, and that the officers' 'allegation[s]' in this case were '*not received for the truth of any allegation* but because it is part of the statement and helps you judge the response of the defendant.' (Italics added.)" (*Id.* at p. 524.) The Attorney General counters that the statement in *Maciel* is dicta. Regardless, *Maciel* is distinguishable, because the officers' statements in *Maciel* were not admissible for their truth. Here, the informant's statements were admitted for context, but the informant's statement that Johnson dropped off his "boy" could also be considered for its truth if the jury found it was an adoptive admission. A categorical instruction that the informant's statements could not be considered for their truth would not have been appropriate. And for the reasons stated above, any error was also nonprejudicial.

### ***Johnson's Hearsay Statements (Johns)***

Both at trial and in his proffer statement, Smith attested that he heard Johnson encourage Johns to kill Price. In the proffer statement, Smith said that as he was walking down 11th Avenue trying to dissuade Johns from

shooting Price, he heard Johnson say, “Watch out, watch out, watch out. Let him go to do it. Let him go to do it.” At trial he testified that Johnson said, “[W]atch out. Go kill him. Go kill him.” Johns contends the statements were testimonial hearsay admitted in violation of his constitutional right to confront witnesses and right to due process. He alternatively argues that, even if the statements were nontestimonial, they were inadmissible under the *Aranda/Bruton* doctrine,<sup>22</sup> and not excepted from the hearsay rule. We conclude that the issue was forfeited for failure to raise it with the trial court, but that even if preserved it would fail on the merits because the statements were not hearsay.

At trial, defense counsel objected to some of the statements included in Smith’s police interview and proffer statement, but specifically excepted from objection Johnson’s statements encouraging Johns, which he conceded were prior consistent statements.<sup>23</sup> Johns has forfeited the argument by conceding the issue below. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [confrontation clause claim forfeited for failure to raise it with the trial court].) Even if the claim had been preserved, it lacks merit. Hearsay is

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<sup>22</sup> *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123.

<sup>23</sup> Johnson’s counsel made the objection. The parties agreed that defense counsel would be assumed to join in each other’s objections.

“evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Johnson’s statements were not offered to prove their truth as to Johns; they were not hearsay and their admission did not infringe on his right to confrontation or violate state evidentiary rules.

### ***Prosecutorial Misconduct (Johns)***

Johns contends the prosecutor committed misconduct by using the gang evidence to instill fear in the jury and malign his character during closing arguments. He argues that counsel’s failure to raise the issue below did not forfeit the claim because an objection would have called more attention to the prosecutor’s remarks, but that if the claim has been forfeited, counsel rendered ineffective assistance. We conclude that Johns has forfeited his claim by failing to specifically object to the prosecutor’s argument in the trial court, but that even if it had been preserved for appeal, it fails on the merits. Counsel did not render ineffective assistance by failing to make a meritless objection.

### **Proceedings**

Johns objects to the following statements by the prosecutor in closing argument:



“The very beginning of this case, I told you that this case was about gang pride. Pride is what killed Tavin Price on May 29th.”

“This case that you’ve been a part of is really one of the best examples for how gangs and gang members affect a community. Because Tavin Price was killed by gang members because he was not allowed to wear those colors because in their neighborhoods that they control, he’s not allowed to wear those colors.

“This case has been touched by this gang culture in so many different ways. It’s been touched by the gang culture because it gives you the idea and shows you how much they actually control. They control the motives for where -- for how people are killed. They control the neighborhoods and the meat market and tell people when to cut wires. They control businesses and areas allowed to just sell drugs openly in broad daylight. They control the people around them that they instill with fear of retaliation and fear of being involved in law enforcement. They control so many parts and you saw so much of it. They control people that do cooperate with the police and they control them by attacking them and by beating them up and by threatening them.

“These gang members control this area in such a powerful way that any young black man walking through South Central Los Angeles will have a target on his back. He will be hit up by these gang members because they need to have that control. They control all of these things in these communities.”

“You need to remember that the same people that have been sitting in this courtroom this entire trial, these two men right here, these are the same two men that committed the crime on that day. These are the same men. The evidence has shown that. They’ve been sitting here in their collared shirts trying to portray to you that they’re Kevin Johnson and Kanasho Johns when they’re truly Bang and Bone. These are the same people.”

“[T]he other thing that helps identify him as the shooter is all the gang evidence. And this gang evidence is not being presented to you just to try to dirty up defendant Johns. That’s not the point of this. Because this has a very important and significant purpose because it shows you motivation, it shows you the identity of the shooter, and is also one of the allegations that has to be proven against the defendants. But you know that defendant Johns by this point is Bone or Tiny S. Bone from the 58 Neighborhood Crips, and you know that he had repeated self-admissions to law enforcement officers.

“You know that he has tattoos all over his body supporting the Neighborhood Crips to the point where if you look at his chest and his stomach, he makes sure to incorporate every set of the Neighborhood Crips on his body. There is no better example of who the Neighborhood Crips are than what you’re looking at right now. This is why they’re one gang. This is why the different sets and different sets of the same gang. Every single one is covered. And he has it all over his body, on his arms, on his back, on his legs,

on his -- inside of his arms. He's just covered in these gang tattoos.

"And why does this prove he's guilty? Because first of all, it helps prove the shooter's identity. . . . This murder happened in Neighborhood Crip[s] territory in broad daylight. And from what you know, the Neighborhood Crips control that area. So who's going to commit the crimes in that area? It's not going to be a rival. It's going to be a Neighborhood Crip.

"Who has the audacity to shoot someone in broad daylight in front of their mother at a public car wash? Only someone who is a Neighborhood Crip from that area because they control the area. If defendant Johns was not a Neighborhood Crip, that would be an important factor for you to consider in determining who the shooter was because only a Neighborhood Crip would do this. But the fact that he is shows you and helps support the identity -- his identity as the shooter.

"And this was -- make no mistake -- this was a very, very bold crime. This was a very bold crime to go in broad daylight and execute someone in front of a number of people. This was not something done at night. This was not something done in the dark alleys. That's not what happened. This was a very bold crime. And who would do such a bold crime, except for someone who is an entrenched gang member from that gang and that helps you understand the identity of the shooter as defendant Johns."

“So let’s talk now about the gang evidence. . . . The gang evidence is being presented to you to show not only the motive and the identity of who may have been involved, but also because it’s an underlying allegation that has to be proved. [¶] . . . [¶] The people that do these crimes in these neighborhoods are the Rollin’ 60 gang members or the Neighborhood Crip[s] gang members.”

### **Law**

“Under California law, a prosecutor commits reversible misconduct if he or she makes use of “deceptive or reprehensible methods” when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” [Citations.] [¶] “[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]”” (*People v. Riggs*

(2008) 44 Cal.4th 248, 298 [(*Riggs*)].) A defendant who fails to object at trial ‘waive[s] any error or misconduct emanating from the prosecutor’s argument that could have been cured by a timely admonition.’ (*People v. Wrest* (1992) 3 Cal.4th 1088, 1105.)

“““[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom.” [Citation.]’ (*People v. Welch* (1999) 20 Cal.4th 701, 752.) ‘When we review a claim of prosecutorial remarks constituting misconduct, we examine whether there is a reasonable likelihood that the jury would have understood the remark to cause the mischief complained of. [Citation.]’ (*People v. Osband* (1996) 13 Cal.4th 622, 689.) ‘To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1402–1403 (*Spector*).)

### **Analysis**

Johns has forfeited his claim by failing to specifically object to the prosecutor’s argument in the trial court. (*Riggs, supra*, 44 Cal.4th at p. 298.) Because he argues trial counsel

rendered ineffective assistance in this regard, however, we review the merits. (See *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

Johns relies on *People v. Duvernay* (1941) 43 Cal.App.2d 823 (*Duvernay*), and *People v. Santa Maria* (1962) 207 Cal.App.2d 306 (*Santa Maria*). These cases are readily distinguishable. In *Duvernay*, the prosecutor stated in closing argument: “[Defendant is charged with], in the legal phraseology, [] the offense of selling narcotics-probably the most depraved and lowest thing that I think a human being can do, because it destroys the mentality of the people who use it. *I don’t know whether this defendant is a user or not. The characteristics of one who uses narcotics habitually are pretty well known and recognized by one who has any knowledge at all of the matter. The defendant has many of the characteristics of a user of narcotics-*” (*Id.* at p. 827.) Defense counsel objected to the remarks as misconduct intended to appeal to the prejudices of the jurors, and asked the court to admonish the jury and the prosecutor. The court instructed the jury to disregard the remarks. (*Id.* at p. 828.) The Court of Appeal deemed the prosecutor’s statements prejudicial misconduct, stating that: “The challenged remarks of the district attorney are wholly unsupported by the record, and go far beyond the scope of legitimate argument.” (*Ibid.*) It held that the remarks violated the defendant’s right to due process, reversed the judgment, and remanded the cause for a new trial. (*Id.* at pp. 829–831.)

In *Santa Maria*, defendant was charged with possessing marijuana. (*Santa Maria, supra*, 207 Cal.App.2d at p. 309.) During questioning, the prosecutor asked, “Along with selling cigarettes, you were even selling women there, weren’t you?” (*Id.* at pp. 314–315.) The court sustained an objection to the question and admonished counsel “not [to] burden this record with any more extraneous matter.” (*Id.* at p. 315.) In closing argument, the prosecutor argued that the defendant’s prior conviction for selling narcotics proved that he knew the substance in his possession was marijuana. The prosecutor stated that the defendant “admits selling [marijuana] apparently quite regularly and on a pretty big scale.” (*Ibid.*) He further argued that “pills and dangerous drugs [were found in the defendant’s apartment] and they are wrapped commercially and there are several pills and several packages, and we find that the narcotics are wrapped commercially and that there is no question about them being wrapped for sale.” (*Ibid.*) The Court of Appeal held that the prosecutor committed misconduct by referring to these facts in argument, because they had not been admitted into evidence. (*Id.* at p. 316.) It held that defendant had suffered prejudice, especially in light of the fact that the case was close and the jury had not been instructed on the limited purpose for which evidence of other crimes was admitted. (*Id.* at pp. 316–317.)

As Johns concedes, in this case the gang evidence was admissible for multiple purposes: intent, purpose, and knowledge required to prove the gang enhancement; motive

to commit the crimes charged; evaluating the credibility of a witness; and for facts and information relied on by an expert witness. Much of the prosecutor's argument simply reiterated the gang expert's testimony regarding the Neighborhood Crips, its culture, and its impact on the community. The prosecutor reminded the jury of the purposes for which the gang evidence could be used multiple times, and admonished the jury that the gang evidence was not presented to "dirty up" Johns—that was "not the point." Reasonable jurors would have understood the challenged comments not as an appeal to convict Johns because he was a gang member, but as an appeal to convict Johns because the gang evidence established that he had the intent, purpose, and knowledge required to act for the benefit of the gang and that he had a gang-related motive to kill Price. Viewing the prosecutor's argument as a whole, we conclude that there was not "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." (*Spector, supra*, 194 Cal.App.4th at p. 1403.)

We cannot conclude counsel was ineffective on this record. Counsel had no obligation to make a meritless objection. And a tactical decision not to object to an argument that the jury would not be reasonably likely to misunderstand falls within the range of reasonable professional assistance. (*People v. Weaver* (2001) 26 Cal.4th 876, 925 ["[r]eviewing courts defer to counsel's reasonable



tactical decisions in examining a claim of ineffective assistance of counsel”].)

Nor was there prejudice. Unlike *Santa Maria*, here the jury was properly instructed on the limited use of gang evidence under CALCRIM No. 1403. “We presume jurors understand and follow the court’s instructions.” (*Vasquez, supra*, 239 Cal.App.4th at p. 1518.) Considering the prosecutor’s many reminders to the jury regarding the limited purpose of the evidence, his admonition that the evidence was not admitted to sully Johns’s character, and the instructions given, it is not reasonably probable that the outcome of the trial was affected by the prosecutor’s argument.

***Sufficiency of the Evidence Supporting the Gang Enhancements (Both Defendants)***

Defendants next contend the evidence was insufficient to sustain the gang enhancements under section 186.22, subdivisions (b)(1)(C), and (b)(5) in count 1, because the prosecution failed to prove an organizational or associational connection between the 5-8 Neighborhood Crips, the Rollin’ 60’s, and the overarching Neighborhood Crips gang, as required by *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*) and *People v. Cornejo* (2016) 3 Cal.App.5th 36 (*Cornejo*). They argue that in the absence of an organizational or associational connection, the prosecution failed to establish defendants committed the crimes to benefit the Neighborhood Crips. We disagree.

## Law

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in 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. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. (*Ibid.*) If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) ‘A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.’ (*Ibid.*)” (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

The first element of a gang enhancement requires evidence that a defendant committed an offense “for the benefit of, at the direction of, or in association with” a criminal gang. (§ 186.22, subd. (b)(1).) This necessarily requires proof of the existence of the criminal gang, which involves evidence of three or more persons associating under a common name or insignia with a primary activity of committing at least one criminal act specified in the statute,

and proof that members of this association engage (alone or together) in a “pattern” of gang activity involving two or more of the specified criminal acts. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617, disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686 fn. 13; see § 186.22, subds. (e) & (f).) “[W]here the prosecution’s case positing the existence of a single ‘criminal street gang’ for purposes of section 186.22[, subdivision] (f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets.” (*Prunty, supra*, 62 Cal.4th at p. 71.) “[T]he evidence must show that it is the same ‘group’ that meets the definition of section 186.22[, subdivision ](f)—i.e., that the group committed the predicate offenses and engaged in criminal primary activities—and that the defendant sought to benefit under section 186.22[, subdivision ](b).” (*Id.* at p. 72, fn. omitted.)

### **Analysis**

Defendants argue that the prosecution failed to establish the requisite organizational or associational connections because although the gang expert testified to the Neighborhood Crips’ primary activities and opined that the murder was committed to benefit the Neighborhood Crips, the predicate offenses were committed by Rollin’ 60’s members, and there was insufficient evidence of the Rollin’ 60’s connection to the Neighborhood Crips. Johns further

argues that unlike Smith and Johnson, he was not a Rollin' 60's member. He claimed the 5-8 Neighborhood Crips, and there was insufficient evidence of an organizational or associational connection between the 5-8 Neighborhood Crips and either the Neighborhood Crips or the Rollin' 60's, as required under *Prunty* and *Cornejo*.

Defendants' reliance on *Prunty* and *Cornejo* is misplaced. In contrast to those cases, here the prosecution's case did not turn on the existence and criminal activities of a subset that had no demonstrated connection to the gang implicated in the crimes at issue. (See *Prunty, supra*, 62 Cal.4th at p. 69 [predicate crimes committed by three subsets none of which were involved in the crime or shown to be connected with the overarching gang defendant sought to benefit or any of its subsets]; *Cornejo, supra*, 3 Cal.App.5th at pp. 47–48 [predicate crimes committed by two subsets neither of which were involved in the crime or shown to be connected with the overarching gang defendants sought to benefit or any of its subsets].) The predicate offenses were committed by Rollin' 60's members, and evidence was presented that both Smith and Johnson belonged to the Rollin' 60's.

In this case there was also evidence of a connection between both subsets and the overarching gang. The gang expert testified that the Neighborhood Crips was a single gang, with different subset names merely signifying the blocks that its members resided on. When testifying that the subsets formed a single gang, the expert specifically

named both the 5-8 Neighborhood Crips and the Rollin' 60's as sets who were part of the overarching Neighborhood Crips and considered part of a single gang. Johns had a tattoo demonstrating the unity of the sets within the Neighborhood Crips on his chest, located directly above his "5-8" tattoo. The tattoo named several sets including the "60's" and bore the phrase "All Enemies Respect Your Local Neighbor." The tattoo evidenced the relationship of the sets and showed that Johns had a personal affiliation with the Rollin' 60's. Smith and Johns lived in the same apartment building in Rollin' 60's territory. (See *Prunty, supra*, 62 Cal.4th at pp. 73–74 ["use of the same 'turf,' . . . will show that individual subsets are part of a larger group"].) Most importantly, evidence was presented that Johns, a 5-8 Neighborhood Crip, coordinated with Smith and Johnson, who were members of the Rollin' 60's, to commit the murder. (See *Prunty, supra*, 62 Cal.4th at p. 84 [evidence that the crime at issue is committed by members of two sets demonstrates collaboration between those sets].)

In Johns's case, the fact that he is a documented member of a different subset than the individuals who committed the predicate offenses does not foreclose the possibility of a true finding on the gang allegation after *Prunty*, because section 186.22, subdivision (b), does not require that a defendant be a member of a criminal street gang. It requires "only that the defendant commits a felony either to benefit a gang, or in association with a gang and that the defendant has a specific intent to aid gang members

in the commission of a felony.” (*People v. Garcia* (2016) 244 Cal.App.4th 1349, 1369; *People v. Villa-Gomez* (2017) 9 Cal.App.5th 527, 539–540.)

Regardless of his own affiliations, there was abundant evidence that Johns committed the crime in association with a criminal street gang. Johns committed the murder after Smith, who was a member of the Rollin’ 60’s subset, challenged Price for wearing red in a Neighborhood Crips neighborhood, and was transported to the scene by Johnson, another Rollin’ 60’s member. Johns’s commission of the murder in response to Smith’s challenge is sufficient to establish that he acted in association with a criminal street gang. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [crime committed with fellow gang members]; see also *People v. Ewing* (2016) 244 Cal.App.4th 359, 379 [crime committed with an individual defendant knew to be a gang member].)

The evidence also tended to show that Johns committed the crime for the benefit of the Neighborhood Crips gang. The prosecution presented expert testimony that red is the primary color of the Bloods, which is a rival of the Neighborhood Crips gang. A gang expert opined that a gang member who enters a rival gang’s territory is showing disrespect. When a gang member challenges a rival in his territory, as Smith challenged Price, violence is likely to ensue. The only interaction that took place between Price and the perpetrators prior to the shooting was the confrontation with Smith. The jury could reasonably infer

that Johns sought to benefit the Neighborhood Crips by enforcing its ban on the Bloods' colors.

We conclude the evidence sufficiently established the “criminal street gang” with which defendants associated, and which they benefitted by murdering Price, was “the same ‘group’ that . . . committed the predicate offenses and engaged in criminal primary activities” within the meaning of section 186.22. (*Prunty, supra*, 62 Cal.4th at p. 72.)

### ***Actual Custody Credits***

At the sentencing hearing, the trial court awarded Johns 511 days of custody credit at his counsel's request, based on a sentencing date of November 30, 2016, and an arrest date of July 9, 2015, as listed in his probation report.<sup>24</sup> At trial, however, Detective Crosson testified that Johns was arrested on June 23, 2015. This arrest date would entitle Johns to 527 days of custody credits for an additional 16 days. Because calculation of Johns's custody credits involves a factual determination more properly resolved in the trial court, we reverse and remand for redetermination of custody credits and correction of the abstract of judgment, if necessary. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 911; *People v. Kennedy* (2012) 209 Cal.App.4th 385, 394.)

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<sup>24</sup> The probation report lists two arrest dates: July 8, 2015, and July 9, 2015. We utilize the July 9, 2015 date as it yields the number of credits awarded by the court.

### ***Firearm Enhancement (Both Defendants)***

Finally, defendants contend that the trial court now has discretion, under recently enacted Senate Bill No. 620, to strike the section 12022.53, subdivisions (d) and (e)(1) firearm enhancements in count 1. They argue the case should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, because the court lacked the power to do so at the time of sentencing.

When defendants were charged, convicted and sentenced, section 12022.53, subdivision (d), mandated that “any person who, in the commission of a [specified] felony . . . personally and intentionally discharges a firearm and proximately causes . . . death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” (Former § 12022.53, subd. (d).) Former section 12022.53, subdivision (e), subjected any person who was a principal in an offense where it had been pled and proved that the person violated section 186.22, subdivision (b), and a principal in the offense committed an act specified in section 12022.53, subdivision (d), to the same punishment. After defendants were convicted, but before the cause was final on appeal, the Governor signed Senate Bill No. 620, which amends former section 12022.53, subdivision (h), to permit the trial court to strike a firearm enhancement as follows: “The court may, in the interest of justice pursuant



to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, § 1.)

At the time of sentencing, the trial court did not have discretion to strike the firearm use findings under section 12022.53, subdivisions (d) and (e)(1). We therefore remand the matter to permit the trial court, if it so chooses and within the confines of section 1385, to exercise its discretion regarding whether to strike defendants’ firearm enhancements.

## DISPOSITION

We remand the matter to the trial court to consider whether to exercise its discretion to strike the section 12022.53, subdivisions (d) and (e)(1) firearm use enhancements under section 12022.53, subdivision (h) as to both defendants, and to determine whether Johns is entitled to additional custody credits. In all other respects, the judgment is affirmed.

KRIEGLER, Acting P.J.

I concur:

KIM, J.\*

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

BAKER, J., Concurring

I agree affirmance is required in this case. In certain respects I shall briefly describe, my reasons differ from those given by the majority. But, at bottom, there are no preserved claims of error that warrant reversal.

I

Defendants Kevin Johnson (defendant Johnson) and Kanasho Johns (defendant Johns) frame their objections to certain portions of Detective Crosson's testimony concerning the surveillance video evidence in terms of the proper limits of opinion testimony. That is not the most apt framing; to the extent defendants or the majority suggest it is generally improper for a witness to narrate or correlate what is shown by footage from various surveillance cameras, I disagree. (See Evid. Code, § 1523, subd. (d).) Instead, the problem here is that, in describing the video evidence, Detective Crosson was permitted to offer irrelevant, speculative, foundationless, or argumentative testimony concerning what the videos depicted. (For instance, Detective Crosson testified defendant Johnson "appeared to be tracking [Tavin] Price" and defendant Johnson moved "his head go up and

down as if he is looking Mr. Price up and down.” This was speculation.)

Defendants also challenge aspects of Detective Crosson’s testimony concerning defendant Johnson’s interrogation—particularly the detective’s testimony that he believed defendant Johnson was lying—and the various answers given by Detective Crosson concerning whether defendant Johnson was “involved” in the murder. I agree the majority correctly identifies the errors the trial court made in admitting these aspects of the detective’s testimony.

That brings us to the key question of prejudice. The majority concludes the problematic features of Detective Crosson’s testimony do not warrant reversal. I agree the majority puts forward persuasive reasons to find each of the errors are not reasonably likely to have resulted in a more favorable outcome absent their commission. But, to my mind, a more difficult question arises upon consideration of whether all the errors considered in the aggregate resulted in prejudice. The fundamental problem in this trial was that the prosecution improperly and repeatedly attempted to accomplish via Detective Crosson’s testimony what the prosecutor could (and did) properly argue on his own during closing argument. I ultimately do not believe it is reasonably probable defendants would have achieved a better result absent presentation of all the improper testimony, particularly in light of the cautionary instructions the trial judge gave, but the question is concededly a close one.

## II

Defendant Johns argues the trial court violated his due process and confrontation rights by allowing Dwight Smith to testify that he heard defendant Johnson tell defendant Johns to kill Price. The majority concludes the argument is forfeited for failure to raise a contemporaneous objection and further concludes, on the merits, that defendant Johnson's statements were not offered to prove their truth as to defendant Johns, were not hearsay, and did not violate confrontation guarantees or state evidentiary rules. I join only the majority's forfeiture holding.

Separately, as to the discussion of whether there was sufficient evidence to support the true findings on the gang enhancements (which the trial court struck for sentencing purposes), I agree only that the killing was done for the benefit of the Neighborhood Crips criminal street gang; I do not join the majority's "in association with" (Pen. Code, § 186.22, subd. (b)) analysis.

BAKER, J.