Filed 9/26/12 P. v. Gowdy CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CARL E. GOWDY, Defendant and Appellant.	B234850 (Los Angeles County Super. Ct. No. BA380701)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Matthew Alger, 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, Senior Assistant Attorney General, John Yang, Eric E. Reynolds and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Carl Gowdy was convicted, following a jury trial, of one count of murder in violation of Penal Code section 187, subdivision (a). The jury found true the allegations that a principal personally used and discharged a firearm, causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c), (d) and (e)(1). The jury also found true the allegation that the murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivisions (b)(1)(C) and (b)(4). The trial court sentenced appellant to a total term of 50 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in permitting the prosecutor to question Brandon Tolson after Tolson refused to answer questions. Appellant also contends that the prosecutor's reference, in a question, to Tolson's plea of guilty as an accessory in this matter was incurably prejudicial. We affirm the judgment of conviction.

Facts

During the evening of August 9, 2008, there was a party at Janise Farris's home at 322 West 73rd Street in Los Angeles. Around 25 or 35 people were there. There were two houses on the property where Farris's home was located, one in the back and one in the front. Farris lived in the rear residence with her mother, sisters and brothers. The homes were located within the territory of the 73 Hustler Crips, which also is known as the Seven Trey gang.

Farris had known appellant for nearly eight years and had been dating him off and on for about three years. She knew him to belong to 11 Deuce, which is a set of the Neighborhood Crips gang. The Neighborhood Crips and the 73 Hustlers are enemies.

Farris had asked appellant to visit her on August 9, 2008. He showed up about 1:00 a.m. on August 10, 2008, while the party was still taking place. Appellant arrived in a Chevrolet Tahoe with two other men. He was not driving. One of the men with appellant was between 6 feet 2 inches and 6 feet 8 inches tall, and weighed approximately 300 pounds.

Also present at the party was Patrick Grigsby, a member of the Seven Trey Gangsters, or 73 Hustlers gang. Grigsby's gang affiliation was manifested by a "7" tattooed on one side of his face and a "3" tattooed on the other side. He was wearing green, his gang's designated color.

Grigsby met appellant in the driveway outside Farris's house. Grigsby said, "Fuck NAPS," which is an insult to a rival gang member and refers to all Neighborhood Crips. He also told appellant that he was in Seven Trey Gangster territory. Appellant became angry. The two men argued.

Farris told appellant to leave and come back later when they could be alone. She then walked to the back of the property to turn off the music, since the party was coming to an end. Other people were walking to the front of the property to leave.

Appellant and his two companions walked to the Chevrolet Tahoe, which was parked about four houses down the street, and got in. Appellant got into the rear passenger's seat. The larger of his companions got into the driver's seat and the third man got into the front passenger's seat.

The Tahoe then drove down 73rd Street, made a U-turn and came back, going the wrong way on the one-way street. The Tahoe stopped on the other side of a Cadillac that Grigsby was leaning against. Grigsby made gestures with his body and exchanged words with appellant. Both were speaking in an angry tone.

About seven gunshots then were fired from the Chevrolet Tahoe. Police officers who responded to the call of the shooting later found Grigsby lying face-down on the ground in the front yard of Farris's residence, by the entrance gate. He had been shot four times and died from multiple gunshot wounds. Four bullet fragments were recovered during his autopsy. Those fragments subsequently were examined by a firearms examiner and determined to be consistent with fragments of .22 caliber bullets.

Two other people also were shot. Aquinas Steward, a former Gear Street gang member, was shot once in the leg. John Childress, who was Farris's cousin, was shot in one of his buttocks.

After the shooting, Farris telephoned appellant, told him there had been a shooting and asked if he was okay. She later told a police detective that appellant laughed and said, "I did the shooting." Farris told appellant that he had shot her cousin. Appellant said that he had tried "to get a Trey," meaning a Seven Trey gang member. Appellant asked Farris whether he had killed anyone. Farris later testified that she had lied to the detective because she wanted to go home. She also testified that detectives threatened that she would be implicated in a murder conspiracy if she did not give them information about the shooting.

Childress was a Seven Trey gang member but had "hung around" with appellant five or six years earlier in another neighborhood. Appellant had dated Childress's sister and also his cousin, Farris. When he was in the hospital for his gunshot wound, Childress told the police that he had seen appellant "get off," meaning shoot a gun, from the back seat area on the passenger's side of "the truck." Childress said the gun was an automatic because it was "fast." He thought the firearm was a "deuce," meaning a .22 caliber, or a "nine." Childress told the police that he also had seen gunfire coming from the front passenger's seat, which was occupied by a man who was about 25 years of age, 6 feet to 6 feet 6 inches tall and weighed 220 to 300 pounds. However, he remembered that one of the shooters was a "big old Black dude." Childress had earlier told police detectives that he did not see who did the shooting but was still worried he would be killed by gang members for talking with the detectives.

When Steward was interviewed by the police at the hospital, he said that he was standing near the front of Farris's house, talking with his fiancé, Eboni Jones, when he got shot. He saw "the truck" make the U-turn and knew there was going to be a shooting because the truck had turned around to travel the wrong way on a one-way street. He and Jones moved behind the gate when the truck "pulled up quick" and shots were fired from the back window behind the front passenger's seat. Steward and Jones fled to the back house. There, Steward was told that blood was coming out of his shoe. He realized that he had been shot in the leg.

Steward described the shooter as a "young dude" who was shorter, with light skin and a "fade" haircut. He said the "big Black dude" was driving. When he was shown a six-pack photographic lineup that contained appellant's photograph, Steward did not choose appellant's photograph but identified someone else as a person who looked like the shooter.

Jones identified another person who was not appellant as the shooter when she was shown the photographs. She made that identification although she did not actually see anyone shooting a gun.

On August 18, 2008, officers established surveillance at an address on East Hardy Street in Inglewood in the hope of locating appellant and a man named Brandon Tolson. About 10:30 p.m. that day, Tolson drove up in a Chevrolet Tahoe and parked in front of the apartment building at the East Hardy address. He got out of the Tahoe and walked down a driveway. He returned five minutes later with appellant, who then was arrested.

Tolson was the registered owner of the Chevrolet Tahoe involved in the shooting. He weighed approximately 300 pounds. He was called as a witness at trial by the prosecution but refused to answer questions.

After appellant's arrest, an apartment at the Hardy Street address was searched. A photograph of appellant and Tolson was found in one of the bedrooms. Appellant can be seen in the photograph making a Neighborhood Crips gang sign and Tolson is depicted making a "C" gesture with his right hand, signifying the Crips.

On June 3, 2006, appellant admitted to an L.A.P.D. gang enforcement officer that he was an active member of the Neighborhood Westside Crips, with the moniker "C." In 2007 and 2008, appellant had three contacts with a Hawthorne City Police gang detective in which he admitted that he was an 11 Deuce Neighborhood Crips gang member.

On one of the occasions when the Hawthorne detective made contact with appellant, the detective took a photograph that shows appellant making a Neighborhood Crips hand sign. The detective had seen appellant wear clothing with the letters "NY" on it, which the Crips have adopted as a symbol for their gang. He had also seen appellant wear a belt that was blue, which the Crips have adopted as their color. On another

occasion, appellant was wearing a t-shirt with the letters "NH" on it, which designates the Neighborhood Crips. A "roll call" – or list – of all the sets in the Crips gang also was printed on the t-shirt.

During each of his three contacts with the Hawthorne police detective, appellant was with other people who were affiliated with Crips gangs. Each of those contacts took place at Holly Park. The park is located within the boundaries of the 111 and 115 Neighborhood Crips, and is a place where different sets of the Neighborhood Crips gather.

While appellant's trial was taking place, a sheriff's deputy saw appellant writing 112 Neighborhood Crips graffiti on the wall of a holding cell with a pencil, then smearing the graffiti with a tissue to make it bigger. The number 112 refers to 112 Street, which is within the territory of the 11 Deuce Crips. The deputy photographed the graffiti and the photographs were introduced into evidence at trial.

The primary activities of the Neighborhood Crips are drive-by shootings, possession of narcotics for sale, possession of weapons, rape, mayhem, robbery and burglary. At least one Neighborhood Crips member was found guilty in 2006 of attempted murder and assault with a semiautomatic firearm. Another was found guilty in 2009 of attempted murder and assault with a firearm. A police officer who testified as the prosecution's gang expert opined that a shooting such as the one committed in this case would be done to benefit the Neighborhood Crips by showing that the gang is not afraid of its rival--the Seven Trey Gangsters.

Discussion

1. Refusal to testify

Appellant contends that the trial court committed prejudicial error when it allowed the prosecutor to question Brandon Tolson after Tolson asserted the Fifth Amendment privilege against self-incrimination. He contends that the error violated his Sixth Amendment right to cross-examination. We see no error. Assuming error, we see no prejudice.

"It is 'the duty of [the] court to determine the legitimacy of a witness'[s] reliance upon the Fifth Amendment. [Citation.]' (*Roberts v. United States* (1980) 445 U.S. 552, 560, fn. 7 [100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 630].)" (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554.) Here, as appellant acknowledges, the trial court correctly determined that its grant of use immunity to Tolson meant that Tolson no longer had a right to invoke the Fifth Amendment.

When a witness has no constitutional or statutory right to refuse to testify, the prosecutor may call the witness to testify, knowing that the witness will refuse. "Jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*People v. Lopez*, *supra*, 71 Cal.App.4th at p. 1554.)

Here, Tolson was granted use immunity before trial by the court and was advised by the trial court that he no longer had the right to invoke the Fifth Amendment. Tolson's counsel later advised Tolson, erroneously, that the court was wrong and that Tolson still had a basis to invoke the Fifth Amendment. Appellant appears to contend, without citation to authority, that if a witness relies on the advice of counsel and invokes the Fifth Amendment, that witness must be treated as if he does have a valid basis to invoke the Fifth Amendment.[1]

We need not address this novel argument, because it is based on a faulty factual foundation. Appellant's argument is premised on his belief that Tolson refused to testify because he was relying on the advice of James Pinchak, one of Tolson's attorneys, that

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[1] Appellant points out that Evidence Code section 913, which prohibits comments on, and inferences from, the exercise of a privilege, reads "[i]f . . . a privilege is or was exercised not to testify." He contends that section 913 does not say that the privilege must be valid in order for the section to apply, and that the section must therefore apply to situations in which a witness mistakenly believes he has a claim of privilege. Appellant is mistaken. A witness can only exercise a valid privilege. When a witness claims a privilege and his claim is disputed, the trial court must determine the existence of the privilege as a preliminary fact. (*People v. Lopez*, *supra*, 71 Cal.App.4th at p. 1554 [duty of court to determine legitimacy of 5th Amendment claim]; See Evid. Code, § 914 ["presiding officer shall determine a claim of privilege in any proceeding in the same manner as a court determines such a claim under Article 2 (commencing with Section 400)" of the Evid. Code].)

Tolson retained his Fifth Amendment right not to testify. The record does not support this contention. Well before Mr. Pinchak made his claim that Tolson still had a Fifth Amendment right not to testify, Tolson had repeatedly refused to testify.

On May 25, before jury selection began in this case, the trial court conducted an Evidence Code section 402 hearing with Tolson to find out if he was going to invoke the Fifth Amendment. Tolson did invoke. The prosecution made an offer of proof that she expected Tolson, if he testified truthfully, to say that he drove appellant to a party, away from a party and then back to the party while appellant fired shots from Tolson's vehicle. The court indicated its intention to sign an order granting use immunity and compelling Tolson to testify, under Penal Code section 1324.

Tolson's counsel, Naomi Falk, stated that she was requesting transactional immunity. The court asked counsel if she had a reason under existing case law that Tolson would have a right to transactional immunity, and counsel replied that she did not. She mentioned a concern about marijuana that was found in Tolson's car when he was arrested. The court explained that use immunity would cover any mention Tolson made of the marijuana during trial. Tolson's counsel replied: "My client is not requesting immunity. He's refusing to testify at this point and any grant of immunity would be over his objection."

There is nothing in Ms. Falk's comments to indicate that she believed, let alone had advised, Tolson that he still had a Fifth Amendment right not to testify. Although she expressed concern about the marijuana, the court explained that use immunity would cover any mention of it at trial. Ms. Falk did not express disagreement with this statement. Further, although Ms. Falk stated that "we're requesting transactional immunity," she in no way contended that such immunity was necessary to protect Tolson from the consequences of his testimony.

A further hearing was held on May 31. Tolson's counsel repeated that Tolson was not willingly taking immunity. She also repeated that she objected to the grant of only use immunity. She also repeated that she had asked for "transactional immunity and also

immunity that would cover anything related to that incident as well as the marijuana found in the car."

Tolson was called as a witness. In response to the first two questions asked by the prosecutor, he replied that he was pleading the Fifth. The court informed Tolson that he no longer had the right to plead the Fifth. Thereafter, Tolson did not respond to any questions. When asked by the court if he was going to refuse to answer any question, Tolson replied, "Yes."

Again, there is nothing in Ms. Falk's comments to indicate that she believed, let alone had advised Tolson, that he still had a Fifth Amendment right not to testify.

On June 1, Tolson was again called to the stand, outside the presence of the jury. The court asked if Tolson was still refusing to testify, and Tolson replied in the affirmative. There was no discussion of the reason for the refusal.

It was only later that day, when Mr. Pinchak appeared for Tolson, that the claim was made that Tolson could be subject to prosecution even if given a grant of use immunity.[2] Over the next two days, the parties presented cases on this issue and the court also may have conducted its own research. Ultimately, the court ruled that under existing law, a grant of use immunity by the court would apply to the federal government as well as the state. The court concluded that Tolson did not have a right to refuse to testify. Appellant now acknowledges that the court's ruling was correct.

Following this ruling, Mr. Pinchak told the court that communications between himself and Tolson would remain privileged. Mr. Pinchak nevertheless went on to state that he had told Tolson that he believed that Tolson still had a basis to invoke the Fifth Amendment. Mr. Pinchak also stated: "I believe – and I cannot put words in his mouth,

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[2] Mr. Pinchak informed the court that it was his position that it was possible that Tolson could be prosecuted federally about the facts of the case. He acknowledged that he did not have a specific statute in mind, "but generally speaking, there are many federal statutes out there that a person can potentially get prosecuted on" based on the conversation he had had with his client.

but I believe that he will not be answering today in front of the jury based on his advice from counsel . . . ."

In fact, when called to the witness stand, Tolson did not personally invoke the Fifth Amendment and did not state that he was relying on the advice of counsel not to testify. He simply remained silent when questioned by the prosecutor. At one point, the court asked if Tolson was refusing to answer, and Tolson replied, "Yes."

Later, appellant's attorney sought to call Mr. Pinchak to testify that Tolson's silence was due to advice of counsel. After speaking with Mr. Pinchak, appellant's counsel reported that Mr. Pinchak had stated that he would be unable to answer any questions on the topic because Tolson would be asserting his attorney-client privilege. Mr. Pinchak stated that he had not intended to waive the attorney-client privilege by his earlier comments.

Although appellant contends that Mr. Pinchak invoked the Fifth Amendment on Tolson's behalf, this is simply not accurate. Mr. Pinchak stated only that he had given advice to Tolson. Since Tolson invoked the attorney-client privilege, there is no way to know if Tolson actually told Mr. Pinchak that he would refuse to testify based on Mr. Pinchak's advice. Mr. Pinchak's belief that Tolson would rely on his advice, was just that, a subjective impression. Thus, there is nothing in the record to show that Tolson was relying on advice of counsel that he still had a Fifth Amendment right not to testify.

Appellant contends that even assuming that Tolson was not relying on advice of counsel in refusing to testify, his true reason for refusing to testify was not known and so no valid inference can be drawn from the refusal. He contends that any inference would be speculative and improper. This is not the law. (*People v. Morgain* (2009) 177 Cal.App.4th 454; *People v. Sisneros* (2009) 174 Cal.App.4th 142; *People v. Lopez*, *supra*, 71 Cal.App.4th 1550.) The witnesses in *Morgain*, *Sisneros* and *Lopez* did not explain their "true" reason for refusing to testify. They simply remained silent when questioned. The courts in all three cases, including this Court in *Sisneros*, found a negative inference permissible.

The reason that negative inferences were permissible in the above-cited cases, and in this case, is that the inferences did not rest on the refusal alone. There was other evidence to support the inference and make it reasonable. In *Morgain, supra,* the jury was permitted to infer that the witness remained silent in an attempt to protect the defendant. There was evidence that the defendant was the witness's boyfriend and the father of her child. In *Sisneros, supra,* the jury was permitted to infer that the witness's silence was motivated by a fear of gang retribution. There was expert testimony that the Mexican Mafia had a penchant for intimidating witnesses. (*Sisneros, supra,* 174 Cal.App.4th at p. 152.) In *Lopez, supra,* the jury was permitted to infer that the witness was displaying gang solidarity. There was evidence that the witness was a gang member, and there was expert testimony that gang members stick together. Here, there was evidence that Tolson was a gang associate or was friendly with appellant's gang. Thus, it would have been reasonable for the jury to infer that Tolson was assisting or protecting his passengers in their gang activity.

Appellant further contends that even if the court could properly inform the jury of Tolson's refusal to testify and permit negative inferences from that refusal, the court erred in allowing the prosecution to ask specific questions of Tolson that Tolson did not answer. Appellant contends that the nature of the prosecutor's questions improperly suggested to the jury that she had a source of information unknown to them. (*People v. Wagner* (1975) 13 Cal.3d 612.)[3] He contends that the jury could not reasonably be expected to follow the court's instruction that questions were not evidence.

The instruction that questions are not evidence is a standard jury instruction. Jurors are presumed to understand and follow the court's instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662; see *Tennessee v. Street* (1985) 471 U.S. 409, 415, fn. 6 ["The

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[3] Appellant also contends that by asking these questions the prosecutor was able to call upon the jury to speculate about what Tolson would have said if he had testified, and to argue facts not in evidence. Appellant does not provide any example of where the prosecutor behaved in such a manner. We see none. The citations which he provides to the reporter's transcript are to argument by his counsel that this could occur.

assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue."].) Appellant has pointed to nothing about the prosecutor's questions which would suggest that the presumption should not be applied in this case.

The prosecutor began by asking Tolson if he had previously pled guilty to being an accessory after the fact. We discuss this question in section 2, *post*. The prosecutor also asked Tolson if he was afraid to testify. This is an obvious question, and does not suggest that the prosecutor had information unknown to the jury.

The prosecutor then asked Tolson if he knew appellant, if Tolson was the person shown in a photograph (Exhibit 39), if appellant was also in the photograph, if he recognized the license plate of the vehicle shown in the photograph, if a vehicle shown in another photograph (Exhibit 30) was Tolson's truck, and if Tolson's middle name was Ray. Tolson refused to answer these questions. These photographs do contain information, but Exhibit 29 was introduced into evidence by Officer Hammond who found it in a search of an apartment near where appellant was arrested. Detective Rashthian testified that Tolson was the registered owner of the Chevy Tahoe shown in Exhibit 30.

The prosecutor next asked if Tolson was with appellant on the evening of August 9, 2008, if he went to a party at 320 West 73rd Street that night, if he went to the party as the driver of the vehicle shown in Exhibit 30, and if he left the party as the driver of that vehicle. These questions do not suggest the prosecutor had information unknown to the jury. There was evidence that appellant was at the party with someone who matched Tolson's description and that appellant left in the Chevy Tahoe whose appearance was the same as Tolson's Chevy Tahoe, and that the Tahoe was driven by someone who matched Tolson's appearance. The prosecutor's questions logically arise from that evidence.

Finally, the prosecutor asked Tolson if he was driving the vehicle shown in Exhibit 30 right before he was arrested with appellant. This event was also shown through other evidence. Officer Moorer testified that Tolson drove up to an apartment

building on Hardy Street, got out, returned with appellant and both were arrested. Thus, the question did not suggest that the prosecutor had information unknown to the jury.

Appellant's reliance on *Douglas v. Alabama* (1965) 380 U.S. 415 to show error is misplaced. In that case, the Supreme Court found that the jury might have improperly inferred that statements contained in the prosecutor's questions were true. The prosecutor's questions consisted of reading statements that were purportedly from an accomplice's confession implicating the defendant, and asking the accomplice to confirm or deny the statements. The accomplice invoked the Fifth Amendment and refused to answer. Ultimately, the prosecutor read the entire confession. The confession was never entered into evidence. Thus, in *Douglas*, the prosecutor's questions clearly showed that she had information not available to the jury. As we explain, *ante*, that was not the case here.

Similarly, to the extent that appellant relies on *Douglas, supra,* to show that his rights under the Confrontation Clause were violated, that reliance is misplaced. In that case, the Court found that the defendant could not cross-examine the accomplice about the statements in the confession, and could not cross-examine the prosecutor about whether the accomplice actually made the statements read by the prosecutor. As we discuss, *ante*, the prosecutor's questions in this case generally did not suggest that she had information that was not known to the jury or not in evidence. Thus, there was nothing for appellant to cross-examine. The prosecutor's use of the two photographs in this case bears some superficial similarity to the prosecutor's use of the confession in *Douglas*, but there is one key difference. In this case, the photographs were introduced into evidence and additional evidence was introduced to support the inferences created by the photos, specifically that Tolson and appellant knew each other, and that Tolson was the registered owner of the vehicle shown in the photograph. Thus, appellant could challenge the photographs, Tolson's ownership of the Tahoe and his relationship with Tolson, by cross-examining the witnesses who provided that evidence.

To the extent that appellant contends that he was unable to cross-examine Tolson on his silence, and that this violated his right to confrontation, we do not agree. As we

explained in *Sisneros*: "Defendant's attempt to frame the issue in terms of a violation of defendant's right to confront adverse witnesses under the Sixth Amendment fares no better. The United States Supreme Court has made it clear that a defendant's confrontation rights apply to testimonial statements offered for their truth. (*Tennessee v. Street* (1985) 471 U.S. 409, 413–414, 105 S.Ct. 2078, 85 L.Ed.2d 425; *Crawford* [(2004)] 541 U.S. [36,] 59, fn. 9, 124 S.Ct. 1354 ['The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]'].) The high court recently reiterated its long-standing teaching: 'The [Sixth] Amendment contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him.' (*Giles v. California* (2008) 554 U.S. 353, 357–58, 128 S.Ct. 2678, 2682, 171 L.Ed.2d 488.) Here, of course, [the witness] never testified . . . and never offered any statement, much less a testimonial statement." (*Sisneros, supra,* 174 Cal.App.4th at p. 153.)

Finally, even assuming for the sake of argument that the trial court erred in permitting the prosecutor to question Tolson and the jury to draw a negative inference from Tolson's refusal to testify, we would find the error harmless under either a state or federal standard of review. Specifically, we would find beyond a reasonable doubt that in light of the whole record, the jury verdict would have been the same absent the error. Significantly, the prosecutor did not mention Tolson's silence during her closing argument. As we discuss, *ante,* there was ample other evidence linking Tolson to the drive-by shooting and showing that Tolson and appellant were friends. There was also solid evidence putting appellant in the car from which shots were fired. The only real area of weakness in the case was whether appellant or the other passenger or both fired from the vehicle. On this issue, Tolson's silence was not probative. Gang solidarity (or fear) would prevent him from exonerating appellant because to do so would be to inculpate the other passenger.

2. Prior conviction

Appellant contends that the trial court erred in denying his motion for a mistrial, based on the prosecutor's question about whether Tolson had pled guilty to being an accessory after the fact to the murder in this case. Although appellant did not object to the question and request an admonition, appellant contends that he did not forfeit his claim because an admonition would have been futile.

A trial court's denial of a motion for a mistrial is reviewed under the deferential abuse of discretion standard. (*People v. Price* (1991) 1 Cal.4th 324, 428.) A motion for a new trial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) A motion for a mistrial should be granted when a defendant's chances of receiving a fair trial have been irreparably damaged. (*People v. Valdez* (2004) 32 Cal.4th 73, 128.)

The court agreed the prosecutor should not have asked the question if the prosecutor was not going to introduce any evidence of the conviction.[4] The court found that it had already given an admonition that questions were not evidence. The court further found that even if the admonition were not completely effective concerning the prior conviction, there was a lot of evidence that tied Tolson to the crime and even if the jury improperly believed that Tolson had pled guilty, "I don't know what that would establish that isn't already established by so much other evidence. I can't see that it's going to result in any harm." Later the court repeated that the conviction question "doesn't really add anything that the evidence doesn't already overwhelmingly establish."

We see no abuse of discretion in the trial court's denial of the motion. The trial court's admonition to the jurors was very strong, and came immediately after the prosecutor's question about pleading guilty. The court told the jury that "Number one, questions are not answers. You're not to consider any question asked by [the prosecutor]

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[4] We note that immediately after the questioning of Tolson ended, the prosecutor stated that she would be asking the court in the future to take judicial notice of Tolson's conviction. The court agreed that it would take judicial notice of the fact of the conviction. It is not clear what happened to make the prosecutor change her mind.

or [appellant's counsel] as proof of anything. They only give context to the answers." After explaining the background to Tolson's refusal to answer, the court stated, "If he does not testify, you're to – if he does not answer any questions, you're to remember that none of the questions are evidence, that you cannot consider the questions as evidence."

In addition, as we discuss throughout this opinion, there was very strong evidence placing Tolson in the car during the drive-by shooting. Even assuming the jury improperly considered the prosecutor's question as evidence that Tolson had pled guilty, it added nothing to the evidence in the case. The question did not damage appellant's chances of receiving a fair trial. (See *People v. Cummings* (1993) 4 Cal.4th 1233, 1324 [assessing erroneous admission of evidence of codefendants' guilty pleas/convictions to determine whether it was "reasonably probable" that defendant's jury would have reached a more favorable result absent knowledge of the convictions].)

We do not agree with appellant that the fact of Tolson's guilty plea made it less likely that the jury would believe that appellant was merely present in the car and had nothing to do with the decision to turn the car around and shoot the victim. After shots were fired from his vehicle, Tolson drove the perpetrator(s) away from the crime scene, making him an accessory. Tolson was an accessory no matter who fired the shots from Tolson's car. Thus, Tolson's guilty plea says nothing about appellant's role in the shooting.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J. KRIEGLER, J.