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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DEREK EDWARD ROBINSON, Defendant and Appellant.	B149425 (Los Angeles County Super. Ct. No. GA 036768)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Reversed with directions.

Ralph H. Goldson, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Susan Lee Frierson, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of Parts B., C. and D. of the Facts and Parts III, IV and V.

Derek Edward Robinson (defendant) was convicted by a jury of the murders of Michael Boyd (count 1) and Anthony Wells (count 2). (Pen. Code, § 187.) The jury found true the special circumstance allegations that defendant committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)) and that the victim in count 2 was intentionally killed because he was a witness to a crime. (Pen. Code, § 190.2, subd. (a)(10).) The jury also found defendant guilty of attempted murder of Howard Littleton (count 3) and found the attempted murder was committed willfully, deliberately, and with premeditation. (Pen. Code, § 664, subd. (a).) On all counts, the jury found defendant personally used a firearm. (Pen. Code, § 12022.5, subd. (a)(1).)

In the penalty phase, the jury returned a verdict of death. At the sentencing hearing the penalty was modified, without objection by the People.[1] As to counts 1 and 2, the court sentenced the defendant to life without the possibility of parole plus an additional five years for the use of a gun in the commission of the offenses. As to count 3 defendant was sentenced to life with the possibility of parole plus an additional five years for the use of a gun. All sentences were to run consecutively to one another.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Introduction.

Defendant was convicted of killing Michael Boyd (Boyd) and Anthony Wells (Wells), who were both friends of defendant and members of defendant's gang, the Denver Lane Bloods. The prosecution's theory of the case was that defendant shot Boyd over a gun that Boyd was allegedly keeping for defendant while defendant was in jail,[2] and defendant shot Wells because he knew too much about the Boyd murder. Aside from ballistic evidence at the scenes of the crimes, most of the evidence of defendant's guilt

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[1] After defendant's conviction, co-defendant Cooks had been allowed to plead guilty to five murders in exchange for a sentence of five consecutive sentences of life without the possibility of parole. In light of the Cooks disposition, the People did not oppose defendant's request for modification.

[2] The gun was later found in the crawl space below defendant's father's house, where defendant was residing during late May to June 1994.

was hearsay testimony from friends and acquaintances of defendant. Such testimony came in at trial as prior inconsistent statements made in interviews conducted by the police, as the witnesses at trial uniformly denied their prior statements implicating defendant. (See Evid. Code, § 1235;[3] *California v. Green* (1970) 399 U.S. 149.)

B. Prosecution Evidence.

1. Killing of Michael Boyd, May 30, 1994.

(a) The Shooting.

Boyd was shot late in the evening on May 30, 1994, outside an apartment building at 830 North El Molino Avenue in Pasadena. Mia Boyd, Michael Boyd's sister, resided with her mother and her children in an apartment at 830 North El Molino, and Boyd stayed there from time to time. The day before the shooting, sometime in the early evening, defendant was at her apartment building, outside on the walkway, talking to Boyd. Also there were Chris Bush (a friend of Boyd's who grew up with Boyd in Pasadena, who was also Mia Boyd's boyfriend), and Kalem Squires. Boyd and defendant were talking. Defendant asked where the gun was, and Boyd responded, "what are you talking about?" Defendant said it was the "gun that was at Joe's house." Boyd responded that he had not seen Joe. Defendant made a gesture to indicate that Boyd was lying and sighed. Boyd said, "I don't know what you're talking about no gun. I ain't seen no gun, I haven't been up there to talk to Joe about nothing." Defendant responded that "I'm going to go up and talk to Joe, and my gun better come up." Defendant and Squires then walked away. Boyd remained and told Bush he did not know what they were talking about. Bush believed that defendant was suspicious that Boyd had the gun. Mia Boyd also overheard part of the conversation. Boyd said, "are you going to take a

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[3] Evidence Code section 1235 provides in relevant part that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing. . . ."

basehead's[4] word over mine?" Mia Boyd observed that defendant did not look convinced with what Boyd told him.

On May 30, 1994, Boyd came home about 9:30 or 10:00 p.m. after spending the day in a nearby park. After Chris Bush left, Mia thought Boyd was lying in bed downstairs at her apartment. Fifteen or 20 minutes later, after Mia had gone upstairs to watch television, she heard gunshots, grabbed her children and got on the floor. She was not concerned about Boyd because she thought he was in the house. Then she heard Boyd call her name, and when she went to the window she saw him lying outside. She did not see anyone else around. She ran out of the house and she could see he had been shot. She was the first one to her brother's body. She told Detective Orent[5] that Monte Russell was with defendant that night out in front of the apartment, but at trial she stated she would no longer recognize Russell if shown his picture.

By the time of trial, Monte Russell was serving a 12-year term for assault with a handgun. In 1994, he was a member of the Pasadena Denver Lanes gang, a Bloods gang, and was living in Pasadena. He had known Anthony Wells,[6] a cousin of his, all his life. Russell had known defendant since he was 13 and defendant was about 16 or 17.

Russell was not sure when he arrived at 830 North El Molino the night Boyd was killed. He believed he was there after the murder. He drove there in his Monte Carlo with Wells. They parked in the driveway. He saw "two people with dark clothes on" and "somebody laying [*sic*] on the ground." The people he saw were standing right by Boyd. The people ran away when Russell drove in. They were wearing hooded sweatshirts with the hoods pulled up over their heads. Russell and Wells jumped out of the car. They ran to the back and saw Boyd lying on the ground. By that time Mia Boyd was there.

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[4] A "basehead" is someone who smokes crack cocaine.

[5] Detective Dana Orent, an officer with the Pasadena police department, was not the original detective assigned to the murder. He was assigned in the spring of 1998. The cases had been dormant from January 1995 to June 1998. Detective Orent conducted interviews of most of the witnesses in the case.

[6] Wells's gang moniker was "Little God," short for "Little Godfather."

Russell saw a little boy about seven to nine years old and asked him where the two men ran. The boy said the men jumped the fence and ran away. Russell went to move his car and the police and paramedics arrived.

Kelli Scott, who was incarcerated at the time of trial, met Boyd about a month before the shooting when she moved into the apartment complex at 830 North El Molino. On the night of the shooting Boyd, who often came over to use her phone, came by her apartment and used the phone. After the call Boyd got a gun from Scott's closet that he had put there some time before and left her apartment. About 20 or 30 seconds later, Scott heard gunfire. She fell to the floor. The next thing she knew, she heard someone outside screaming. She got up and went outside and saw Boyd in his sister's arms.

Sometime before the murder, Russell went to visit defendant at his father's house at 1510 North Marengo in Pasadena. Defendant's room was at the back of the house and when Russell arrived the door was open. Russell overheard a discussion about a missing gun between Danny Cooks[7] and defendant. Defendant said that only three people knew the location of the missing gun: defendant, Russell, and Boyd. Russell recalled that both men were angry. Defendant asked Russell if he had the gun, and Russell denied knowledge of its whereabouts.[8]

Cooks suggested that they "set up" Boyd. Defendant wanted to lure Boyd to a cul-de-sac by paging him and telling him they wanted to buy some marijuana. Around 7:00 p.m. on the evening of the murder, Russell received a page from defendant. Defendant said something to the effect that "we gonna get at [Boyd]." Russell called Boyd and told him he wanted to buy some "weed." Russell drove his Monte Carlo to a location on Pepper Street in Pasadena, and defendant went with Cooks in another car and hid behind a trashcan. Defendant and Cooks were armed and wearing dark clothes. After Boyd failed to show up, defendant and Cooks agreed they would set him up another

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[7] Cooks's gang moniker was "Two Punch."

[8] On another day, Russell could not recall when defendant tried to give the gun to Boyd. Finally, defendant put the gun under a battery in the car that was in the yard.

time. Russell met Wells about 8:00 p.m. and Wells told him that he had to go warn Boyd.

Russell called Boyd later that evening to tell him he was being set up; Boyd responded that he was not concerned about defendant's threats to "smoke" him. Russell told Boyd that he thought defendant's threats were serious. Later that evening Russell and Wells bought some marijuana from Boyd at the apartment complex. Boyd walked into the back area of the complex to get the marijuana, and after he returned, they heard Cooks's voice, which Russell recognized. Cooks asked Boyd "what's up, Mike B.?" Defendant was also there and again asked Boyd where the gun was. Boyd denied knowing the location of the gun. Russell saw defendant and Cooks pull out their guns. Cooks shot first, and then defendant shot Boyd.[9]

About eight months after the murder, Mia Boyd had a conversation with Kamisha Daniel about Boyd's murder. Daniel told Mia Boyd that she had talked to defendant and asked him how he felt that the police had raided his father's house and found the gun he had accused Boyd of taking. Defendant stated he had only meant to scare Boyd, but Cooks was there and egged defendant on by saying, "let me show you how to kill a nigger."

(b) Police Officers' Testimony and Forensic Evidence.

Officer Luis Bañuelos, a Pasadena police officer and his partner, Officer Paul Carpenter, were on patrol on May 30, 1994, when they received a radio call of shots fired in the area. They went to 830 North El Molino. When they got to the complex, there was a Monte Carlo, later identified as Monte Russell's, parked behind a gate in the complex's long driveway.

They saw a group of people around a man who was lying on the ground. Officer Bañuelos recognized the man, from prior contacts, as Boyd. Pasadena Police Sergeant

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[9] These statements were made by Russell to police in an interview conducted while Russell was facing sentencing on his assault with a firearm charge. Russell received a reduction of two years on his sentence.

Victor Alaniz then arrived. Alaniz saw that Officer Carpenter and Monte Russell were trying to open the gate near the Monte Carlo. When Alaniz reached Boyd, his sister, Mia Boyd, was holding his hand. Boyd was alive but non-responsive. Officer Bañuelos observed shell casings and a bullet on the ground in the vicinity of Boyd, who was not armed.

Sergeant Alaniz pulled up Boyd's shirt and observed multiple gunshot wounds on Boyd's upper torso. Alaniz saw what looked like a .380 bullet casing near Boyd's head, and picked it up so it would not get trampled by the paramedics. He also picked up another bullet casing that was in a puddle of blood for the same reason, even though the field technicians usually handle physical evidence. When the paramedics cut away Boyd's clothing to treat him, he saw another bullet fall out. Sergeant Alaniz went to the hospital where Boyd was pronounced dead. There, the doctor gave him another bullet that had been removed from Boyd's body. Sergeant Alaniz took Boyd's pager, and checked to see if there were any numbers in its memory. One number, 187, stood out in his mind.

Joseph Perez, a crime scene investigator with the Pasadena Police Department, collected spent bullet casings and other items from the scene. He found .380 casings and a copper-jacketed lead bullet casing. Deborah Bush, a crime scene investigator with the Pasadena Police Department, went to the hospital to photograph victim Boyd's body. Sergeant Alaniz gave her a .380 shell casing collected from the scene, a bullet fragment removed from the victim's stomach, and another bullet removed from the victim.

Dr. Solomon L. Riley, a deputy medical examiner with the Los Angeles County Department of the Coroner, performed the autopsy on Boyd. He identified 13 gunshot entry wounds on Boyd's body, and recovered four bullets from Boyd's body. One of them was a jacketed bullet; three of them were unjacketed lead bullets. Boyd sustained three bullet wounds in his back. A fragment was recovered from Boyd's left forearm. Toxicology showed that Boyd's blood contained alcohol and PCP.

Dale Higashi, a criminalist and firearms examiner with the Los Angeles County Sheriff's Department, testified that in his opinion, three of the bullets recovered from

Boyd's body were fired from the same .38 or a .357 caliber revolver (both calibers use the same bullets). The bullet recovered from Boyd's clothing was fired from a .380 caliber semi-automatic weapon, as was one of the bullets recovered from Boyd's body. Four of the shell casings found at the scene were from a .380 weapon. A .380 semiautomatic weapon can fire more than six rounds. A .357 caliber pistol has six rounds.

Detective Dan Mowery was with the Pasadena Police Department, and was the lead detective on the Boyd murder in 1994. He executed a search warrant of defendant's father's house at 1510 North Marengo on June 14, 1994. Mowery believed at the time that defendant was living in the house. Defendant was detained as he was leaving the house at the commencement of the search. In the crawl space beneath the house the detectives found a Ruger revolver. The Ruger is either a .357 or .38 caliber revolver. Defendant was arrested and booked at the Pasadena Police Department. Wells and Russell were questioned at the police department that day, and defendant was released a couple of days later.

(c) Defendant's Admission to His Cousin

In 1994, Kamisha Daniel[10] was a member of the Pasadena Denver Lane Bloods gang. She knew defendant, who was her cousin. She did not see him much growing up, except on holidays. She was close with Boyd, like "peanut butter and jelly." While defendant was in jail in early 1994,[11] he called her and asked her to retrieve his gun. She sent Boyd to find it, and he told her it was not there. Daniel told defendant the gun was not there, and he was angry at Boyd. Defendant assumed because the gun was not there,

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[10] Daniel's January 29, 1999, interview with Detective Orent came in as prior inconsistent statements to rebut her testimony on the witness stand that when Detective Orent from the Pasadena police came to interview her, she just "ran with" the story and started to make things up.

[11] The parties stipulated that defendant was in Los Angeles County Men's Central Jail from March 18, 1994, through May 24, 1994.

Boyd had taken it. Defendant thought Boyd was trying to put one over on him, but defendant had forgotten where the gun was.

Sometime after execution of the search warrant at his father's house, defendant had Daniel pick him up at his mother's house. Defendant told Daniel that he was involved in the Boyd shooting and that he felt bad because the gun had been under his house. Defendant and Cooks set Boyd up, and they paged him and found out where he was. They knew he was high, which "made it easier." Defendant did not intend to kill Boyd, just scare him. Daniel told Mia Boyd what had happened. Daniel was afraid of defendant because she knew what had happened.

2. Killing of Anthony Wells, June 24, 1994.

On June 24, 1994, Anthony Wells was shot outside a party in the 1300 block of North Glen Avenue in Pasadena. The party was held at a house owned by Karen White. A large number of people attended the party, most of them Pasadena Denver Lanes gang members. Wells was shot by two men as he left the party.

On the day Wells was killed, Russell spent the day with him. He was with defendant and Howard Littleton.[12] Russell and Wells shared custody that day of a .380 automatic weapon. Defendant asked to borrow the gun. Wells gave him the gun and they dropped defendant off. They went to Russell's mother's house, then Wells left for a party in Pasadena in Russell's red Mitsubishi.

At trial, Howard Littleton[13] was on parole for assault with a deadly weapon. He knew Boyd, but did not hang out with him. He also knew Monte Russell and defendant. The day of the party, Littleton met up with Russell and Wells at Littleton's house on Manzanita. They left to get some marijuana, and while they were driving around they saw defendant. Defendant needed a gun and wanted to commit a robbery. Wells had a

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[12] Littleton was known as "Victor," "Little Vic," and "Gangster Vic."

[13] Some of Littleton's testimony consisted of a June 18, 1998, interview, exhibit 53, introduced to rebut his statements on the witness stand.

gun, which he gave to defendant. The gun was a .32 or a .380. Russell dropped Littleton off at his house.

Littleton went to the party after it was dark, and saw Wells pull up in Russell's car. Littleton was under the influence of PCP, but he talked to Paul Carpenter and Cooks for a while. Wells wanted to get some marijuana, and Littleton told him that he would go with him. Littleton walked out of the house with Wells and Paul Carpenter and saw Wells talking with Cooks and defendant. Two men in black approached Wells. Littleton recognized them as defendant and Cooks. Littleton saw defendant shoot Wells once in the face. Littleton fell to the ground, believing he would be shot too. Some "homeys" were shooting from across the street. After the shooting, Littleton hit the sidewalk and crawled back to the house; looking back, he saw defendant and Cooks firing in his direction. He ran all the way home before the police got there.

Officer Jesse Carrillo responded to a call of shots fired on June 24, 1994, at 11:30 p.m. at a location in the 1300 block of North Glen Avenue in Pasadena. When he arrived at the scene, the victim (Wells) was lying on the ground on the driveway.

Officer Michael Villalobos of the Pasadena Police Department also responded to the shooting on North Glen. He observed 17 shell casings on the parkway and sidewalk area near the victim. Sixteen of the shells were nine-millimeter, one was .380 caliber. The house where the party was held was associated with the Pasadena Denver Lanes gang.

Ogbonna Chinwah, a deputy medical examiner with the Los Angeles County Coroner's office, performed the autopsy on Wells. Wells sustained two gunshot wounds, one to the face and one to the left foot. She recovered a bullet from Wells's brain. She did not observe any stippling of Wells's face, which would have indicated the gun was fired from less than two feet away.

Dale Hagashi, a firearms examiner for the Los Angeles County Sheriff's Department, testified that all 16 shell casings from the nine-millimeter firearm were fired from the same weapon. With respect to some .380 caliber shell casings recovered from the scene of the shooting, he could not determine whether they were fired from the same

weapon. The bullet from Wells's brain was from a .380 caliber weapon. The .380 shell casings found at Boyd's murder scene were not shell casings from the same weapon as those found at the scene of Wells's murder.

C. Defense Case.

Officer George Ramos of the Pasadena Police Department was flying surveillance in a helicopter on May 30, 1994. Based upon a report which was based upon what Ramos said at the time of the murder, but was written by someone else, Ramos testified that he could not remember whether he saw a car pulling into the driveway at 830 North El Molino, or whether he saw a person get out of the car and throw something under it.

Tamanika Denham went to school with defendant. She went to the party on Glen Avenue on June 24, 1994, with two friends. There were a number of gang members at the party. She knew Wells and saw him at the party as he was getting out of his car. Her sister had dated Russell. Wells spoke to her and told her that he was waiting for some of his "homeboys" to go get some marijuana. That was when Wells was shot. Two people came walking up the street. They were dressed in black and wore hooded sweatshirts. One was tall and one was short. The short one was Cooks; the tall one was Damien Lane.[14] The two stood out because they were wearing all black. Both of them had guns. Cooks had a gun pointed at Wells, he shot, Wells fell, and the two ran away. After that there was a lot of shooting from the garage area. She saw at least three people shooting.

Denham told the police that she did not hit the ground after the shooting, but instead stood and watched because they fired one shot and took off running; she denied telling the police that she did not get on the ground because all of the shots were being fired from across the street. Wells said, "God, I need help. I need help."

Detective George Vidal was at one time the investigating officer on the Wells murder. He interviewed witnesses at the crime scene of the Wells murder on June 24, 1994. On October 14, 1994, he conducted a phone interview of Littleton and taped the conversation. Although Littleton had told him that he was under one of the cars in the

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[14] Damien Lane was also known as Damien Thomas.

driveway that had been shot up, there was no evidence that either of the two cars had been shot at. Littleton told Vidal that he could find out who committed the murder from Wells's mother, Kim Flagg.

Alfred Robinson, defendant's father, ran a print shop. Defendant asked him to prepare the obituary for Boyd. In 1994 the door to defendant's bedroom was nailed shut because the frame was rotted and it could not be opened.

Defendant testified that he is sometimes referred to as D Rock or Dirt Rock. In 1994 he split his time between his father's house in Pasadena, and his mother's house in Panorama City. He met Russell in late 1992. Littleton was more Russell's friend than defendant's friend. Defendant is related to Damien Thomas (Lane) by marriage. The Ruger revolver is defendant's gun, and he obtained it in January or February of 1994. He kept it in his house for protection, but he was afraid of that his father would find the gun. He hid the gun under the house, and did not try to find someone to hold the gun for him while he was in jail. He did not put the gun in the car; Boyd and Russell were not present when he put the gun under the house. While he was in jail, he spoke to Kamisha Daniel. Somehow, she ended up knowing where the gun was located and was supposed to retrieve it because she wanted it. After he got out of jail, he asked Kamisha for the gun, and she told him Boyd had it. He asked Boyd if he had the gun, and Boyd denied having it. Defendant thought Kamisha might have stolen something from the house, as she was known for stealing from his dad's house. Kalem was present when he had the conversation with Boyd. Even if Boyd had taken his gun, it was not a reason to kill him because defendant could always get another gun.

He did not find out Boyd had been killed until the next day, at Ernie Ogletree's house. He found out the gun had not been taken by Boyd when the police executed the search warrant on his house and found the Ruger in the crawl space. He found out Wells had been killed the day after the killing, when Russell told him. On the day of Wells's murder he rode around with Wells and Russell. He did not recall that Littleton was with them. At some point, they went to Damien Lane's house. Danny Cooks was there. Cooks was upset that defendant was with Russell and Wells.

Defendant denied killing Boyd or having anything to do with the murder. He testified he did not kill Wells, nor did he know who killed Wells. Littleton had approached him several weeks after Wells was killed about a gun because he wanted some protection because he had seen who killed Wells. Defendant sold Littleton his shotgun and agreed to take the gun back to Pasadena even though defendant did not think it was fair he had to bring the gun back to Pasadena. He took the gun to his girlfriend's house. Russell and Littleton showed up later. When defendant went into the back to get the gun, Russell and Littleton left. Littleton never tried to get the money or the gun. Defendant was the only one in his family that belonged to a gang.

Shortly after the shooting, defendant told the police he was upset because he had asked Boyd to look for the gun because he was afraid his father might find it. In spite of the fact he told police he believed Boyd took the gun, he was lying. Defendant denied setting up Boyd. He gave Detective Orent a detailed description of where he was the night Boyd was killed. He told Detective Orent that he spoke to Heather that night; he was with Ernie Ogletree; he was coming from Lisa Jones's house; he ran into Heather at Ogletree's house; and on the way back to his house, he drove by the crime scene. Defendant did not recall where he was the night Wells was shot.

Richard Perez, a member of the Denver Lane Bloods, knew Wells, Boyd, and defendant. He saw Boyd at a barbecue on the day he was shot. He met with Boyd outside at the apartment complex about 8:00 that night. They were drinking and smoking marijuana and PCP with William Githuway. He left to take his girlfriend home, a trip of about 15 minutes. When he got back, Boyd had already been shot and the police and ambulance were there. He did not see Boyd with any food, nor did Boyd get any pages. Perez was also at the party when Wells was shot. He was in a lot next door and saw Wells get shot and saw him fall. He did not see Wells's shooters, nor did he see Wells arguing with anyone before he was shot. He denied driving to the apartments in a sea green Impala; instead stating he had a red Granada.

D. Prosecution Rebuttal.

Officer Andrea Rochelle with the Pasadena Police Department interviewed Richard Perez the night of the Boyd shooting. Perez told her he had arrived there in his sea green Impala. Perez also told her he arrived at the scene with William Johnson. They smoked a joint outside with Boyd, and Johnson wanted to leave. Boyd had some barbecue in the microwave he wanted to retrieve. Less than half an hour later, Perez returned and by then Boyd had been shot. Perez denied speaking to a woman police officer.

Odell Shepherd is a licensed private investigator. The defense hired Shepherd to assist in the preparation of its case. Shepherd interviewed Richard Perez on October 28, 1998. Perez told Shepherd that he was inside the garage area of the house where Wells was shot. After he heard the shots, he went outside.

DEFENDANT'S CONTENTIONS

On appeal, defendant argues that the trial court erred in (1) ruling that the prosecution could ask a key defense witness about a statement made by defendant; (2) denying defendant's *Wheeler*[15] motion that the prosecution improperly excluded an African American juror; (3) failing to instruct sua sponte that accomplice evidence required corroboration and should be viewed with caution; (4) that substantial evidence does not support a special circumstance finding that he killed a witness within the meaning of Penal Code section 190.2, subdivision (a)(10); and (5) his custody credits were wrongly limited to 15 percent of actual confinement time.

I. IMPEACHMENT OF ERIC THOMAS

During trial, defendant advised the court that he intended to introduce the testimony of Eric Thomas that Thomas overhead a third party, Damien Lane, confessing to the Wells murder. In ruling on defendant's motion to introduce this testimony, the

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[15] *People v. Wheeler* (1978) 22 Cal.3d 258.

court indicated it would also permit the prosecution to impeach[16] Thomas by asking about defendant's statements that he intended to have someone take care of the people out there who were telling on him to the police about the Wells murder. Thomas overheard these statements on a jail bus in 1998. Defendant apparently chose not to introduce Thomas's testimony because of this potential impeachment.

A. Factual Background.

The defense proposed to put on the testimony of Eric Thomas. At the hearing pursuant to Evidence Code section 402, Eric Thomas testified he had told Detective Orent that he was with Darrell Johnson and Damien Lane[17] when Lane told Thomas that he had killed Wells. Lane did not identify the other person with him at the time shooting, but Thomas believed it might have been Cooks. Lane, who was over six feet tall, was a member of the Squiggly Lane Bloods,[18] whereas Thomas is a member of the Pasadena Denver Lanes. On cross-examination, Thomas admitted gang members sometimes brag about doing things they did not do to increase their respect among other gang members. At that same hearing, Thomas was asked about -- and denied -- telling the detectives he overheard defendant make a statement on the jail bus, sometime in 1998, that Everett Johnson was going to take care of people who were talking to the police about defendant.

Defendant sought to offer the hearsay statement of Damien Lane as a declaration against penal interest, but indicated it depended upon the court's ruling on the admissibility of defendant's statement. Relying on *People v. Cudjo* (1993) 6 Cal.4th 585, the court stated it was inclined to admit the statement as a declaration against penal interest, but further stated if the Lane declaration came in, the prosecution would be

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[16] Defendant categorizes this procedure as impeachment. It is impeachment only to the extent that Thomas denied telling Detective Orent about defendant's statements. The real purposes of the supposed impeachment would to be introduce defendant's statements as evidence against defendant. (See *California v. Green, supra,* 399 U.S. 149.)

[17] Damien Lane was also known as Damien Thomas and was an associate of Cooks. At the time of trial, Lane was deceased.

[18] The Squiggly Lane Gang is another Bloods gang in Pasadena.

allowed to impeach Thomas with the statements overheard on the jail bus even though Thomas denied telling the police defendant had made those statements. The court further indicated Thomas could be impeached by his affiliation with gangs and the fact he was a convicted and sentenced prisoner. The court was of the opinion these facts were relevant to Thomas's credibility. Defendant never objected to the admission of defendant's prior statement; rather, he simply did not call Thomas as a witness.

B. Defendant's 1998 Statements Were Admissible As Admissions

On appeal, defendant contends the court's ruling was error because defendant's statement was irrelevant to impeach Thomas and in fact the proposed impeachment was prohibited character evidence. This error by the court, he argues, had the improper effect of excluding critical exculpatory evidence of the third-party confession. (*People v. Hall* (1986) 41 Cal.3d 826, 831-834.) Defendant argues the threats were not relevant as impeachment evidence because defendant did not threaten to harm Thomas, nor did Thomas express any fear of defendant. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355.) Furthermore, the threats were generalized, non-specific threats that were not admissible as evidence of defendant's consciousness of guilt and the statements were not admissible as evidence of defendant's state of mind, because they were too remote to the killings. (See, e.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 757; *People v. Hamilton* (1985) 41 Cal.3d 408, 429-430; *People v. Karis* (1988) 46 Cal.3d 612, 634.) Defendant also argues the evidence was impermissible character evidence. (Evid. Code, § 1101, subd. (b).) Lastly, defendant argues the error was prejudicial -- Lane's testimony would have altered the outcome of the trial because it corroborated Denham's testimony that *Lane* was the second shooter, not defendant.

In making this contention, defendant paints with too broad a brush. First of all, the fact that Eric Thomas was a convicted felon was admissible to impeach his credibility. (Evid. Code, § 788.) Secondly, the fact that Eric Thomas was also a member of the Pasadena Denver Lanes was admissible to show a possible bias in favor of defendant. (Evid. Code, § 780, subd. (f).)

Finally, asking Eric Tomas about defendant's statements to the effect[19] that he was going to beat this case because Everett Johnson was going to get out and take care of those people that were out there telling on him is not prohibited character evidence under Evidence Code Section 1101. Rather, defendant's extra-judicial statements qualified as admissions against interest. (See *People v. McClary* (1977) 20 Cal.3d 218, 230; *People v. Brackett* (1991) 229 Cal.App.3d 13, 19-20.)

Here, the murders had been committed in 1994. The initial investigation had come to a standstill in January 1995 and the case lay dormant until June 1998. At that time, a new investigator was assigned to the case and he began the process of re-interviewing the witnesses and trying to find new witnesses and evidence. It was the new investigation that unearthed the existence of, among others, Kamisha Daniel who was then in a federal prison in Dublin, California. It was at this time, with the investigation beginning anew, that defendant was alleged to have made the comments about having someone take care of the people who were talking to the police about him.

Had defendant's alleged statements been heard by the jury, that jury could reasonably conclude that defendant was beginning to feel threatened as the new investigation began to concentrate upon him, and his statement was that of a desperate man who wanted to intimidate or somehow get rid of possible witnesses. The same jury could also have concluded that only a guilty man would be acting in such a fashion. In other words, that evidence was a classic admission which is "the recital of facts tending

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[19] The record before this court does not contain the actual statements Eric Thomas made to Detective Orent. Because Eric Thomas did not testify, he was not confronted with his prior statements concerning the comments defendant had made. We assume the prosecutor had a tape recording of Eric Thomas's statement to Detective Orent, as the prosecutor did with most of the witnesses, because Eric Thomas was asked specific questions about the alleged comments of defendant. Transcripts of the taped recorded interviews of all of the other witnesses who were impeached by their prior inconsistent statements were made part of the record. Because Eric Thomas did not testify, there is no transcript. However, the fact defendant did not call Eric Thomas to testify before the jury seems to indicate defense counsel was aware there was a tape-recorded statement ready for possible impeachment of Thomas.

to establish guilt when considered with the remaining evidence in the case." (*People v. McClary, supra*, 20 Cal.3d at p. 230.) Thus, defendant's alleged statements, made in a jail bus while defendant was in custody, were admissible. (See *People v. Wong* (1973) 35 Cal.App.3d 812, 831.)

C. The Ruling That Thomas Could Be Asked About Defendant's Statements Did Not Prevent Defendant From Presenting An Affirmative Defense.

Defendant further contends the court prevented him from presenting evidence that a third party, Damien Lane, had confessed to the murder for which defendant was on trial. This contention places the burden on the wrong party. First, the court did not say that Lane's out-of-court confession was inadmissible. Instead, the court stated that if Thomas testified, he could also be asked about defendant's 1998 statements concerning "getting [the] witnesses" who were talking to the police about defendant. If defendant had any constitutional or policy issues concerning the 1998 statements, it was his duty to bring those matters to the court's attention so that the court could have considered options such as excluding the evidence pursuant to Evidence Code section 352, or limiting its admission to prevent possible prejudice. (*People v. Morris* (1991) 53 Cal.3d 152, 188, disapproved on other ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) If requested, the court could also have given a limiting instruction to the jury either at the time of the admission of the statements, or when the formal instructions were given to the jury at the conclusion of the trial. (Pen. Code, §§ 1093, 1093.5.) Instead, defendant did nothing. Now, having bypassed any objections, making any objections on the record, or making *any* record, he argues the court denied him his right to present an affirmative defense. Defendant did not make a specific and timely objection to the evidence. (Evid. Code, § 353.) Instead, he indicated the calling of Thomas depended on the court's decision as to whether defendant's prior statements were admissible. Defendant never argued to the court why defendant's statements should not be admitted. Instead, not getting the answer he sought, he chose not to call Thomas. This is not a situation where the court is imposing a penalty for the exercise of a constitutional right. (See *Griffin v. California* (1965) 380 U.S. 609, 614.) Defendant's statements were admissible.

Defendant bypassed any attempt to make a record and thus apprise the court why Thomas should not be asked about defendant's statements which were declarations against interest. Because of this failure to argue to the court, counsel and defendant were forced to make some hard choices, but this was not the fault of the court, nor was it error.

II. THE WHEELER MOTION

Defendant next contends the trial court erred when it permitted the prosecution to excuse a Black juror merely because she "worked in a religious profession." Excluding jurors merely because they have religious beliefs is as impermissible as excluding jurors based upon race or ethnicity. Respondent contends defendant waived his claims due to his failure to present them in the trial court, and in any event, the record demonstrates the juror was dismissed because of her occupation, not her religious beliefs. As to the specific juror we find no error, but, because the trial court followed the limited *Wheeler* procedure which this court found to be error in *People v. McGee* (2002) 104 Cal.App.4th 559, the case must be remanded for a limited *Wheeler* hearing.

A. Factual Background

During voir dire, Juror No. 46 was asked if she had any contact with gang members. She replied that personally she did not have contact with them, but as chaplain [at Twin Towers], she did. She was asked how she felt about gun control. She replied that "I live in the County of Los Angeles. I'm single. I'm an investigator with the L.A. Sheriff's Department. I have no children. I had a -- was on a jury trial a long time ago for civil case and there was a verdict there. I have an A.A. degree from Los Angeles City College. I don't have any organization affiliations, no military service, and I feel that every handgun, every gun should be registered, and gun shows and swap meets that sell guns should be strongly regulated."

The court asked for peremptory challenges after the conclusion of the juror questioning. After several jurors had been excused, defense counsel asked for a hearing, and objected that the prosecution was exercising its peremptory challenges in a racially biased manner. The following colloquy occurred: "[Counsel for Defendant]: The People have exercised seven challenges. Three of them have been of African-American

jurors, those being Jurors No. 2, No. 25 and -- [¶] The Court: And now No. 42. [¶] [Counsel for Defendant]: No. 42. [¶] The Court: Yes. Did you consider your exercise of Juror 22 to be an exercise against a Black female? [¶] [Counsel for Defendant]: No. 22? No. [¶] The Court: All right. I want to tell you I did. We can discuss that later. Mr. [Prosecutor], I could understand the exercise as to 2 and to 25, but I am going to declare a prima facie case at this point as to 42." Counsel then argued the merits of the prosecution's challenge to Juror No. 42, but never addressed the challenge to Juror Nos. 2 or 25.

The prosecution then exercised a peremptory challenge on Juror No. 46. Defense counsel again objected that the challenge was exercised in a racially biased manner, as Juror No. 46 was Black. The court once again found a prima facie case. The prosecution responded that "[she]'s a chaplain at the Twin Towers, and I do not typically leave people that work in the religious profession on juries. I think that they're too sympathetic to defendants, and that's my concern with her. I was frankly ambivalent because she also works for the sheriff's department and I wanted to keep her on for that reason, but the fact that she's a chaplain also at the Twin Towers [men's jail] pretty much outweighs that and caused me to want to exercise a peremptory." The court accepted counsel's explanation as objective.

B. There Was No Error In Finding Juror 46 Had Been Properly Excused

The use of peremptory challenges to remove prospective jurors from a petit jury solely based upon their membership in a racial group violates the defendant's right to trial by a jury composed of a representative cross-section of the community. (*People v. Wheeler, supra* 22 Cal.3d at p. 277 [no litigant has a right to jury that mirrors the demographic composition of population, but is entitled to jury "that is as near an approximation of the ideal cross-section of the community as the process of random draw permits"]; *Batson v. Kentucky* (1986) 476 U.S. 79, 84-89.) "'"Group bias is a presumption that jurors are biased merely because they are members of an identifiable group,'" distinguished on grounds such as race, religion, ethnicity, or gender. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 115.) On the other hand,

"specific bias" is "a bias relating to the particular case on trial or the parties or witnesses thereto." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1215.)

If a defendant believes peremptory challenges are being used improperly to exclude jurors on the basis of group bias alone, defendant must raise the point in a timely fashion and make a prima facie case. To establish a prima facie case, the defendant must (1) make as complete a record of the circumstances as is feasible; (2) establish the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule; and (3) from all of the circumstances of the case demonstrate a strong likelihood that such persons are being challenged based upon their group association. (*People v. Howard* (1992) 1 Cal.4th 1132, 1153-1154.)

Once defendant has established the prima facie case, the burden shifts to the prosecution to show a neutral explanation related to the particular case to be tried. Exclusion based upon hunches and other arbitrary reasons are permissible, as long as the reasons are not based upon improper group bias. (*People v. Turner* (1994) 8 Cal.4th 137, 164-165.) We presume the prosecution used the peremptory challenges properly and give deference to the trial court's ruling on defendant's *Wheeler* motion. We review the entire record of voir dire to see if the record suggests any grounds upon which the prosecution might reasonably have challenged the excluded jurors. If so, we affirm. (*People v. Turner, supra*, 8 Cal.4th at p. 165.) The grounds specified need not support a challenge for cause. The reasons need only to be genuine, reasonably specific, and race or group neutral; even trivial reasons may suffice. (*People v. Arias* (1996) 13 Cal.4th 92, 136.)

Wheeler motions depend on the trial judge's personal observations made during voir dire, and because such observations often involve subtle and visual assessments incapable of transcription, the trial court's ruling is given considerable deference on appeal. (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409-410 ["the reason a juror is challenged by a party may be patently obvious to everyone in a courtroom, yet not be apparent to someone reading a cold record of [the] trial"].) Our review of the defendant's attempts to establish a prima facie case is not limited to a review solely of counsel's

argument at the time of the motion. We also review the record to determine whether there are no "other circumstances" to support a finding of a prima facie case, and scrutinize the record to see if we can discern any non-discriminatory basis for the challenges. (*People v. Howard, supra*, 1 Cal.4th at p. 1155; *People v. Trevino, supra*, at pp. 408-409.) *Wheeler* error is reversible per se. A "'conviction by a jury so selected must be set aside.' [Citations.]" (*People v. Wheeler, supra,* 22 Cal.3d at p. 283.)

In *People v. Martin* (1998) 64 Cal.App.4th 378, a prospective juror in a prosecution for theft was a Jehovah's Witness who stated that her beliefs would not cause a problem unless she were sitting on a capital case, because she was opposed to the death penalty. Nonetheless, the prosecution exercised a peremptory challenge on the basis that his experience with Jehovah's Witnesses was that they had a hard time with criminal trials because "they couldn't judge anybody at all." (*Id.* at p. 381.) *Martin* held that membership in a religious group could be used to strike a prospective juror, as long as the prosecution explained *how* religion would affect the juror's ability to deliberate. Reasoning that while exclusion on the basis of religion alone would be improper, *Martin* found a detailed explanation of how religious beliefs might impact upon deliberation provided evidence of permissible *specific,* as opposed to *group*, bias. (*Id.* at pp. 383-384.) *Martin* emphasized that "the justification for a peremptory challenge need not rise to grounds for a challenge for cause; the prosecutor need not show *actual* bias." (*Id.* at p. 384.)

Similarly, in *People v. Allen* (1989) 212 Cal.App.3d 306, a church pastor was excluded on a peremptory challenge when she conceded her religious views might interfere with her ability to deliberate. (*Id.* at p. 315.) During the voir dire examination, she had been asked whether, "based upon your position as a pastor and your feelings about police, *that in some fashion in deliberation you might have a tendency to bring out your abilities as a pastor to try to put forth your views"* and whether she felt "that . . . in a religious sense, that you might attempt to show people in a religious vein the propriety of a particular position, so to speak?" (*Id.* at p. 315, fn. 6.) *Allen* held her positive response to both questions was evidence of permissible specific bias. (*Id.* at p. 316.)

In the instant case, the prosecution established that it felt Juror No. 46 would not deliberate properly based upon the combination of her religious views *and* her position at the men's jail, where she stated she came into contact with gang members. Juror No. 46, although she was a chaplain (or an investigator, the record is unclear), stated she did not belong to any particular groups and did not admit affiliation with any particular church. Thus, it was reasonable for the prosecution to conclude her ministering to gang members at the jail might improperly influence her in the instant case, which involved gang members. The record demonstrates permissible *specific*, rather than *group*, bias, and we find no error.

C. The Trial Court Improperly Short-Circuited The *Wheeler* Requirements

Even though the court properly ruled as to Juror No. 46 as an individual juror, it erred in the manner in which it applied *Wheeler*. After the three challenges, and the defense objection, the trial court, without waiting for the prosecutor to give any reasons, stated it could understand two of the challenges, but not defendant's challenge as to Juror No. 22. The court then stated Juror No. 22 could be discussed later even though there had been no objection about Juror No. 22. However, the court then declared a prima facie case against Juror No. 42, and the matter was argued. The prosecutor was never called on to explain the basis for the other two challenges (Juror Nos. 2 and 25). This violated the dictates of *Wheeler*.

We recently stated *Wheeler* and *Batson* protect a defendant's constitutional right to be tried by a representative jury. A *Wheeler* motion challenges the selection of a jury, not the rejection of an individual juror; the issue is whether a pattern of systematic exclusion exists. (*People v. Gore* (1993) 18 Cal.App.4th 692, 705.) Accordingly, once the trial court has found a prima facie case of improper use of peremptory challenges to exclude jurors based on perceived group bias, the burden shifts to the prosecutor to provide race-neutral explanations for all challenges involved and for the court to evaluate the prosecutor's explanation in light of the circumstances of the case as then known. (*People v. Fuentes,* (1991) 54 Cal.3d 707, 715 ["every questioned peremptory challenge must be justified"]; *People v. Gray* (2001) 87 Cal.App.4th 781, 789 [based on "facts

showing there was no apparent reason to exclude at least one of the three potential jurors other than his status as an African-American male," prosecutor should have been asked to "explain[] why he excluded every African-American male juror"]; *People v. Gore, supra*, at p. 705 ["trial court should have considered the motion as to all seven challenged Hispanic prospective jurors"]; *People v. McGee*, *supra,* 104 Cal.App.4th at p. 570.)

Here, as in *McGee*, because the trial court short-circuited the proper procedure for a *Wheeler* motion, we cannot determine if the prosecutor engaged in an improper group bias. Even though it has been almost two years since the voir dire in this case, this case was a death penalty case and it is likely counsel and the court paid close attention to, and are more likely to remember, the specifics of voir dire than they would in a less serious cases. (*See People v. Gore, supra*, 18 Cal.App.4th at p. 706.) Accordingly, as in *McGee*, and *Gore*, the matter will have to be remanded for a hearing to have the prosecutor explain race neutral reasons for each of his challenges. After hearing those reasons, the court must then determine the validity of those challenges based upon the entire record. (*Batson v. Kentucky, supra*, 476 U. S. at pp. 96-97; *People v. McGee*, *supra*, 104 Cal.App.4th at pp. 573-574; *People v. Gore, supra.* 18 Cal.App.4th at p. 706.) If the trial court determines the passage of time has made it impossible for the prosecutor to remember why he made certain challenges or for the court to adequately evaluate those reasons, the judgment must be reversed and a new trial granted. (*People v. McGee, supra*, 104 Cal.App.4th at pp. 573-574; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125-1126; *People v. Garcia* (2000) 77 Cal.App.4th 1269, 1282.)

III. SUFFICIENCY OF THE EVIDENCE, WITNESS-KILLING MOTIVE.

Defendant challenges the jury's finding of a special circumstance that he killed Wells because Wells was a witness within the meaning of Penal Code section 190.2, subd. (a)(10). Although the prosecution's theory was that Wells was killed to prevent him from giving testimony, there was no evidence that defendant knew Wells had seen or been told anything about the murder. Therefore, the murder could not have been "for the purpose of preventing his or her testimony," as required by the statute. (See *People v.*

Weidert (1985) 39 Cal.3d 836, 852-853; *People v. Stanley* (1995) 10 Cal.4th 764, 799-800.)

In particular, defendant argues that the theory of liability in this case that Wells was a witness and killed because "he knew too much" is too broad for the language of the statute, and would support a finding of witness killing whenever someone is killed who had knowledge of a crime. To the contrary, defendant argues, the statute requires that the killer must be aware that his intended victim knows about some prior crime, and motive cannot be inferred from witness killing alone. Otherwise, if the defendant kills some victim without knowing that the victim has some knowledge of the prior crime, it cannot be "for the purpose of preventing his or her testimony." Defendant points to *People v. Stanley* in which the court affirmed that motive is an element of the witness murder special circumstance; the murder must be motivated by a desire to prevent testimony. (*People v. Stanley, supra,* 10 Cal.4th 764 at pp. 790-800; see also *People v. Sanders* (1990) 51 Cal.3d 471, 517-518 [pending proceedings not necessary for application of special circumstance].) Defendant also relies on reasoning in *People v. Weidert* that a homicide is more culpable if motivated by a desire to eliminate a potential witness. Hence, a witness-killing motive cannot be inferred solely from the killing of a witness. (*People v. Weidert, supra,* 39 Cal.3d 836 at p. 857.) Lastly, defendant argues that merely because there is another, valid ground for a special circumstance (multiple murder), we must analyze his argument because if his conviction for the Wells murder is later reversed (in this or a habeas proceeding), then the multiple murder circumstance will fail.

Respondent points out that defendant was eligible for another special circumstance finding, i.e., multiple murder, and only one special circumstance finding is necessary. Unless the defendant can claim prejudice at the penalty phase, the issue raised is moot. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1101-1102.) Because defendant got the lesser of the two available penalties (death versus life without parole), there was no prejudice. In any event, even assuming the issue is not moot, the finding is supported by sufficient evidence because both defendant and Cooks killed Boyd and less than one month later,

both men killed Wells, who had been at Boyd's murder scene moments after the murder occurred. Wells also had knowledge of the earlier attempt to kill Boyd.

Penal Code section 190.2, subdivision (a) provides in relevant part that, "The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: . . . [¶] . . . [¶] (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness. . . ."

The elements of a witness killing special circumstance are "'(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed.'" (*People v. Benson* (1990) 52 Cal.3d 754, 784.) The special circumstance applies to the intentional killing of a person who witnessed a crime prior to and separate from the killing for the purpose of preventing the witness from testifying. (*People v. Beardslee* (1991) 53 Cal.3d 68, 95.) In reviewing a challenge to a special circumstance finding, we consider whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the special circumstance beyond a reasonable doubt. (*People v. Benson, supra,* at p. 785.)

In *People v. Stanley, supra,* 10 Cal.4th 764, defendant shot his wife. The evidence at trial established he was attempting to gain custody of his two children from a prior marriage, but had burned his current wife's house and her car. The couple was estranged at the time of the shooting, and because it would harm his chances in the child custody proceeding, defendant had been pressuring her to drop charges against him. (*Id.* at pp. 778-779.) Defendant argued he would have killed his wife "in any event for other reasons," and thus the witness-killing special circumstance did not apply. (*Id.* at p. 800.) *Stanley* held that multiple purposes in a killing did not prevent the witness-killing special

circumstance from applying, because to find otherwise would reward more culpable defendants. (*Id.* at p. 800 ["it is not a defense to the special circumstance allegation that [defendant] had another purpose as well"].)

In *People v. Benson, supra,* 52 Cal.3d 754, defendant kidnapped a woman and her three children for the purpose of molesting the two daughters, ages three and four. Prior to molesting the girls, he killed the mother and her infant son. (*Id.* at pp. 766-767.) After molesting the girls for a day, he killed both of them. (*Id.* at pp. 767-768.) *Benson* found the witness-killing special circumstance was not supported by the evidence, because the murder of the mother and the two girls was an "integral part[] of a single continuous criminal transaction against the entire family." (*Id.* at p. 785.)

Defendant is correct there is a defined mens rea element to the witness-killing special circumstance, and that evidence of such mens rea is absent. Beyond the fact that Wells was at the Boyd crime scene and knew of the plan to kill Boyd, there is no other evidence that the motive in the Wells shooting was to prevent his testimony. This is insufficient. (Cf. *People v. Stanley, supra,* 10 Cal.4th at pp. 778-779; *People v. Benson, supra,* 52 Cal.3d at p. 785.) There is no evidence aside from the killing that the motive was to silence Wells. Defendant's motive in shooting Wells easily could have been a bad drug deal, dispute over weapons, or some other gang related dispute. However, because the evidence amply supports the multiple murder special circumstance (we found no grounds for reversing the Wells slaying), we find no prejudice. (Pen. Code, § 190.2, subd. (a)(d); *People v. Bittaker, supra,* 48 Cal.3d at pp. 1101-1102.)

IV. FAILURE TO INSTRUCT ON ACCOMPLICE TESTIMONY

Defendant argues that the trial court should have instructed the jury[20] sua sponte that they needed to determine whether Russell was an accomplice to the Boyd murder whose testimony required corroboration and should be viewed with caution. Days before the Boyd murder, Russell assisted defendant and Cooks in attempting to lure Boyd to a

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[20] Defendant argues the following instructions should have been given: CALJIC Nos. 3.11, 3.12, 3.18 and 3.19.

location where he could be killed, making Russell a conspirator, subject to prosecution for the identical offense committed by defendant. Russell was a crucial witness against defendant, and his testimony and out-of-court statements were not corroborated. Therefore, the failure to instruct was prejudicial. Respondent contends the absence of the accomplice instructions was invited error; and even if not, the court was not under any duty to instruct because of sufficient evidence of defendant's guilt and ample evidence that Russell's testimony should be viewed with suspicion.

A. Factual Background.

While jury instructions were being proposed and considered, a colloquy occurred in which the court inquired whether the defense required accomplice instructions, and advised defense counsel that it was amenable to accomplice instructions. Counsel for defendant stated that it did not believe Russell was an accomplice and that accomplice instructions would not be necessary. The following discussion took place:

The Court: All right. So we're defining accomplice in 3.10. . . . [¶] [Defense Counsel]: I disagree with you, Your Honor. [¶] I don't think that given the testimony of Monte Russell or given even the taped statement of Monte Russell he would define himself as an accomplice or that the jury could find that he is an accomplice. [¶] Because there is nothing that he said that he did that led to the murder of Michael Boyd. [¶] The Court: . . . I think that the idea behind the accomplice instruction would be, of course, to make sure that someone is not getting a benefit by laying out others that he participated in the crime with. [¶] Monte Russell's testimony, as I remember it was -- I mean, if you take not what he testified to here, but what he had said on prior occasions, is that he clearly was involved in setting up Boyd initially, but that setup did not work. That he was then intending to warn Boyd and before he could warn him, Boyd was killed. [¶] Now if you ask for accomplice instructions, I would be inclined to allow the jury to make the decision as to whether Russell fits or doesn't fit as an accomplice. [¶] I would not declare him to be an accomplice as a matter of law. I think it is a question of fact for the jury to decide. [¶] And I would let the accomplice instructions go to the jury. And that would include a whole number of instructions here that [the prosecution] pulled,

conspiracy instructions as well, that the testimony of an accomplice must be corroborated and what it means to have sufficient corroboration. [¶] Now, all of those instructions go away if you agree that Russell was not an accomplice. [¶] [Defense Counsel]: I agree. [¶] . . . [¶] [The Prosecution]: Your Honor, I would think the record should be clear, that [defense counsel] is making the decision, it is an informed legal decision and tactical choice that he is making in this case. [¶] The Court: I think it is very clear. And I don't know what else we can do about it. [¶] I mean, he is the trial lawyer. He is a skillful lawyer. I have been impressed with the way he has conducted the defense in this case. And I think he is asking the court -- and I think I made it clear that I would be inclined to give an accomplice instruction as you have asked for them. [¶] [But] [h]e is asking that we not give them and based upon the defense request, I am deciding not to give them. [¶] I think it is an open question. I think it is something that the jury could be required to decide. [¶] But he's not -- he is saying let's not burden the jury with that issue. And it is his request that they not be given."

B. Discussion

1. What is an Accomplice?

Penal Code section 1111 defines an accomplice as a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. (Pen. Code, § 1111; *People v. Balderas* (1985) 41 Cal.3d 144, 194; *People v. Sully* (1991) 53 Cal.3d 1195, 1227.) In order to be chargeable with the identical offense, the witness must be considered a principal under Penal Code section 31, which defines principals to include "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (Pen. Code, § 31; *People v. Fauber* (1992) 2 Cal.4th 792, 833.) An aider and abettor may be chargeable as a principal, but liability as a principal depends on whether he or she promoted, encouraged, or assisted the perpetrator and shares the perpetrator's criminal purpose. The aider and abettor must do more than give assistance with knowledge of the perpetrator's criminal purpose. (*People v. Sully, supra,* 53 Cal.3d

at p. 1227.) "'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) Presence at the scene of the crime, companionship, and conduct before and after the offense, however, are factors which may be considered in determining whether a person was an aider and abettor. However, mere presence at the scene of a crime is not sufficient to establish aiding and abetting its commission, nor is knowledge of, but failure to prevent the crime sufficient to do so. (*Ibid.*) The inquiry is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures. (*Id.* at p. 411.)

The burden is on the defendant to prove a witness is an accomplice by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 962.) In this context, "'preponderance of [the] evidence'" means evidence that has more convincing force and the greater probability of truth than that opposed to it. (See *People v. Superior Court* (1971) 18 Cal.App.3d 316, 319, fn. 4.) Whether a witness is an accomplice is only a question for the jury if there is evidence from which the jury could reasonably find the witness to be an accomplice. (*People v. Howard* (1992) 1 Cal.4th 1132, 1174; see also *People v. Williams* (1997) 16 Cal.4th 635, 679 [whether witness is an accomplice is a question for the trier of fact, unless the "facts regarding the witness's criminal culpability are 'clear and undisputed.'"].)

2. What is Sufficient Corroboration?

Section 1111 provides, in pertinent part, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Thus, the testimony of an accomplice "has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated." (*People v. Tewksbury, supra,* 15 Cal.3d at p. 967.)

Accomplice testimony must be corroborated by other evidence tending to connect the defendant with the commission of the offense. (Pen. Code, § 1111.) Adequate corroboration of an accomplice's testimony need not in itself be sufficient to convict the defendant; it may be slight and entitled to little consideration when standing alone. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Douglas* (1990) 50 Cal.3d 468, 507.) Rather, it must tend "to connect the defendant with the crime so that the jury may be satisfied that the accomplice is telling the truth." (*Id*. at p. 506, fn. omitted.) The corroborating evidence may be circumstantial and may consist of a defendant's conduct or statements. (*Id.* at p. 507.) It thus may be evidence which shows a consciousness of guilt. (*People v. Hurd* (1970) 5 Cal.App.3d 865, 875.)

CALJIC No. 3.12 provides, "To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the crime which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the crime charged. [¶] However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the crime charged, or that it corroborate every fact to which the accomplice testifies. [¶] In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the crime. [¶] If there is no independent evidence which tends to connect defendant with the commission of the crime, the testimony of the accomplice is not corroborated. [¶] If there is independent evidence which you believe, then the testimony of the accomplice is corroborated." (CALJIC No. 3.12.)

3. *The Failure to Instruct Is Prejudicial Only Where the Record Lacks Sufficient Corroboration.*

An instruction on accomplice testimony is required sua sponte, even where the accomplice is not a prosecution witness.[21] (See *People v. Box* (2000) 23 Cal.4th 1153, 1209 [accomplice instruction must be given if codefendant testifies]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [sua sponte duty regardless of who calls the accomplice to testify].) The instruction requires that to the extent an accomplice gives testimony that tends to incriminate the defendant, it should be viewed with caution and given the weight the jury thinks it deserves after examining it with care and caution. (*People v. Box*, *supra*, 23 Cal.4th at p. 1208.) The instruction is required because an accomplice's testimony is subject to the taint of improper motive, that is, that the accomplice may promote his own self-interest by inculpating the defendant. (*Id*. at p. 1209.) Although an accomplice instruction was requested in *People v. Box,* the court stated that there was no persuasive reason to treat a codefendant who testifies differently from an accomplice called to testify by the prosecution. (*Id.* at p. 1209.)

However, the failure to instruct on accomplice testimony pursuant to Penal Code section 1111 is harmless where there is sufficient corroborating evidence in the record. Corroboration may be established entirely by circumstantial evidence, and may be slight and entitled to little consideration when standing alone. "'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged."'" (*People v. Zapien* (1993) 4 Cal.4th 929, 982.)

"If there is ample evidence corroborating the accomplice's testimony, an error in failing to give accomplice instructions is harmless." (*People v. Sully, supra,* 53 Cal.3d at

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[21] Because we must address the instructional issue, we do not apply the doctrine of invited error, as urged by respondent. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1057.)

p. 1228.) "It is only required that the evidence '"'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the [accomplice] is telling the truth.'"' [Citation.]" (*People v. Miranda* (1987) 44 Cal.3d 57, 100.) "[I]f there [is] insufficient corroboration, reversal is not required unless it is reasonably probable a result more favorable to the defendant would have been reached. [Citation.]" (*Id*. at p. 101.) Evidence indicating the accomplice's testimony is untrustworthy may render harmless the trial court's failure to instruct concerning the requirement an accomplice's testimony should be viewed with distrust. (*People v. Sully, supra,* 53 Cal.3d at p. 1228.) Failure to instruct that an accomplice's testimony must be viewed with caution is reversible error when it is reasonably probable that, had the jury been given the instruction, the jury would have reached a result more favorable to the defendant. (*People v. James* (1987) 196 Cal.App.3d 272, 284-285.)

4. There is Sufficient Corroborating Evidence in the Record.

The record contains sufficient evidence to corroborate the testimony of Monte Russell that defendant killed Boyd. Kamisha Daniel told Mia Boyd that defendant told her he shot Boyd. (*People v. Williams. supra,* 16 Cal.4th at p. 680 [defendant's admission can constitute corroboration for purposes of accomplice testimony].) In addition to this direct evidence of defendant's culpability, there is circumstantial evidence in the form of ballistics evidence (two guns were used, as defendant told Daniel); Scott's testimony that Boyd used her phone because Mia Boyd did not have a phone (possibly to return the page where he was set up by defendant, Cooks and Russell); and the pager displayed the numbers "187," for Penal Code section 187, defining murder.

V. CORRECTION OF CUSTODY CREDITS.

Defendant contends the trial court erred in calculating his custody credits because it applied the 15 percent limitation of Penal Code section 2933.1, which was not effective until September 21, 1994, after the crimes were committed. He contends the application of this provision to his sentence violated the ex post facto clauses of the California and federal constitutions. Respondent concedes error, and asks us to correct the abstract of judgment to provide that defendant receive the one-third presentence custody credits of

the applicable statute, Penal Code section 2933. Respondent also asks us to correct the judgment to reflect the imposition of consecutive high terms of five years for the gun use enhancements on each count pursuant to Penal Code section 12022.5, subdivision (a)(l).

We can resolve the issue without a constitutional analysis by reference to the plain language of the statute. Penal Code section 2933.1, subdivision (d) provides that section 2933.1, enacted September 21, 1994, as an emergency measure, "shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative." (See *People v. Camba* (1996) 50 Cal.App.4th 857, 862.) For offenses committed prior to that date, Penal Code section 2933 applies. (*Id.* at pp. 862-863.)

The version of Penal Code section 2933 in effect at the time of the crimes provided for a limit of one-third of presentence custody credits. Subsection (e) provides that "[a]ny person sentenced to a term in the state prison under subdivision (a) of Section 190 shall be eligible only for credit pursuant to subdivisions (a), (b), and (c) of Section 2931." The relevant subsection, subsection (a), provides for a custody credit of one-third.

Thus, the abstract of judgment must be corrected to reflect that defendant is entitled to 574 days conduct credit based upon presentence custody of 1,148 days. In addition, the abstract of judgment should be corrected to reflect the imposition of consecutive high terms of five years for the gun use enhancements on each count pursuant to Penal Code section 12022.5, subdivision (a)(l).

DISPOSITION

The judgment of the superior court is reversed and the matter is remanded to the Superior Court to allow the trial court to conduct a new hearing on the *Wheeler* issues. Initially, the court must determine whether it and the attorneys can adequately address the issues at this late date. If not, the court is to order a retrial. If it can address the issues, it must first consider if the prosecutor's reasons for excusing each of the African-Americans that were the subject of the first *Wheeler* motion were constitutionally valid. If it determines that the reasons given by the prosecutor for the first *Wheeler* motion are valid, then it must reconsider the second *Wheeler* motion taking into account all of the

evidence it has heard in the first *Wheeler* motion in order to determine if there has been a pattern of systematic exclusion.

If the court grants any of the *Wheeler* motions, it shall order a new trial. If the court denies the *Wheeler* motions, judgment shall be reinstated and the abstract of judgment corrected to reflect defendant is entitled to 574 days conduct credit and that, as to each count, defendant receive consecutive five-year high terms for the gun use enhancement.

CERTIFIED FOR PARTIAL PUBLICATION

MUÑOZ (AURELIO), J.*

We concur:

JOHNSON, Acting P. J. WOODS, J.

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