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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DEMETRIS L. CROSBY et al., Defendants and Appellants.	B251779 (Los Angeles County Super. Ct. No. BA391952 c/w BA372538)

APPEALS from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Modified and affirmed as to Defendant Crosby. Affirmed as to Defendants Williams and Ottley.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Crosby.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Williams.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Ottley.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Maurice M. Williams was charged with second degree robbery, with criminal street gang and firearm allegations. (Pen. Code, §§ 211, 186.22, subd. (b)(1)(C), 12022.53, subd. (b).)[1] In a separate action, Williams, Demetris L. Crosby, and William Ottley were charged with murder, with criminal street gang and firearm allegations. (§§ 187, subd. (a), 186.22, subd. (b)(1)(C), 12022.53, subds. (b), (c), (d), (e)(1).) After consolidation of the two actions over a defense objection, defendants were jointly tried before a single jury. Williams was convicted of second degree robbery (count 4); and Williams, Crosby, and Ottley were convicted of first degree murder (count 1).[2] The criminal street gang and firearm allegations were found true as to each defendant. In their appeals from the judgment, defendants raise numerous issues. We find no prejudicial error, but conclude that Crosby is entitled to an additional day of presentence custody credit and a corrected abstract of judgment. The judgment, as modified, is affirmed as to Crosby. The judgment is affirmed as to Williams and Ottley.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Robbery

On June 4, 2010, Walter Yates was walking near Highland Avenue when he was approached by a man with a gun. The assailant, later identified as Williams, was accompanied by two unidentified males. Yates complied with the assailant's demand to hand over his bags, which contained a computer, his contact information, and gym clothes. A few days later, Diana Hendon purchased a computer from Williams. After finding Yates's contact information in the computer bag, Hendon offered to sell the computer back to Yates for $1,700.

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

[2] It was also alleged that Williams had suffered two prior strike convictions (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), a prior serious felony conviction (§ 667, subd. (a)(1)), and a prior prison term (§ 667.5, subd. (b)). After a court trial, the prior conviction allegations were found true.

On June 8, 2010, Los Angeles Police Department Detective Dave Vinton recovered Yates's stolen laptop from Hendon's car. Williams was arrested for robbery the following week.

Upon examining Williams's cell phone, Detective Vinton found photographs of Williams's Camaro and of Crosby, whose phone number was listed under his gang moniker, H K Baby Sneak. Vinton also found gang-related photographs. One photo contained the word "Crip," and showed Williams "throwing up the C for Crip." Another depicted Williams "throwing up the C" with the letters "RTC" for Rolling Thirties Crip, and "BK" for "Blood Killer," with the letter "B" crossed out. A text message, "come to church," referred to a gang meeting.

Detective Vinton also found a text message in Williams's phone that caused him to contact South Bureau's homicide division. Vinton inquired whether any murders involving a Camaro had occurred over the weekend of June 12 and 13. As will be discussed, the inquiry proved to be relevant to the investigation of the June 13, 2010 shooting of Marlon Usher.

When Yates was shown a photographic lineup, he selected Williams's photo. Yates also identified Williams at the preliminary hearing and trial.

B. The Shooting

At 2:30 a.m. on June 13, 2010, Usher was shot and killed on Don Tomaso Drive by three men in a Camaro. The first officer to arrive at the scene, Los Angeles Police Officer Jesse Rosales, found no weapons or shell casings.

Shortly before the shooting, Usher was a passenger in Loralyn Aguilar's car, a Toyota Corolla. Aguilar was parked in front of an apartment complex on Don Tomaso Drive, where another passenger, Marvel Lacy, had exited the car. Aguilar was arguing with Usher, because Usher was refusing to get out of her car. He had been drinking heavily. The argument attracted the attention of Paul Jones, a resident at the complex who had just arrived in a taxi. As Aguilar asked the taxi driver to help her remove Usher

from her car, Jones went to his apartment and called 911 to report that a woman was having trouble getting a man to leave her car. That call was made at 2:21 a.m.

Jones, who was watching from his balcony, saw a familiar car—a Camaro—park in front of the complex. Jones recognized the Camaro because of its special rims and rally flag on the side panel. Jones also recognized one of the three men in the Camaro, Crosby, who was a friend of a neighbor named Skylar.

As Aguilar was trying to get Usher to leave her car, she heard Usher yell "Mind your business" at one of the men in the Camaro. That man looked at Usher in an unfriendly manner and gestured toward Aguilar while talking to his companions in the Camaro.

Aguilar, who was frustrated by Usher's refusal to get out of Aguilar's car, began driving away. The three men in the Camaro drove after the car, maneuvered in front of it, and stopped at an angle that blocked the road and forced her to stop. The driver of the Camaro (later identified as Williams)[3] and Usher got out and began walking toward each other. The Camaro's passengers also got out and ran toward Usher. When Aguilar saw that the Camaro's rear passenger had a revolver, she quickly backed up her car, turned around, and drove back to Lacy's apartment. When she got there, she heard gunshots. As she called 911, she heard a second set of gunshots.

Usher sustained one gunshot wound to the abdomen, a gunshot wound to the back of the head, and several gunshot wounds to the back of the torso. There was an abrasion on his knee.

There were no eyewitnesses to the shooting. However, a nearby resident, Ruben Roney, heard a man begging, "Please don't shoot me. Don't do this to me. Don't do me this way." Roney then heard another voice say, "No, not this time, Blood." After

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[3] At trial, but not at the preliminary hearing, Aguilar identified Williams as the driver of the Camaro. Aguilar testified that because she was scared at the preliminary hearing, she had lied about being unable to identify the men in the Camaro.

hearing a single series of gunshots, Roney heard someone say, "Let's go." He then heard a car driving away. He went outside, saw Usher's body, and called 911.

Another resident, Larese Hogan, heard a man say, "Oh man, what are you doing? Why are you doing this, man? You don't have to do this. Please, man, come on now. Please, man." Hogan heard a single series of four gun shots ("[i]t went pow pow pow pow"), followed by the sound of a car leaving. She looked out from her window and saw Usher's body on the street.

Jason Smith, who also lived in the area, heard four or five gunshots. When Smith looked out his window, he saw what appeared to be a Camaro driving westbound on Don Tomaso Drive.

As Bobby Johnson was turning onto Don Tomaso Drive at 2:30 a.m., he saw a Camaro driving away. Johnson saw Usher, who appeared to still be alive, lying on the ground.

C. The Investigation

Later that day, Williams reported to police that his 1995 Chevrolet Camaro with license plate 5HPZ083 had been stolen at 2:30 a.m. that morning In the police report, Williams identified Ottley as his nearest relative.

On the day after the shooting, Detective Vinton arrested Williams for the robbery of Yates. As previously discussed, that arrest led to the recovery of photographs from Williams's cell phone, as well as text messages and other information that caused Vinton to ask homicide detectives in South Bureau about a possible murder involving a Camaro.

After receiving information from Detective Vinton, Detective Linda Heitzman, who was investigating Usher's death, visited the home of Williams's girlfriend, Summer Bonner. At that location, Heitzman found Williams's Camaro partially covered beneath a tarp. The Camaro was dusted for fingerprints, and Ottley's print was found on a compact disk inside the Camaro.

Ottley (whose moniker is BayBay) was arrested by police on another matter and his DNA sample was collected. A DNA sample also was collected from Williams, who

had been arrested for the robbery of Yates. Through DNA testing, Williams was matched to a sample found on the Camaro's steering wheel and on a red plaid shirt that was recovered from the Camaro. Ottley was determined to be a possible contributor (with a statistical probability of 1 in 1,500) of a DNA mixture found on the front passenger door of the Camaro.

Detective Heitzman interviewed witnesses who had reported seeing a Camaro on Don Tomaso Drive at about the time of the shooting. Several witnesses—Tony Ray, Smith, Johnson, and Paul Jones—identified a photograph of Williams's Camaro as the same vehicle that was present around the time of the shooting.

D. Crosby's Extrajudicial Statements

In June 2011, a wiretap was authorized for Ottley's and Crosby's phones. After a warrant was served at Crosby's home, several phone calls were intercepted between Crosby and a woman named Diamond. Those recordings were played at trial over the objections of Ottley and Williams.

During one of the phone calls, Crosby stated: "I think the homie snitched on me." "It's a murder case though." The "homie" who "was there" "went to jail for it and they tried to put it on him." "Cuz was there and he went to jail, and they . . . tried to put the murder case on him." And after "he got out," they "came to my house today" for a "warrant and they came thicker than a motherfucker" and "I got a warrant out for my arrest." "[T]hey want me to . . . do a swab, and I'm like nope. They did my brother, and they did the homie, and they said, I guess they said now they are saying they want me. I'm not about to do that shit." When asked whether he was going to run for the rest of his life, Crosby replied, "I'ma have to Diamond, cuz I did it." "Look, they got, they got, where his, where the body was at, where his body was at, like, nigga, they probably got . . . got my, my. . . ." Crosby again stated that the "homie snitched on me." When asked whether the "homie" knew his home address, Crosby replied, "Yeah, he been to my house and knows. The police talking about like, whoever he is like, somebody from Broadway talking." "I thought Cuz was not going to do that. You feel me? That nigger

was my, my fuckin ace. That's why, you feel me, it was me, Cuz, and uh my brother at the scene. You feel me, in the 'maro' and shit . . . ."[4] In response to the question, "You had a maro?" Crosby replied, "My brother did."

In another phone call, Diamond stated, "So you think like some of your shit is over there." Crosby replied, "gotta be Diamond. Why the fuck they want my shit now? They did Maurice, they did the homie and it wasn't them. Now they want my shit." Diamond stated, "so you think, oh, ok, ok, so they got something." Crosby answered, "[t]hey got something off that ground, they got something. They want my shit bad motherfucker." Diamond: "And you don't remember what you . . . did." Crosby: "That nigga didn't grab my body, that's all I know. The shell was wiped off. Cuz did not grab my body, like nigga." Diamond: "I talking about your mouth, nigga, your spit." Crosby: "I didn't spit. I didn't spit though." Diamond: "You sure?" Crosby: "That's what I'm saying. I don't know see. It's something. They want my shit bad. They got a warrant to get my mutherfucking swabbed test. They got a warrant to get my shit."

E. Cell Phone Location Evidence

Police determined that Metro PCS was the cell phone service provider for phones used by Crosby, Williams, and Ottley. It was ascertained that service for Crosby's phone was terminated prior to the shooting. However, the phones for Williams and Ottley were in active use at the time of the shooting.

Metro PCS records showed that at 2:30 a.m. on the night of the shooting, Ottley's cell phone[5] was travelling in a southbound direction from the cell phone tower located near Don Tomaso Drive. Six calls were made from Ottley's phone between 2:30 a.m. and 2:33 a.m.

Cell phone records also showed that Williams's phone was used shortly before the shooting in the vicinity of Don Tomaso Drive. After the shooting, Williams's phone was

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[4] The prosecutor argued to the jury that "maro" referred to Williams's Camaro.

[5] The cell phone subscriber was Denise Hill, Ottley's mother.

also traveling away from the area of the shooting. The next call made from his phone was made in the vicinity of the home of Williams's girlfriend (where the Camaro was later found by Detective Heitzman).

F. Relationships and Affiliations

At the time of the shooting, Crosby was living on Don Tomaso Drive at the home of his girlfriend, Skylar Gipson. Gipson's mother, Debra Pearson, also lived there. Pearson identified Williams in court as Crosby's brother, and identified a photograph of the Camaro as the vehicle driven by Williams. Pearson knew Ottley by his nickname, BayBay, but could not identify him in court.

Crosby and Ottley are self-professed members of the Five Deuce Broadway Gangster Crips. They were seen together on several occasions by Los Angeles Police Officer Mario Legac of Newton Division.

Williams is a self-professed member of the Long Beach Rollin 20's Crips. In May 2010, Los Angeles Police Officer Dion Trimble encountered Williams and Crosby north of USC in Los Angeles Rollin 20's Bloods territory. They were in the same Camaro (license plate 5HPZ083) used in the shooting in this case. Crosby identified himself to Trimble as a member of Five Deuce Broadway Crips; Williams said he was from Long Beach Rollin 20's Crips. Trimble thought it unusual for Crip members to be in a Blood neighborhood.

In 2010, Los Angeles Police Officer Cory Hogg of Newton Division stopped Crosby and Williams at 54th Street and Broadway. Williams and Crosby gave the same home address. Williams admitted he was from Rollin 20's Long Beach Crips. Crosby admitted he was from Five Deuce Broadway Gangster Crips.

G. Expert Gang Testimony

Los Angeles Police Officer Rene Santos, the prosecution's gang expert witness, testified the territory of Five Deuce Broadway Gangster Crips is located within Newton Division, where there are 70 gangs within 9 square miles. Relying on field information cards and information provided by fellow officers, including Officers Brandt and Hogg,

Santos formed the opinion that Crosby and Ottley are self-admitted members of Five Deuce Broadway Gangster Crips.

The shooting in this case occurred in Black P Stones territory, a Blood gang. Crip members who travel in rival Blood territory are likely to carry weapons to defend themselves.

Gang members gain respect by putting in work, which means committing crimes, selling drugs, obtaining money for the gang to buy firearms, conducting shootings, and fighting for territory. Gang members "post up" on street corners by selling drugs and protecting their territory. The failure to do this will lead to invasion by other gangs.

No gang member wants to be disrespected. In the gang culture, a gang member who is disrespected must retaliate with violence. An apology is not enough. Disrespect is what leads to retaliatory gang stabbings, shootings, and beatings. If a Five Deuce Broadway Gangster Crips member is disrespected in public, neither a verbal nor written apology will suffice. There will be retaliatory violence in the form of a beating or shooting. If other gang members are present when a fellow gang member commits an act of violence, they must join in and help, in order to avoid being seen as weak. If a gang member commits an act of violence and his companions run away or refuse to help, the companions will be dealt with by the gang. They may be shot or beaten. If a gang member snitches, he is in danger of being killed. Killing a snitch is perceived by the gang as a good thing.

Santos was presented with a hypothetical situation that tracked the main facts of this case: A person in a car shouts something disrespectful and confrontational to three gang members; they chase him down in their car and confront him; one gang member immediately goes up to that person and is followed by the other two members; the third gang member has a gun and shoots the victim. Santos testified that in this scenario, all three hypothetical gang members are acting to benefit their respective gangs and in association with their gangs. Their gangs will benefit by showing the community and

other gangs that they are willing to commit violence in their neighborhood and will not be disrespected.

Santos testified that where two individuals belong to one gang, and a third individual belongs to another gang, and both gangs fall under the same umbrella gang, each individual will personally benefit within his own gang for his own conduct. They will all gain respect for their violence.

H. Williams's Defense Evidence

Williams presented the testimony of Kathy Pezdek, an eyewitness identification expert. Pezdek discussed some of the general factors that may affect the accuracy of eyewitness identifications. They include the passage of time, lighting conditions, distance, the length of time for observation, cross-racial identifications, the number of persons present, the use of a weapon, and the presence of any distractions. Pezdek testified that the witness's degree of confidence in his or her identification of an individual does not reflect the accuracy of that identification.

I. Verdict and Sentence

As previously mentioned, the robbery and murder cases were consolidated over an objection by Williams that the cases should be tried separately. During voir dire, the defense raised a *Wheeler/Batson*[6] motion based on the prosecution's exercise of a peremptory challenge to exclude a prospective juror who was African-American. The motion was denied.

During trial, the following events occurred that are relevant to this appeal (we discuss them in greater detail below): First, the court excluded defense evidence of gunshot residue and toxicology tests of the victim, Usher. Second, over defense objections based on hearsay and the right to confront witnesses, the court allowed the jury to hear recordings of the intercepted telephone conversations between Crosby and

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[6] *People v. Wheeler* (1978) 22 Cal.3d 258 and *Batson v. Kentucky* (1986) 476 U.S. 79.

Diamond. Third, postmortem photographs of the victim were admitted over defense objections as to the quantity and graphic nature of the photographs.[7] Fourth, Aguilar testified that she had been contacted by a defense attorney and was afraid to testify. Fifth, the trial court did not give an instruction on its own motion that Crosby was an accomplice as a matter of law and that his statements against Ottley required corroboration. Finally, the prosecutor made statements in closing argument regarding premeditation and deliberation, which defendants contend on appeal constituted misconduct.

The jury convicted Williams, Crosby, and Ottley of first degree murder, and convicted Williams of second degree robbery. Criminal street gang and firearm allegations were sustained as to each defendant. In a bifurcated court trial of the prior conviction allegations against Williams, the allegations were sustained.

Crosby and Ottley received sentences of 50 years to life. The sentence consisted of a base term of 25 years to life, with a consecutive firearm enhancement of 25 years to life under section 12022.53, subdivision (d). All other firearm enhancements were stayed under section 654.[8]

Williams received a sentence of 110 years to life. As to the first degree murder conviction, he received minimum term of 75 years, consisting of a base term of 25 years to life, which was doubled because of a prior strike conviction to 50 years to life, plus a firearm enhancement of 25 years to life. As to the second degree robbery conviction, he

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[7] The postmortem photographs showed that Usher had a gunshot wound to the abdomen, several gunshot wounds to the back of the head and torso, and an abrasion on his knee. The crime scene photograph depicted Usher lying face down on the ground.

[8] The court did not impose the 15-year minimum parole eligibility requirement of section 186.22, subdivision (b)(5), the criminal street gang statute. The omission has no practical effect, however, and respondent does not contend otherwise. Because Crosby and Ottley received sentences of 50 years to life, the 15-year minimum parole eligibility is subsumed by the 50-year minimum term imposed for the underlying murder conviction. (See § 190, subd. (e); *People v. Harper* (2003) 109 Cal.App.4th 520, 527.)

received a minimum term of 35 years, consisting of a third strike sentence of 25 years to life, plus a firearm enhancement of 10 years under section 12022.53, subdivision (b).

DISCUSSION

We discuss each defendant's contentions separately, with the understanding that, where relevant, each has joined in the issues raised by the others.

I

Crosby raises issues of insufficient evidence and wrongful exclusion of evidence. As to the murder conviction, Crosby contends the evidence was insufficient to identify him as the shooter, and that the court erroneously excluded evidence of Usher's positive test results for gunshot residue, drugs, and alcohol. As to the criminal street gang enhancement, Crosby argues the evidence was insufficient to show that the shooting was committed for the benefit of, or in association with, a criminal street gang, or that he had the requisite intent to promote, further, or assist in criminal conduct by a gang. Finally, he seeks an additional day of presentence custody credit and a corrected abstract of judgment.

A. Sufficiency of Identification Evidence

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Reilly* (1970) 3 Cal.3d 421, 425 . . . .) The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Although it is the jury's duty to acquit a defendant if it finds the circumstantial

evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. (*Ibid*.) '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054.)

Measured by this standard, we conclude there was ample evidence to identify Crosby as the shooter. According to his own statements during his intercepted telephone calls with Diamond, Crosby was responsible for a "murder" at which his "brother" "Maurice," who had a "maro" (Camaro), was present. Crosby also admitted there was a gun—the "shell was wiped off"—and a warrant for his arrest. While discussing the "murder," Crosby acknowledged that because he "did it," he would have to hide for the rest of his life. Crosby said he was unwilling to provide a DNA sample because "they got . . . where his body was at," and "they probably got" Crosby's DNA, even though he "didn't spit," the "shell was wiped off," and "[t]hat nigga didn't grab my body."

Crosby's incriminating statements were corroborated by testimony of numerous witnesses concerning a Camaro that was involved in the shooting, testimony from Jones that both Crosby and the Camaro were present on Don Tomaso Drive shortly before the shooting, testimony from Aguilar that the Camaro's rear passenger had a gun, and DNA evidence that indicated by process of elimination—because Williams's DNA was found on the steering wheel and possibly Ottley's DNA was found on the front passenger door—that Crosby was the rear passenger. The DNA evidence, eyewitness testimony, and Aguilar's testimony that the rear passenger of the Camaro had a gun supported a reasonable inference that Crosby—who was identified by Jones as one of the three men in the Camaro on the night of the shooting—was the rear passenger with a firearm.

B. Exclusion of Gunshot Residue and Toxicology Test Results

Crosby contends the court erred in excluding forensic evidence regarding the murder victim, Usher. At the conclusion of the prosecution's case, defendants sought to introduce test results showing the presence of gunshot residue on both of Usher's hands, and the presence of drugs and alcohol in his blood. (The prosecution offered to stipulate to these test results if the court found they were admissible.) We conclude the exclusion of the evidence was not an abuse of discretion.

"The rules regarding the admissibility of evidence are well established. Only relevant evidence is admissible. (Evid. Code, § 350.) Evidence is relevant if it has 'any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.) 'The test of relevance is whether the evidence tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.] The trial court retains broad discretion in determining the relevance of evidence.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 995 (*Cunningham*).)

After a hearing under Evidence Code section 402, the court exercised its discretion to exclude the evidence under Evidence Code section 352. It found the evidence of gunshot residue on Usher's hands would be confusing to the jury because there was no evidence that he was armed or that self-defense might be an issue in this case. It also pointed out that gunshot residue is easily transferred.

We find no abuse of discretion. Under Evidence Code section 352, a trial court has broad discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will create a substantial danger of confusing the issues or misleading the jury. In this case, no weapon was found at the crime scene, the eyewitness testimony indicated that only the rear passenger of the Camaro had a firearm, and there was no evidence that Usher was armed. Under these circumstances, we agree that evidence of gunshot residue on Usher's hands would have been confusing to the jury. The prosecution's evidence—Usher was heard begging for his life, he had an abrasion on

his knee, he was shot from the front (in the abdomen) and from the rear (in the back of the head and torso) and was found lying face down on the pavement—support a reasonable inference that Usher was in a kneeling position while pleading with the shooter, who shot him from the front—which would have afforded an opportunity for gunshot residue to collect on Usher's hands—and then from the rear, thus causing him to fall face down on the ground.

Cunningham, supra, 25 Cal.4th 926 is instructive. In that case, the court stated: "The trial court did not abuse its discretion by precluding that line of inquiry. The defense did not offer any evidence indicating a third party had committed the murder. [Citation.] Moreover, although the defense was informed it could subsequently reintroduce the subject of the letters upon further development of a theory of the murder related to Treto's purported involvement with such a third party, counsel did not do so." The same reasoning applies to this case. At best, the evidence shows that there may have been two rounds of gunshots. Even if that were true—we note that some witnesses heard only a single round of gunshots—no shell casings or weapons were found at the scene, and there is no right to present a speculative and factually unfounded inference. "In general, the '"[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103; see *People v. Mincey* [(1992)] 2 Cal.4th 408, 442 [the right to a defense does not include the right to present to the jury a speculative, factually unfounded inference].)" (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 998.)

Crosby contends the exclusion of the disputed evidence unfairly precluded him from presenting a defense. We are not persuaded. As stated in *Cunningham*, there is no right to present a speculative or factually unfounded defense.

"Although the complete exclusion of evidence intended to establish an accused's defense may impair his or her right to due process of law, the exclusion of defense evidence on a minor or subsidiary point does not interfere with that constitutional right. [Citation.] Accordingly such a ruling, if erroneous, is 'an error of law merely,' which is

governed by the standard of review announced in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]" (*Cunningham, supra*, 25 Cal.4th at p. 999.) The question is whether, " had the trial court permitted the inquiries that defense counsel sought to make, the resulting testimony would have produced evidence of significant probative value to the defense." (*Ibid.*)

Even if the defense were permitted to show that Usher's hands had gunshot residue, there was no indication that self-defense was an issue in this case. The mere fact that some witnesses said they heard two bursts of gunshots while others said they heard only a single burst of gunshots does not, on this record, support a plausible theory of self-defense. It is not reasonably probable that defendants would have obtained a more favorable verdict had the gunshot residue evidence been admitted.

As to the exclusion of toxicology reports concerning alcohol and drugs in Usher's body, the jury already was aware through Aguilar's testimony that Usher had been drinking alcohol and smoking "weed" shortly before his death. Because the toxicology reports would have been cumulative, the trial court properly acted within its discretion to exclude that evidence. (See *People v. Trinh* (2014) 59 Cal.4th 216, 246.)

C. Sufficiency of Gang Enhancement Evidence

The criminal street gang enhancement defined by section 186.22, subdivision (b)(1) adds specified penalties for "any 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." As to the first prong of the statute, Crosby argues the evidence was insufficient to show that the shooting was committed for the benefit of, or in association with, a criminal street gang. As to the second, he argues the evidence failed to show that he had the requisite intent to promote, further, or assist in criminal conduct by gang members. We are not persuaded.

The prosecution's gang expert, Officer Santos, was asked to assume the main facts of this case—that a person in a car shouts something disrespectful and confrontational to

three gang members; they chase him down in their car and confront him; one gang member immediately goes up to that person, followed by the other two members; the third gang member has a gun and shoots the victim. In his expert opinion, Santos concluded the hypothetical shooting was committed for benefit of, and in association with, each participant's gang. He testified that this conclusion would hold true regardless whether the three hypothetical participants belonged to the same gang or different gangs that are affiliated with each other. In either case, the gangs would benefit by showing the community and other gangs that they are willing to commit violence in their neighborhood and will not be disrespected. The jury was entitled to accept or reject his expert testimony on this point.

As to the specific intent element of the statute, the law does not require specific intent to benefit the gang. In *People v. Morales* (2003) 112 Cal.App.4th 1176, the court addressed a similar issue and stated, "What is required is the 'specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' Here, there was evidence that defendant intended to commit robberies, that he intended to commit them in association with [fellow gang members] Flores and Moreno, and that he knew that Flores and Moreno were members of his gang. Moreover, . . . there was sufficient evidence that defendant intended to aid and abet the robberies Flores and Moreno actually committed. It was fairly inferable that he intended to assist criminal conduct by his fellow gang members." (*Id.* at p. 1198.)

This case is similar. There was evidence that Crosby intended to shoot Usher, to do so in association with Williams and Ottley, and that he knew Ottley was a member of his gang, and Williams was a member of an affiliated gang. As in *Morales*, it was inferable that Crosby intended to assist criminal conduct by other gang members. (*People v. Morales*, *supra*, 112 Cal.App.4th at p. 1198.)

D. Custody Credits and Abstract of Judgment

Crosby contends he is entitled to one additional day of presentence custody credits. Respondent agrees. The parties concur that because Crosby "was arrested on

June 28, 2011 . . . and his sentencing took place on September 10, 2013 . . . , the actual days he spent in custody prior to sentencing was 806 days rather than 805 days awarded by the trial court." (See *People v. Smith* (1989) 211 Cal.App.3d 523, 526.)

A sentence that fails to award legally mandated presentence custody credit is unauthorized and may be corrected when discovered. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.) We direct the trial court on remand to prepare a corrected abstract of judgment for Crosby that reflects 806 days of presentence custody credits.

Additionally, as requested by Crosby, we direct that the corrected abstract of judgment reflect that his sentence of 50 years to life consists of 25 years to life for the murder conviction plus an additional 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). (We note the present abstract of judgment erroneously states that Crosby's sentence was doubled as a second strike sentence.)

II

Williams's contentions are: (1) the trial court erred in failing to sever the murder and robbery counts; (2) admission of Crosby's extrajudicial statements violated his right to confront witnesses; (3) numerous and graphic photos of the deceased victim were unduly prejudicial; (4) Aguilar was erroneously allowed to state she was afraid to testify and that a defense attorney had called her; and (5) cumulative error. For the reasons discussed below, we find no error.[9]

A. The Joint Trial of the Murder and Robbery Charges

Section 954 provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

[9] Finding no error, we do not reach the issue of cumulative error.

The joint trial of the robbery and murder charges was authorized by statute. Robbery and murder are "in the same class as other assaultive crimes against the person which may be jointly charged against an accused under Penal Code section 954. (See, e.g., *People v. Rhoden* (1972) 6 Cal.3d 519, 524–525.)" (*People v. Stewart* (1985) 165 Cal.App.3d 1050, 1058.)

The question, therefore, is whether the trial court abused its discretion in denying Williams's motion to sever the murder and robbery counts. "Because it ordinarily promotes efficiency, joinder is the preferred course of action. When the statutory requirements are met, joinder is error only if prejudice is clearly shown. (*People v. Hartsch* (2010) 49 Cal.4th 472, 493 (*Hartsch*); *People v. Soper* (2009) 45 Cal.4th 759, 771–774 (*Soper*); *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220 (*Alcala*).)" (*People v. Scott* (2011) 52 Cal.4th 452, 469.)

"'"In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.'" (*People v. Soper*[, *supra*,] 45 Cal.4th 759, 774 . . . , quoting *Alcala v. Superior Court*[, *supra*,] 43 Cal.4th 1205, 1220 . . . .) "The relevant factors are whether (1) the evidence would be cross-admissible in separate trials, (2) some charges are unusually likely to inflame the jury against the defendant, (3) a weak case has been joined with a strong case, or with another weak case, so that the total evidence may unfairly alter the outcome on some or all charges, and (4) one of the charges is a capital offense, or joinder of the charges converts the matter into a capital case." ([*People v.*] *Zambrano* [(2007)] 41 Cal.4th [1082,] 1128–1129.) "[I]f evidence underlying the offenses in question would be 'cross-admissible' in separate trials of other charges, that circumstance normally is sufficient, standing alone, to dispel any prejudice and justify a trial court's refusal to sever the charged offenses." (*Alcala*, *supra*, at p. 1221; see *Zambrano*, *supra*, at p. 1129.) "[A] jury may consider properly admissible 'other crimes' evidence so long as it finds 'by a preponderance of the evidence' that the defendant committed those other crimes." (*Alcala*, *supra*, at p. 1224, fn. 14; see *Soper*, *supra*, at

p. 778.)' (*People v. Lynch* (2010) 50 Cal.4th 693, 735–736 (*Lynch*).)" (*People v. Scott*, *supra*, 52 Cal.4th at pp. 469–470.)

In support of his contention that joinder would be prejudicial, Williams argued below that the murder and robbery cases were not similar, the identification evidence in the murder case was weaker than in the robbery case, and the prosecution was seeking to bolster the murder case by joining it with the stronger robbery case. In denying his request to sever the charges, the trial court found that a joint trial would not be prejudicial and that evidence underlying the crimes would be cross-admissible in separate trials.

The finding of cross-admissibility of evidence is generally sufficient to dispel prejudice and justify a trial court's refusal to sever the charged offenses. (*People v. Scott*, *supra*, 52 Cal.4th at p. 469.) On appeal, Williams does not dispute cross-admissibility of the evidence.

Williams contends, however, that the identification evidence in the murder case was weak, resulting in that charge being enhanced by the relative strength of the robbery charge. We do not agree. Williams was identified by Pearson as the brother of Crosby, her daughter's boyfriend, who visited their apartment on Don Tomaso Drive. Jones, who lived in the same complex, saw Williams's Camaro and Crosby in front of the complex on the night of the shooting. Aguilar identified Williams as the driver who blocked her vehicle and confronted Usher with two men, one of whom was armed. The fact that Aguilar did not identify Williams at the preliminary hearing does not necessarily indicate the identification evidence was weak. She explained that she was nervous and afraid to testify. Moreover, her identification of Williams as the driver of the Camaro was corroborated by cell phone records that tracked Williams's phone from Don Tomaso Drive to his girlfriend's home where the Camaro was later found by Detective Heitzman.

The identification evidence in each case was strong. In each, Williams was linked to the crime by eyewitness testimony and circumstantial evidence. We find none of the factors that would suggest undue prejudice from trying the charges together. Under these

circumstances, the failure to challenge the cross-admissibility finding is fatal to the contention that the trial court abused its discretion in refusing to sever the charges.

B. Crosby's Extrajudicial Statements

Williams contends that Crosby's extrajudicial statements to Diamond were admitted in violation of the hearsay rule and his rights to confrontation and due process.

The constitutional right to confront witnesses does not apply to nontestimonial extrajudicial statements. As explained in *Davis v. Washington* (2006) 547 U.S. 813, only testimonial statements can cause a declarant to be a witness within the meaning of the Confrontation Clause. (*Id.* at p. 828.) "The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right 'to be confronted with the witnesses against him.' In *Crawford v. Washington* (2004) 541 U.S. 36, the high court held that this provision prohibits the admission of out-of-court testimonial statements offered for their truth, unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. [Citations.]" (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158.) The Confrontation Clause does not apply "to out-of-court nontestimonial statements (*Whorton v. Bockting* (2007) 549 U.S. 406, 420; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812), including statements by codefendants. [Citations.]." (*People v. Arceo* (2011) 195 Cal.App.4th 556, 571.)

The term "testimonial," according to *Crawford*, typically refers to a solemn declaration, affirmation, or formal statement made to government officers. (*Crawford, supra*, 541 U.S. at p. 51.) The word is not commonly used to denote "a casual remark to an acquaintance." (*Ibid.*) "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." (*Id*. at p. 68.)

In this case, Crosby's extrajudicial statements were made during personal telephone conversations with a close friend. No government official was present, and no formal declaration or affirmation was made by anyone during the conversation. There

was nothing that indicated the statements were "testimonial" in the general sense mentioned in *Crawford.* Because Crosby's statements were *not* testimonial, their admission did not violate Williams's right to confrontation.

Respondent argues that Crosby's references to his brother (Williams) and the homie were admissible because Crosby was not attempting to shift blame onto them, but was accepting full responsibility for the shooting by unequivocally stating, "I did it." Respondent analogizes this case to *People v. Cervantes* (2004) 118 Cal.App.4th 162 (*Cervantes*). In that case, the court held that extrajudicial statements by defendant Morales were properly admitted in a joint trial with codefendants Cervantes and Martinez, because the statements qualified as declarations against interest and satisfied the constitutional standard of trustworthiness: "The evidence here showed Morales made the statement within 24 hours of the shooting to a lifelong friend from whom he sought medical treatment for injuries sustained in the commission of the offenses. . . . Morales did attribute blame to Cervantes and Martinez but accepted for himself an active role in the crimes and described how he had directed the activities of Martinez. Thus, Morales's statement specifically was disserving of his penal interest because it subjected him to the risk of criminal liability to such an extent that a reasonable person in his position would not have made the statement unless he believed it to be true." (*Id.* at p. 175.)

Cervantes relied on *People v. Greenberger* (1997) 58 Cal.App.4th 298 (*Greenberger*) in concluding that redaction of Morales's references to Cervantes and Martinez was not required. In that case, we held the statements to be trustworthy and admissible under the declaration against penal interest exception because they were disserving to the interests of the declarant. (*Id.* at pp. 332–334; *Cervantes*, *supra*, 118 Cal.App.4th at p. 177.) We concluded that the declarant's references to the codefendant were also admissible: "Since declarations against interest may be admitted in evidence without doing violence to the confrontation clause, we see no reason why such declarations, when made by a codefendant, should not also be admissible. This is not to say that all statements which incriminate the declarant and implicate the codefendant are

admissible. Any such statement must satisfy the statutory definition of a declaration against interest and likewise satisfy the constitutional requirement of trustworthiness. This necessarily requires a 'fact-intensive inquiry, which would require careful examination of all the circumstances surrounding the criminal activity involved; . . .' (*Williamson v. United States* [(1994)] 512 U.S. [594,] 604.) There is nothing in *Bruton* [*v. United States* (1968) 391 U.S. 123] which prohibits introduction of such evidence." (*Greenberger*, *supra*, 58 Cal.App.4th at p. 332.)

Crosby's statements were self-inculpatory. He said he did not want to provide a DNA sample because he was present at the scene and "I did it." He said his "brother Maurice" and his "homie" already had provided DNA samples, and police were now seeking his DNA sample, which he feared would tie him to the crime. Under the totality of the circumstances, Crosby's statements were trustworthy because they were disserving to his penal interests and did not shift blame to others. Under *Greenberger* and *Cervantes*, redaction of references to Crosby's "brother Maurice," and the "homie" was not required because the statements were disserving to the interests of the declarant, Crosby. (*Greenberger*, *supra*¸ 58 Cal.App.4th at p. 332; *Cervantes*, *supra*, 118 Cal.App.4th at p. 177.)

In any event, assuming the words "brother" and "Maurice" should have been redacted because they implicated Williams (see *People v. Leach* (1975) 15 Cal.3d 419, 441 [declaration against interest exception to hearsay rule is inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant]), the error was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cahill* (1993) 5 Cal.4th 478, 510.) We already have discussed the reasons why the identification evidence against Williams was strong; there was ample evidence, independent of Crosby's statements, that Williams was driving the Camaro on the night of the shooting. On this record, it is not reasonably probable that Williams would have obtained a more favorable result if the references to "brother" and "Maurice" had been redacted from Crosby's statements.

C. Photographs of the Deceased Victim

Williams contends the numerous and graphic photos of the deceased victim were unduly prejudicial. The photographs, which we have examined, consisted of a single photograph of the victim's body lying on the street, and several photographs of the victim's body. The photographs depicted the location and number of gunshot wounds, as well as abrasions.

"[P]hotographs of murder victims are always unpleasant, [but these were] not 'so gruesome as to have impermissibly swayed the jury.' [Citation.]" (*People v. Loker* (2008) 44 Cal.4th 691, 705.) In this case, the photographs were relevant to the prosecution's case, to show how the murder was committed and to explain the prosecution's theory that the shooting was premeditated. (*Id.* at pp. 704–705 [prosecutor was entitled to present photographic evidence to show how murder was committed].) Williams has not shown an abuse of discretion

D. Aguilar's Testimony

During her direct testimony, Aguilar was asked whether she was anxious about testifying in this case. She acknowledged that she was afraid: "I was always scared and I felt . . . I would be found or something . . . might happen to me." She then was asked whether she had received any phone calls that made her nervous. This inquiry prompted an immediate objection from defense counsel. The trial court responded to the objection by informing the jury that "to the extent that you may hear evidence about some party other than the parties involved in this case might have contacted this witness, none of this is attributable to any of the defendants. Do not hold it against them in any respect whatsoever. Again, it goes only to the issue of the witness and her testimony today, whether it is or is not believable."

Following this statement by the trial court, Aguilar testified: "I received a call from a defense attorney [who] wanted to know the story of what I had seen and he persisted in requesting my address." The call occurred over a year before trial.

Counsel for Williams objected, stating that the implication that one of the defense attorneys had engaged in intimidation was so prejudicial that he wanted to move for a mistrial. The trial court stated, "Okay, well don't do that in open court. Let me just say that there is no suggestion from the witness that there was any intimidation here. It was simply that a phone call was made asking for information, so at this point I think we are fine."

Later that day, Aguilar was asked on cross-examination whether she knew what perjury was and whether she was lying at the preliminary hearing when she testified that she did not know what the driver of the Camaro looked like. Aguilar admitted that because she had been afraid at the preliminary hearing, she had lied about being unable to identify any of the men in the Camaro. Aguilar explained that she had lied at the preliminary hearing "[o]ut of fear of my life."

The following day, Aguilar was asked on cross-examination by counsel for Williams about the phone call she had received. She explained that the caller was a man who "claimed to be defending someone on this case." She stated that she did not know who had called her, but she did not recognize the voice to be that of counsel for Williams. When Aguilar was asked whether the voice on the phone sounded like the voices of the other defense attorneys, Aguilar replied, "I wouldn't know. It was over a year ago."

On appeal, Williams argues that Aguilar's testimony regarding the phone call was inadmissible because there was nothing to link the call to defendants. Williams relies on the principle that evidence of an attempt to suppress evidence is inadmissible unless there is a nexus between the defendant and the alleged suppression of evidence.

The record in this case does not show that an accusation of intimidation was made or may be inferred to have been made. Moreover, the trial court specifically found "that there is no suggestion from the witness that there was any intimidation here." The trial court also informed the jury that it was to consider this line of testimony for the limited purpose of assessing Aguilar's credibility.

The trial court did not abuse its discretion. As the Supreme Court stated in *People v. Merriman* (2014) 60 Cal.4th 1, 85, demeanor is always relevant to credibility. Where a witness is afraid to testify, an explanation for the basis of the witness's fear is admissible because the jury is entitled to evaluate the witness's testimony knowing that it was given under circumstances that induced fear. (*Id.* at pp. 85–86.) We find no error. Further, even if we were to find error on this issue, there is no reasonable probability defendants would have obtained a more favorable outcome if the evidence had been excluded. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

III

Ottley contends Crosby's extrajudicial statements constituted inadmissible hearsay and violated his right to confront witnesses; the trial court erred in failing to instruct the jury, sua sponte, that Crosby was an accomplice as a matter of law and that his extrajudicial statements required corroboration; the prosecutor engaged in misconduct; and the trial court erroneously denied a defense *Wheeler/Batson* motion.

A. Crosby's Extrajudicial Statements

Ottley contends that Crosby's extrajudicial statements to Diamond were admitted in violation of the hearsay rule and the rights to confrontation and due process. For the reasons previously discussed, we conclude the trial court did not err in admitting Crosby's extrajudicial statements as declarations against interest.

In any event, the failure to redact the word "homie" was not prejudicial. We note that because Crosby never identified the "homie" by name, it is possible the "homie" was someone other than Ottley. Redacting the word "homie" would have left the jury with the same task of identifying that individual from the surrounding context of the statements.

This case is distinguishable from *People v. Falconer* (1988) 201 Cal.App.3d 1540, which Ottley cites in his reply brief. In that case, four or five armed and masked intruders attempted to steal marijuana plants from a residence. One of them (Patrick

Falconer, Jr.) was wounded and later arrested at a hospital. Another (Matthew Mitchell) admitted his involvement to police and testified for the prosecution at trial. A third intruder, defendant Patrick Falconer, Sr. (Falconer Sr.), was implicated at trial through the testimony of Mitchell. On appeal, Falconer Sr. argued to reverse his conviction on the ground that Mitchell's accomplice testimony was not corroborated by independent evidence that connected him to the crime. The appellate court agreed. (*Id.* at pp. 1543–1544.) It held that the prosecution's evidence—apart from Mitchell's testimony—showed only that Falconer Sr.'s son was one of the intruders, and that Falconer Sr. had visited the residence on a prior occasion and had known about the marijuana. (*Ibid.*)

This case is distinguishable. In addition to DNA and fingerprint evidence that tied Ottley to the Camaro used in the shooting, prosecution witnesses identified Ottley, a member of Five Deuce Broadway Gangster Crips, as a visitor to the apartment on Don Tomaso Drive where Crosby, also a member of that gang, was living when the shooting occurred. More specifically, Ottley's cell phone records showed that he, like Williams, was traveling away from the location of the shooting at the time in question. We conclude the prosecution's evidence—apart from Crosby's extrajudicial statements regarding the "homie"—pointed to Ottley as a participant in the shooting of Usher.

Ottley argues the cell phone records linked only Crosby to the shooting and that, according to the prosecution's theory, Crosby—whose cell phone had been disconnected prior to the shooting—was using Ottley's cell phone on the night in question. But the inference urged by Ottley—that only his cell phone, not his person, was present during the shooting—is not the only reasonable inference supported by the evidence. The evidence showed there were *three* men in the Camaro, two of whom were identified as Crosby and Williams. The fact that Ottley's phone, like Williams's phone, was moving away from the shooting supported a reasonable inference that Ottley was the third occupant in the Camaro.

Because Crosby's extrajudicial statements concerning the "homie" were corroborated by independent evidence—including Ottley's DNA, fingerprint, and cell

phone records—there is no reasonable probability that Ottley would have obtained a more favorable outcome if the word "homie" had been redacted from Crosby's statements. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

B. Accomplice Instruction

Ottley contends that because Crosby was an accomplice, the trial court erred in failing to instruct, sua sponte, on accomplice testimony. Generally, "an instruction on accomplice testimony must be given on the court's own motion when the accomplice is called solely by the prosecution. [Citations.]" (*People v. Guiuan* (1998) 18 Cal.4th 558, 566.) A witness is an accomplice if he or she "is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (§ 1111.)

Although Crosby was not a witness at trial, Ottley argues that because Crosby was an accomplice, the jury should have been instructed to view his extrajudicial statements with caution and to require corroboration. In *People v. Brown* (2003) 31 Cal.4th 518, 555–556 (*Brown*), the Supreme Court considered and rejected a similar contention. It stated that because the accomplice's extrajudicial statements were made under conditions sufficiently trustworthy to be admitted as declarations against interest, the usual problems with accomplice testimony—that it is self-interested and shifts blame to codefendants—were not present, and the instruction on accomplice testimony was not required. (*Ibid*.)

As we have discussed, Crosby's extrajudicial statements to Diamond were properly admitted as declarations against interest. (See Evid. Code, § 1230.) Where that is the case, the trial court need not instruct on accomplice testimony. (*Brown*, *supra*, 31 Cal.4th at pp. 555–556.) We therefore reject the contention of instructional error.

In any event, "'[a] trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record. [Citation.] "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense. [Citations.]" . . . The evidence "is sufficient if it tends to connect the defendant with the crime in such

a way as to satisfy the jury that the accomplice is telling the truth." [Citation.].' (*People v. Lewis* (2001) 26 Cal.4th 334, 370.)" (*Brown*, *supra*, 31 Cal.4th at p. 556.) Thus, even were we to assume the trial court erred by failing to instruct sua sponte on accomplice testimony, we would conclude the error was harmless for the reasons previously discussed.

C. Prosecutorial Misconduct

Ottley contends that during closing argument, the prosecutor committed misconduct by characterizing deliberation and premeditation in the following manner: "Deliberate and premeditated means you think about it. It's not the amount of time you spent thinking about it. There is a classic . . . example: You are at a stoplight and you are driving a car. And as you are driving this car, at the stoplight you look left, you look right. You are making important decisions. You are weighing is it safe for me and my family to go through this light. And you make a decision to put the gas on and go through the intersection. That, Ladies and Gentlemen, is the sort of thought we are talking about. It doesn't have to be written down in a manifesto and it says right here, 'The true test is not the duration of time, but rather the extent of the reflection.' A cold, calculated judgment or decision may be arrived at in a short period of time."

Ottley argues this example constituted prejudicial misconduct because it suggested that a person engages in premeditation and deliberation when he or she decides whether to drive through an intersection. In Ottley's view, the example mischaracterized the terms premeditation and deliberation, which require careful thought and weighing of considerations. (See *People v. Mayfield* (1997) 14 Cal.4th 668.)

Respondent contends the prosecutor's example was neither misleading nor erroneous. We agree. As respondent points out, deciding whether to proceed through an intersection can be a life or death decision that, like premeditation and deliberation, may be made in a short period of time.

Moreover, the failure to raise a timely objection was fatal to Ottley's contention because an admonition by the court would have cured any error. (*People v. Nguyen*

(1995) 40 Cal.App.4th 28, 36–37.) In any case, the jury was correctly instructed on premeditation and deliberation, and we must presume it followed that instruction. (*Ibid.*)

D. Wheeler/Batson

Ottley contends the trial court erred in denying defendants' *Wheeler/Batson* motion. We find no error.

1. Facts

The prosecutor exercised a peremptory challenge against Prospective Juror No. 2545, and she was excused by the trial court. Counsel for Williams (Robert Horner) immediately requested to approach the bench. At sidebar, the trial court inquired whether defendants were making a *Wheeler* motion. In responding affirmatively for defendants, counsel for Crosby (Mark Brandt) described Prospective Juror No. 2545 as a young African-American female juror, about 22 to 24 years old, with no prior jury experience. Her uncle was a police officer, and she had no apparent objectionable qualities. Brandt stated that he was expecting a similar challenge to be made against the other female African-American juror on the panel. (When the trial court later inquired whether the prosecutor was intending to challenge the other African-American juror, the prosecutor replied, "I don't know yet.")

The trial court asked whether the prosecution wished to be heard. The prosecutor then gave his reasons for excusing Prospective Juror No. 2545: "She is unemployed. She is single, has no life experience. . . . [F]rom the moment she sat down, I didn't really like her. I liked her better today because she changed her dress, but that first day she was wearing a very short skirt, 12-inch earrings, and had on these sandals that were blinged out with . . . at least 100 cubic zirconia on each one and that is how she came in the very first day. Today she is wearing a conservative black suit. That is not what she wore the first day." In addition, Prospective Juror No. 2545 "has friends in gangs and . . . [s]he doesn't want to tell us the gangs. My fear is when she hears these guys are 52 Broadways, maybe she knows people. Maybe she knows or has family that associates or may or may not know anybody that is in alliance or in a dispute with any of these gangs

and that could affect her ability I think to be a fair juror. I would say it's a combination of those, the unemployment and also . . . her answer to some of your questions. I really didn't like her answer to direct evidence. She was the first one to raise her hand, but in my humble opinion, I don't think she got the answer all that correct. I don't like someone for a juror that thinks that they may know a little bit more than they do. Based upon all of that, that is the basis for my excusal of her."

The trial court then gave defense counsel an opportunity to respond. Counsel for Ottley (Gia Bosley) argued that a juror's clothing is completely irrelevant to the assessment of his or her mindset, that a juror should not be penalized for answering a legal question posed by the court, and that dismissing a juror who lives in a gang area is improper unless the prosecution is willing to strike every juror in that situation. Bosley pointed out that several prospective jurors had expressed knowledge of gangs, and that Juror No. 2545 did not indicate an inability to be fair. Horner similarly argued that the prosecutor's stated reasons for dismissal—her unemployment and gaudy clothing—were not race-neutral. Brandt pointed out that about six other prospective jurors were unemployed.

After considering these arguments, the trial court explained that a *genuine*, race-neutral explanation is all that is required of the prosecution, and that a juror's clothing and appearance may provide some insight into a juror's attitudes and beliefs. After declaring that the prosecutor's stated reasons as to Prospective Juror No. 2545 appeared to be genuine and race-neutral, the court denied the motion.

2. Applicable Law

"Under *Wheeler*, "'[a] prosecutor's use of peremptory challenges to strike prospective jurors on the basis of group bias—that is, bias against "members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"—violates the right of a criminal defendant to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the state Constitution. [Citations.]'" [Citation.] Such a practice also violates the defendant's right to equal

protection under the Fourteenth Amendment. [Citations.]" (*People v. Streeter* (2012) 54 Cal.4th 205, 221.)

"There is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination. (*Purkett v. Elem* (1995) 514 U.S. 765, 768; *People v. Griffin* (2004) 33 Cal.4th 536, 554; *People v. Johnson* (2003) 30 Cal.4th 1302, 1309, overruled on other grounds in *Johnson v. California* (2005) 545 U.S. 162.) To do so, a defendant must first "'make out a prima facie case "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." [Citation.] Second, once the defendant has made out a prima facie case, the "burden shifts to the State to explain adequately the racial exclusion" by offering permissible race-neutral justifications for the strikes. [Citations.] Third, "[i]f a race-neutral [or gender-neutral] explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful . . . discrimination." [Citation.]' (*Johnson v. California*, at p. 168, fn. omitted.) The same three-step procedure applies to state constitutional claims. (*People v. Bell* (2007) 40 Cal.4th 582, 596.)" (*People v. Bonilla* (2007) 41 Cal.4th 313, 341.)

Where the trial court skips over the first question—whether the defense made a prima facie showing of group bias—and reaches the "ultimate question of purposeful discrimination, the case is described as a first stage/third stage *Batson*/*Wheeler* hybrid, and the question whether a defendant established a prima facie case of group bias is rendered moot. [Citations.]" (*People v. Chism* (2014) 58 Cal.4th 1266, 1314 (*Chism*).) In that situation, the reviewing court need not determine whether defendants established a prima facie case of discrimination, but may skip to the third stage analysis and determine whether the prosecutor's stated reasons for dismissing the prospective juror were race-neutral. (*Ibid.*)

In a third-stage analysis, the issue is whether substantial evidence supports the trial court's finding that the prosecutor's race-neutral explanations were credible. "'"Credibility can be measured by, among other factors, the prosecutor's demeanor; by

how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.'" [Citation.] In reviewing a trial court's denial of a *Batson/Wheeler* motion, we examine 'only whether substantial evidence supports its conclusions.' [Citation.] '"We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 76.)" (*Chism, supra*, 58 Cal.4th at p. 1314.)

The determination whether a prospective juror's views would substantially impair his or her performance as a juror involves "an assessment of the juror's demeanor and credibility, [and] is one 'peculiarly within a trial judge's province.' [Citation.] . . . '[T]he trial court's assessment of a prospective juror's state of mind will generally be binding on the reviewing court if the juror's responses are equivocal or conflicting.' [Citation.] In other words, the reviewing court generally must defer to the judge who sees and hears the prospective juror, and who has the 'definite impression' that he is biased, despite a failure to express clear views. [Citation.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1006–1007.)

3. Analysis

The record indicates that when Prospective Juror No. 2545 was excused, there was another African-American female juror on the panel. We have not been informed if she was excused (as far as we can tell, she was not), and the racial composition of the jury is not apparent from the face of the record.

In evaluating the prosecutor's stated reasons for dismissing Prospective Juror No. 2545, the trial court indicated that a prospective juror's clothing and appearance may provide some insight into the juror's attitudes and thus provide a legitimate basis for dismissal. The court found that the prosecutor's stated reasons—based on inferences drawn from Juror No. 2545's manner of dress, youthful inexperience and lack of

employment, response to the court's questions, and knowledge of gang members—were not a pretext for race-based discrimination, but were genuinely held, race-neutral beliefs.

In *People v. Lomax* (2010) 49 Cal.4th 530, the prosecutor excused a prospective juror, Robbie W., a 24-year-old female clerk with a social services agency. The prosecutor explained that Robbie W. was wearing a t-shirt and was sloppily attired, which conflicted with the prosecutor's preference for older, more conservative jurors. The Supreme Court concluded the dismissal was not improper. The court found nothing in the record to contradict the prosecutor's description of Robbie W.'s appearance and attire. Youth and apparent immaturity were found to be race-neutral reasons, since it was "not unreasonable for a prosecutor to believe a young person with few ties to the community might be less willing than an older, more permanent resident to impose a substantial penalty. Likewise, a slovenly appearance can reveal characteristics that are legitimately undesirable to the prosecution. [Citation.]" (49 Cal.4th at pp. 574–575.) The failure to excuse Juror No. 12, Gloria Y., a 28-year-old juror, did not suggest that Robbie W.'s dismissal was improper, because "[o]ther than their relative youth, Juror No. 12 and Prospective Juror Robbie W. shared little in common. Defendant's comparison does not undermine the trial court's finding that Robbie W. was dismissed for reasons unrelated to her race. That finding is supported by substantial evidence." (*Id.* at p. 575.)

The same is true in this case. There is nothing to contradict the prosecutor's description of Prospective Juror No. 2545's young age, youthful immaturity, and gaudy attire. Under these circumstances, we defer to the trial court's assessment of Prospective Juror No. 2545's state of mind, and find there is substantial evidence to support the court's finding that she was dismissed for race-neutral reasons.

DISPOSITION

As to Williams and Ottley, the judgment is affirmed. As to Crosby, the judgment is modified to reflect an award of 806 days of presentence custody credits; the judgment, as modified, is affirmed. The clerk of the superior court is ordered to prepare an

amended abstract of judgment for Crosby that reflects the additional day of presentence custody credits, and shows that his sentence of 50 years to life consists of 25 years to life for the murder conviction plus an additional 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d). The amended abstract shall be transmitted to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.