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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. XAVIER R. BIRDSONG, Defendant and Appellant.	B254838 (Los Angeles County Super. Ct. No. BA375216)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Modified and Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Xavier Birdsong was convicted, following a jury trial, of one count of murder in violation of Penal Code[1] section 187, subdivision (a), and one count of willful deliberate and premeditated murder in violation of sections 664 and 187, subdivision (a). The jury found true the allegations that the crimes were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C), and that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) through (d). The trial court sentenced appellant to a total term of 90 years to life in state prison, consisting of 25 years to life for the murder conviction plus 25 years for the firearm enhancement to that conviction and 15 years to life for the attempted murder conviction plus 25 years for the firearm enhancement to that conviction.

Appellant appeals from the judgment of conviction, contending the trial court abused its discretion in admitting evidence of third party threats made against prosecution witness Dominique Austin and the prosecutor committed misconduct in arguing that Austin believed the threats were real. Appellant also contends the prosecutor committed misconduct by misrepresenting the identification of appellant by a witness and by presenting excessive gang evidence. Appellant further contends his counsel was ineffective in failing to present expert testimony on eyewitness identification. Finally, appellant contends the trial court erred in denying his motion for a new trial. Appellant and respondent agree that appellant is entitled to one additional day of presentence custody credit. We affirm the judgment of conviction.

Facts

On June 13, 2008, Christopher Taylor, Orlando Iles and Tyrone Miller were hanging out in front of Taylor's home on 7th Avenue near 36th Street in Los Angeles. The location was in territory claimed by the Harlem Rolling 30's Crips gang. Although

[1] All further statutory references are to the Penal Code unless otherwise specified.

Taylor was not a gang member, he was wearing blue, a color worn by members of the Rolling 30's. Miller left the group to get his motorbike.

A car pulled up in front of Taylor and Iles. Several gunshots were fired. Taylor was hit in the head and killed. Iles was hit in the leg and survived.

Francisco Llamas lived in the area, heard gunshots, went outside and saw a body in the street. He ran to the fire station down the block to get help. He saw a 1995 or 1996 tan Toyota Camry heading south. There were two dark-skinned African-American men in the front seats.

Miller told Los Angeles Police Officer Robert Lait that he was only a few houses away when the shooting took place. Just before the shooting he saw a mid-1990's gold or beige Toyota Camry stopped next to the area where he had been standing with Taylor and Iles. After he heard the gunshots, the car accelerated and drove past Miller.

Iles spoke with Officer Lait in the hospital. Iles stated that after Miller left the group, a gold or beige sedan, possibly an Infiniti, pulled up. There were two African-American men in the front seat and two or three in the backseat. The front passenger had a dark complexion, braided hair, and a muscular build, and appeared to be of medium height. He said, "What's up, homie?" The passenger then extended his right hand, which was holding a black revolver, and began firing. Iles was hit in the leg. The car drove away to the south.

Iles also spoke with Los Angeles Police Department (LAPD) Detective Brian Calicchia. Iles gave the same account of events as he had given Officer Lait. This time, however, he described the car as a mid-90's tan or beige Toyota Camry. He said the shooter had a dark complexion, an athletic build, a goatee, a wide head, a pointy nose, facial hair along his jaw line and braids with tails. The detective showed him a book containing photographs of Rolling 30's gang members and members of rival gang the Black P Stones (BPS). An old photo of appellant was included in the book, but Iles did not select it.

Forensic sketch artist Marilyn Droz worked with Iles to create a sketch of the shooter. Iles told her that the shooter was between 21 and 25 years of age, 5 feet 9 inches

tall, with a dark complexion and thick braids. The sketch was distributed internally in the LAPD but not was shown to the public until 2009, when a reward was offered in the case. The trial court later characterized the sketch as an exact match for appellant.

Thirteen-year-old Derrick Beamon was a neighbor of Taylor. He told LAPD Officer Brendy Ponce that on June 13, 2008, at about 5:00 p.m., he saw two or three African-American men vandalizing a wall with BPS graffiti in and near 4th Avenue. The men left in a gold Toyota Camry. BPS and the Rolling 30's were engaged in an ongoing feud. Beamon also told Detective Calicchia about the graffiti, although he put the time at 4:00 p.m. in that account. Beamon described the front passenger in the Camry as an African-American man with a medium complexion, a mustache and eight braids. Calicchia viewed the graffiti.

In late May 2009, due to a lack of progress in the investigation, the Los Angeles City Council approved a reward of $50,000 for information on the Taylor murder.

In March 2010, Dominique Austin contacted Detective Calicchia. Austin told the detective that in 2008 he lived in an area known as the "Jungle." The area was claimed by BPS. On June 14, 2008, Austin parked his car in the alley behind his residence. Appellant approached Austin. Austin knew appellant from the neighborhood, and knew he was a BPS member, but had never talked to him before. Appellant appeared confused, and said that he had "fucked up." Appellant said the night before he "rode up on somebody" and shot one person in the face and another in the leg. The two men were standing outside a house. Appellant said the person he killed was from the Harlem 30's. The shooting happened on the street with the fire station. Austin knew the area, which was in Harlem 30's territory.

Austin then spoke on the telephone with his friend Scootie, who lived in the area of the shooting.[2] Appellant asked Austin what Scootie had heard about the shooting. Scootie said the shooting was at night, from a car and the shooter had braids. Appellant showed Austin a black revolver, which he said was the gun used in the shooting.

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[2] Initially, Austin told Detective Calicchia that Scootie called him. Later Austin said that he called Scootie.

Austin did not tell anyone about his encounter with appellant. He was afraid for his own life. He also knew gang members come after "snitches" and their families.

At some point after the conversation, a friend of Austin's was murdered. At his friend's funeral, Austin saw what his friend's mother was going through. He approached a detective who was at the funeral and said he wanted to talk with him. The detective gave him a business card.

A few days after the funeral, Austin called the police and ended up speaking with Detective Richard Gordon. His partner, Detective Calicchia, was present during the call. Austin thought he would just give them the information he had, and they would investigate. He did not expect to be a witness. He did not know about the reward. Austin met with Detective Calicchia and told the detective about his encounter with appellant. Austin did not know appellant's name, but described him as having long hair and tattoos on his face. Austin gave the detective the license plate number of a truck he had seen appellant with. The truck belonged to appellant's wife. Appellant had received a ticket while driving the truck.

Detective Calicchia obtained a photo of appellant, placed it in a six-pack photographic lineup and showed the photos to Austin. Austin identified appellant. Austin had seen appellant in the neighborhood occasionally after their conversation,

Detective Calicchia put appellant's photo in a six-pack and showed it to Iles. Iles selected appellant's photo in a photographic lineup, writing "I think that's him." He noted that several features in the photo were similar to the shooter's features. Detective Calicchia did not view this as a positive identification.

At trial, Iles, Miller and Beamon were reluctant witnesses. Iles claimed that he did not remember anything. Miller claimed that all he noticed was Taylor lying in the street. He did not want to testify because he did not want to die. He believed that it was the "rules of the street" that if you testified about a murder you would die. Beamon denied telling police anything.

Austin did provide substantive testimony at trial, but he was afraid for his life and that of his family. Austin testified that two or three days before trial, his father received a

telephone call telling him that the other witnesses at the trial had not had much to say. The caller said everything would be okay if Austin did not come to court. If he did come to court, Austin's family would be killed. Austin's cousin, who was affiliated with the BPS gang, told Austin that the other witnesses at trial were not providing much information. The cousin said BPS was telling him that they might kill him if he did not prevent Austin from testifying. Austin's cousin personally threatened to kill Austin if he testified. Austin's family moved the day before he began testifying.

Despite his fear, Austin testified about his encounter with appellant. His testimony was generally consistent with the account he gave detectives. According to Austin, appellant said that he "rode up" on the street with the fire station, said "BPS" and started shooting. He emptied the gun. Appellant thought he was shooting at members of the Harlem 30's gang.

Austin did learn about the reward at some point before trial, but he was not sure when. Austin said he was not interested in the reward, and would not collect it if it was offered to him.

Two gang experts testified at trial. LAPD Officer Dean Alcaraz worked in the Jungle area and was familiar with BPS. He had encountered appellant numerous times on the street. Appellant had been a self-admitted member of the Jungles clique since 2000, and had a "BPSN 5X" gang tattoo over one eye.

LAPD Officer Bill Rodriguez was a gang expert as well. He testified that there were about 1000 BPS gang members. It was Officer Rodriguez's opinion that appellant was an active member of BPS. Officer Rodriguez opined, in response to a hypothetical based on facts similar to the facts of this case, that the crimes were gang related and committed for the benefit of both the individual shooter and the gang as a whole.

Discussion

1. Threat evidence

Appellant contends the evidence of third-party threats against Austin and his family was more prejudicial than probative and should have been excluded under

Evidence Code section 352, but the trial court either failed to perform an analysis under that section or abused its discretion in finding the evidence admissible. He contends the erroneous admission of this evidence undermined his constitutional due process right to a fair trial.

a. Admissibility of third party threats

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of the witness and is therefore admissible." (*People v. Burgener* (2003) 29 Cal.4th 833, 869; Evid. Code, § 780; *People v. Warren* (1988) 45 Cal.3d 471, 481.) "It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the fear to be admissible." (*People v. Williams* (2013) 58 Cal.4th 197, 270.)

"[T]he fact a witness is testifying despite fear of recrimination is important to fully evaluating his or her credibility. For this purpose, it matters not the source of the threat. It could come from a friend of the defendant, or it could come from a stranger who merely approves of the defendant's conduct or disapproves of the victim. It could come from a person who perceives a social or political agenda to have been advanced by the defendant's actions. It could come from a member of the witness's profession, religion, or subculture, who disapproves of the witness's involvement for some reason. It could come from a zealot of any stripe, large groups of whom seem ready to rally to virtually any cause these days. [¶] Regardless of its source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, within the limits of Evidence Code section 352, those facts which would enable them to evaluate the witness's fear." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.)

"There is no requirement . . . that threats be corroborated before they may be admitted to reflect on the witness's credibility." (*People v. Burgener, supra,* 29 Cal.4th at p. 869.)

b. Evidence Code section 352

Evidence Code ection 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A trial court's decision under section 352 will not be disturbed on appeal unless the court exercised its discretion in "'an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

A trial court "need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352." (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) The fact that a hearing is held at which the parties argue prejudice and probative value prior to the trial court's ruling may demonstrate that the court was aware of, and performed its balancing function under Evidence Code section 352, even if the trial court did not make an express statement on the record. (See *People v. Padilla* (1995) 11 Cal.4th 891, 924.)

c. Due process claim

Appellant contends that the standard for admissibility of third-party threats is so broad that it would violate due process if it were not limited by Evidence Code section 352. To support this contention, he relied on a discussion of propensity evidence in *People v. Falsetta* (1999) 21 Cal.4th 903. Appellant does not make a compelling argument that the two types of evidence are so similar that they must be treated the same for due process purposes. We need not reach appellant's contention, however, because evidence of third party threats *is* limited by section 352. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1085 [trial court has discretion "within the limits of Evidence Code section 352" to permit the introduction of third party threats].) Further, as we discuss in detail below, the record demonstrates the trial court did perform a section 352 analysis and did

not abuse its discretion in admitting the evidence, and so we also need not consider appellant's contention that the federal standard for assessing error must be applied to any erroneous admission of threats evidence.

d. Examination of the record

The record as a whole clearly demonstrates that the trial court was aware of and performed its balancing function under Evidence Code section 352.

At the hearing on the admissibility of the threats, both parties argued the admissibility of the evidence. The prosecutor argued the probative value of the evidence. Appellant's trial counsel argued that the evidence should not be admitted because there was no proof the threats were actually made and the witness's "story . . . borders on far reaching and so would be consistent with him pulling stuff out of the air." Appellant's counsel also argued that the evidence should not be admitted because some of the threats purportedly came from appellant's father, but the whereabouts of the father had been unknown for 20 years. In addition, appellant's counsel pointed out the prosecution had not disclosed the name of the cousin who was a gang member and was directly threatening appellant.

In response to arguments by counsel, the court recognized the danger that if the threats were shown to come from the BPS gang, the jury might indirectly link the threats to appellant. The court also recognized that if the name of the cousin were not revealed, the court "may have to strike the testimony if I decide it doesn't have any validity."

In makings its ruling, the trial court stated that it had done a lot of gang cases and "this is one of the more stronger sets of evidence in terms of someone being intimidated or threatened. [¶] I mean you have someone come directly to him and indicating if he testifies, you know, he will be killed." The court then expressly stated, "I also made a [section] 352 analysis also and feel it is relevant, but I am relying on those cases I cited." The court told the prosecutor that "[t]hat area of what you are allow[ed] as threats has some limitations some 352 limitations."

The court did in fact enforce limits on the prosecutor's inquiry into the threats evidence. The court ruled that the prosecutor could not elicit evidence that the district attorney's office moved the witness because that would "sort of add[] corroboration to whatever he is saying. . . . [¶] . . . . I think it adds a 352 issue that I don't want in the case." Later, the court sustained a defense objection to a question about multiple threatening calls, ruling, "I don't think we need to have multiple calls." When the prosecutor sought to question the witness about threats weeks earlier, the court told the prosecutor, "I think it is time to move on to something else." When the prosecutor began repeating questions, the court sustained a defense objection, ruling "352 now Miss Macintyre this is not what the trial is about. [¶] Let's go on to something else."

Thus, the record as a whole shows the court was aware of the potential for undue prejudice and misleading the jury, and for undue consumption of time, but found that the evidence was highly relevant and should be admitted with limitations. This is precisely the sort of balancing test required by section 352.

e. Abuse of discretion analysis

To the extent that appellant contends in the alternative that the trial court abused its discretion in admitting the threats evidence, we do not agree.

As appellant recognizes, evidence of third party threats is admissible. Appellant contends the threats in this case were more prejudicial than probative because there was no way to tell if the threats were actually made or who made them. He further contends the evidence was prejudicial because the threats supposedly came from appellant's gang and so led to an impermissible guilt-by-association inference. Appellant also contends the evidence was cumulative of the gang expert's testimony.

Appellant objected on only the first ground at trial, and has arguably forfeited the remaining two claims. As the court considered the second two grounds on its own motion and also took steps to prevent the evidence from being too broad or repetitive, we will consider those grounds as well. (See *People v. Abel* (2012) 53 Cal.4th 891, 924.)

Appellant has not identified any "undue" prejudice from the anonymous nature of the threats.

Appellant complains that there was no way to tell who made the telephone threats or even if the threats were actually made. However, there is no requirement that a threat be corroborated before being admitted. (*People v. Burgener, supra,* 29 Cal.4th at p. 869.) Difficulty verifying or corroborating threats is the norm for a variety of reasons, not least of which is that the person making the threats often will not wish to be caught. (See, e.g., *People v. Burgener, supra*, at p. 869 [witness claimed threats from the defendant had been conveyed to her by a person who died before trial; threats were admissible]; *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368 ["someone" telephoned witness and told him they knew where he lived and he should watch his back, and said "go Southside Gang;" threats were admissible]; *People v. Williams, supra,* 58 Cal.4th at pp. 258-269 [witness provided the names of only two of three intermediaries who conveyed threats; all threats were admissible].) Appellant specifically complains that the name of appellant's threatening cousin was not given, and so the cousin's status as a gang member could not be verified. This is not a bar to admission.[3]

Appellant also complains that the fact some of the threats allegedly came from appellant's gang created an impermissible inference of guilt by association that appellant was trying to suppress evidence through his fellow gang members. The fact that some of the threats came from a fellow gang member is not a bar to admission. (See *People v. Olguin, supra*, 31 Cal.App.4th at p. 1368 [threats from apparent gang supporter admitted].) As appellant himself points out, there was properly admitted expert testimony that gangs threaten people who cooperate with police. According to Officer Rodriguez, it is important to a gang that people do not cooperate with law enforcement because "it assists them in their power struggle, if they are allowed to get away with these violent crimes they are going to continue, and that is part of their strategy, intimidation,

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[3] The trial court indicated that a refusal to provide the cousin's name might result in the threats from the cousin being stricken. There is no indication that appellant followed up on this ruling.

fear." Intimidation and fear have "major roles" in gang culture. It "benefit[s] the gang if people don't cooperate with police." Thus, there was no reason for the jury to think that appellant himself had instigated the threats, rather than threats being the typical response of a gang.

To the extent appellant contends the gang expert's testimony made Austin's testimony about threats cumulative, appellant is mistaken. The expert testified generally about threats. He could not, and did not, testify that every witness in every criminal case involving a gang member is threatened. Thus, evidence that threats were actually made to Austin in this case was not cumulative. As the excerpts from the transcript quoted above show, the court prevented the prosecutor from introducing repetitive or overly broad evidence.

2. Prosecutorial misconduct

Appellant contends the prosecutor committed misconduct during closing argument while discussing the threats received by Austin and the strength of Iles's identification of appellant.

a. Applicable law

"'''''A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, as all of defendant's claims are, '" the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion."' [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]"

[Citation.]' A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm.' [Citations.]" (*People v. Adams* (2014) 60 Cal.4th 541, 568-569.)

b. Threats

Evidence of threats to Austin was admitted only to show his state of mind. Appellant contends the prosecutor argued the threats were factually true.

Appellant did not object to the prosecutor's argument on this topic. He contends that an admonition would have been futile, and so his failure to object did not forfeit this claim. As we discuss in more detail below, the trial court gave an admonition on this subject sua sponte. Accordingly, we consider appellant's claim.

i. Closing argument - threats

Appellant identified four instances of alleged misconduct involving the threats. First, the prosecutor argued, "You heard evidence from Dominique Austin when he and his family received threats. What did they do? They hid. He picked up his family at 6:00 o'clock before testifying in this case and moved them, picked up his family and moved them without telling anybody where they were going because he could hide."

The prosecutor also argued, "And Dominique Austin had that additional hurdle of his family [which] had been threatened. He was being threatened and felt it was significant enough to pick up and move everybody in his family before coming in to testify. You saw how nervous he was on the stand. And I said to you: I don't know if the people that are doing this are present in court today. He was nervous. He was scared, and this was a brave and difficult thing for a young man to do in this gang case, to come forward and to help the family."

The prosecutor next argued, "So he comes into court and testifies. And then his family starts receiving these threats from his own cousin who he says is BPS. And he says the gang itself is putting pressure on my cousin, saying they're going to kill him, and

my cousin is saying he is going to kill my family, because this is the grip that the gang culture has on people in these neighborhoods."

The last instance identified by appellant occurred during the prosecution's rebuttal argument. The prosecutor argued, "Dominique Austin, if you remember, tells you I live in BPS territory. I live in the Jungles. I have a cousin who is now threatening me and my family who is Black P-Stones."

ii. Court's sua sponte admonition

At the close of the prosecutor's rebuttal argument, the trial court told the prosecutor, "I didn't want to interrupt your argument. You argued that Dominique Austin testified to something in court. That wasn't introduced as a truth of the matter. That was introduced by state of mind." The prosecutor replied, "My argument was that he testified despite his state of mind." The trial court disagreed, stating "No. That's not the way you—you said it just like it was a fact. Anyway, I intend to tell them one of the instructions on that area."

The court promptly instructed the jury as follows: "I didn't interrupt the prosecution while she was arguing, but I do want to remind the jury of an in limine instruction I gave. The prosecutor argued, and I think it was proper, but I want to make sure that you're clear that Dominique Austin testified despite someone sitting in court, tracking the events in court, and issuing threats. I just want to remind you that that evidence about that came in not for the truth of the matter but was rather offered to show the witness's state of mind and to help you evaluate his credibility, and that's because it was based on hearsay. That's all."

iii. Analysis

Appellant contends that the prosecutor's repeated references to the threats as facts during closing argument could not be undone with by a cautionary instruction. Appellant is mistaken.

The prosecutor never expressly claimed that the threats were actually real. Although perhaps awkwardly phrased, the prosecutor's argument is essentially a summary of Austin's testimony. Overall, the prosecutor's argument made it reasonably clear Austin claimed to have been threatened and testified in spite of this claimed fear. As the trial court later stated in denying appellant's motion for a new trial on the ground of prosecutorial misconduct, "I think [the prosecutor] was merely commenting on [the threat evidence]. I think . . . if I had been arguing, I would have done it more artfully, but I do not think that it was exploited in any way. I believe she was painting a total picture of what was motivating Austin to testify and about the obstacles he was facing."

As appellant acknowledges, jurors are generally presumed to follow instructions. (See, e.g., *People v. Delgado* (1993) 5 Cal.4th 312, 331; *Tennessee v. Street* (1985) 471 U.S. 409, 415, fn. 6 ["The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue"].) Here, any possible prejudice from the prosecutor's isolated statements was not so severe that it could not be cured by an admonition.

As detailed above, the court admonished the jury about the limited nature of the threat evidence at the end of the prosecutor's closing argument. This was not the first time the court had instructed the jury on this topic. The court instructed the jury three times during Austin's testimony that the evidence of the threats was being admitted only to show Austin's state of mind. Before Austin testified, the court told jurors, "The evidence being offered now about threats is not offered for the truth of the matter but is offered to show the witness's state of mind and to help you in your determination of the witness's credibility. This evidence may only be used for this limited purpose." After Austin mentioned his cousin, the court again admonished the jury, stating, "Again I have got to tell the jury there are several layers of hearsay being introduced here. [¶] It is not being introduced for the truth of the matter, only as it affects the hearer's state of mind. Does everybody understand what I am saying? [¶] It is important that you understand that." Very near the end of Austin's testimony about the threats, the court reminded the jury that the evidence was "allow[ed] for what I indicated is a limited purpose."

In addition, as part of the instructions given before deliberations, the court reminded the jury, "Certain evidence was admitted for a limited purpose. [¶] At the time this evidence was admitted, you were instructed that it could not be considered by you for any purpose other than the limited purpose for which it was admitted. [¶] Do not consider this evidence for any purpose except the limited purpose for which it was admitted."

Both before trial began and before deliberations began, the jury was instructed that statements by the attorneys were not evidence. The jury was also instructed before deliberations began that, "If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions."

There is no reasonable probability or possibility that the prosecutor's awkward summary of the threat evidence was such a powerful and persuasive argument that the jury ignored the court's multiple admonitions on the limited use of the threat evidence and the limited role of attorney statements and arguments and decided to treat the threats as true. Our conclusion is buttressed by the fact that the prosecutor in no way suggested that she was privy to evidence outside the record indicating that the threats were true.

c. Iles's identification

During closing argument, the prosecutor argued that when Iles was shown a six-pack photographic lineup containing appellant's photo, Iles said, "I think that's him. Not hey, here's a characteristic. . ." and "So Iles says for the first time: I think that's him, not it's a characteristic, but I think that's him." Appellant contends this overstates the certainty of Iles's identification of appellant and so was misconduct.

Appellant did object to the prosecutor's remark on the ground that the prosecutor was misstating the evidence. The court held a sidebar on the objection. The court stated that Iles had said, "That could be him. . . . He does not say, that's him." The prosecutor repeated that Iles's words were, "I think that's him." The court overruled appellant's objection

Appellant raised this issue again in his motion for a new trial. The trial court denied the motion, explaining, "The court has read the trial transcript. . . . There was a misunderstanding by the court [during trial]. First the court did not remember whether Iles had I.D.'d [appellant] as part of a six-pack procedure; he had. [¶] Moreover, the court thought the prosecutor was personally claiming the defendant was the person who had done the murder rather than repeating what Iles had said. [¶] The prosecutor is correct when she claims that the statement of the evidence by the People was accurate and correct."

Appellant contends the court was wrong in both rulings.

It is undisputed that Iles wrote "I think its him" in the comments section of the six-pack. The jury was shown a copy of the handwritten statement.

Appellant argues Iles demonstrated more uncertainty about the identification in his taped interview with police. Iles said the photo "fits his face" but added that the facial hair "wasn't really, like, you know, lined up." He agreed the photo "looked like" the shooter and was "similar" to the shooter.

The prosecutor accurately represented what Iles had written on the six-pack form. Further, the quote used by the prosecutor does not give a misleading impression of the evidence. "I think it's him" is a tentative statement, not a positive identification. It is not incompatible with Iles's other statements that the photo "looked like" the shooter or was similar to the shooter. There was no misconduct by the prosecutor.

Further, even if the prosecutor's comments were to be understood as slightly overstating the strength of Iles's identification of appellant in the six-pack, any overstatement would be harmless under either a state or federal standard. Regardless of how confident Iles felt of his identification of appellant when shown the six-pack, Iles provided information to a sketch artist which resulted in a drawing that the court characterized as "an exact match" for appellant. Thus, through the sketch Iles did

positively and strongly identify appellant as the shooter. As the trial court stated, this was evidence "that just cannot be explained away." [4]

3. Gang evidence

Appellant contends the trial court erred in denying his motion for a new trial made on the ground that the prosecutor had presented excessive gang evidence, specifically evidence of appellant's tattoos. The court did not err.

Appellant contends the evidence of his tattoos was cumulative and prejudicial, particularly since appellant did not dispute his gang affiliation. According to appellant, the prosecutor questioned Officer Alvarez at great length about the tattoos and showed him four photos depicting appellant's gang clothing and tattoos. The prosecutor then elicited the same evidence from Officer Rodriguez, the gang expert. The prosecutor showed the officer about twenty photographs.

The trial court found that the photographs shown to Officer Rodriquez were cumulative. The court stated, "I have got to tell you this is getting to be 352, so I am about ready to say that . . . we have heard enough of the gang stuff." When the prosecutor replied that she wanted to put on more photos, the court responded, "It is cumulative that is why I am raising it is way cumulative."

Nothing in the court's comments suggests the court found the photos prejudicial. Appellant contends generally that gang evidence is "powerfully prejudicial." This case involved a gang killing, and in such cases gang evidence is normally relevant and admissible. Even if appellant did not dispute his gang membership, the extent of his involvement in the gang was relevant. Wearing gang clothing and gang tattoos can show a serious loyalty to a gang.

There is nothing about the photos which "uniquely evokes an emotional bias against" appellant. (See *People v. Zepeda* (2008) 167 Cal.App.4th 25, 35 [for purposes

[4] A copy of the sketch and a photograph of appellant are part of the record on appeal. The photo is very dark, but a resemblance is apparent. The trial court had the advantage of comparing the sketch to appellant himself, as did the jury.

of section 352, "'prejudicial' is not synonymous with 'damaging' but refers instead to evidence that 'uniquely invokes an emotional bias against defendant' without regard to its relevance on material issues"].) Appellant has at least two visible gang tattoos on his face and it is difficult to see how photographs of additional tattoos could be prejudicial.

There is nothing to indicate that appellant was prejudiced by the cumulative presentation of photos showing him in gang attire and providing close-up views of his tattoos. The trial court did not err in denying appellant's motion for a new trial based on allegedly excessive gang evidence.

4. Ineffective assistance of counsel

Appellant contends the trial court erred in denying his motion for a new trial on the ground that his counsel was ineffective in failing to call an expert witness on eyewitness identification. The trial court did not err. Appellant has not shown ineffective assistance of counsel.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for the counsel's challenged actions or omissions, the

conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

Appellant contends expert testimony was necessary for the jury to accurately evaluate Iles's identification of appellant. Appellant contends Iles's statements in his recorded interview with police show that Iles's observation of appellant was influenced by stress, his unfamiliarity with appellant, speed and the angle of observation. According to appellant, an expert was necessary to explain these influences to the jury.

The jury in this case was instructed with CALJIC No. 2.92, which contains 12 specific factors for the jury to consider when evaluating the accuracy of eyewitness identification. The four factors identified by appellant are included in that list. Appellant lists stress as a factor. The instruction tells jurors to consider, "The stress, if any, to which the witness was subjected at the time of the observation." Appellant also lists Iles's unfamiliarity with appellant as a factor. The instruction tells juror to consider, "Whether the witness had prior contacts with the alleged perpetrator." In addition, appellant lists speed (or more precisely the brevity of the event) and the angle of observation as factors. The instruction tells the jury to consider, "The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act." This factor involves many subfactors, including the amount of time the witness had for observation, the lighting in the area, any obstructions between the witness and the perpetrator. This factor would certainly support an argument that the angle of Iles's observation degraded the accuracy of his identification of appellant.

This instruction gave counsel a solid base for argument to the jury, if counsel wished to make such an argument. Appellant does not explain how an expert witness would have made a difference. (See *People v. Datt* (2010) 185 Cal.App.4th 942, 951-953 [jury instruction on evaluating eyewitness identification can be substitute for expert testimony; counsel can utilize factors listed in instruction to support argument to jury that an eyewitness identification is suspect]). Thus, he has not shown that his trial counsel's performance was deficient, or that a more favorable result was reasonably probable.

Further, appellant has not overcome the presumption that his trial counsel's failure to call an expert witness was sound trial tactics. The only eyewitness in this case was Iles, who recanted his previous tentative identification of appellant from a photographic line-up. It might have been a sound trial strategy to further discredit the recanted identification by calling an eyewitness expert, but that was not the only sound strategy available to trial counsel. Counsel's decision to not focus further attention on the identification by calling an expert was also a reasonable one. As the trial court pointed out, "Iles did not testify during the trial in any manner that reflected a good eyewitness. What would be the point of raising that issue and potentially bringing in evidence that might undermine the fact that he was a horrible eyewitness during the trial?"

5. Reward

Appellant made a motion for a new trial based on newly discovered evidence, specifically evidence that about four months after the trial was over, Austin sought to claim the reward offered in this case. During trial, Austin had stated that he would refuse any reward. Appellant contends the trial court erred in denying this motion.

"'[T]he trial court has broad discretion in ruling on a new trial motion,' and its 'ruling will be disturbed only for clear abuse of that discretion.' [Citation.] In addition, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

In order to be entitled to a new trial on the basis of newly discovered evidence, a defendant must show that he "could not with reasonable diligence have discovered and produced it at trial." (*People v. Martinez* (1984) 36 Cal.3d 816, 821.) This requirement assumes that the evidence existed at the time of trial. There would be no need for a diligence requirement if the evidence did not exist. No matter the level of diligence employed, non-existent evidence could not be discovered. Austin had not inquired about claiming the reward at the time of trial, and so evidence that he had claimed the reward did not exist. For this reason alone, the motion for a new trial was properly denied.

A defendant must also show that any newly discovered evidence is "such as to render a different result reasonably probable upon a retrial." (*People v. Soojian* (2010) 190 Cal.App.4th 491, 511.) "In considering the likelihood of a different result on a motion for new trial, both the trial and appellate courts are asked 'to determine whether the inability of the defendant to present the evidence in question prejudiced the outcome of the trial. In viewing such an issue, we justifiably accord considerable deference to the trial judge, "because of 'his observation of the witnesses, [and] his superior opportunity to get "the feel of the case." '[Citation.]" [Citation.]' [Citation.]" (*People v. Cua* (2011) 191 Cal.App.4th 582, 608.)

Here, the trial court found that "Even assuming that Austin was motivated by the reward money, in whole or in part, this does not make his testimony incredible or unbelievable. As the prosecutor pointed out, the jury had all the information to decide Austin's credibility, and obviously the jury found him credible." As the court explained, seeking a reward "does not mean that your testimony is a lie and that your only motivation is that you want the money. What it shows is that you have an interest in the case; you have a reason to testify the way you're testifying, and that is to get the reward money." The court added that it "found, from observation, found Dominique Austin to be a very credible witness and does not believe that he was lying about his encounter with Mr. Birdsong."

The trial court considered the circumstances of the trial and the court's own assessment of Austin's credibility in reaching its conclusion. The court did not abuse its discretion in finding that the jury would not have reached a different result if it had heard evidence that Austin was motivated by the reward.

To the extent that appellant is contending that Austin's attempt to claim the reward after trial was material because it creates an inference Austin lied about his intention at trial, such an inference would not be a reasonable one. There is nothing suspect about a change of heart or a change of mind. A person's statement of intent always contains

implicit conditions.[5] Thus, failing to follow through on a statement of intent is at best weak evidence that a person was lying when he made his statement, particularly when circumstances have changed in the interval. Thus, this view of the evidence would not warrant granting a new trial.

6. Presentence custody credit

The trial court awarded appellant 1249 days of presentence custody. He contends he is entitled to 1250 days. Respondent agrees. We agree as well.

An appellant may present a custody credit claim on appeal where there are other properly cognizable issues. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.) As a general rule, a defendant is entitled to credit for the date of arrest, the date of sentencing and every day in between. (*People v. Smith* (1989) 211 Cal.App.3d 523, 525-526.) Appellant was arrested on January 27, 2010 and sentenced on January 27, 2014. That totals 1250 days.

[5] For example, when a person states that he intends to go to work in the morning, this will likely be conditioned implicitly on being in good health and having a means of transportation to work.

Disposition

The abstract of judgment is ordered corrected to show that appellant has 1250 days of presentence custody credit. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this correction and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOODMAN, J.*

We concur:

TURNER, P.J.

MOSK, J.

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