Filed 12/7/12 P. v. Crane CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TOMMY GLENN CRANE, Defendant and Appellant.	B232311 (Los Angeles County Super. Ct. No. MA048866)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hayden Zacky, Judge. Affirmed.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Tommy Glenn Crane appeals from the judgment entered after a jury convicted him of two counts of attempted first degree murder. We reject his contentions that there was insufficient evidence one of his victims was within the shooting "kill zone," that the jury was improperly instructed on the "kill zone" theory, that evidence of eyewitness photo identifications should have been excluded because the photo lineups were improperly suggestive, and that the prosecution violated his due process rights by failing to disclose certain helpful evidence. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Around 8:45 p.m. on March 22, 2010, one member of a group of three black men walked down an alley leading up to the Lancaster house of Rosalind Willis and fired a handgun several times in the direction of Willis and some of her sons. One son, Cameron Dorsey, was shot in the lower back, leaving him paralyzed for two months. After the police showed Willis, Dorsey, and several other family members photo "six pack" lineups, they identified Tommy Glenn Crane as the shooter.

Defendant was a member of the Six Deuce Brims gang. Two nights earlier, Six Deuce Brims member Tevin Williams had been shot and injured in front of Willis's house during a party being held there by Dorsey's brother, Corey Talbert. Another Six Deuce Brims member was beaten. Because of that incident, Willis and her sons decided to pack up their car and stay at Dorsey's apartment. The car was parked in an alley adjacent to Willis's house. As Talbert and his 13-year-old brother Cody Clarke loaded items into the car's trunk, Dorsey spoke with a neighbor about 25 to 30 feet away from them. Defendant then fired several gunshots, one of which struck Dorsey in the back.

Defendant was charged with two counts of attempted first degree murder, one as to Dorsey, and the other as to Talbert. The information also alleged that the shooting was

done for the benefit of a street gang (Pen. Code, § 186.22, subd. (b)(4)), and various firearm use enhancements.[1]

The prosecution theorized that defendant acted in response to the shooting of his fellow gang member Williams at Willis's house two nights before. Sheriff's Deputy Nathan Grimes testified that after he arrested Williams in 2005 on a charge of receiving stolen property, Williams told him that he belonged to the Six Deuce Brims gang, prompting Grimes to fill out a gang field identification card for Williams. Expert testimony was introduced concerning defendant's gang membership, along with evidence that Dorsey had at least once belonged to the Fudge Town Mafia Crips, which was a rival of the Six Deuce Brims. The expert also gave his opinions that the shooting of a gang member would prompt retaliation from the gang, and that the shooting by defendant had been for the benefit of his gang.

The case turned primarily on the eyewitness photo identifications made shortly after the shooting. At the trial, those witnesses recanted their identifications and testified that although they selected defendant's photo from the lineups, he was not the man who fired the shots. Dorsey testified that the gun's muzzle flash enabled him to see the shooter, who he described as a light-skinned African-American about 5-feet, 3-inches tall, who had been wearing a beanie, and whose hair was braided. After defendant was told to stand up for a moment, Dorsey acknowledged that defendant was about the same height as the shooter. Although the shooter's complexion was lighter than defendant's, Dorsey said his perception was based on the light from the gun's muzzle flash.

While victim Dorsey was in the hospital, Detective Cartmill showed him two photo lineups. Each contained a photo of only one man with braided hair. One of the 12 photos was of defendant. Dorsey identified defendant from the first six pack, circled defendant's photograph, and wrote his initials and the phrase "100 percent" by

---

[1] The information also included five attempted murder counts against other Willis family members who were at the shooting scene, but those counts were dismissed at the preliminary hearing due to insufficiency of evidence.

defendant's photo. At trial Dorsey claimed he did so because only defendant's photo fit the shooter's description. When he wrote down "100 percent," Dorsey claimed that meant there was a 100 percent chance that defendant's photo depicted the man who most resembled the shooter. Dorsey did not pick the man with braided hair in the other six pack because his complexion was too dark and his braids were too long. Although defendant was the man he identified in the photo lineup, Dorsey testified defendant was not the shooter.

Witness Clarke testified that he too was able to see the shooter in the gun's muzzle flash. The shooter was probably no more than 5 feet 5 inches tall, had French braids, no facial hair, and was thin. When Cartmill showed Clarke the photo lineups, Clarke selected defendant's photograph, circled the photo, signed his name, and wrote "Shooter" next to the photo. He did so because defendant most closely resembled the shooter. According to Clarke, when he "put the braids and skin complexion together, it eliminated everybody else." His identification was based on defendant's face, complexion, and hair. Although the man with braided hair in the other photo lineup resembled the shooter, Clarke did not select him and was unsure of the shape of that man's mouth. Even though defendant was the man Clarke identified, Clarke claimed defendant was not the shooter.

Victim Talbert testified that he knew defendant lived in the neighborhood, had seen him drive by a few times, and knew what defendant looked like. When shown a photo lineup containing defendant's photo, Talbert selected defendant and wrote "100 percent" near the photo. At trial, Talbert claimed he identified defendant because his photo was the only one depicting a man with braids and a light complexion. Talbert did not identify the man with braids in the other photo lineup. He agreed that defendant was the man he selected in the photo lineup, but testified that defendant was "not the right guy at all."

Virtually identical testimony was given by witnesses Willis and Dorsey's girlfriend, Cynthia Banks.

In defendant's defense, his mother testified that defendant lived with her and was at home the whole evening of the shooting. Calvin Jones lived with defendant and

defendant's mother, and testified that defendant had been at home all day. A psychologist gave expert testimony on the unreliability of eyewitness identifications and photo lineup procedures. Rebuttal testimony tended to impeach defendant's mother and Jones.

The jury convicted defendant of attempted first degree murder as to both Dorsey and Talbert. The jury also found true the street gang enhancements as to both crimes, along with certain firearm use enhancements.

After the trial, the prosecution turned over a report of Detective Cartmill's interview of Tevin Williams, whose shooting outside Willis's house supposedly prompted the retaliatory shooting outside the Willis home two days later by fellow Six Deuce Brims member defendant. Williams supposedly told Cartmill on March 23, 2010, that he was not a gang member and did not know defendant. Based on this, defendant brought a new trial motion on three grounds: (1) newly discovered evidence; (2) prosecutorial misconduct; and (3) a violation of his due process rights under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). The trial court denied the motion.

DISCUSSION

1. *There Was Sufficient Evidence That Defendant Intended to Kill Corey Talbert*

Attempted murder requires proof of a direct but ineffectual act intended to unlawfully kill someone. Unlike murder, which requires only implied malice through a conscious disregard for life, attempted murder requires the specific intent to kill. The doctrine of transferred intent, where the intended victim is not killed, but an unintended victim is, does not apply to attempted murder. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1242 (*Campos*).)

Although guilt based on transferred intent does not apply to attempted murder, the court in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*) held that there could still be a concurrent intent to kill where the defendant shoots at a group of people even if his main target was only one member of that group. (*Id.* at p. 329.) Under *Bland*, that concurrent

intent exists if a "kill zone" was created because "the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Ibid.*) The kill zone theory applies even if the defendant had no specific target in mind, but instead fired indiscriminately at a group of people. (*People v. Stone* (2009) 46 Cal.4th 131, 140 (*Stone*).)

Defendant contends there was no evidence he had the specific intent to kill Talbert. He bases this on the fact that only Dorsey was struck by a bullet at a time Dorsey was 25 to 30 feet away from Talbert, and there is no evidence he fired toward Talbert or that Talbert was otherwise in any kill zone created when Dorsey was shot. The only physical evidence in the record concerning the gunshots comes from Detective Cartmill's testimony in reference to a photo exhibit, which is not in the appellate record, that various shell casings were found near a fence in the general location where defendant and the two other men with him were located. The parties do not mention, and we have found no references in the record, to bullets being found anywhere near the crime scene, except of course for the one in Dorsey's back. Based on this, defendant contends, the jury could not reasonably conclude that shots were fired in a way that showed an intent to kill Talbert. We disagree.

When the shots were fired, Talbert was standing next to his 13-year-old brother Cody Clarke as they loaded items into the trunk of Dorsey's car. Early on in the prosecution's direct examination of Clarke, when he was asked to set the stage for his testimony about the shooting, Clarke answered yes to the question, "There were some men who ended up shooting towards you and your family; correct?" Clarke was asked, and affirmatively answered, several other questions expressly premised on the notion that shots were fired toward him. These included: (1) "You said that at some point, somebody ended up shooting towards you guys; is that right?"; (2) "Is his height roughly the height of the person that you saw end up shooting at you?"; (3) "All you can remember is this person who shot towards you. Is that correct?"; and (4) "On here, is there anybody here that resembles the person who ended up shooting at you?"

Given that Clarke was standing right next to Talbert, who hosted the party where a Six Deuce Brims gang member had been shot two nights earlier, the jury could reasonably infer that shots were in fact fired toward Talbert, either directly, or as part of an indiscriminate firing pattern whose sweep included both Talbert and Dorsey.[2] Defendant contends this evidence was speculative because Clarke testified it was dark at the time. He also contends that Clarke's testimony was the apparent result of speculation on Clarke's part. However, no objections were raised to these questions, and Clarke was not cross-examined about the topic of whether shots were actually fired at or toward him. As a result, we conclude there was sufficient evidence to support the verdict for the attempted murder of Talbert.

2. *The Kill-Zone Instruction Was Correct*

The "concurrent intent" or "kill zone" theory is not a separate legal doctrine requiring special jury instructions. It is instead " 'simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' " (*Stone, supra,* 46 Cal.4th at p. 137, quoting *Bland, supra,* 28 Cal.4th at p. 331, fn. 6.) As *Stone* noted, current pattern jury instructions such as CALCRIM No. 600 discuss the kill zone theory, but the instruction is not required and is instead left to the trial court's discretion.[3] (*Stone, supra,* at pp. 137-138.)

---

[2] Respondent contends that the shell casings found nearby were distributed in a pattern that suggested the shots were fired in such a sweeping pattern. However, the photo showing that pattern is not in the record, and Cartmill's testimony did not address the topic. We therefore agree with Crane that Cartmill's shell casing testimony does not show an indiscriminate firing pattern.

[3] Respondent contends the issue of instructional error was waived because Crane did not object to the instruction at trial. Crane contends that if we conclude a waiver occurred, then he received ineffective assistance of counsel. We exercise our discretion to reach the instructional error claim. Because we conclude that no error occurred, we need not reach Crane's contention that he received ineffective assistance of counsel at trial.

CALCRIM No. 600 states: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of ___ <*insert name of primary target alleged*>, the People must prove that the defendant not only intended to kill <*insert name of primary target alleged*> but also either intended to kill ___ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill ___ <*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill ___ <*insert name of primary target alleged*> by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of ___<*insert name of victim charged in attempted murder count[s] on concurrent-intent theory*>."

The jury in this case was instructed with a slightly modified version of CALCRIM No. 600 as follows: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm of 'kill zone.' In order to convict the defendant of the attempted murder of Corey Talbert, the People must prove that the defendant not only intended to kill Cameron Dorsey but also either intended to kill Corey Talbert, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Corey Talbert or intended to kill Cameron Dorsey by killing anyone in the kill zone, then you must find the defendant not guilty of the attempted murder."

The only tangible difference between the pattern instruction and the modified version the jury got in this case is the use of the word "anyone" instead of "everyone" in the last sentence. Defendant contends instructional error occurred in connection with the modified version of CALCRIM No. 600 the jury received because: (1) pursuant to *People v. Stone*, *supra*, 46 Cal.4th 131, the facts of this case did not warrant giving such an instruction; (2) the instruction focused the jury on whether he intended to kill *anyone* in the kill zone as opposed to *everyone* in that zone; and (3) the jury was not instructed

that Talbert had to have been in the kill zone when the shooting occurred. We reject these contentions in turn.

In *Stone, supra,* 46 Cal.4th 131, the defendant was charged with one count of attempting to murder Joel F. after firing a single gunshot toward a group of rival gang members where Joel was sitting. The jury was instructed on the kill zone theory and found the defendant guilty. The Court of Appeal reversed the judgment in part because the kill zone instruction was not warranted, and the Supreme Court agreed. The court held that the "kill zone theory simply does not fit the charge or facts of this case. That theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons. Here, defendant was charged with but a single count of attempted murder. He was not charged with 10 attempted murders, one for each member of the group at which he shot. As the Court of Appeal explained, 'There was no evidence here that [defendant] used a means to kill the named victim, Joel F., that inevitably would result in the death of other victims within a zone of danger. [Defendant] was charged only with the attempted murder of Joel F. and not with the attempted murder of others in the group on which [defendant] fired his gun.' " (*Id.* at p. 138, original italics.)

Defendant contends that, as in *Stone,* the kill zone theory did not fit the facts of this case because "despite appellant allegedly firing multiple shots, the prosecution only charged him with the *premeditated murder* of Cameron Dorsey (count 1) and the attempted premeditated murder of Corey Talbert (count 2)[]. It is like in *Stone*, where the prosecution did not charge defendant with 10 attempted murders, but only a single attempted murder." (Italics added.)

This confusing contention is an obvious disregard of the facts of this case, where defendant was not charged with murder at all but with multiple counts of attempted murder for allegedly creating a kill zone when he fired his gun at primary target Dorsey. Instead of falling within the *Stone* paradigm of misapplying a kill zone instruction when attempted murder is charged as to only one member of a kill zone group and only one shot was fired, this case is just like those that *Stone* believed were proper subjects for a

kill zone instruction – where attempted murder is charged both as to a primary target and as to others in the kill zone, with multiple shots being fired. To the extent defendant might be attempting to argue that the instruction was inapplicable because the prosecutor did not charge him with the attempted murder of everyone in the kill zone, we reject that contention. Although *Stone* pointed out that the defendant in that case had not been charged with 10 counts of attempted murder for each person in the kill zone, it did so in the context of noting that the defendant had been charged with the attempted murder of only one kill zone member, without charging the murder or attempted murder of a primary target. We do not read *Stone* as requiring that an attempted murder charge be brought for each person in the kill zone. Instead, it simply holds that a prerequisite for a kill zone instruction is a companion charge for attempted murder or murder of some primary target.

Defendant's contention that the instruction was faulty because it did not tell the jury it had to find that Talbert was in the kill zone is also not well taken. As we read his appellate briefs, this contention is actually part of his third criticism of the kill zone instruction – that the jury was told it had to find defendant intended to kill anyone, instead of everyone, in the kill zone. The pattern instruction refers twice to the intent to kill anyone in the kill zone, and in the last sentence refers to the intent to kill everyone in that zone. The instruction in this case used anyone throughout.

A similar contention was considered and rejected in *Campos, supra,* 156 Cal.App.4th 1228, where the jury was instructed with the unmodified version of CALCRIM No. 600, which on the last of three occasions refers to the intent to kill everyone in the kill zone. The *Campos* court rejected the defendant's contention that use of the term "anyone" twice within the instruction erroneously told the jury it could convict even if a defendant did not have the intent to kill all group members within the kill zone. Evaluating the instruction under the applicable test of determining whether there was a reasonable likelihood the jury misconstrued or misapplied the instruction, the *Campos* court rejected that contention for three reasons. First, as noted in *Bland, supra,* 28 Cal.4th at page 331, footnote 6, the kill zone instruction was not legally required, but

instead described an inference the jury could draw. Because the jury was properly instructed elsewhere on the elements of attempted murder, including the requirement of the specific intent to murder the person whose attempted murder was charged, the instruction was superfluous. Second, even if ambiguous, the kill zone instruction was not necessarily inconsistent with *Bland* because it included the term "everyone" at least once. Third, "in the context presented here, there is little difference between the words 'kill anyone within the kill zone' and 'kill everyone within the kill zone.' In both cases, there exists the specific intent to kill each person in the group. A defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits, as each person in the group is at risk of death due to the shooter's indifference as to who is his victim." (*Campos, supra,* at pp. 1242-1243.)

This sentiment was echoed in *Stone, supra,* 46 Cal.4th 131. The Court of Appeal in *Stone* noted the same ambiguity as did the *Campos* court. However, "[i]n context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone. But any possible ambiguity can easily be eliminated by changing the word 'anyone' to 'everyone.' " (*Stone, supra,* at p. 138, fn. 3, original italics.) Therefore, while it might be preferable to use "everyone" instead of "anyone" in CALCRIM No. 600, nothing in either *Stone* or *Campos* suggests that a reasonable jury would likely consider anyone to mean anything less than the intent to kill everyone who happens to be within a kill zone. Combined with the fact that, as in *Campos,* the jury was properly instructed that it had to find that defendant had the specific intent to kill Talbert, we conclude that no instructional error occurred.

Finally, to the extent defendant is arguing that the court needed to state expressly that Talbert had to be in the kill zone for his attempted murder to have been based on the kill zone theory, the jury instructions taken as a whole convey that concept. (See *Campos, supra,* 156 Cal.App.4th at p. 1237.) Moreover, the prosecution expressly argued that "Corey Talbert is also a victim because he was within that kill zone."

3. *The Photo Lineups Were Not Improperly Suggestive*

At the start of the trial, defense counsel moved to suppress evidence of the various witnesses' pretrial identifications of defendant on the ground that the photo lineups they were shown were unduly suggestive. Defendant's lawyer argued that the six pack that included defendant's photo was improper because none of the men depicted was similar in terms of hair style, facial hair, weight and color, because defendant's photo was the only one to depict braided hair, and because four other photos showed men who were "considerably darker." Defense counsel told the court that the witnesses said the shooter had braids and a light complexion, but at the preliminary hearing all denied that defendant had been that man.

The court made several comments after examining the photo six pack that included defendant's photo. First, each photo depicted an African-American male of around the same age. Defendant, who was in the second photo, was the only one whose hair was pulled back in what looked like a ponytail. When defense counsel said defendant had braided hair in the photo, the court said it could not see that. The first photo showed someone with very short hair, with a hairline that might have been receding. The third photo showed someone with dreadlocks, but that person looked heavy. The fourth photo showed a man with short hair, and neither dreadlocks nor braids. The fifth photo showed another man with short hair. The sixth photo showed a man with an afro type hairstyle that was "combed out" and was longer than the others. The court believed each man had facial hair, but defense counsel pointed out that the man in photo number five did not.

After researching the case law, the trial court said the issue was not whether there were differences between the lineup photos, but whether anything caused defendant to stand out from the others in a way that would suggest the witnesses should choose him. The court found that the lineup was not unduly suggestive, but said any differences between the photos might go to the weight of the identification evidence. On appeal,

defendant contends the trial court erred because his photo was the only one in the lineup depicting a man with braids and a light complexion.

Due process requires the exclusion of identification testimony if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable. (*People v. Avila* (2009) 46 Cal.4th 680, 698.) We exercise independent review when considering a trial court's ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Johnson* (2010) 183 Cal.App.4th 253, 271.) We first determine whether the identification procedure was unduly suggestive and unnecessary. If it was not, our inquiry ends. If the procedure was improperly suggestive, however, we then determine whether the identification itself was nevertheless reliable under the totality of the circumstances. (*Id.* at pp. 271-272.) Defendant has the burden of showing that the identification procedure was unduly suggestive and unfair as a demonstrable reality, not just speculation. A due process violation occurs only if the procedure was so impermissibly suggestive that an irreparable misidentification was substantially likely. (*Ibid.*) An identification procedure is improperly suggestive if it caused the defendant to stand out from the others in a way that would suggest the witness should select him. (*Id.* at p. 272.)

After examining the photo lineups (see *People v. Cunningham* (2001) 25 Cal.4th 926, 990), we conclude they were not unduly suggestive.[4] First, we agree with the trial court that the braids in defendant's hair are not particularly visible in the photo. To the extent they appear at all, they look as much like shadows as anything else. Second, although his skin tone appears somewhat lighter than that of others in the photos, some of that difference can be attributed to the lighting. His skin tone is similar to that of the subject in photo number six, who sported a thick, combed-out Afro hairstyle. Regardless, the skin tone difference appears minor to us and does not jump out. Finally, it is important to remember that the witnesses were shown two photo six packs. That six pack included a man with more visible braids and a complexion that appeared lighter than

---

[4] The photo lineups were not included in the record on appeal. By separate order we augmented the record to include them.

defendant's. Despite that, all the witnesses unhesitatingly identified defendant as the shooter. On this record, we conclude the pretrial identification procedure was not impermissibly suggestive.

4. *Post-Trial Disclosure of the Williams Interview Report Was Not Prejudicial Under Brady*

Under *Brady, supra,* 373 U.S. 83, the prosecution violates due process when it fails to disclose evidence that is favorable to the defendant, including both impeachment and exculpatory evidence. The duty extends to evidence known by only the police and not by the prosecutor. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*).)

A defendant who contends the prosecution violated *Brady* must prove three things: (1) the evidence was favorable to him because it was either impeaching or exculpatory; (2) the evidence must have been suppressed by the prosecution, either intentionally or inadvertently; and (3) the failure to disclose prejudiced the defendant. (*Salazar, supra,* 35 Cal.4th at p. 1043.) Whether prejudice occurred turns on the materiality of the evidence to guilt or innocence. Materiality requires more than a showing that the suppressed evidence would have been admissible, that the absence of the suppressed evidence made conviction more likely, or that using the suppressed evidence to discredit a witness's testimony might have changed the outcome of the trial. Instead, a defendant claiming that a *Brady* violation occurred must show a reasonable probability of a different result. (*Ibid.*)

Defendant contends the prosecution violated *Brady* because it did not disclose until after trial the report of Detective Cartmill's interview with Tevin Williams, whose gunshot wound in front of the Willis house supposedly prompted defendant to retaliate two nights later because he and Williams were both members of the Six Deuce Brims gang. Within days of the attack on the Willis family, Williams told Cartmill that he was not a member of the Six Deuce gang, that he did not know defendant, that the party was not a gang party, and that his shooting was not gang-related. Defendant contends this evidence was material because it undermined the prosecution's theory for his motive –

retaliation on behalf of a fellow gang member, as well as the theory that the crime was for the benefit of a street gang.[5]

Under the standard of review for *Brady* claims, conclusions of law or mixed questions of law and fact, such as the elements of such claims, are subject to independent review. While the trial court's findings of fact are not binding on us, they are entitled to great weight when supported by substantial evidence. (*Salazar, supra,* 35 Cal.4th at p. 1042.)

Williams testified at the hearing on defendant's *Brady* motion. Williams recalled that Cartmill came to his home a few days after Williams had been shot. When Cartmill asked Williams if he belonged to Six Deuce Brims, Williams told him he did not. When Cartmill asked if Williams knew defendant, Williams said he did not. On cross-examination by the prosecution, Williams denied ever having told Deputies Gross and Jacob that he was a member of Six Deuce Brims. He also admitted that he was currently incarcerated following his conviction for being an accessory after the fact to an August 2010, robbery committed by gang members. Williams was not charged as a gang member in that case. No other witnesses were called, and the report prepared by Cartmill was not introduced in evidence.

The trial court issued a seven-page order denying the motion. The trial court found that while the evidence might have been relevant on the issues of motive and gang evidence, Williams was not a credible witness: "This court had an opportunity to watch Williams' demeanor when he testified, listened to cross-examination of him, and heard damaging testimony that he is currently serving a prison sentence for violation of Penal Code, [section] 32, being an accessory to a gang related armed robbery. In determining whether a different result is reasonably probable, the trial court may consider both the credibility and the materiality of the evidence. People v. Delgado (1993) 5 Cal.4th 312. Even if Williams' testimony was presented to the jury, it still would not change the fact

---

[5] Crane's new trial motion also contended that the prosecution's failure to turn over the report warranted a new trial on the grounds of newly discovered evidence and prosecutorial misconduct. Crane has expressly waived those two grounds on appeal.

that several deputies had previously identified him as a 62 gang member, based on his own admissions and associations. Williams' testimony would have been marginally probative as it relates to motive and gang evidence, and constitutes evidence that is tangential and collateral to the ultimate issue of whether the defendant was one of the perpetrators of the subject crimes, and this court makes a factual determination that Williams' testimony lacks credibility and is not believable."

Defendant contends the trial court should not have relied on *People v. Delgado, supra,* 5 Cal.4th 312, when using its determination of Williams's lack of credibility to assess the materiality of the suppressed evidence, because *Delgado* did not address *Brady* and concerned only whether a new trial was warranted based on newly discovered evidence. Defendant does not cite, and we are not aware of, any authority for the proposition that the trial court cannot make credibility findings concerning the strength of the prosecution's case when determining whether a different outcome was reasonably probable under *Brady*. (See *Salazar, supra,* 35 Cal.4th at pp. 1050-1051 [Supreme Court considers inconsistencies in defendant's testimony when determining materiality of undisclosed evidence that could have impeached a prosecution expert witness].)

With this in mind, we consider whether the missing evidence was material under *Brady*.[6] First, although Williams claimed he was not a Six Deuce Brims member, Deputy Grimes testified that Williams admitted his membership in that gang when Grimes arrested Williams in 2005. Second, five months after the shootings at issue in this case, Williams helped gang members who had committed an armed robbery evade the police, and later pleaded guilty to being an accessory after the fact. Even without the trial court's assessment of Williams's credibility, we conclude that it was unlikely the jury would accept Williams's version of events. To the extent the missing evidence was relevant to whether the attempted murders were committed for the benefit of defendant's

---

6 There is no dispute that the missing evidence was suppressed, at least inadvertently, and was also favorable to Crane. Respondent does not address those issues on appeal, and has therefore conceded them. Accordingly, we limit our analysis to whether the evidence was material.

street gang, we conclude that admission of that evidence would not have made a different outcome reasonably probable.

The same is true when the missing evidence is considered on the issue of defendant's motive for the attacks. First, for the reasons set forth above, it was unlikely the jury would accept Williams's claim that he was not a member of the Six Deuce Gang and did not know defendant. Second, the essential issue at trial was the validity of the photo lineup identifications of defendant that were made by the victims and other Willis family members in light of their recantation of those identifications at trial. The guilty verdicts must have been based on those identifications, making evidence of any motive for the attacks tangential.

DISPOSITION

The judgment and the order denying defendant's motion for a new trial based on *Brady* are affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.