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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE HERNANDEZ, Defendant and Appellant.	B231493 (Los Angeles County Super. Ct. No. BA358705)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed as modified.

Emry J. Allen, 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, Linda C. Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Jose Hernandez guilty of first degree murder of Roberto Alcazar (Pen. Code, § 187, subd. (a)).[1] The jury also found defendant personally and intentionally discharged a handgun causing death (§ 12022.53, subds. (b)-(d)) and committed the murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). On March 3, 2011, defendant was sentenced to 50 years to life in state prison.[2]

In this timely appeal, defendant contends the trial court abused its discretion in (1) declining to bifurcate the gang allegation, (2) admitting evidence of text messages, a prior act of domestic violence, and a hearsay statement made by Sandra Lopez (Sandra), and (3) overruling an objection to the prosecutor's opening statement. Defendant forfeited the contention concerning the evidence of a prior act of domestic violence by failing to object in the trial court. We conclude the court's other rulings were not an abuse of discretion. As suggested by the Attorney General, we order the abstract of judgment amended to reflect the court's pronouncement of custody credits. In all other respects, we affirm the judgment.

STATEMENT OF FACTS

Prosecution Case

Defendant was a member of the State Street gang, with numerous gang tattoos on his body. His gang moniker was Mad or Enojado, in Spanish. He lived in a known State Street gang hangout with his mother and nephew Ivan, a State Street gang member. His nephew Sammy was a member of the gang with the moniker of "Lil Mad." A State

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1 All statutory references will be to the Penal Code, unless otherwise indicated.

2 The sentence consisted of 25 years to life for the murder, plus a consecutive term of 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)). The trial court imposed and stayed the 10- and 20-year prison terms, respectively, pursuant to section 12022.53, subdivisions (b) and (c). No additional punishment was imposed for the gang allegation.

Street gang member is expected to murder or inflict violence on any member of a rival gang who is found in State Street territory or who shows disrespect to the State Street member by, for example, having sex with a former sexual partner.

On the night of July 5, 2009, Sandra, mother of Sammy and common-law wife of defendant's brother, went to a bar with Juanita Lopez (Juanita), who was a former sexual partner of defendant. Sandra and five of her children lived in Juanita's house, which was in State Street territory. Juanita met Alcazar at the bar. Alcazar, nicknamed Green Eyes, was a tattoo bearing member of the Tiny Boys gang, a rival to State Street. Juanita brought Alcazar home in the early morning hours of April 6 to smoke crystal methamphetamine and have sex in her bedroom. Sandra smoked with them briefly and then left them alone in the bedroom. The three of them went out onto the porch, but Juanita sent Alcazar back in because she realized his tattoos were visible to people on the street and that could bring trouble because this was State Street territory.

Sandra called defendant on Ivan's cell phone, which defendant used as his phone, and told him to come over. Defendant arrived, carrying a gun, and went into Juanita's bedroom, where he saw Juanita and Alcazar having sex. Pointing the gun at Alcazar and Juanita, defendant told Juanita, "Bitch, I told you he was going to go down" and left the room. Defendant returned, saw Juanita and Alcazar having sex again, pointed the gun, and told Juanita to leave. Alcazar did not have a gun. Juanita left. Defendant asked Alcazar where he was from, to which Alcazar replied, "nowhere." Defendant told Alcazar he was lying and shot him, firing three times from a distance of at least two feet. Defendant left the premises with Sandra's children in tow, warning Juanita, "You motherfucking bitch, if you call the police, I'm going to come and kill you and your family."

As Alcazar lay dying on the bedroom floor of a gunshot wound to the chest, Sandra told Juanita not to call an ambulance or the police because defendant had two bullets left in the gun and could return. Sandra staged the room to look as though a burglary had taken place and packed up everything connected to Alcazar. She and

Juanita left the house and disposed of Alcazar's possessions. After concocting a story to tell the police to hide the identity of the killer, Sandra reported the shooting to the police.

Defendant bragged about the shooting in text messages afterward.

Defense Case

Alcazar ingested enough methamphetamine on the night of the killing to be under the influence.

Gina, who is Sandra's daughter and defendant's niece, testified Alcazar had a gun, asked defendant where he was from, and jumped at defendant. Defendant got possession of the gun and fired in self-defense. She testified that Alcazar was shot because he was from the wrong gang and in the wrong territory. Gina loved her uncle. Defendant and her brother Sammy were State Street gang members.

DISCUSSION

Order Denying Bifurcation of Trial of Gang Allegations

Defendant contends he was deprived of a fair trial by the denial of his motion to try the gang allegation separately from the murder charge, in that the evidence of State Street's pattern of criminal activity invited the jury to find defendant had a propensity to commit crimes whether or not he committed this one and had nothing to do with defendant or the charged offense. The trial court did not abuse its discretion.

Defendant moved to sever the gang enhancement allegation on the grounds there was little evidence the murder was gang-related and evidence concerning the gang's primary activities would be highly prejudicial in the trial of the murder charge. The trial court denied the motion, stating: "I do know that I have the discretion to bifurcate the gang enhancement if there is good cause for doing so. I also understand that, when gang evidence is inextricably intertwined with the presentation of the prosecution's case, that it

need not be bifurcated." "[T]he prosecution had to prove malice aforethought. They must also prove that . . . there was an intent to kill, and it seems to me that the reference to gang in the statements ascribed to . . . defendant goes to proving that malice aforethought. It also proves motive. While motive is not necessary to be proved by the prosecution, the jury instruction says the existence of motive may tend to prove the defendant is guilty. The absence of it may tend to prove defendant is not guilty. [¶] So it is certainly relevant in proving up the case, and when I analyze it from that perspective, it seems to me that gang issues will be inextricably intertwined with the presentation of the prosecution's case. And while I understand that gang evidence can have a prejudicial impact, I do not see that in this case where it is the explanation of what happened, at least from the prosecution's perspective, that the probative value is substantially outweighed by prejudice. I do not believe it is. And so for that reason the motion to bifurcate . . . is respectfully denied."

The jury was instructed in modified language of CALJIC No. 17.24.3 as follows: "Evidence has been introduced for the purpose of showing criminal street gang activities, and of criminal acts by gang members, other than the crime for which defendant is on trial. [¶] This evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you for the limited purpose of determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members. You may also use it on the question of whether or not a motive existed for the commission of the alleged crime. [¶] For the limited purpose for which you may consider this evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose."

The evidence defendant objects to on appeal is the gang expert's testimony that State Street's primary activities included such crimes as murder, selling drugs, assaults with deadly weapons, and robberies, and historically, the State Street gang has responded

to a rival gang member entering State Street territory with murder or other acts of violence.

"[A]uthority to bifurcate trial issues [is found in] 'section 1044, which vests the trial court with broad discretion to control the conduct of a criminal trial: "It shall be the duty of the judge to control all proceedings during the trial . . . with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."' [Citation.]" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048 (*Hernandez*).) Whether to bifurcate a gang allegation from the substantive offense charged is a matter for the trial court's sound discretion, and the ruling is reviewed for abuse of discretion. (*Ibid*.) The trial court considers the relevance of the gang enhancement evidence to the substantive charge and the degree to which it risks inflaming the jury. (*Hernandez, supra*, 43 Cal.4th at pp. 1048-1049.) "[T]he criminal street gang enhancement is attached to the charged offense and is, by definition, inextricably intertwined with that offense." (*Id*. at p. 1048) "[S]ome of the . . . gang evidence, even as it relates to the defendant, may be so extraordinarily prejudicial, and of so little relevance to guilt, that it threatens to sway the jury to convict regardless of the defendant's actual guilt." (*Id*. at p. 1049.)

"[As a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative. [Citation.] Consequently, gang evidence may be relevant to establish the defendant's motive, intent or some fact concerning the charged offenses other than criminal propensity as long as the probative value of the evidence outweighs its prejudicial effect. (*People v. Williams* (1997) 16 Cal.4th 153, 193; see generally Evid. Code, § 352.) 'Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]' (*People v. Hernandez, supra*, 33 Cal.4th at p. 1049.)" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223-224.)

The prosecution argued to the jury that defendant shot Alcazar because Alcazar belonged to a rival gang and was acting disrespectfully to the State Street gang by being in State Street territory in defendant's sister-in-law's house having sex with defendant's ex-girlfriend. Defendant's deadly response to Alcazar's disrespect was required by the gang's rules and culture.

The evidence that members of State Street are expected to respond to a rival gang member's encroachment on their territory by murdering or assaulting the rival gangster is highly probative of the prosecution's theory of the crime and the gun enhancement, including defendant's motive and intent, and is relevant to negate the defense of self-defense. The evidence of gang rivalry and the high value placed on enforcing respect for the gang was relevant to show that this murder was a logical and natural response by defendant after learning the rival gang member was in State Street territory having sex with his former girlfriend. The jury was instructed it must not consider the gang evidence to show criminal propensity. The gang evidence was highly relevant and "inextricably entwined" with the crime. It was not unduly prejudicial, and the decision to deny bifurcation of the gang allegation was well within the trial court's sound discretion.[3]

Evidentiary Rulings

"On appeal, we apply an abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1140.) "A trial court abuses its discretion when its ruling 'fall[s] "outside the bounds of reason."' [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 714.)

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[3] To the extent defendant contends the gang enhancement allegation should have been bifurcated because, under *People v. Lopez* (2005) 34 Cal.4th 1002, 1004 [no additional time is added to sentences of 25 years to life], he was sentenced to no additional time for it, we disagree with the contention. If the jury had found defendant guilty of the lesser offense of voluntary manslaughter, as defendant sought, additional time would have been added to the sentence. (§§ 193, subd. (a), 186.22, subd. (b)(1)(C).)

"""Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded under the federal or California Constitution or by statute. [Citations.] Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends '"logically, naturally, and by reasonable inference" to establish material facts . . . . [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] . . . . [Citations.]" [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1166–1167.)

"Relevant evidence may nonetheless be excluded under Evidence Code section 352 at the trial court's discretion if 'its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' . . . (*People v. Ledesma* (2006) 39 Cal.4th 641, 701.)" (*People v. Richardson* (2008) 43 Cal.4th 959, 1000-1001.) "'The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging."' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 638; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) "A finding as to admissibility of evidence under Evidence Code section 352 is left to the sound discretion of the trial court and will not be disturbed unless it manifestly constituted an abuse of discretion." (*People v. Siripongs* (1988) 45 Cal.3d 548, 574.)

A. Text Messages

Defendant contends it was an abuse of discretion to admit text messages from the cell phone number subscribed to by Ivan, because in the absence of proof defendant was the author, the messages were irrelevant and prejudicial. As substantial evidence

supports the conclusion defendant was the author, admission of the messages was not an abuse of discretion.

At a hearing under Evidence Code section 402, the trial court ruled: (1) the text messages signed with defendant's moniker would be admissible under Evidence Code section 1220 [admission of party opponent] upon proof of a relationship between Ivan and defendant; (2) messages lacking a sign-off, but linked to defendant so that it appeared defendant was the author, might be admissible, depending on the content and context of the messages; and (3) for each text, if the probative value is substantially outweighed by its prejudicial value, the message would not be admitted. Admitting the messages into evidence did not mean there was no reasonable doubt defendant wrote them. "But [that] doesn't mean that it doesn't get in front of the jury. It's up to [the jury] to decide whether somebody else wrote it or [defendant] wrote it. But there has to be a sufficient link to [defendant] for me to say it's a party opponent admission to allow it to be given to . . . the jury[.]"

The trial court then made rulings admitting the specific text messages that defendant objects to in the appeal. Unsigned messages, if shown to be by defendant, stating, "When I go back, I'm going to smoke another taco bell"[**4**] and "Fuck taco bells[;] I'll be back" were not more prejudicial than probative, because they did not refer to past conduct.**5** The messages in the sequence - "Caught that on straight boxers,[**6**]" "Ha Ha, lame ass taco bell," "Fuck taco bells. I'll be back'"—were sufficiently linked to raise an inference that defendant wrote them all, but the jury was not required to draw

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4 State Street members showed disrespect to Tiny Boys members by referring to them as taco bells.

5 The portion of a message by defendant bragging he killed other taco bells was inadmissible because its reference to a murder defendant committed in the past was more prejudicial than probative under Evidence Code section 352.

6 This referred to Alcazar, because he was in his boxer shorts when defendant shot him.

that inference. The court ruled the message, "All toy[] [guns] are gone for right now, my boy," was admissible as probative of the issues of identity and mental state and more probative than prejudicial under Evidence Code section 352. Counsel stated defendant had no objection to the admission of "'Hey, I need like $385 to keep on moving.'"[7]

The trial court stated, "The prosecution has to establish two things: one, authenticity, that the information that they have obtained through the document purported to be a business record is what it purports to be, which is a text message sent by somebody who has the phone number 323-671-9993; then the prosecution then must establish preliminarily that the person who texted is your client, to establish that it is an admission by a party opponent. [¶] . . . [¶] And so I looked at the information that the witness [from Metro P.C.S.] testified to and found preliminarily that the authentication aspect of it has been met.[8] [¶] Now, I have said that it relates to the connection part, that the prosecution must establish that Ivan . . . is connected to your client in some manner which would establish that your client potentially has access to that phone. [¶] And then I ruled that the ones where it says 'Mad' are admissible because that is your client's moniker, and where it is not noted 'Mad' that the prosecution must establish, either through context or content, a link between the message and your client."

Defendant did not argue to the jury that he was not the author of the texts. Defendant argued he was bragging, trying to increase his own reputation, but, in actuality, the shooting was in self-defense.[9] He also acknowledged that Sandra called Ivan's cell phone to reach defendant in the early morning of July 6, and defendant called

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7 As defendant had no objection to this message, he forfeited his challenge to it in the appeal. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

8 Defendant does not challenge the ruling the cell phone company's record of text messages from and to Ivan's cell phone is a business record.

9 Counsel argued to the jury: "The text messages, I encourage you to look at them. . . . [¶] . . . [Defendant] bragged about [the shooting]. He told his homies that he . . . shot a rival gang member. That's not disputed."

her back using Ivan's cell phone. Defendant characterized the phone to the jury as his phone.

Substantial evidence supports the trial court's preliminary finding defendant was the author of the messages signed by Enojado sent from Ivan's cell phone.[10] There is evidence defendant and the cell phone subscriber were close relatives, lived together, and were members of the same gang. Defendant was a hardcore member and the only member whose moniker was Mad (Enojado). Text messages signed by Enojado reflect an animosity toward Tiny Boys. It is reasonable to infer the author of the texts signed "Enojado" is defendant. Moreover, late at night on July 6, "Enojado" wrote a text stating, "Juanita thru rat at me but im leaving L.A." The fact that Juanita identified defendant to the police as the shooter on July 6 makes it reasonable to infer that the "me" (Enojado) referred to in that text message is defendant.

Substantial evidence supports finding defendant wrote the unsigned messages, as well. Using his moniker, he wrote almost all the messages during the three-week period prior to the incident and virtually all the messages on July 5, 6, and 7.[11] In his signed text message of July 7, defendant used the same expression, "FUCK TACOBELL," that was used in the unsigned message of July 8, "FUCK TACOBELLS ILL BE BACK." This similarity sufficiently links both messages to the same author.

Concerning the July 8th unsigned message, "When I do go back im going to smoke another taco bell," and Juanita's identification of defendant as Alcazar's shooter links this message to defendant as the author, because its author identifies himself as a taco bell killer. Moreover, this unsigned message is the third in a sequence of unsigned messages written in rapid succession. The other two messages of the sequence, "Hey I need like 385 dollars 2 keep on moving" and "Shit I got the homicide after me," indicate

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10 The signed message that defendant singles out in the appeal was sent on July 6, 2009, and stated: "All toys r gone 4 right now, my boy."

11 Two hundred of the 213 text messages sent from Ivan's cell phone June 15, 2009, through July 6, 2009, were signed Enojado, and 61 of the 62 messages sent on July 5 through 7 were signed Enojado.

the taco bell killing referred to is a recent killing. The July 6th message stating defendant knows Juanita betrayed him to the police ("Juanita thru rat at me") indicates the recent killing the author is running from is Alcazar's murder. This is ample evidence from which it can be inferred the author of "When I do go back im going to smoke another taco bell" is defendant.

The unsigned July 8th text, "Cought [*sic*] that on straight boxers, HAHA LAME ASS TACOBELL," is sufficiently linked to defendant as the author by the facts it reflects animosity toward Tiny Boys, such as State Street members harbored, and knowledge of a detail of the killing (Alcazar was wearing his boxer shorts) that would be known by someone who was there. Defendant, the shooter, was there. Moreover, this message was written within nine minutes of the earlier "FUCK TACOBELLS ILL BE BACK" message, which was linked to defendant as the author.

Substantial evidence supports the conclusion defendant authored the signed and unsigned messages. Admission of the text messages as a party admission was not an abuse of discretion.[12]

B. <u>Prior Acts of Domestic Violence</u>

Defendant contends evidence he had beaten Juanita in the past was more prejudicial than probative. He forfeited the contention by failing to object below. (*People v. Fuiava* (2012) 53 Cal.4th 622, 670 (*Fuiava*) ["'In the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed.'"]; Evid. Code, § 353, subd. (a).)

Juanita testified the reason she believed defendant when he threatened to kill her and her family if she called the police was because "he once beat me up . . . years ago and I know that he's capable." Counsel had no objection to testimony in general terms about

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[12] Defendant cites no authority to support his contention that it was an abuse of discretion to allow the jury to make the factual finding of authorship after the court decided there was enough evidence to admit the messages.

the incident of domestic violence, but did object to Juanita testifying to the details of the domestic violence: "I just want to make sure she was not going to talk about the details and just talk in general about the domestic violence." Counsel stated that, if Juanita went into the details of the incident, her testimony would be more prejudicial than probative. The trial court ruled Juanita's testimony must not go into the details and directed the prosecution to ask leading questions. Juanita then testified, without going into any detail, that the reason she believed defendant's threat was because he beat her before. Defendant did not object. As defendant acceded to the admission of Juanita's testimony that defendant beat her, and did not object to it, we deem his contention on appeal forfeited, and we will not review it.

C. Codefendant's[13] Out-of-Court Statement

Defendant contends the trial court violated the Confrontation Clause to admit Sandra's statement to Juanita "not to call the police because . . . supposedly [defendant] had two bullets in the gun and would probably be back." Defendant objected on hearsay grounds at trial and asked it be stricken as in violation of *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (*Bruton*) (1968) 391 U.S. 123. The prosecutor argued Sandra's statement was admissible for a nonhearsay purpose: for its effect on Juanita, in that it explained why she did not call the police and why she complied with what Sandra told her to do. The court ruled the statement was admissible "simply to show how that statement impacted Juanita[,] . . . not . . . for the truth that [defendant] is coming back with two bullets in the gun."

The trial court gave a limiting instruction to the jury. "[The statement] isn't coming in to prove the truth of the statement. It doesn't matter whether the statement is true or not true because that isn't the purpose of why the statement is being introduced in

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13 At the time Juanita testified concerning Sandra's statement, Sandra was on trial as a codefendant. Later in the prosecution's case, Sandra pleaded no contest to involuntary manslaughter (§ 192, subd. (a)).

the trial. [¶] The purpose is to show the impact on the . . . the person who hears the statement. It's called state of mind of the person who hears the statement. That's what is relevant, not whether or not there were two bullets in the gun. . . . The issue is: How did that statement impact the person who heard the statement?" "It cannot be used for all purposes. You may only consider that statement for the limited purpose for which it has been allowed, which is the state of mind of the recipient of the statement, how it impacted . . . [Juanita]." The court confirmed by a show of hands that all jurors understood the instruction and would follow the instruction. Juanita testified the statement made her so fearful that she did not call 911.

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the "United States Supreme Court held . . . that the confrontation clause of the Sixth Amendment of the federal Constitution prohibits 'testimonial[**14**] hearsay' from being admitted into evidence against a defendant in a criminal trial unless (1) the declarant is unavailable as a witness and the defendant has had a prior opportunity to cross-examine him or her, or (2) the declarant appears for cross-examination at trial. (*Crawford*, at pp. 53, 59 & fn. 9.) . . . *Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation

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14 "Various formulations of this core class of 'testimonial' statements exist: '*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]. These formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." (*Crawford, supra*, 541 U.S. at pp. 51-52.)

and cross-examination, even if a limiting instruction is given.[15]' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 651.)

"The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985).)" (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9.)

Defendant's Confrontation Clause challenge fails because the statement was not testimonial under *Crawford*. Moreover, it was admitted for the nonhearsay purposes of its bearing on Juanita's credibility and state of mind. Juanita initially went along with Sandra's plan to hide defendant's role in the shooting by staging the crime scene to look as though a burglary had taken place there, disposing of all of Alcazar's possessions, and telling the police the shooter wore a mask. Juanita explained she complied because Sandra's statement made her frightened. When first questioned, Juanita gave the police the cover-up story. In a second statement to the police and at trial, she identified defendant as the shooter and stated defendant came into the bedroom with a gun. As Juanita's testimony was at odds with her initial interview, Sandra's statement to her was also relevant to assessing the credibility of her trial testimony.

The trial court instructed the jury it must not consider the statement for its truth, but only as evidence of Juanita's state of mind. The court confirmed each member of the jury understood the limiting instruction. We disagree with defendant's argument that the testimony was so prejudicial the jury could not be expected to follow the limiting instruction. The court's contemporaneous admonition to the jury was clear and easy to understand**,** and we "'presume that jurors . . . follow the instructions given them.' [Citations.]" (*United States v. Olano* (1993) 507 U.S. 725, 740.)

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15 The limiting instruction referred to is an instruction directing the jury that the extrajudicial statement may only be used against the codefendant.

D. The Prosecution's Opening Statement

Immediately before opening statements, the trial court twice admonished the jury that statements made by the attorneys are not evidence. In her opening statement, the prosecutor stated to the jury that Sandra told Juanita they must fabricate evidence.[16] Defendant did not object. In her opening statement, defense counsel reminded the jury that what the prosecutor said is not evidence. After the conclusion of the opening statements, defendant objected on hearsay grounds. The court ruled the objection was made too late, as the opening statements had already been given. At the conclusion of trial, the court instructed the jury in the language of CALJIC No. 1.02: "Statements made by the attorneys during the trial are not evidence."

Defendant contends the trial court's overruling of his objection violates his right to confrontation and, "in light of other errors," requires reversal. Respondent contends the objection was forfeited, to which defendant replies, if the error was forfeited, counsel was ineffective for failing to timely object.

We agree that, as no timely objection was made on the ground sought to be urged in the appeal, the contention is forfeited. (*Fuiava*, *supra*, 53 Cal.4th at p. 670.)

We further hold that the contention has no merit. The out-of-court statements are not testimonial under *Crawford*, having been admitted for nonhearsay purposes. (See *Crawford*, *supra*, 541 U.S. at pp. 51-52.) In any event, defendant does not argue the error is prejudicial standing alone. Defendant contends the error only requires reversal in light of other errors. As we have found no other errors,[17] reversal is not required even if error occurred.

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[16] Defendant objects to two statements the prosecutor stated Sandra made to Juanita: "We have to say, like, someone came in here and robbed the place and this is what happened. [¶] . . . We have to come up with something to tell the police."

[17] For the same reason, there is no cumulative error that requires reversal.

Presentence Custody Credits

Respondent points out the abstract of judgment incorrectly states defendant had presentence custody credits of 1,094 days, instead of the 547 days of presentence custody credit contained in the oral pronouncement of judgment. Defendant does not disagree. We order the abstract of judgment corrected to reflect total credits of 547 days.

DISPOSITION

Item 14 of the abstract of judgment is amended to reflect presentence credits of 547 days. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.