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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. EDWIN ALEXANDER PEREZ, Defendant and Appellant.	B279779 (Los Angeles County Super. Ct. No. MA060452)

APPEAL from a judgment of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed with directions.

Andrea Keith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Edwin Alexander Perez appeals from his convictions for two counts of carjacking (counts 3 & 4).[1] (Pen. Code, § 215.)[2] The jury found true the allegations that appellant committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(4)), that a principal personally used a firearm in the commission of the offenses (§ 12022.53, subds. (b) & (e)(1)), and that appellant personally used a handgun in the commission of the offenses (§ 12022.53, subd. (a)). Appellant was sentenced to a total state prison term of 40 years to life: on count 3, 15 years to life, plus 10 years for the firearm use enhancement; on count 4, a consecutive 15 years to life.

Appellant contends (1) there was insufficient evidence to support the gang enhancement, (2) the gang enhancement must be stricken under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), (3) the trial court erred in refusing to modify CALCRIM No. 301, (4) a note written by appellant's codefendant was inadmissible, (5) the six-pack photographic lineup was unduly suggestive, and (6) the trial court miscalculated his presentence custody credits. We agree in part with the last contention and otherwise affirm the judgment.

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[1] Appellant's codefendant, Michael Alfred Hurtado (Hurtado), was charged with the same two crimes in counts 1 and 2. Hurtado and appellant were tried together. We affirmed Hurtado's convictions in *People v. Hurtado* (Oct. 25, 2016, B265955) [nonpub. opn.]. Review was denied by the California Supreme Court on January 18, 2017.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

FACTS[3]

Prosecution Case

The Carjackings

On July 18, 2013, Brandon Monroy (Monroy) and Orby Garcia (Garcia) drove to Brandon Orozco's (Orozco) house in Lancaster to hang out. Monroy parked his 1998 Honda Civic on the street. Monroy and Garcia spoke with Orozco's mother, learned that he would be home in five or 10 minutes, and returned to the Civic to wait.

As the men sat in the car, a Chrysler 300 pulled up behind them and blocked them in. Codefendant Hurtado got out of the Chrysler and walked up to Monroy, who was in the driver's seat of the Civic. According to Monroy, Hurtado asked him if he wanted to buy "stuff." Monroy understood the term to mean drugs and he declined. Hurtado returned to the Chrysler.

Appellant then walked up to Monroy, with Hurtado following behind. Appellant poked his head into the car and asked Monroy to drive him to the store. Monroy noticed that appellant had tattoos: a "P" on the top of his head; a dollar sign or cross between his eyebrows; and a "P" and "818" on his hands. Monroy recognized the tattoos as Pacas 13 gang tattoos. Monroy testified that he first became concerned about the encounter "when [appellant] poked his head in the car." Garcia also noticed that appellant had a big "P" on his head, a dollar sign between his eyebrows, and some "818" tattoos. Garcia also believed the tattoos referred to the Pacas Trece gang. The gang tattoos

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[3] The facts are taken from our prior opinion in *People v. Hurtado, supra*, B265955.

caused Garcia concern. Monroy nevertheless declined to drive appellant to the store.

Appellant then pulled out a handgun from his waistband, pointed it at Monroy and said, "Get out of the fuckin' car, I need it." Garcia noticed that Hurtado was standing by his window with a handgun. Hurtado tapped the gun against the frame of the car, then pointed it at Garcia. Monroy and Garcia got out of the car.

Appellant got into the driver's seat of the Civic. Hurtado returned to the Chrysler. They both drove off. Monroy called the police, who arrived quickly. Monroy described appellant's numerous tattoos to police. Garcia also spoke with police.

Identifications

Los Angeles County Sheriff's Department Detective Richard O'Neal investigated the carjackings. Detective O'Neal identified appellant and Hurtado as suspects, prepared a six-pack photographic lineup for each suspect, and showed the lineups to Monroy and Garcia. Garcia identified appellant immediately, but did not identify Hurtado the first time he viewed the lineups. About a week later, Garcia looked at the lineups again, and identified Hurtado. Monroy identified appellant and Hurtado in the photographic lineups. At the time, he was 30 percent sure of his identification of Hurtado and 100 percent sure of his identification of appellant.

Gang Evidence

Detective O'Neal testified at trial as a gang expert. He explained that "Pacas" is a general term for all Hispanic gangs in Pacoima. Pacas Trece is a Hispanic gang in Pacoima, as is Pacoima Criminals. Both gangs would be considered "Pacas." The parties stipulated that "Pacas, also known as Pacas 13," is a

criminal street gang, as that term is used in section 186.22 and CALCRIM No. 1401, and that Pacas is an ongoing association of three or more people which has a common identifying name and sign or symbol, has as its primary activities crimes listed in section 186.22, and whose members engage in a pattern of criminal activity as defined in section 186.22 and CALCRIM No. 1401. Detective O'Neal testified that tattoos with a "P" design and "818" were used by Pacas.

In Detective O'Neal's opinion, appellant was a member of the Pacoima Criminals gang with the moniker "Puppet." His opinion was based on appellant's tattoos, field identification cards for appellant, and speaking to other deputies. Hurtado did not have any gang tattoos. Detective O'Neal could not find any documentation showing Hurtado was a gang member. As far as the detective knew, Hurtado was not a gang member. In Detective O'Neal's opinion, Hurtado was an associate of the Pacoima Criminals gang. His opinion was based on his investigation of this case.

There were Pacas gang members in the Antelope Valley, but "very, very few." Pacas, and members of various other gangs, had migrated to the area for family or other reasons. They were fewer in number and at a distance from their original gangs and so they tended to "clique up" with each other. They often joined together based on friendship.

Detective O'Neal also explained the role of tattoos in gangs. Only members of a gang are permitted by the gang to have tattoos related to the gang. Gang tattoos are an advertisement of gang membership. The average person who does not know much about gangs can look at a distinctive gang tattoo and know the person wearing it is a gang member. Often, residents of

communities with a gang presence are in such fear of gang members that they will not call the authorities about gang crimes. Thus, it is common for gang members to display their tattoos for the purpose of intimidating their victims or the community.

The display of gang tattoos during the commission of a crime benefits the gang in several ways. It creates or increases fear of that gang, assists in the commission of the crime and decreases the likelihood that the crime will be reported. This empowers the gang as a whole, not merely the individual gang member.

In response to a hypothetical based on the facts of this case, Detective O'Neal opined the carjackings were committed for the benefit of the Pacas gang and in association with it. The detective explained that if a gang member displayed his tattoos to identify his gang affiliation and to attempt to intimidate his victims, he was using the power of the gang to commit the crimes. The display would also benefit the gang because it would strike fear into the community and further empower the gang.

On cross-examination, Detective O'Neal agreed state prison records showed Hurtado as a "gang drop out," which was consistent with being debriefed from a gang and green-lighted by the gang. A person who is green-lighted is "free game" to be hunted down and beaten or killed. Detective O'Neal also agreed that it would not benefit a Hispanic gang if a gang member committed a crime with someone who had been green-lighted by the Mexican Mafia, assuming the gang was aware of the green light. If the green light came from the person's own gang, "you can't expect . . . other gangs to really respect that one particular gang's green light."

The Note

The prosecution introduced evidence that Hurtado tried to pass a note to appellant during pretrial proceedings. Hurtado was housed separately from other inmates, including appellant, for his own protection because he was a "green light." The note was intercepted by a courtroom bailiff, Los Angeles County Sheriff's Deputy Jon Dutcher. It was addressed to "Puppet" and, in pertinent part, the note read, "I'm thinking [Juan the informant is] the one who told on us cause Carmen told him everything. I'm not trippin on getting life I just want to get it over with so I can go upstate." The note was offered to show consciousness of guilt.

Defense Case

Hurtado testified on his own behalf. He became a member of the Hawthorne Little Watts gang when he was 13 years old. When he went to prison in 2002, the Mexican Mafia considered him a kind of member. In 2004, he decided he no longer wanted to be a gang member. He "debriefed" with prison officials and provided information to them about the Mexican Mafia. As a result, the Mexican Mafia put out a "green light" on him.

Hurtado was addicted to crystal methamphetamine and sold the drug to support his habit. He met appellant at a drug house in Palmdale in 2013, and they began to buy, sell and use drugs together. At some point, Hurtado became aware that appellant was a Pacas 13 gang member. Hurtado considered appellant a friend and told him about being green-lighted by the Mexican Mafia. Hurtado also knew Orozco through mutual drug use. Occasionally, Hurtado sold drugs to Orozco or bought drugs from him.

On July 18, 2013, Orozco called Hurtado and asked for drugs. Hurtado and appellant drove to Orozco's house to sell him drugs. Hurtado saw Monroy and Garcia sitting in a car and recognized Monroy as a fellow drug user. Hurtado went up to Monroy, asked him if Orozco was at home and learned he was on his way home. Hurtado then asked Monroy if he wanted to buy "stuff," meaning drugs. Monroy said that he wanted drugs but did not have any money. Hurtado returned to his car and recounted the conversation to appellant. Appellant walked to Monroy's car, spoke with him, returned to Hurtado's car and told Hurtado that he was going to use Monroy's car for a few hours in exchange for drugs. Appellant drove away in Monroy's car. Hurtado did not see appellant pull a gun and did not know if appellant carjacked Monroy. Hurtado did not have a gun and did not carjack anybody. He did not know of any reason Monroy or Garcia would falsely accuse him of carjacking.

Hurtado also discussed the note he sent to appellant. When he wrote in that note that he was not tripping on getting life, he was just tired of being in county jail, of the arrangements there and the bus rides. It was not an admission that he had committed the carjackings. He was just depressed at the time. Hurtado wrote that Juan "told on us" to try to make it "comfortable" for appellant to say that he did the carjackings alone.

DISCUSSION

I. Substantial Evidence Supports the Gang Enhancement

Appellant contends there is insufficient evidence to support the jury's true findings that he committed the carjackings for the benefit of a criminal street gang and with the intent required by section 186.22, subdivision (b)(4). We disagree.

In evaluating a claim the evidence is insufficient to support a true finding on an allegation, we review the entire record in the light most favorable to the judgment to determine "'whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "We draw all reasonable inferences in support of the judgment. [Citation.]" (*People v. Wader* (1993) 5 Cal.4th 610, 640.) Reversal is not warranted unless it appears "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Section 186.22, subdivision (b)(4) applies to "[a]ny person who is convicted of a felony . . . committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" Application of the gang enhancement "does not depend on membership in a gang at all." (*People v. Albillar* (2010) 51 Cal.4th 47, 67–68.)

Section 186.22, subdivision (b)(4) has two prongs. The first prong requires the crime to be "committed for the benefit of, at the direction of, or in association with any criminal street gang." This prong is intended to make it clear the enhancement applies only if the crime is "'gang related.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 622, overruled on other grounds by *Sanchez, supra,* 63 Cal.4th at p. 686, fn. 13.)

Appellant, a Pacoima Criminals gang member, committed the crimes along with Hurtado, a Pacoima Criminals associate. Appellant displayed his Pacoima Criminals gang tattoos during

the commission of the carjackings. Both victims saw the tattoos and recognized that the tattoos were gang related. Detective O'Neal testified that it is common for gang members to display their gang-related tattoos for the purpose of intimidating their victims or the community. The detective also explained that when a gang member uses his gang tattoos to intimidate his victims, he is using the power of the gang to effect the crime. Thus, the gang benefits when a tattooed gang member commits a crime. A jury could reasonably infer that appellant, who had numerous visible gang tattoos, "empower[ed]" the Pacoima Criminals gang when he and Hurtado committed the carjackings. (See *People v. Albillar, supra*, 51 Cal.4th at p. 63 ["Expert opinion that particular criminal conduct benefited a gang by enhancing its reputation for viciousness can be sufficient to raise the inference that the conduct was 'committed for the benefit of . . . a[] criminal street gang' within the meaning of section 186.22[, subdivision] (b)(1)"]; see also *People v. Ewing* (2016) 244 Cal.App.4th 359, 380 [expert's opinion that defendant's tattoo was gang related, coupled with a gang sign on a car used in the crime, was sufficient to find the shooting was gang related].)

The second prong requires "the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(4).) "Intent is rarely susceptible of direct proof and usually must be inferred from the facts and circumstances surrounding the offense." (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.) Here, appellant's numerous gang-related tattoos "advertis[ed]" that he was committing the crimes for the benefit of a criminal street gang. Appellant thrust his head into the car, and both victims saw appellant's tattoos. Both victims recognized from the tattoos that appellant was a Pacas gang

member. From this evidence the jury could reasonably infer that appellant's crimes promoted and furthered criminal conduct by Pacas gang members. Thus, the evidence was sufficient to satisfy the specific intent prong. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["specific intent" element means "'specific intent to promote, further, or assist in any criminal conduct by gang members . . .'"].)

Appellant argues that he cannot be found to have the requisite intent because he committed the carjackings with Hurtado, a gang dropout who had been "green lighted," and Detective O'Neal testified that a gang member who committed a crime with someone who had been green-lighted could face negative repercussions from his gang, including physical violence. But Detective O'Neal also testified that appellant's gang would have to be aware of the green light. There is no evidence appellant's gang was aware that Hurtado had been green-lighted. As we pointed out in *People v. Hurtado, supra*, B265955, a jury could reasonably infer that appellant and Hurtado acted in the belief that Hurtado's identity and status would never become known.

Appellant cites several cases in which appellate courts found the evidence insufficient to support a gang enhancement. Reviewing the sufficiency of evidence, however, necessarily calls for analysis of the unique facts and inferences present in each case, and therefore comparisons between cases are of little value. (*People v. Thomas* (1992) 2 Cal.4th 489, 516.)

We conclude substantial evidence supports the gang enhancement.

II. Any *Sanchez* Error In the Gang Expert's Testimony was Harmless

The prosecution's gang expert, Detective O'Neal, was asked if he had an opinion whether appellant was a gang member. He responded that appellant was a member of the Pacoima Criminals gang. When asked how he knew that, Detective O'Neal responded: "His tattoos, F.I. cards that have been written on him in the past, and speaking to other deputies." Appellant contends Detective O'Neal's expert testimony regarding the basis of his opinion was inadmissible testimonial hearsay under *Sanchez, supra*, 63 Cal.4th 665.

Sanchez reversed jury findings on street gang enhancements because "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof. Some of those hearsay statements were also testimonial and therefore should have been excluded under *Crawford* [*v. Washington* (2004) 541 U.S. 36]. The error was not harmless beyond a reasonable doubt." (*Sanchez*, *supra*, 63 Cal.4th at pp. 670–671.) *Sanchez* "drew a distinction between 'an expert's testimony regarding his general knowledge in his field of expertise,' and 'case-specific facts about which the expert has no independent knowledge.' [Citation.] The former is not barred by the hearsay rule, even if it is 'technically hearsay,' while the latter is." (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 408.) Case-specific knowledge that is inadmissible, testimonial hearsay includes "statements about a completed crime, made to an investigating officer by a nontestifying witness . . . unless they

are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, *supra*, at p. 694.) Police reports were therefore testimonial, but the court in *Sanchez* "was unable to determine whether information about the defendant recorded on an FI card was testimonial because the circumstances of its creation were not clarified by the parties at trial." (*People v. Vega-Robles, supra*, 9 Cal.App.5th at p. 410.)

The People argue that the issue has been forfeited because appellant's counsel did not object to Detective O'Neal's testimony on the ground that it was based on case-specific, testimonial hearsay. We decline to find forfeiture because the trial took place before *Sanchez*, when such an objection "would likely have been futile." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7.)

Detective O'Neal testified that he looked at six FI cards on appellant prepared by other officers. The FI cards were not introduced into evidence because, as the prosecutor stated, "it's hearsay." The People concede the detective's testimony that "Puppet" was appellant's gang moniker was case-specific hearsay, but argue that it was not testimonial hearsay. According to *Sanchez*, "Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Sanchez, supra*, 63 Cal.4th at p. 689.) *Sanchez* suggested "[i]f the card was produced in the course of an ongoing criminal investigation, it would be more akin to a police report, rendering it testimonial." (*Sanchez, supra,* at p. 697.)

Detective O'Neal's description of the six FI cards did not suggest they were created for evidentiary purposes during the course of a police investigation of a specific crime. Detective O'Neal testified: "An F.I. card is quite simply a card that deputies use to document information about a person. That information includes necessary[ily] name, date of birth, residence, tattoos, what gang they may or may not belong to, whether he admits that he's a member of that gang. . . . [¶] . . . [¶] So it's a card with just general information of people we contact in the field." At a minimum, the record was undeveloped in this regard.

To the extent appellant also complains the brief statement by Detective O'Neal that he spoke with other deputies also constitutes inadmissible, testimonial hearsay, appellant points to no place in the record showing where this testimony was further explored at trial. Thus, the record was undeveloped in this regard as well.

Even if considered testimonial hearsay, Detective O'Neal's testimony based on the contents of FI cards or some undescribed conversations with deputies was harmless beyond a reasonable doubt. Detective O'Neal's expert opinion that appellant was a member of the Pacoima Criminals gang and that his moniker was Puppet was not exclusively premised on the FI cards or information received from other officers. Rather, his opinion was also based on appellant's many highly-visible, gang-related tattoos. Indeed, both victims testified that they recognized appellant's tattoos as related to the Pacas or Pacoima Criminals gang. Further, Hurtado testified that he knew appellant was a Pacas gang member. And Hurtado testified that appellant was the intended recipient for the note Hurtado wrote that was

addressed to "Puppet." Thus, the jury had ample nonhearsay testimony on which to find that appellant was a gang member within the meaning of section 186.22, subdivision (b)(4).

III. Error in Failing to Modify CALCRIM No. 301 was Harmless

Appellant contends, and the People concede, that the trial court erred in failing to modify CALCRIM No. 301, as requested by appellant's trial counsel. Appellant further contends the error was not harmless under either the federal harmless beyond a reasonable doubt standard enunciated in *Chapman v. California* (1967) 386 U.S. 18, 24 or the state reasonably probable standard enunciated in *People v. Watson* (1956) 46 Cal.2d 818, 836.

A. *Background*

As appellant notes, Hurtado testified that he and appellant went to Orozco's house to buy drugs; Garcia and Monroy were also there to buy drugs; Hurtado did not see appellant pull out a gun; and appellant worked out a deal to use Monroy's car for a few hours in exchange for drugs. Hurtado also testified that he had been green-lighted by the Mexican Mafia. According to appellant, had the jury believed this testimony, it might have acquitted appellant altogether or found not true the gang enhancement.

The jury was instructed with a modified version of CALCRIM No. 301, agreed to by the People and Hurtado's counsel: "Except for the testimony of Michael Hurtado, which requires supporting evidence, the testimony of only one witness can prove any fact. If you find Michael Hurtado an accomplice, then that accomplice testimony requires supporting evidence. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Appellant's trial counsel requested the following modification of CALCRIM No. 301:

"Even if you find Michael Hurtado an accomplice[,] any testimony he provides that you believe that could be used to find the defendants not guilty or did not commit the allegation[,] does not need corroboration." The trial court denied the requested modification, finding that it was "too pinpointed" because it directed the jurors to specific evidence for their evaluation.

The jury was also instructed with CALCRIM No. 334 that if it decided Hurtado "was an accomplice, then you may not convict a defendant of Carjacking based on his or her statement alone. You may use the statement of an accomplice to convict the defendant only if" the statement is supported by other independent evidence that tends to connect the defendant with the crime.

In closing argument, appellant's trial counsel argued: "An accomplice's testimony is untrustworthy when it's going to implicate the co-defendant. But there's nothing in the law that says it has to be considered [un]trustworthy when it's going to do the reverse, have the defendant found not guilty or have the allegation found not true. There is no limitation in the instruction on that. [¶] So, therefore, anything you want to utilize for Mr. Hurtado's testimony for a not true rendering on the allegations or not guilty on the carjacking, you don't need any corroboration from his testimony. That is not stated in the instructions. [¶] So even if you find Michael Hurtado an accomplice, any testimony he provides that you believe that could be used to find the defendants not guilty or did not commit the allegation, does not need corroboration." The prosecutor did not address this issue in rebuttal.

During deliberations, the jury asked for read back of: Monroy's testimony "where he speaks about Michael Hurtado's involvement"; Garcia's testimony "where Michael Hurtado was involved"; and Hurtado's "entire testimony starting from where he and [appellant] arrived at Brandon Orozco's." Following the last read back, the jury deliberated for a little over an hour before reaching a verdict.

B. *People v. Smith (2017) 12 Cal.App.5th 766*

Section 1111 provides in relevant part: "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

In *People v. Smith, supra*, 12 Cal.App.5th at page 780, the Fourth Appellate District reviewed section 1111 and determined that "[e]xculpatory testimony, by definition, cannot be said to support a conviction and, thus, need *not* be corroborated." The court therefore found that a modified version of CALCRIM No. 301 was erroneous in stating that "'[t]he testimony of any other person you determine to be an accomplice also requires supporting evidence.'" (*People v. Smith, supra*, at p. 780.) Without deciding which harmless error standard applied, the *Smith* court found that even under the state harmless error standard set forth in *People v. Watson, supra,* 46 Cal.2d 818, there was "more than an abstract possibility that the instructional error affected the verdict in this case." (*People v. Smith, supra*, 12 Cal.App.5th at p. 781.) In particular, the court noted that a lone hold-out juror was ultimately dismissed because he was unwilling to follow the court's erroneous instruction

regarding the need for corroboration of any accomplice testimony, including exculpatory testimony. (*Ibid.*) In other words, the lone hold-out juror "was attempting to apply the law correctly," while the rest of the jury understood that the accomplice's "exculpatory testimony could not be believed because it was uncorroborated." (*Id.* at p. 784.)

C. *Analysis*

Unlike *Smith*, there was no hold-out juror here and no indication that the jurors struggled with applying the corroboration requirement to Hurtado's exculpatory testimony. Appellant's trial counsel argued to the jurors that they could use Hurtado's testimony without limitation if it exonerated appellant, and the prosecutor did not dispute this point. Appellant argues that the read backs requested by the jury appeared to focus on the accomplice testimony issue. Even so, the jury did not indicate any confusion regarding the accomplice instructions. Indeed, once the testimony was read back to the jurors, it took them only a little over an hour to find appellant guilty. Both victims identified appellant from six-pack photographic lineups. Appellant has highly-distinctive gang-related tattoos on his head, face, and hands. The crime benefitted appellant's gang. And while Hurtado gave some exculpatory testimony regarding appellant, he later testified that the reason he wrote the note addressed to appellant was to get appellant comfortable so appellant would admit having done the carjackings alone.

Based on this strong evidence, any instructional error was harmless under either the state or federal standards.

IV. The Note was Properly Admitted

Appellant contends the trial court improperly admitted into evidence the note written by Hurtado. We find no error.

A. *Background*

Hurtado's note read in full: "Puppet, [¶] What's up Fu. I came on Tuesday, but they didn't bring you. *I tried to fire my lawyer but they didn't let me.* I just saw Dee Dee here today she's busted again. When I came on Tuesday I saw Ruben the one that Dora used to live with he said he's facing an attempt murder. They killed Juan the one with the white [H]onda. They shot him in front of his pad in Sylmar. The foo's from Sanfer because they said Juan was an informant so I'm thinking he's the one who told on us cause Carmen told him everything. I'm not trippin on getting life I just want to get it over with so I can go upstate. *Fuck the county.* ¶] Mike" The italicized sentences were later redacted.

Before trial, the prosecutor moved to admit the note against both Hurtado and appellant as containing inculpatory evidence. The prosecutor argued the statements in the note were nontestimonial under *Crawford v. Washington, supra*, 541 U.S. 36, and were admissible against appellant as a statement against his and Hurtado's penal interests under Evidence Code section 1230.[4] The prosecutor also argued the note was trustworthy

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[4] Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an

under *People v. Greenberger* (1997) 58 Cal.App.4th 298, 335, which found "the most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosure," and that there was "no conceivable reason why" Hurtado would lie to appellant "about them being responsible for the carjacking." Over objection by both defense counsel, the trial court found the note was admissible against both codefendants.

Hurtado ultimately testified on his own behalf. He admitted writing the note to appellant. Hurtado wrote in the note that someone had told on them, and explained that he was trying to get appellant comfortable so that appellant would later admit having done the carjackings himself. Counsel for appellant had the opportunity to cross-examine Hurtado on the note, but declined to do so.

The jury was instructed with a modified version of CALCRIM No. 358: "You have heard evidence that defendant Michael Hurtado made an oral or written statement before the trial. You must decide whether the defendant made any such a statement, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement."

B. *Analysis*

Appellant argues admission of the note violated the confrontation clause, was inadmissible as a declaration against penal interest, and was untrustworthy. We disagree.

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object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

First, the confrontation clause argument is easily resolved. Hurtado, the author of the note, testified at trial about the note. Thus, appellant's trial counsel had a full opportunity to cross-examine him. (*Crawford v. Washington, supra*, 541 U.S. at p. 59 [confrontation clause does not bar admission of a statement so long as declarant is present at trial to defend or explain it].)

Second, the note constitutes a statement against penal interest. As appellant admits, "the note clearly inculpated appellant, the non-declarant, while also inculpating the declarant," by saying "Juan was an informant so I'm thinking he's the one who told on *us*." (Italics added.) Because Hurtado and appellant were both charged with the same carjackings, and there is no indication that other charges were pending against either of them, the statement is against the penal interests of both Hurtado and appellant.

Third, the circumstances surrounding the note make it trustworthy. """[A] declaration against interest may be admitted in a joint trial so long as the statement satisfies the statutory definition and otherwise satisfies the constitutional requirement of trustworthiness."""" (*People v. Arceo* (2011) 195 Cal.App.4th 556, 575.)

"Clearly, the least reliable circumstance is one in which the declarant has been arrested and attempts to improve his situation with the police by deflecting criminal responsibility onto others. . . . [T]he most reliable circumstance is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures." (*Greenberger, supra*, 58 Cal.App.4th at p. 335.) As the People state, "the note from Hurtado, addressed to appellant, shared tidbits of jailhouse

gossip, and was casual and friendly in tone." It therefore meets the most reliable circumstance.

Appellant's arguments to the contrary—that there was no indicia of trustworthiness because "the note was provided while in custody, presumably dropped in a place where it would be seen by law enforcement"—are not persuasive. The fact that Hurtado wrote the note while in custody has no relevance here because there is no indication that Hurtado wrote the note while being interrogated; no indication that he was asked, or otherwise coerced, to write the note; no indication that law enforcement was even aware that he was writing it; and no indication that Hurtado hoped the note, in which he implicated himself in the carjackings, would be found by any person other than appellant.

Appellant's reliance on *Lilly v. Virginia* (1999) 527 U.S. 116 is unavailing because the case is distinguishable. There, the confession of an accomplice while in custody, primarily responding to leading questions and under the influence of alcohol, militated against finding that his confession was inherently reliable. (*Id.* at p. 139.)

V. The Six-Pack Photographic Lineup Was Properly Admitted

Appellant contends the trial court erred in admitting into evidence the six-pack photographic lineup prepared by Detective O'Neal. Specifically, appellant argues that because he is the only person depicted with a dollar sign tattoo between his eyebrows, the lineup was so unduly suggestive that it violated his due process rights. We find no error.

"'"In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was

unduly suggestive and unnecessary, and, if so, (2) whether the identification was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." [Citation.]'" (*People v. Thomas* (2012) 54 Cal.4th 908, 930; *People v. Carter* (2005) 36 Cal.4th 1114, 1162.)

Based on our review of the lineup, we do not find it impermissibly suggestive. While it is true that appellant is the only person pictured with a dollar sign tattoo on his face, this particular tattoo is very small on the photograph. Four of the other men pictured also have facial tattoos. All of the photographs depict young men with similar features, the identical haircut, and each is wearing a T-shirt.

Because we do not find the lineup unduly suggestive, we need not address the reliability of the identifications. (*People v. Thomas, supra*, 54 Cal.4th at pp. 930–931 [""""Only if the challenged identification procedure is unnecessarily suggestive is it necessary to determine the reliability of the resulting identification""""].) But even so, we find the identifications reliable. The evidence showed that the victims described appellant's distinct tattoos to the responding officers. Appellant poked his head through the car window so that the victims had sufficient opportunity to see him up close. And the victims both immediately identified appellant from the lineups, with Monroy writing he was 100 percent certain of his identification of appellant.

VI. Appellant is Entitled to One Extra Day of Presentence Custody Credit

Appellant contends, and the People agree, that he is entitled to one extra day of presentence custody credit.

At sentencing, appellant was awarded credit for 1,217 actual days served, plus 182 days of local conduct credit, calculated at 15 percent. As a general rule, the time credited includes the date of arrest, the date of sentencing, and every day in between. (*People v. Smith* (1989) 211 Cal.App.3d 523, 526 ["Since section 2900.5 speaks in terms of 'days' instead of 'hours,' it is presumed the Legislature intended to treat any partial day as a whole day"]; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [counting arrest and sentencing date, even though sentencing "necessarily" a partial day].) Counting both the arrest date and sentencing date, appellant spent 1,218 days in presentence custody, not 1,217 days. Accordingly, the abstract of judgment must be modified to show the correct number of actual days in custody.

Appellant also contends that he is entitled to one more day of local conduct credit, from 182 to 183 days. The People disagree and so do we. Under section 2933.1, subdivision (a), appellant is entitled to "no more than 15 percent of worktime credit." (See also § 2933.1, subd. (c) ["the maximum credit that may be earned against a period of confinement . . . *shall not exceed* 15 percent of the actual period of confinement"].) (Italics added.) Fifteen percent of 1,218 is 182.7. In calculating conduct credits, there is no rounding up. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 817 [defendant entitled to "greatest whole number of days which does not 'exceed 15[.00] percent of the actual period of confinement . . .'"].) Dropping the fraction as required, appellant

is entitled to 182 days of conduct credit rather than 183 days. Thus, appellant is only entitled to one extra day of presentence custody credit from 1,399 to 1,400 days.

DISPOSITION

The trial court is directed to amend the abstract of judgment to reflect 1,400 days of presentence custody credit, and to forward the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT