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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. HAISANI REYNOLDS, Defendant and Appellant.	B247784 (Los Angeles County Super. Ct. No. TA122815)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ricardo R. Ocampo, Judge. Affirmed.

Robert Franklin Howell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Haisani Reynolds appeals from the judgment entered following his conviction by jury for first degree willful, deliberate, and premeditated murder, with findings a principal personally and intentionally discharged a firearm, and the offense was committed for the benefit of a criminal street gang, and with a court finding he suffered a prior felony conviction. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b), 667, subd. (d), 12022.53, subds. (d), (e)(1)). The court sentenced appellant to prison for 75 years to life. We affirm.

FACTUAL SUMMARY

1. *People's Evidence.*

Dietra Holmes testified that on and before March 26, 2012, Holmes knew appellant. Racquel Staves was Holmes's niece. Staves testified appellant was known as Peanut. Staves testified Holmes introduced Staves to appellant, and Staves had known him about two or three years prior to March 26, 2012. On March 26, 2012, Holmes and Staves went in a vehicle to pick up appellant. The three later picked up Raven Hall. The four went in Holmes's Ford Mustang to a party near 111th and Towne.

Staves knew persons with the monikers Blue and Ace in the 112th Street neighborhood. Blue was later identified as Terrance Bell (and hereafter we refer to Blue as Bell). Appellant and Bell were members of the 11 Deuce Neighborhood gang (hereafter, Neighborhood). Appellant would wear hats, including one with an N-Y logo. N-Y stood for Neighborhood.

On March 26, 2012, Holmes, Staves, appellant, and Ace left the party and went to a Valero gas station on 111th and Avalon. Later that night, Holmes and Staves left the party again and went to that station to get a snack. Appellant was still at the party. The gas station was a short distance from the party's location. Holmes parked the Mustang and entered the station store. Staves remained in the front passenger seat. Staves saw appellant, Bell, and Ace approaching. The three were no more than 15 to 20 feet from Staves.

Delores Porter and her boyfriend Mark Lewis (the decedent) were at the gas station. Lewis entered the station store to buy gas, then returned to his car. Staves testified appellant asked Lewis, "Where you from?" Lewis answered, "Avalon." Bell retrieved a gun and Staves ducked. Staves heard at least five to six shots. Staves looked up and saw appellant kick Lewis in the head and yell, "Neighborhood." Appellant and Bell fled. Staves heard additional gunshots.

Staves testified Holmes and Staves left the station and Holmes drove the two to 112th and Towne. Holmes picked up appellant and Ace and drove them to 120th and Avalon. Appellant indicated he was going to take the gun to 120th. Holmes, with Staves in the car, later dropped off appellant and Ace, then went home.

Staves told detectives she knew appellant and had seen him a few times because of Holmes. About April 13, 2012, Staves identified appellant immediately from a photograph. Staves testified appellant and Bell, at 112th and Towne, were wearing the same clothes they had been wearing at the scene. On March 26, 2012, appellant had braided hair. Staves was certain appellant and Bell were the two people she had seen at the gas station and who were asking Lewis where he was from. Staves identified Blue as the shooter from a photographic lineup.

Porter testified as follows. Porter was in a car, a Dodge Neon, when Lewis returned to the car. After Lewis returned, appellant asked, "Where you from, nigga? Where you from?" Porter saw appellant and another man. Lewis answered, "Avalon." One man pulled up his shirt and Porter saw a gun handle. Appellant repeatedly said, "Get that nigga, cuz." The man with the gun began shooting at Lewis, and Porter ducked. Porter heard about six to seven shots.

After the shooting, appellant went to the front of the Dodge. Lewis, who had been shot, was on the ground and appellant stomped on him three or four times while repeatedly saying, "Fuck Avon." The voice of the person saying that and the voice of the person who had asked, "Where you from?" were the same. The shooter and appellant fled on 111th toward Gompers. Porter identified appellant at trial.

Porter identified appellant to police from a photographic lineup as the person who had been kicking Lewis. Porter told Los Angeles Police Detective Peter McCoy that appellant "looks like him" and she remembered appellant's braids as having been longer. Porter testified appellant was "the shot caller" wearing a hat with a letter on it, a blue sweatshirt, saggy clothes, and long dreadlocks or braids. The hat was pulled down over appellant's eyes. During cross-examination, Porter acknowledged appellant, in court, had a tattoo on top of his left eyebrow. On the night of the shooting, Porter had not noticed on appellant's face any tattoos. However, Porter testified appellant "had a hat pulled over it" and the hat was "down low." Porter identified Bell as the shooter from a photographic lineup.

Holmes testified as follows. Holmes was inside the station store when she heard about four to five gunshots and ducked. She later went outside. Porter was screaming her boyfriend had been shot and Porter asked Holmes for help. Lewis was lying on the ground between the gas pump and a car. One or two minutes after the shooting, Holmes saw Staves, in shock, on the floor of the Mustang. As Holmes was driving away, Porter asked her for help and pointed where the culprits had fled. Holmes told Porter that Holmes would find the shooters. Holmes eventually went home and did not see appellant until the next day. (Holmes's testimony she eventually went home and did not see appellant until the next day was contradicted by Staves's testimony that, inter alia, Holmes picked up appellant and drove him to 120th and Avalon, and Holmes later dropped off appellant.)

About 8:45 p.m., a Los Angeles police sergeant went to the gas station. Porter told him the perpetrators were two Black males wearing dark clothing, one had dreadlocks, the other wore glasses, and the two had fled westbound on 111th Place. A detective determined a surveillance camera on 111th Place between Avalon and Towne recorded that about 8:45 p.m., two people ran westbound on the south side of 111th Place, followed by two more people running. One of the four had a pronounced limp. Shortly after the four people ran past the camera, there were flashing lights suggesting a

response by emergency personnel or police. Seven .45-caliber casings were found at the crime scene.

On April 3, 2012, Los Angeles Police Detective John Jamison arrested Hall. Jamison searched Hall's residence and found her cell phone, the phone number of which was (310) 344-8834. The contact list in the cell phone listed Peanut as a contact with a phone number of (323) 906-5988. On April 12, 2012, McCoy arrested appellant and detained Holmes. Appellant previously had been shot in his right leg. Appellant told McCoy that appellant's phone number was (323) 906-5988.

Records for appellant's cell phone (with phone number (323) 906-5988) reflected March 26, 2012 text messages between the cell phones of appellant and Hall. The records provided evidence that on March 26, 2012, prior to the shooting, Hall asked appellant when she was going to get her "offic[i]als," appellant replied, "We go try 2 make that happen 2day," (*sic*) and appellant later told Hall to contact him "when y'all get there." (*Sic*.) The records also provide evidence that on that same date, after the shooting, appellant told Hall, "U hood mama," (*sic*) Hall replied, "Yeah[]," and appellant then said, "welcome 2 the hood." (*Sic*.)

During an interview, Holmes told McCoy that Holmes knew appellant only as Peanut, she had been dating appellant about two or three weeks, and appellant was a Neighborhood member. The following occurred during the interview: "[Holmes]: And we went to the gas station. Only part is not true that I told you was when I was going down the street. [¶] [McCoy]: Uh-huh. [¶] [Holmes]: And my niece told me – she said it was Peanut and the boy, Blue." (*Sic*.) Holmes then stated to McCoy, "Please help us."

Holmes also told McCoy as follows. Holmes's husband told her appellant would not do anything. However, Holmes believed appellant would do something "if a person can kick somebody while they're down like that." Hall's parents told appellant that Hall was in jail for murder. Appellant told Hall's parents that "[Hall] better keep her fucking mouth closed" and they would be next.

Holmes told McCoy that Holmes overheard appellant talking on the phone about what had happened. Appellant told the person on the phone appellant was asking the guy where he was from. Appellant then said, "'The nigga act like he was challenging me, cuz. He told me he was from Avalon. And so I told that boy – bust on this bitch ass." Appellant was smiling while bragging about it to the person on the phone. Appellant said, "I love that nigga."

A deputy medical examiner determined Lewis sustained seven gunshot wounds and died from multiple gunshot wounds. The deputy medical examiner denied noticing any bruising on Lewis consistent with his having been kicked, or stomped, anywhere. A detective, a gang expert, testified Neighborhood was a criminal street gang. The numerals 112 were symbols for the gang. The southwest corner of 111th Street and Avalon was within Neighborhood territory. Gangs protected their territory against rival gangs through violence, mostly by shootings.

According to the gang expert, Neighborhood and the Avalons (a Bloods gang) were rivals. The phrase "where you from" was the common method of asking another gang member's affiliation. The phrase was a challenge, and if the response identified a rival gang, violence would likely result. Neighborhood's primary activities included murders and shootings. Appellant was a Neighborhood member with monikers Peanut and Young Son. The present crime was committed for the benefit of, and in association with, a street gang.

2. *Defense Evidence.*

In defense, appellant testified as follows. Appellant never went to the Valero gas station on the night of March 26, 2012. He did not know who the shooter was. Appellant knew Holmes but not Staves or Hall. Appellant often let friends use his cell phone with the number (323) 906-5988. In 2011, appellant was shot and, as a result, he could not run. Appellant had a temporary rod in his leg. Appellant also testified, "The reason why I said I can't [run], because I never tried to run. I'm just assuming I can't." Appellant used to be a Neighborhood member with the moniker Young Son but not Peanut.

Appellant stopped being an active member before he became 30 years old. At time of trial, appellant was 33 years old.

ISSUES

Appellant claims (1) the court erroneously denied his motion to represent himself, (2) the court erroneously denied his *Marsden*[1] motions, (3) the court erroneously refused to give CALCRIM No. 334, (4) the court erroneously gave CALCRIM No. 335, and (5) appellant was denied effective assistance of counsel by his trial counsel's failure to litigate the admissibility of the eyewitness identification testimony. Appellant also asks this court to conduct an independent review of the in camera hearing on his *Pitchess*[2] motion.

DISCUSSION

1. *The Court Properly Denied Appellant's Marsden Motions and Motion to Represent Himself.*

a. *Pertinent Facts.*

(1) *Appellant's November 1, 2012 Marsden Motion.*

On November 1, 2012, appellant made a *Marsden* motion. At the hearing thereon, the court asked appellant to state in detail what appellant's counsel (counsel) had done or failed to do. Appellant said, "We don't communicate." The court asked appellant to elaborate. Appellant said counsel had disregarded appellant's requests that counsel file a motion to suppress eyewitness identification and file a Penal Code section 1538.5 motion. Appellant also said he wanted all discovery, counsel was hiding things from appellant, and they did not get along.

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1 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

2 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

Counsel replied as follows. Counsel had explained to appellant a motion to suppress identification would not be proper because any issues regarding identification went to weight, not admissibility, of such evidence. Counsel had hired a "confidential I.D. expert" to review any identification issues. Counsel did not want to file frivolous motions.

After the court gave appellant an opportunity to respond further, appellant made additional comments. The court then inquired about the Penal Code section 1538.5 issue. Appellant's counsel replied, "There is no basis. He was on search and seizure."[3] Counsel also advised as follows. Appellant had made it clear he would not cooperate with counsel unless counsel gave him copies of all police reports. Counsel told appellant that appellant was not entitled to them and counsel would not give them to him. Counsel had reviewed police reports and had given appellant copies of certain transcripts. Counsel explained to appellant it was in his best interests to cooperate.

The court advised appellant it was for his protection that counsel was not giving him copies of police reports. The court stated jail was full of snitches, and an inmate could steal the reports, familiarize himself with appellant's case, then go to police and falsely report appellant made incriminating statements to the inmate. The court asked if appellant wanted to add anything. Appellant indicated he would see certain things his counsel might not, appellant had his own space in jail, and inmates would not be involved in his business. The court asked if there was anything else, and appellant indicated no. The court denied appellant's *Marsden* motion, concluding counsel had provided adequate tactical explanations for the issues raised by appellant. The court urged appellant to cooperate with his counsel. Appellant replied, "It's not going to happen."

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[3] The present offense occurred on March 26, 2012. The probation report reflects that, at that time, appellant was a parolee. We note every parolee is subject to search and seizure at anytime by any peace officer with or without cause. (*People v. Schmitz* (2012) 55 Cal.4th 909, 916.)

(2) *Appellant's November 27, 2012 Motion to Represent Himself.*

On November 27, 2012, counsel advised the court appellant wanted to represent himself. The court advised as follows. The last day for trial was January 28, 2013. Appellant was trying to exercise his *Faretta*[4] rights because his November 1, 2012 *Marsden* motion had been denied. Appellant's trial counsel was one of the best attorneys in the courthouse. Self-representation had specified disadvantages, and appellant was frustrated because he did not understand how the criminal justice system worked. In specified circumstances, the court could revoke pro per privileges.

Counsel later stated appellant had indicated he would not cooperate with counsel unless counsel did what appellant wanted. Appellant replied, "I want to do my own motions." The court asked if appellant had anything else. Appellant replied, "I am concerned as far as my arrest. If I don't get what I want, I want to be my own lawyer."

The court indicated appellant wanted to represent himself because his *Marsden* motion had been denied. Appellant replied, "No." The court later denied appellant's motion to represent himself on the ground it was equivocal.

(3) *Appellant's December 20, 2012 Marsden Motion.*

During December 20, 2012 discussions concerning a new trial date, appellant stated, "I won't deal with this." The court treated the comment as a *Marsden* motion. At the hearing thereon, the court asked appellant to explain.

Appellant indicated as follows. Appellant told counsel that appellant felt counsel could not help appellant. Appellant told counsel to withdraw as counsel. Counsel had indicated she did not care about appellant's case. Counsel denied certain of appellant's requests. Appellant requested certain information he thought she was concealing. He repeatedly asked the same questions, she disregarded his statements, and they had heated arguments. Appellant did not want his counsel to represent him.

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[4] *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562].

The court asked what appellant meant by concealing information. Appellant indicated he had asked counsel how did appellant get here and what led police to arrest him. The court asked if appellant had heard the preliminary hearing evidence and appellant indicated yes. The court explained the magistrate had determined the evidence was sufficient. Appellant replied he was talking about what led to his arrest.

Counsel replied as follows. This was appellant's fourth or fifth *Marsden* motion.[5] Appellant did not listen and dismissed whatever counsel told him. Counsel had made several efforts to talk with appellant but he rejected them. Counsel told appellant this was not a complicated case. A witness present at a shooting had identified appellant as a participant. Appellant was identified at a photographic lineup.

The court asked what appellant meant when he said he did not get to talk. Appellant indicated he had asked counsel how his photograph was selected. Counsel replied that a week before the Lewis shooting there was another shooting at the same gas station. Police talked with witnesses on the night of the Lewis shooting and had information the prior shooting was committed by Peanut or someone from a certain gang. Police resources led to the name Peanut, his photograph was placed in the six-photo photographic lineup, and appellant was identified. Counsel indicated appellant did not want to accept counsel's explanation. The court stated, "I don't see a breakdown of communication. Maybe you don't listen. But I don't see this being cured with replacing [counsel]. She is the captain of the case. She is the lawyer. The court is not. I find there is not a breakdown in the communication that would warrant a replacement of counsel."

b. *Analysis.*

Appellant claims the trial court erroneously denied his November 1 and December 20, 2012 *Marsden* motions. We reject the claim. At the *Marsden* hearings, the court gave appellant an opportunity to state reasons he was dissatisfied with counsel. Appellant expressed his reasons and the court listened to them. The court asked

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[5] The record does not otherwise reflect any *Marsden* motions other than the November 1 and December 20, 2012 motions.

thoughtful follow-up questions before finding appellant's concerns were insufficient to support the motions and denied them.

We conclude appellant made no showing of ineffective representation or a breakdown of the attorney-client relationship sufficient to signal the likelihood of constitutionally-inadequate representation. Appellant's hostility, failure to cooperate, and disagreement concerning tactics were insufficient grounds to grant the motions. The denials of appellant's November 1 and December 20, 2012 *Marsden* motions were well within the sound discretion of the court. (Cf. *People v. Moore* (1988) 47 Cal.3d 63, 76; *People v. Crandell* (1988) 46 Cal.3d 833, 854, 858-860; *People v. Turner* (1992) 7 Cal.App.4th 1214, 1218-1219.)[6]

Appellant claims the trial court erroneously denied his November 27, 2012 motion to represent himself. We reject the claim. A request for self-representation must be unequivocal. A trial court should draw every reasonable inference against waiver of the right to counsel. (*People v. Marshall* (1997) 15 Cal.4th 1, 20-23.) Our Supreme Court has not decided whether appellate review of a trial court's determination that an alleged self-representation motion was equivocal is governed by the substantial evidence or de novo standard of review. (*Id.* at p. 24-25.) However, we need not decide which standard applies.

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[6] Appellant argues the trial court should have appointed counsel to represent appellant in connection with at least one of his *Marsden* motions because trial counsel's antagonistic position towards the motions created a conflict of interest. In *People v. Smith* (1993) 6 Cal.4th 684, our Supreme Court stated, "Appointment of counsel for the purpose of arguing that previous counsel was incompetent, *without an adequate showing by defendant*, can have undesirable consequences." (*Id.* at p. 695, italics added.) Appellant has made no such adequate showing, appellant has failed to show his trial counsel's position was antagonistic, and none of appellant's arguments demonstrate the trial court erred by failing to appoint counsel to argue his trial counsel was incompetent.

In the present case, appellant stated, "I want to do my own motions." The statement suggested appellant wanted self-representation in connection with motions but otherwise wanted to be represented by counsel. Appellant also stated, "If I don't get what I want, I want to be my own lawyer." This vague and ambiguous statement reasonably could be construed as indicating that if, either at the time of the statement, or in the future, appellant did not get whatever he wanted, he wanted to represent himself. We conclude that, under any standard of review, the trial court properly denied appellant's request for self-representation on the ground the request was equivocal.[7]

2. *The Court Properly Refused to Give CALCRIM No. 334, and Did Not Prejudicially Err by Giving CALCRIM No. 335.*

a. *The Court Properly Refused to Give CALCRIM No. 334.*

CALCRIM No. 334 essentially advises a jury, inter alia, (1) to determine whether a witness is an accomplice and, if the witness is, (2) the witness's testimony requires corroboration and should be viewed with caution. The trial court refused appellant's

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[7] Appellant cites *People v. Michaels* (2002) 28 Cal.4th 486, in support of his arguments. In *Michaels*, the trial court denied the defendant's *Marsden* motion and granted his *Faretta* motion. On appeal, the defendant claimed he had moved to represent himself *if* the trial court denied the *Marsden* motion; therefore, his *Faretta* motion was conditional with the result it was equivocal and the trial court erred by granting an equivocal *Faretta* motion. *Michaels* concluded a conditional request was not necessarily equivocal, and if the trial court properly denied the *Marsden* motion, the trial court did not err by putting the defendant to the choice of proceeding with existing counsel or representing himself. (*Id.* at pp. 523-524.) However, *Michaels* is distinguishable. If the claim of the defendant in *Michaels* was true, his *Faretta* motion was based on a specific condition, i.e., the denial of his *Marsden* motion. Because of that specificity, the trial court in *Michaels* could determine, at the time of the *Faretta* motion, whether the condition had been satisfied. However, *Michaels* did not hold a conditional request is always unequivocal without regard to the content of the condition. Appellant's *Faretta* motion was based on an ambiguous and illusory condition, i.e., "[i]f I don't get what I want." That condition did not expressly, or contextually, pertain to the denial of a *Marsden* motion. The ambiguous nature of the condition precluded the trial court in the present case from determining, at the time of the *Faretta* motion, what appellant wanted and whether the condition had been (or was capable of being) satisfied.

request that the court give CALCRIM No. 334 with Staves as the alleged accomplice. Appellant claims the refusal was error. We disagree.

If evidence is sufficient to support a conclusion a witness implicating a defendant is an accomplice, a trial court must sua sponte instruct the jury to determine whether the witness was an accomplice and give the cautionary accomplice instructions. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) The burden is on the defendant to establish by a preponderance of the evidence at trial that a witness is an accomplice. (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Our Factual Summary recites the pertinent facts concerning Staves's involvement in the present case. Simply put, there was no substantial evidence she was an accomplice.[8] The trial court was not required to give the instruction. (Cf. *People v. Lewis* (2001) 26 Cal.4th 334, 369-370.) Moreover, other evidence, including (1) Porter's statements to police and testimony about the shooting and appellant's involvement therein, (2) the text messages between appellant and Hall, and (3) the evidence of appellant's gang membership and therefore motive to participate in the shooting, corroborated Staves's testimony. The trial court gave CALCRIM No. 226 concerning a willfully false witness, and concerning witness credibility. Any erroneous failure to use CALCRIM No. 334 to instruct on the accomplice corroboration requirement, or to give the accomplice cautionary instruction, was not prejudicial (cf. *Lewis, supra,* 26 Cal.4th at pp. 370-371) and did not violate appellant's constitutional right to due process. (*Id*. at p. 371.)

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[8] As CALCRIM No. 401, given in this case, taught the jury, neither mere presence at the scene of a crime, nor a mere failure to prevent it, amounts to aiding and abetting. Evidence a person accompanied a defendant to the scene of a crime, or observed it being committed, is not itself sufficient evidence the person was an accomplice. (*People v. Sully* (1991) 53 Cal.3d 1195, 1227-1228.)

b. *The Court Did Not Prejudicially Err by Giving CALCRIM No. 335.*

CALCRIM No. 335 essentially advised the jury, inter alia, if murder was committed, Holmes was an accomplice, her testimony and statements required corroboration, and the jury was to view her testimony and statements with caution. The parties stipulated the court give CALCRIM No. 335 to the jury. Appellant later asked for CALCRIM No. 334. The court asked why and appellant's counsel replied, "For the very same reasons that Ms. Holmes is an accomplice, Ms. Staves is also, if you believe the People's theory, an accomplice." Appellant's counsel argued Staves was "absolutely similarly situated as Ms. Holmes."

Appellant claims the trial court erroneously gave CALCRIM No. 335 to the jury. The claim is unavailing. The record reflects appellant made a conscious and deliberate tactical choice to stipulate to the giving of CALCRIM No. 335 in an effort to have Holmes and Staves viewed as accomplices. Appellant invited the alleged instructional error; therefore, his claim is barred. (Cf. *People v. Lee* (2011) 51 Cal.4th 620, 645; *People v. Davis* (2005) 36 Cal.4th 510, 567; *People v. Hardy* (1992) 2 Cal.4th 86, 152.)

Even if the trial court erred by giving CALCRIM No. 335,[9] it does not follow we must reverse the judgment. There was ample evidence, including the testimony of Porter and Staves, that appellant committed the offense of which he was convicted. The evidence from those witnesses that appellant initiated a gang challenge to Lewis, encouraged Bell to shoot Lewis, then, after the shooting, stomped on Lewis while yelling gang references was far more incriminating than any evidence from Holmes. CALCRIM No. 335 was beneficial to appellant to the extent that, absent that instruction, the jury

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[9] A trial court can decide as a matter of law whether a witness is an accomplice only when the facts regarding the witness's criminal culpability are clear and undisputed. (*People v. Williams* (1997) 16 Cal.4th 635, 679.) We express no opinion as to whether Holmes was an accomplice. We note the prosecutor indicated he was "borderline" in his decision to request CALCRIM No. 335, and he had asked the court to give it "in an abundance of caution based on [Holmes's] conduct in taking the defendant to a place of safety and to stash the guns."

could have convicted him based solely on Holmes's uncorroborated testimony and statements. Any instructional error in giving CALJIC No. 335 was not prejudicial. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)[10]

3. *No Ineffective Assistance of Counsel Occurred.*

Appellant makes various claims he received ineffective assistance of counsel. Although we reject each claim for reasons discussed below and specific to each claim, we also here reject each claim for the independent reason the record sheds no light on why appellant's trial counsel failed to act in the manner challenged, the record does not reflect said counsel was asked for an explanation and failed to provide one, and we cannot say there simply could have been no satisfactory explanation. (Cf. *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.)

Moreover, appellant argues below, inter alia, he received constitutionally-deficient representation (see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219 (*Slaughter*)) in connection with evidence presented by the three eyewitnesses, i.e., Holmes, Staves, and Porter. In particular, appellant argues below he received constitutionally-deficient representation as a result of his trial counsel's failure to suppress Holmes's statements, and the identifications of appellant at trial by Staves and Porter. We reject those

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[10] *People v. Hill* (1967) 66 Cal.2d 536, cited by appellant, does not compel a contrary conclusion. *Hill* stated, "where a codefendant has made a judicial confession as to crimes charged, an instruction that as a matter of law such codefendant is an accomplice of other defendants might well be construed by the jurors as imputing the confessing defendant's foregone guilt to the other defendants." (*Id.* at p. 555.) However, *Hill* cited this as a reason the trial court in that case did not err by *failing* to instruct a person was an accomplice as a matter of law (*id.* at pp. 555-556), not as a reason the trial court erred by *giving* such an accomplice instruction. Moreover, Holmes made no judicial confession of guilt. Nor was she a codefendant at appellant's trial; her guilt was not at issue and could not be imputed to appellant. Even if Holmes had been a codefendant at appellant's trial, CALCRIM No. 335 did not expressly refer to a codefendant (e.g., Holmes) who was an accomplice of "other defendants," e.g., appellant. Appellant was not the sole perpetrator of the present crime with the result Holmes could only have been appellant's accomplice. There was no significant danger the jury would have imputed guilt to appellant simply because CALCRIM No. 335 referred to Holmes as an accomplice.

arguments below, but note here that even if appellant received such constitutionally-deficient representation with respect to any one of the three eyewitnesses (e.g., Holmes), there was ample evidence of guilt, including the testimony of the rest of the eyewitnesses (e.g., Staves and Porter), with the result appellant was not denied effective assistance of counsel. Any such constitutionally-deficient representation was not prejudicial. (See *Slaughter*, at p. 1219.)

a. *Counsel's Failure to Suppress Holmes's Statements.*

During direct examination by the People, Holmes testified as follows. Holmes had felt threatened by any involvement in this case. She was "afraid for everything, the victim, my life, my children's life." After she gave a statement to police, she was assaulted, and she believed she was assaulted as a result of the statement.

During cross-examination, Holmes testified as follows. Holmes was not afraid of appellant. When she talked to police when she was arrested, she felt intimidated by police, felt they were trying to get her to say things, and felt they were holding her hostage. Police picked her up in the morning and she was not arrested until midnight. During the interim she was interrogated, left by herself for long periods, and moved to different rooms. Holmes was pregnant, she told personnel she needed sanitary napkins for spotting, and they were provided only after 30 minutes to an hour. She ultimately lost the baby in a process that began the day of her arrest. Appellant was not involved in the shooting.

During redirect examination, Holmes testified as follows. Holmes told a detective she was afraid of appellant and gang members. Holmes did not recall telling the detective she was worried about appellant because of what he had done at the gas station or that she needed protection for herself and her niece. When police stopped Holmes, they asked if they could ask her questions and she willingly went with them. When Holmes was arrested at midnight, police told her she was arrested for murder.

During redirect examination, the court ruled Holmes was a hostile witness. Holmes later testified that, previously during trial, she returned to court after having been told that, if she did not, she would be arrested and her probation would be violated. Holmes's interview was videotaped.

Appellant claims his trial counsel provided ineffective assistance by failing to move to suppress Holmes's statements on the ground they were the product of police coercion. However, appellant's trial counsel reasonably could have refrained from filing any such motion because he believed any testimony by Holmes recanting her statements resulted from her fear of retaliation from appellant and/or gang members, and not because her statements were a product of police coercion. Appellant has failed to demonstrate he received constitutionally-deficient representation.

b. *Counsel's Failure to Suppress Staves's Identification of Appellant At Trial.*

Appellant claims his trial counsel provided ineffective assistance by failing to move to suppress Staves's identification of appellant at trial on the ground the identification was the product of a single-person photographic showup. However, first, a single-person photographic showup is not inherently unfair or impermissibly suggestive. (Cf. *People v. Ochoa* (1998) 19 Cal.4th 353, 412-413, 425-426.) Second, our Factual Summary sets forth pertinent facts concerning such factors as Staves's prior familiarity with appellant, her opportunity to view appellant at the scene, and the certainty of her identification at the time of the showup.

Based on such factors, appellant's trial counsel reasonably could have concluded that even if the single-person photographic showup was suggestive, Staves's identification of appellant at trial was reliable under the totality of the circumstances. (See *People v. Gordon* (1990) 50 Cal.3d 1223, 1242; *People v. Nguyen* (1994) 23 Cal.App.4th 32, 39.) Appellant's trial counsel also reasonably could have believed any motion to suppress Staves's identification of appellant at trial on the ground the identification was the product of a single-person photographic showup would have been futile. Appellant has failed to demonstrate he received constitutionally-deficient representation.

c. *Counsel's Failure to Suppress Porter's Identification of Appellant At Trial.*

Appellant claims his trial counsel provided ineffective assistance by failing to move to suppress Porter's identification of appellant at trial on the ground the identification was the product of a suggestive photographic lineup. However, the detective who prepared the lineup testified as follows. The lineup consisted of six photographs of men, i.e., two with braids, one with dreadlocks, one with pulled-back hair, and two with regular hair. Appellant was one of the men with braids, and the only photograph of appellant the detective could find depicted appellant with braids. The detective did not want to put appellant's photograph with five photographs depicting people with long dreadlocks.

A pretrial lineup will only be deemed unfair if it suggests in advance of a witness's identification the identity of the person suspected by the police. There is no requirement a defendant in a photographic lineup be surrounded by others nearly identical in appearance. Nor is a photographic lineup unconstitutional simply because one suspect's photograph is much more distinguishable from others. (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.)

Moreover, our Factual Summary sets forth pertinent facts concerning Porter's opportunity to view appellant at the scene, and her identification of his voice at the scene. Porter identified appellant from the photograph depicting him wearing braids even though she testified he wore long dreadlocks or braids. Based on such factors, appellant's counsel reasonably could have concluded any motion to suppress Porter's identification of appellant at trial on the ground the identification was the product of a suggestive photographic lineup would have been futile. Appellant has failed to demonstrate he received constitutionally-deficient representation.

Appellant claims his trial counsel provided ineffective assistance by failing to move to suppress Porter's identification of appellant at trial on the ground the identification was influenced by a person identified as C-Bo. Porter testified that prior to the above photographic lineup, Porter's friend C-Bo told her that the guy whom Porter believed stomped on Lewis had braids, not dreadlocks. However, when Porter selected

appellant's photograph in the photographic lineup, she stated the person selected did not have braids at the time of the shooting. During direct examination, Porter testified the person who came to the front of the car had dreadlocks. During cross-examination, appellant asked Porter whether, when she went to view the photographic lineup based on what C-Bo told her, she was looking for a guy with braids and not dreadlocks. Porter replied she was looking for the face she had seen. Porter selected appellant's photograph based solely on his face. Appellant's braids had no role in her selection.

In light of Porter's testimony, any statement C-Bo made to Porter that the guy whom she believed stomped on Lewis had braids, not dreadlocks, was of no consequence to her identification of appellant. As previously mentioned, there was ample evidence of appellant's guilt, independent of any evidence from Porter. No ineffective assistance of counsel resulted from the failure of appellant's trial counsel to move to suppress Porter's identification of appellant at trial on the ground the identification was influenced by C-Bo.

d. *Counsel's Failure to Ask for a Corporeal Lineup for Staves and Porter.*

Appellant claims his trial counsel provided ineffective assistance by failing to ask the court for a pretrial corporeal lineup at which Staves and Porter could view appellant. Due process requires in an appropriate case that a defendant, upon timely request therefor, be afforded such a lineup. However, the right to such a lineup arises only when eyewitness identification is shown to be a material issue and there is a reasonable likelihood of a mistaken identification that the lineup would tend to resolve. (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625.) However, in the present case, given the previously discussed facts pertaining to the various pretrial identifications of appellant by Staves and Porter, as well as Holmes's testimony incriminating appellant, appellant's trial counsel reasonably could have concluded there was no reasonable likelihood of a mistaken identification that a corporeal lineup would have tended to resolve. Appellant's claim fails.

e. *Counsel's Failure to Have an Eyewitness Identification Expert Testify.*

Appellant claims his trial counsel provided ineffective assistance by failing to have an eyewitness identification expert testify at trial. However, first, during appellant's November 1, 2012 *Marsden* motion, appellant's counsel represented she had hired a "confidential I.D. expert" to review any identification issues. Based on this record, appellant's counsel may have elected not to call an identification expert as a witness after consulting with the retained expert. The decision as to whether to call witnesses is a matter of trial tactics and strategy which a reviewing court generally may not second-guess. (Cf. *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059.) Second, an eyewitness identification expert need not testify in every case in which identity is at issue. (Cf. *People v. Datt* (2010) 185 Cal.App.4th 942, 952.)

Further, the court, using CALCRIM No. 226, instructed the jury on factors to be considered when evaluating the credibility of a witness. The court also, using CALCRIM No. 315, instructed on factors to be considered when evaluating the credibility of eyewitness testimony identifying the defendant. No ineffective assistance of counsel occurred. (See *Slaughter*, *supra*, 27 Cal.4th at p. 1219.)

4. *No Prejudicial Pitchess Error Occurred.*

The nonconfidential record reflects as follows. On October 18, 2012, appellant filed a *Pitchess* motion, seeking various information in the personnel files of McCoy and Jamison. On November 14, 2012, the trial court granted the motion, "limited to dishonesty and police reports." The court then conducted an in camera hearing regarding the matter. Following the in camera hearing, the court stated in open court, "We concluded the *Pitchess* motion. There were no hits as to either investigator." The court ordered sealed the transcript of the in camera hearing.

Appellant claims this court should review the record pertaining to the *Pitchess* motion to determine whether the trial court erred by ruling there was no discoverable information. Trial courts are granted wide discretion when ruling on motions to discover police officer personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827 (*Samayoa*); *People v. Memro* (1995) 11 Cal.4th 786, 832.)

We have reviewed the contents of the sealed transcript of the November 14, 2012 in camera *Pitchess* hearing. Said transcript constitutes an adequate record of the trial court's review of any document(s) provided to the trial court during the in camera hearing. As to McCoy, said transcript demonstrates the trial court did not abuse its discretion by failing to disclose any information. (Cf. *Samayoa*, at p. 827; see *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230, 1232.)

As to Jamison, the sealed transcript reflects that during the in camera hearing the custodian of records for the Los Angeles Police Department testified under oath and produced one potentially responsive document. (See *People v. Fuiava* (2012) 53 Cal.4th 622, 646 (*Fuiava*).) We have reviewed said transcript and the trial court's ruling that the document was not discoverable. Even if the trial court should have disclosed the document, we conclude no reversible error occurred in light of the entirety of the evidence in this case. (Cf. *Fuiava*, at p. 648.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

EDMON, P. J.

EGERTON, J.*

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