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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH BLACKNELL,

Defendant and Appellant.

A135721

(Contra Costa County
Super. Ct. No. 51108166)

Defendant Joseph Blacknell appeals from his conviction on 20 counts of criminal conduct arising from his association with a Richmond street gang. He challenges the sufficiency of the evidence and the admissibility of eyewitness, toolmark, and gang expert testimony. He asserts the trial court should have severed three of the counts related to a March 2009 killing from those related to a September 2009 crime spree. Defendant also asserts his sentence to life without parole plus an additional 199 years eight months to life was cruel and unusual, especially given he was 18 years old at the time of the offenses. Except as to his conviction on count 22, receipt of stolen property, and counts 3, 14, and 21, street terrorism, we affirm.

BACKGROUND

In a single information, the Contra Costa County District Attorney charged defendant with 22 crimes arising from the March 10, 2009, killing of Marcus Russell and a spree of mayhem, theft, and violence six months later, on September 13, 2009.

In connection with the murder charge (count 1, Pen. Code, § 187),¹ the district attorney alleged enhancements based on defendant intentionally discharging a firearm (§ 12022.53) and committing the crime for the benefit of a street gang, the Easter Hill Boys (§ 186.22, subd. (b)(1)). The district attorney also alleged the special circumstances that the murder was done from a motor vehicle (§ 190.2, subd. (a)(21)) and for the benefit of the Easter Hill Boys Gang (§ 190.2, subd. (a)(22)). In the two other counts related to the murder, defendant was charged with shooting at an occupied motor vehicle (count 2, § 246), and street terrorism (count 3, § 186.22, subd. (a)). Count 2 incorporated the same firearm and gang enhancements as the murder count.

As for the September 13 crime spree, defendant was charged with an overarching conspiracy of murder, carjacking and assault (count 4, § 182, subd. (a)(1)). In addition, he was charged with unlawfully driving or taking two automobiles, a Honda Odyssey and a Maxima (counts 5 & 18, Veh. Code, § 10851, subd. (a)); attempted murder of Elliot Lawson, Devonte Bernstine, J'nya Buckley, and Fred Buckley (counts 6–9, Pen. Code, §§ 187, 664); shooting at an occupied motor vehicle (count 10, § 246); two carjackings (counts 11 & 15, § 215, subd. (a)); attempted premeditated murder of Lowell Thomas and Sharroy Moore (counts 12–13, §§ 187, 664); street terrorism (counts 14 & 21, § 186.22, subd. (a)); second degree robbery of two individuals (counts 16–17, § 211, 212.5, subd. (c)); resisting an executive officer (count 19, § 69); resisting arrest while brandishing a deadly weapon (count 20, § 417.8); and receiving stolen property (count 22, § 496, subd. (a)). Many of these charges were alleged with a criminal street gang enhancement or weapons enhancements.

A jury convicted defendant of all charges, except for two counts of attempted murder—those related to Lawson and Bernstine. For the charges related to the killing of Marcus Russell, the jury found true the gang allegations and that a firearm had been used in the crimes, but could not agree on whether defendant had personally used or

¹ All further statutory references are to the Penal Code unless otherwise indicated.

discharged a firearm. As the gang allegations in the other counts, the jury found them true.

DISCUSSION

Substantial Evidence

Defendant contends no substantial evidence supports his convictions of counts 1–14 and 21–22. We first recount and analyze the evidence related to the March 2009 crimes, then address the September 2009 crimes, and then discuss the three street terrorism charges.

March 2009

Evidence

Counts 1–3 concern the March 10, 2009, murder of Marcus Russell. On that day, Russell and a woman, Jamesha Thompson, were driving east on the 580 freeway, coming from a photo shoot in Richmond. Russell was a rapper, and Thompson had agreed to pose for a new album cover. They were in Russell’s grandmother’s burgundy Nissan, a car Russell was known to drive. Thompson, sitting in the front passenger’s seat, saw a red van pull close on the driver’s side. While talking to Russell, she saw a gun pointed out the van’s window. Marcus noticed her expression and turned to look, and then the shooting began. Russell died from gunshot wounds. Thompson, though shot, survived.

Immediately after the shooting, Thompson told police she saw two Black males, with complexions darker than hers, in the van but said she could not identify them, despite the police showing her photographs from MySpace of defendant and others. In a phone call with Russell’s sister a few days later, however, Thompson said she could identify defendant as one of people responsible. According to the sister, Thompson said “it was [defendant].” According to Thompson, she did say it was defendant, but also noted the police and everybody were already on to him and the police had come by and tried to make her point him out. Russell’s sister asked why Thompson was not coming forward herself, and Thompson said she was scared, and the conversation got heated.

Indeed, Thompson fled the state fearing for her safety. It was not until 18 months later that police again reached out to Thompson and, after cajoling her in person and asking her to put herself in Russell's sister's shoes, persuaded her to name defendant and his friend, Scooter Do.

Defendant was no stranger to Thompson. Thompson knew him from when she was 10 and was, for a year or two, a cheerleader for defendant's Junior Pee Wee football team. She had also met him, when about age 12 or 13, at a birthday party for one of her cousins with whom defendant was friends. At the party, she recognized defendant from football. She did not see defendant again until the shooting, when she had just turned 19. Thompson had also known Scooter Do as defendant's friend from Easter Hill in Richmond; she had met him five to 10 times while growing up.

At first, Thompson told police only that she heard defendant was involved but she had not seen him. Then, later during the interview, Thompson named defendant and a man who goes by "Scooter Do," but did not say who was the shooter. Thompson testified at trial that, during this conversation with police, she "felt about the same" about her level of certainty as to each. She thought she had seen both men in her nightmares about the crime, which she had after being shown photos of both by the police during initial interviews. When the police followed up a few days later by telephone, Thompson repeated she was sure about defendant, and that he was the shooter, but volunteered that, in the meantime, she had realized she was probably mistaken about Scooter Do, because she recalled he had been in jail at the time and really only remembered the other man having distinct dreadlocks that made him look like Scooter Do.

At trial, Thompson said she had known all along defendant had shot her and Russell. Despite the mix up with Scooter Do, Thompson testified she was sure about defendant and nothing could change her mind on that point. He was the "one right there, and I saw him."

After talking with police, Thompson felt better about her conscience, if not about her personal safety. At trial, she remained scared and broke down crying.

Russell's sister testified Russell ran with the "Backstreets," got into fights and accumulated enemies, particularly from Easter Hill, but in recent years had devoted himself to his music and his daughter. His godfather also testified Russell was with the Backstreets. The prosecution's gang expert linked defendant with the Easter Hill Boys, a rival of the Backstreets. Defendant's MySpace pages suggested he was eager to avenge the death of his comrade Sean Melson, supposedly killed by a gang allied with Backstreets. During a police interview, defendant stated he was okay in Easter Hill, but would be shot if he went to Central Richmond.

Just a few days before the shooting, Russell's friend saw him point out a red "minivan" or "family van" on three occasions, a van which made Russell scared and which his friend recognized as belonging to defendant's mother and being driven, at times, by defendant. The night before the shooting, Russell's mother saw a red minivan parked near Russell's grandmother's house, and watched it drive away without turning its lights on. She also identified the van as belonging to defendant's mom, who lived nearby. (The parties stipulated defendant's mother's van was *not* used in the shooting.)

The shooting was reported about 4:05 p.m. and occurred near Bayview on interstate 580. Cell phone records for defendant's cell phone show it "pinged" (or was likely nearest) a tower at 3:51 p.m. near the Richmond-San Rafael Bridge (about 8.6 miles from the shooting) and a tower at 4:06 p.m. near Emeryville.

Analysis of Counts 1–2

"[I]n reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt." (*People v. Young* (2005) 34 Cal.4th 1149, 1180 (*Young*)). The "court resolves neither credibility issues nor evidentiary conflicts," which remains "the exclusive

province of the trier of fact.” (*Id.* at p. 1181.) “Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.” (*Ibid.*)

Defendant concedes the cell phone evidence, testimony about the red van surveillance, and inconsistencies in defendant’s alibi all might offer some corroborative evidence of defendant’s guilt. Defendant, however, claims the only evidence that could support his conviction was Thompson’s eyewitness identification, and he claims this identification was so problematic and violative of due process that his conviction for counts 1 and 2 (murder and shooting at an occupied vehicle) cannot stand. He takes issue with the supposed “single photo lineup” (showing Thompson photos from MySpace and asking her if she recognized anyone) and highlights Thompson’s dream-infused recollections of the crime that led her to wrongly finger Scooter Do. He points out that while Thompson told police the van occupants had much darker skin than her, another witness who believed he saw defendant during the September 2009 crimes testified defendant had a light complexion.

The initial problem for defendant is he has waived any objection to Thompson’s eyewitness testimony. He did move in limine to exclude identification testimony, but the extent of that motion was, quoting in full, to “[e]xclud[e] any pretrial identifications on the grounds that they were the product of suggestive photo lineups.” At the hearing on the motion, defendant challenged identifications by witnesses *other than Thomas* based on three lineups which were shown to them, *not Thomas*. The trial court was never timely asked to rule on the reliability of Thompson’s testimony, and defendant offers no defense of that omission. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989 [“Defendant’s failure to assert a timely objection results in a waiver of the [identification] issue.”].)

Even if the admissibility of Thompson’s identification were properly before us, we would conclude the trial court did not err in admitting it. “ ‘[T]o determine whether the

admission of identification evidence violates a defendant's right to due process of law, we consider (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.' [Citation.] 'We review deferentially the trial court's findings of historical fact, especially those that turn on credibility determinations, but we independently review the trial court's ruling regarding whether, under those facts, a pretrial identification procedure was unduly suggestive.' ” (*People v. Alexander* (2010) 49 Cal.4th 846, 901–902.)

Assuming without deciding the police's conduct in showing Thompson various MySpace photographs that included defendant was “suggestive” or “unnecessary” (see *People v. Ochoa* (1998) 19 Cal.4th 353, 412 [even a single photo of an unknown person not necessarily an unduly suggestive lineup]; *Hudson v. Blackburn* (5th Cir. 1979) 601 F.2d 785, 788 [“a single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion”]), we conclude Thompson's identification was reliable enough to present to the jury, given the totality of the circumstances.

First, Thompson was identifying a person she already knew, not a stranger out of a lineup. Thus, she had an independent source or origin for her identification aside from any photographs she was shown. (*People v. Yokely* (2010) 183 Cal.App.4th 1264, 1276 (*Yokely*) [independent source can trump suggestive photo lineup]; *Jones v. Barnes* (1983) 463 U.S. 745, 747, fn. 1 [“This identification, which took place in a one-on-one meeting arranged by the police, was the subject of a pretrial hearing. The trial judge found it unnecessary to rule on the validity of that identification. He concluded that [the] . . .

subsequent in-court identification was based upon an independent source, since Butts had known respondent for several years prior to the robbery.”]; *People v. Cuevas* (1995) 12 Cal.4th 252, 276–277 (*Cuevas*) [evidence that witness knew the defendant and had made, but recanted, an out-of-court identification for fear of gang retaliation, was substantial evidence of identity].)

Second, Thompson expressed continued certainty about defendant while quickly conceding error about Scooter Do. Her knee-jerk, dream-infused accusation of Scooter Do was certainly troubling, but having confronted the error, Thompson was reminded that her senses were fallible and yet she remained sure of defendant’s identity through trial. This highlights a further point: Thompson appeared to sincerely believe she faced grave danger by testifying, and those risks would not be worth taking if the testimony she were giving would be false or if she had doubts. (See *Yokely, supra*, 183 Cal.App.4th at pp. 1275–1276, 1278 [at a suppression hearing, the eyewitness said “he told police he was not certain about the photographic identification because he was scared—he had heard about what happened to people who testified against someone accused of a drive by shooting, and he ‘didn’t want to be that individual.’ The trial court found that explanation to be credible” and rightly denied suppression.]; *Cuevas, supra*, 12 Cal.4th at pp. 276–277 [gang culture frowns on testifying, even against rivals]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1123 (*Rodrigues*) [fear explains initial failure to identify]; see also *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368 [“A witness who testifies despite fear of recrimination of any kind by anyone is more credible because of his or her personal stake in the testimony.”], italics omitted.)

Third, Thompson, though she did not get a prolonged look, did get a look at defendant before the shooting began, and her attention was certainly rapt. Any discrepancy between how she and another witness perceived defendant’s skin tone does not sufficiently undermine her identification such that it had to be excluded. Also, though the discrepancy is one appellate counsel observed, no one thought to question

Thompson about it during trial, despite the opportunity. And at last, that the jury found defendant guilty of murder but could not agree on whether defendant personally shot at Russell or Thompson does not undermine the identification of defendant as present in the van. Thompson was clear about defendant's involvement, but her testimony regarding who actually fired shots was at times clear and at other times muddled. That the jury was convinced of defendant's involvement but unsure on the personal use allegation was understandable.

Accordingly, the admission of the identification testimony was appropriate, and it provided substantial evidence supporting defendant's conviction on counts 1 and 2. (See *Young, supra*, 34 Cal.4th at p. 1181 ["No inherent improbability appears in the identification testimony"].)

September 2009

Evidence

We now turn to the crime spree six months later. The September 13 spree began bright and early when a blue Honda Odyssey minivan was stolen from the driveway of a home in Richmond before 6:00 a.m. that morning.

Shots were fired around 8:45 a.m. at the Pullmans, a Richmond apartment complex. Devonte Berstine and Elliot Lawson were struck, but neither said where the shots came from. A woman living in the complex heard the shots and, while trying to get safely inside, saw a blue van drive out of the complex gate. A passenger was wearing a ski mask and black clothing. The woman had noticed the blue van earlier while taking a morning walk and found it peculiar, but she was not sure of its make or model.

At around 11:00 a.m., Fred Buckley was shot several times while driving past 8th and Adeline Streets in Oakland. His niece J'nya Buckley, age ten, was in the car at the time. Police found 29 brass cartridge casings at the scene. Fred Buckley did not see any assailant and did not know why he was targeted. A security camera captured the shooting, however, and showed the perpetrators jumping out of a blue van.

Later, around 1 p.m., Leonard Barnes drove his 2005 silver Chevy Malibu through the intersection of 8th and Wood. He turned left onto Wood and parked in front of a park. A Black man came up, stated he had a big gun, and demanded the car. Barnes gave it to him. He saw the gun (which looked like a .9-millimeter automatic pistol) and a black hoodie and blue jeans, but could not see the face of the man who took the car. He stated the carjacker and at least two other Black males had parked in a blue van directly behind his car. Barnes saw his car and the blue van drive off. He later told the police the van was a newer model blue Honda.

The blue van that had been stolen earlier in the morning was found abandoned about five minutes from the site of the Barnes carjacking. Police reports suggest it was discovered in the afternoon of the 13th around 2:15 p.m., though the witness who found the car later testified to the morning of the 14th. The initial police report taken on the 13th and signed by the witness suggests that after the blue van had been ditched, a Black male walked up to and left in a newer model gray car. Police found two .9-millimeter casings in the van. When the van owners later recovered their vehicle, the back window was shattered and the back bumper, right-side door, and left back fender were damaged. They also found a third casing, which they turned over to police.

At around 2:30 p.m. on the 13th, police learned of another shooting—this one near Harbor and Chanslor in Richmond. An officer found Lowell Thomas shot and in critical condition. Thomas and Sharroy Moore had been driving along in a purple Buick Riviera when gunmen opened fire on the vehicle, shooting Thomas, causing a collision, and causing glass to break, injuring Moore. A witness saw four men emerge from a silver or grey vehicle stopped alongside the purple Buick. To one unfamiliar with cars, the perpetrators' car "looked like one of those Toyotas." Three witnesses saw the men approach and shoot into the Buick. One had a MAC-10 submachine gun, one, who apparently did not shoot, carried a rifle-like weapon (one witness thought it was an AK47), and the others had guns characterized as pistols. All wore black hooded

sweatshirts and masks. The victims ran from the car. Moore was chased into a house and the gunman, back in the car, fired more shots and then drove off.

Around 3:15 p.m., Curlee Jones was talking to people in front of a store near 86th and International when the car he had been driving, a black Nissan Maxima owned by his girlfriend, Teresa McDonald, was stolen. He had told police that four Black males drove up in a gray or white car and took the Nissan from him at gunpoint. But during his trial testimony, he denied this, saying the car had simply been stolen out from under his nose without the use or threat of force. Jones's friend, Darren Armstrong, was waiting in the passenger seat of the Nissan while Jones was talking. Armstrong's trial testimony corroborates Jones's initial police report. Armstrong saw a white Chevy Malibu pull up (he was sure of his car knowledge) with four Black men, all wearing hoodies. Three got out. Two searched Jones for valuables and a third pointed a .45 at Armstrong and demanded everything he had. After Armstrong handed over his phone and some money, his assailant got into the Nissan's driver seat and commanded Armstrong, at gunpoint, to get out of the car. Armstrong complied, and the men left, taking both cars.

Armstrong identified one of the assailants, the "light-skinned" one, as defendant. He did so in open court during a pretrial hearing and at trial. He also had picked defendant out of a photographic lineup shortly after the incident. He had told a defense investigator, however, that he had no idea who carjacked him and had not really identified anyone in the lineup as a person involved—he just picked someone so he could go home. Armstrong stood by his identification at trial and claimed he lied to the defense investigator because he thought that would make the situation go away faster.

Police investigating the taking of the Nissan Maxima entered the car into a stolen car registry at approximately 4:45 p.m.

Around 9:30 p.m., police officer Matthew Andersen and his partner Campos were on duty in their police car near 23rd Street and Cutting Boulevard. They observed a black Nissan driving without headlights. They pulled the Nissan over and approached it

on foot, at which point it sped off. The officers then returned to their car and gave chase. In short order, the Nissan got stuck on a road median and the officers saw four occupants, young Black men in hooded sweatshirts, get out and flee, two running in the direction the car had been heading, north, on 17th Street and two others running east, towards the side of the road and an apartment complex beyond. The officers followed those running north. Andersen shouted commands for the suspects to stop. Andersen nearly had the driver caught against a chain-linked fence, but he then heard shots fired and let the driver escape as he made sure he and his partner were safe.

Meanwhile, two other police officers, Jensen and Palma, were nearby, had learned of the Nissan's evasive maneuvers, and came to provide backup. One suspect running east crossed the path of Jensen and Palma. The officers exited their patrol car and noticed the suspect was wielding a gun. They chased him to a residence, commanding him to drop his weapon, which he did not do. The suspect forced his way through a fence to a backyard and then leveled his firearm at Palma. The officers each fired shots in the direction of the suspects but stopped and stood firm when he entered the backyard under cloak of night. Palma had been closest to the suspect and illuminated him with a lamp attached to his weapon. It was as the suspect, illuminated, slunk through the fence opening that Palma recognized him, based on previous, substantial encounters, as defendant.

Palma and Jensen waited for further assistance. Other officers established a perimeter around the residence and continued the search. A police dog tracked a scent from the backyard to the roof of a house a short distance away. Defendant was found on the roof. Later, after defendant was in custody, Jensen identified him as the person he had chased, based on general physical characteristics such as build and skin tone. An officer found a black mask in defendant's pocket, which Darren Armstrong testified he recognized as similar to the ones worn by the men who robbed him. Also, defendant had a cell phone belonging to Curlee Jones, and a phone belonging to Darren Armstrong was

retrieved from the Nissan Maxima. Finally, four gunshot residue particles were found on defendant's hooded sweatshirt after 30 percent of it was sampled. The prosecution's and defendant's expert disagreed as to whether this finding was consistent with defendant firing the gun approximately 25 times the day of the crime spree.

An officer recovered from the roof a .9-millimeter pistol and a 30-round magazine with over 20 rounds remaining. The gun had been stolen from its owner in Pleasant Hill two years before. The prosecution's ballistics expert, John Murdock, reviewed the gun and the markings on collected cartridges and opined the gun fired .9-millimeter cartridges found at the scenes of the shootings involving the Buckleys and involving Lowell Thomas and Sharroy Moore. He also concluded .9-millimeter cartridges collected from the blue Honda Odyssey van originated from a different gun, but a gun that, like the one found near defendant, was also used in the Buckley shooting.

Analysis

Of the September 13 crimes, defendant was acquitted of counts 6–7, the attempted murders of Elliot Lawson and Devonte Bernstine at the Pullman apartments. Next, defendant does *not* challenge the sufficiency of the evidence supporting counts 15–20, the theft of the Nissan Maxima, carjacking of Darren Armstrong in the Maxima, robbery of Curlee Jones, robbery of Darren Armstrong, resisting an officer, and resisting arrest while brandishing a deadly weapon. This leaves at issue counts 4–5, 8–14, 21, and 22—that is, the unlawful driving or taking of the Honda Odyssey (count 5), attempted murder of J'nya and Fred Buckley around 11:00 a.m. (counts 8–9), shooting at the Buckley's motor vehicle (count 10), carjacking of Leonard Barnes around 1:00 p.m. (count 11), attempted murder of Lowell Thomas and Sherroy Moore around 2:30 p.m. (counts 12–13), receipt of stolen property (the .9-millimeter gun) (count 22), conspiracy (count 4), and active participation in a criminal street gang (counts 14 & 21).

Toolmark Identification

Proof of a number of the September 13 crimes depended in large part on the trial court's admission of the testimony of toolmark expert Murdock linking defendant to various shell casings. Specifically, if believed, Murdock's testimony linked the gun found with defendant to the offenses against the Buckleys (counts 8–10) and against Thomas and Moore (counts 12–13). Murdock also linked a second gun involved in the Buckley shooting to the Honda Odyssey van used at the outset of the September 13 crime spree.

Before trial, defendant moved to exclude Murdock's toolmark identification testimony. Defendant asserted the science of firearm identification was not sufficiently developed such that someone could declare a match between a casing and a gun with "any statistical certainty." The trial court held an Evidence Code section 402 hearing. Several witnesses testified for the defense. David Faigman, having a law degree and a master's degree in psychology but lacking any practical toolmark experience, testified there are too few studies addressing whether toolmark identification is reliable and whether certain toolmarks can be isolated as unique to a single firearm. Statements of extreme probability—that a casing matches a firearm to the exclusion of all other firearms or the practical exclusion—are not based on statistical studies. These concerns were raised in a 2008 National Academy of Science report called *Ballistic Imaging* and a 2009 report called *Strengthening Forensic Science in the United States: A Path Forward*.² Also testifying for the defense were William Tobin, a metallurgist, who disputes the probability claims of toolmark examiners and concurs with the National Academy of Science reports. For Tobin, "appropriate statistical or probabalistic statements" must be attached to any claim of a match. Another defense witness,

² These reports were apparently presented to the trial court at the Evidence Code section 402 hearing, along with many other exhibits. None of these exhibits are in the record on appeal.

statistician Clifford Spiegelman, testified when he read testimony from Murdock about being able to identify a match with practical certainty, he “laughed so hard . . . [his] sides actually hurt in the morning;” it was a concept not backed by rigorous research. He pointed out there are examples of different examiners getting different results with the same source materials. It “isn’t . . . junk science,” but is “oversold science.” As one of the other experts put it, there is no doubt matches can be made, the question is can a match meaningfully identify a casing’s source.

At the Evidence Code section 402 hearing, Murdock testified he could make identifications in this case “to the practical exclusion of other firearms,” such that there was “virtually no chance” another firearm would have made the same marks. Murdock said an examiner could not look at every other gun in the world and claim a match with absolute certainty, but for him he could “say . . . that based on my experience, from the work I’ve either done, from my training, from the work I have peer reviewed, from the extensive empirical and validation studies done by my profession over a protracted period of time, it’s my opinion that I can state—I can make a strong statement and say in my opinion that there’s no credible possibility that you’re going to be able to go out and find another tool or firearm that will match as well as the one that I’ve identified in this particular case.”

Murdock testified that forensic toolmark examiners employ a standardized identification process. In part, they use a technique to count consecutive matching striations and compare that number to results known about the best known non-matches. With impression marks, examiners use their pattern matching experience and subjectivity. Defense witness Spiegelman at least conceded Murdock’s lab’s statement of procedures was the best he had seen, even if it did not meet his standards. Murdock testified examiners share information about detecting and avoiding “subclass” influences—that is similarities between gun parts that come about from the manufacturing process but belong to a subset of parts, and are not individual to only one.

Proficiency tests, though limited and imperfect, do provide, he claimed, a starting point for understanding an error rate.

Murdock and the prosecution's other expert, James Hamby, pointed to numerous studies they believed validated the profession's claims of reproducible results and the uniqueness of gun tools. Murdock contended there were studies of consecutively-manufactured gun parts that showed a "worst case" or "hardest case" scenario for a toolmark examiner and that these studies showed the uniqueness of individual gun parts and thus the reliability of the discipline. Defense witnesses criticized many of these studies as too small, lacking rigor, and involving more simplistic scenarios than real life would present.

After the multi-day Evidence Code section 402 hearing, the trial court issued its ruling. It found toolmark testimony had been admitted in California courts for many years and had not been subject to question. Further, reviewing the evidence presented at the hearing, the trial court found toolmark testimony was valid. It considered the "credibility" and "demeanor" of defendant's experts and found their testimony did not disclose errors in identification procedures. It recognized these experts' critique was the lack of a statistical foundation for making statements that casings and guns matched to a certain degree of probability. But it was concerned these experts had no experience actually performing toolmark identification. It further found Murdock and the prosecution witnesses credible on the manner in which toolmark analyses are done. Finally, it found the NAS reports, though raising criticisms of the toolmark field, explicitly disclaimed an intent to address the credibility of the field in court. When asked for clarification, the trial court explained it would not be limiting the nature of the statement of probability that an expert could make about a match, leaving it for cross examination to explore the strength of any statement of a probable match.

At trial, Murdock testified for the prosecution. First, in describing his field, he told the jury "it's up to skilled firearms examiners to tell when there's sufficient

microscopic agreement to make an identification to the practical exclusion of other guns, not the absolute exclusion.” Then, he testified, based on a wide variety of marks, both striations and impressions, that there was sufficient agreement to declare matches between numerous bullet casings and the gun found near defendant. He claimed to make the match to the practical exclusion of other guns, meaning there was “virtually no chance” another gun marked the studied casings. He discussed and was vigorously cross examined about his level of certainty in the matches he was making. He was questioned about the meaning of “practical” certainty or identity. He was questioned about the NAS reports and other criticisms of the field. He was questioned about when examiners reach opposite conclusions and about a lab in Detroit with high error rates. He conceded identifications to the practical exclusion of other guns were not based on statistical models or mathematics.

At the conclusion of the trial, the court instructed the jury it was not required to accept expert testimony as true simply because it came from a purported expert. The jury was told to consider the basis for any expert opinion given and told to disregard any opinions it did not believe.

Defendant concedes toolmark identification evidence “has been admitted without challenge for decades” in California courts. He nevertheless argues toolmark identification is a scientific technique that, based on recent criticism by some scientists, should be considered a “new” technique that is not generally accepted in the relevant scientific community and therefore inadmissible under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*).

In *Kelly, supra*, 17 Cal.3d 24, “[the Supreme Court] held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. (*Id.* at p. 30.) The second prong requires proof that the witness testifying about the technique and its

application is a properly qualified expert on the subject. (*Ibid.*) The third prong requires proof that the person performing the test in the particular case used correct scientific procedures. (*Ibid.*) [The Supreme Court] further held that proof of a technique’s general acceptance in the relevant scientific community would no longer be necessary once a published appellate decision had affirmed a trial court ruling admitting evidence obtained by that scientific technique” (*People v. Bolden* (2002) 29 Cal.4th 515, 544–545.)

“ ‘*Kelly* is applicable only to “new scientific techniques.” [Citations.]’ (*People v. Leahy* (1994) 8 Cal.4th 587, 605) It ‘ “only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.” [Citation.]’ (*Ibid.*) As stated by the *Leahy* court in discussing *People v. Stoll* (1989) 49 Cal.3d 1136 . . . , ‘by reason of the potential breadth of the term “scientific” in the *Kelly/Frye* doctrine, the courts often refer “to its narrow ‘common sense’ purpose, i.e., to protect the jury from techniques which . . . convey a ‘ “misleading aura of certainty.” ’ [Citations.]” (49 Cal.3d at pp. 1155–1156.) According to *Stoll*, a technique may be deemed “scientific” for purposes of *Kelly/Frye* if “the unproven technique or procedure appears *in both name and description* to provide some definitive truth which the expert need only accurately recognize and relay to the jury.” (*Id.* at p. 1156, italics added.)’ (*People v. Leahy, supra*, 8 Cal.4th at p. 606.)” (*People v. Mitchell* (2003) 110 Cal.App.4th 772, 782–783 (*Mitchell*)).

“Thus, *Kelly* analysis is limited to situations where it will ‘forestall the jury’s uncritical acceptance of scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate. [Citation.] In most other instances, the jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them. [Citations.]’ (*People v. Venegas* (1998) 18 Cal.4th 47, 80.)” (*Mitchell, supra*, 110 Cal.App.4th at p. 783.)

Our Supreme Court has held the *Kelly* test typically does not apply to techniques long accepted by the courts. (Compare *People v. Clark* (1993) 5 Cal.4th 950, 1018 [“the admissibility of ‘blood-spatter’ or ‘blood dynamics’ testimony in this state predates our *Kelly* decision”] and *People v. Stoll, supra*, 49 Cal.3d 1136 [“California courts have routinely admitted defense expert opinion analogous to the one offered here, with no suggestion that *Kelly/Frye* applies.”], with *People v. Leahy* (1994) 8 Cal.4th 587, 605–606 [long-standing police officer, but not *courtroom*, use of horizontal gaze nystagmus intoxication test insufficient to skip *Kelly* inquiry] (*Leahy*).

Defendant, as noted, does not dispute the long-standing acceptance of toolmark identification testimony. (See *People v. Godlewski* (1943) 22 Cal.2d 677, 685 [toolmark identification evidence has been admitted in California for over 60 years]; see also 4 Faigman et al., *Modern Scientific Evidence, The Law and Science of Expert Testimony* (2014–2015 ed.), section 35:3 [“Expert testimony identifying a particular weapon as the one source of both a questioned (crime scene) bullet and known bullets (test firings) is admissible in every American jurisdiction.”].) Thus, *Kelly* is simply not applicable.

But even if we viewed the recent criticism of toolmark testimony as a sufficient basis to reopen the *Kelly* question (see *Leahy, supra*, 8 Cal.4th at p. 606 [“To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified.”]), another limitation on *Kelly* is that it only applies to “scientific” methods (*id.* at p. 605; *People v. Cowan* (2010) 50 Cal.4th 401, 470 (*Cowan*). Thus, “absent some special feature” of an expert’s testimony that would “effectively blindside[] the jury, expert opinion testimony is not subject to *Kelly/Frye*.” (*Stoll, supra*, 49 Cal.3d at p. 1157.)

In *Cowan*, a case that postdates the NAS reports, the Supreme Court addressed the supposedly novel technique of comparing a pistol barrel with recovered bullets by making a cast of the pistol barrel to assist in the comparison (which was needed as a

result of learned tampering with the pistol’s rifling by someone involved with the offense). (*Cowan, supra*, 50 Cal.4th at pp. 468, 470–471.) The defendant there did not claim “that either the technique of ballistics comparisons or the technique of identifying tool marks using molds made of elastic material is new” but objected to the combined technique and argued a *Kelly* hearing was required. (*Cowan*, at p. 470.) The Supreme Court disagreed. Neither technique was “ ‘so foreign to everyday experience as to be unusually difficult for laypersons to evaluate,’ ” noting *People v. Venegas, supra*, 18 Cal.4th at page 81, had contrasted “DNA evidence, which requires validation under *Kelly*, with ‘fingerprint, shoe track, bite mark, or ballistic comparisons, which jurors essentially can see for themselves.’ ” (*Cowan*, at p. 470.) The expert’s procedure in *Cowan*, as with fingerprint capture techniques, for instance, “merely ‘isolate[d] physical evidence’—specifically, the pattern of lands and grooves and associated imperfections on the inside of the Colt pistol’s barrel, as well as the corresponding markings on the recovered bullets—‘whose . . . appearance, nature, and meaning [were] obvious to the senses’ of the lay jurors.” (*Id.* at p. 471.) “Although there was some dispute about whether the method [the expert] used produced a cast of the barrel ‘without tampering or alteration’ due to possible bubbling or shrinkage of the Mikrosil, that possibility was fully explored on cross-examination and the jury had the opportunity to weigh its effect on the validity of [his] conclusions.” (*Ibid.*)

Under *Cowan*’s reasoning, testimony matching bullet casings and firearms based on toolmarks is testimony lay jurors can readily understand and does not “blindsides” them such that a trial court must first decide the admissibility of the testimony under *Kelly*. (Cf. *United States v. Herrera* (7th Cir. 2013) 704 F.3d 480, 486–487 [“Matching evidence of the kinds that we’ve just described, including fingerprint evidence, is less rigorous than the kind of scientific matching involved in DNA evidence; eyewitness evidence is not scientific at all. But no one thinks that only scientific evidence may be used to convict or acquit a defendant. . . . [¶] Evidence doesn’t have to be infallible to be

probative. . . . [¶] . . . [¶] Ultimately the matching depends on ‘subjective judgments by the examiner,’ National Research Council of the National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* [139 (2009)], but responsible fingerprint matching is admissible evidence, in general and in this case,” without a *Daubert*³ hearing.]

Moreover, even the new criticism of toolmark testimony does not dispute that the field has merit. While the NAS reports criticize the subjectivity of toolmark and firearm identification and the lack of a statistical foundation for estimation of error rates, they do not call for abandonment of the field. And, as defendant notes, while some federal district courts have placed limits on the degree of certainty an examiner can express in a match (see, e.g., *United States v. Glynn* (S.D.N.Y.2008) 578 F.Supp.2d 567 (*Glynn*), *United States v. Green* (D.Mass.2005) 405 F.Supp.2d 104 (*Green*)), many allow testimony such as that elicited here—a match to a degree of certainty (*United States v. Otero* (D.N.J. 2012) 849 F.Supp.2d 425, 429 [“reasonable degree of professional certainty”]; *United States v. Diaz* (N.D. Cal., Feb. 12, 2007, No. CR 05-00167 WHA) 2007 WL 485967, at *14 (*Diaz*)), while cases like *Glynn* and *Green* might also be distinguished as involving examiners who have not followed best practices or as not accounting for evidence prepared to rebut the NAS reports (see *United States v. Casey* (D.P.R. 2013) 928 F.Supp.2d 397, 399–400).

Regarding the efficacy of toolmark identification despite its lack of a rigorous statistical underpinning, we share the view of *Diaz, supra*, 2007 WL 485967, which admitted testimony presented by a firearms examiner from San Francisco:

“In ordinary life, we look for features that match our memories. When we recognize someone on the street, there is always a possibility that it is not who we think it is. One can never be absolutely certain it is the other person because there is always a possibility of error. Yet we know when we are confident enough in the

³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1997) 509 U.S. 579 (*Daubert*).

pattern to make an ‘identification.’ Likewise, the practiced eye of parents of identical twins can immediately tell the difference between their children. A zookeeper knows each animal by name, where any other person would not be able to tell the difference between two elephants. The practiced eye of the firearms examiner also looks for patterns. The record demonstrates that there is no such thing as an identical match. There will always be some differences and, in all likelihood, some similarities. It is a matter of judgment whether the patterns are sufficiently close to warrant an identification. A vital aspect of firearms identification is based on the experience these examiners have when they are doing identifications. . . . It is like recognizing someone on the street. . . . [¶] . . . [¶] . . . The record demonstrates that examiners make mistakes even on proficiency tests. But, in view of the thousands of criminal defendants who have had an incentive to challenge firearms examiners’ conclusions, it is significant that defendants cite no false-positive identification used against a criminal defendant in any American jurisdiction.”

Diaz, supra, 2007 WL 485967, at *13.

Finally, defendant claims, without regard to *Kelly*, that Murdock’s toolmark testimony is unreliable and speculative under *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770 (*Sargon*), which holds an expert “ ‘must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible.’ ” Often, *Sargon* is called upon to exclude expert testimony based on improper assumptions about the state of reality. (See *Pedefferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 375 [“the law does not permit an expert opinion unconnected to the evidence in a case”].) That is not the problem here. Murdock unquestionably based his opinions on the bullets collected from the crime scenes.

To the extent defendant argues Murdock’s conclusions of a gun match to the practical exclusion of others is speculative, that conclusion is based on reasons that were explorable, and were deeply explored, on cross-examination, and were based on a field of inquiry, toolmark examination, that has been with us for a lengthy period of time. Further, the jury was instructed it could ignore any of Murdock’s conclusions if it did not find them persuasive. Undoubtedly, a trial court may keep junk reasoning from being

espoused from the witness stand, but *Sargon* leaves much to the discretion of the trial court and cautions that it “not weigh an opinion’s probative value or substitute its own opinion for the expert’s opinion.” (*Sargon, supra*, 55 Cal.4th at pp. 772–773.) “Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies.” (*Id.* at p. 772.) We cannot say the trial court erred, under *Sargon*, in allowing Murdock to testify.

Particular September 2009 Counts

We now consider defendants’ assorted substantial evidence challenges in light of the admissibility of Murdock’s expert testimony.

In connection with the September 13, 2009 counts, the prosecution heavily relied on circumstantial evidence. We still apply a substantial evidence standard of review. (*People v. Brown* (2014) 59 Cal.4th 86, 105–106 [the same substantial evidence standard of review applies even when the prosecution relies primarily on circumstantial evidence].) “ ‘Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “ ‘If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.’ ” [Citations.]’ [Citation.] ‘ “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.” ’ [Citations.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 792–793.)

Taking of the Minivan (Count 5)

The Honda Odyssey minivan was stolen in the early morning hours of September 13. A witness associated a blue van with the Bernstine and Lawson shootings

at the Pullman Apartments at 8:45 a.m. The Buckleys were shot while in their car around 11:00 a.m. Although no one testified to seeing the perpetrators, bullet casings found at the scene matched (1) the gun defendant had when apprehended and (2) bullet casings from a second gun found in the later-recovered blue van. A security camera captured the Buckley shooting and showed the perpetrators jumping out of a blue van. Then around 1:00 p.m., Barnes was carjacked by a Black man with a .9-millimeter pistol. The carjacker and his cohorts stole Barnes's car and took off with it and the "newer model blue Honda van" they had been driving—"it was a large van," "not a little tiny van." The Honda Odyssey was found abandoned about five minutes from the carjacking site.

Barnes car was described as a 2005 silver Chevy Malibu. The person who witnessed the ditching of the Honda Odyssey stated to police that the ditchers drove away in a newer-model grey car. The next incident, at 2:30 p.m., was the shooting of Thomas and Moore. A witness saw the perpetrators emerge from a silver or gray car—he didn't know cars too well but thought it was "looked like one of those Toyotas." After that, was the 3:15 p.m. robbery and carjacking of Jones and Armstrong. Jones told police he saw the perpetrators arrive in a grey or white car. Armstrong, who was confident in his knowledge of cars, reported a white Chevy Malibu. Armstrong was able to identify defendant.

At this point, defendant and his cohorts took off with the Nissan Maxima and committed the remainder of the charged offenses, to which there is no substantial evidence challenge.

This evidence places defendant in the stolen Honda Odyssey in several ways. First, the ballistics evidence puts defendant at the 11:00 a.m. Buckley shooting and connects the van to that shooting. Also connecting the van to the shooting is the security camera footage. Further, Armstrong's identification connects defendant to the stolen Chevy Malibu (in the white/grey/silver spectrum), and other testimony shows the blue van was abandoned in favor of the Malibu. The evidence thus allows the conclusion that

defendant availed himself of the blue van from early in crime spree until the van's abandonment. Finally, as discussed later, the prosecution put on evidence defendant was part of the Easter Hill Boys gang and could have had a gang motive for the September 13 crimes, many of which took place in rival gang territory and occurred around the time of an anniversary of a defeat (the killing of one of their own) the gang typically marks with retaliatory violence.

Therefore substantial evidence supports the conviction of count 5, for violation of Vehicle Code section 10851, subdivision (a), which not only prohibits unauthorized taking or driving, but also reaches "any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking."⁴

Attempted Murders of the Buckleys, Thomas, Moore (Counts 8–10, 12–13)

The ballistics evidence connects defendant to the shootings of the Buckleys, Thomas, and Moore. Defendant's possession of the weapon used in these shootings is "strong circumstantial evidence" of his guilt. (*People v. DePriest* (2007) 42 Cal.4th 1, 50.) The Anderson identification also connects defendant to these shootings by linking defendant to the silver car used in the Thomas and Moore shooting, the car which was stolen as a replacement for the blue van, which, in turn, was involved in the Buckley shooting (as shown by both ballistic evidence and video footage). In addition, some gunshot residue was found on defendant's hooded sweatshirt, which could be viewed as consistent with defendant being involved with the shootings. And lastly, Thomas was a rival gang member, Moore and Thomas were shot in that rival gang's territory, and the Buckleys were shot in another rival gang's territory. Thus, there was substantial evidence to support convictions on counts 8–10 and 12–13.

⁴ Defendant has not challenged the evidence of any requisite state of mind, nor has he disputed the level of involvement with the blue van required for a conviction under Vehicle Code section 10851, subdivision (a).

Carjacking of Barnes (Count 11)

There is also substantial evidence of defendant carjacking Barnes. As just discussed, defendant was with his cohorts just before the carjacking (at the Buckley shooting) and just afterwards (the shooting of Thomas and Moore, and then the crimes against Armstrong). Defendant was associated by Armstrong with a car that resembled Barnes's. There was also evidence defendant was likely involved in a spree of retaliation on behalf of his and his cohorts' gang.

Receipt of Stolen Property (Count 22)

The receiving of stolen property charge relates to the gun found with defendant. The parties stipulated the gun had been stolen two years before the crime spree and that defendant was not involved in the theft.

Defendant contends there was no evidence he received the gun knowing it was stolen. (See § 496, subd. (a) [punishing “[e]very person who . . . receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained”]; *People v. Dupre* (1968) 262 Cal.App.2d 56, 62 [more than possession and suspicion is required]; see also *In re Richard T.* (1978) 79 Cal.App.3d 382, 388–389 [minor thought a gun might have been stolen].) The gun theft was not recent (cf. *People v. Young* (1981) 120 Cal.App.3d 683, 694 [“ ‘ ‘Possession of *recently* stolen property is so incriminating that to warrant conviction there need only be, in addition to possession, slight corroboration in the form of statements or conduct of the defendant tending to show his guilt.’ ’ ” italics added]; *People v. Lyons* (1958) 50 Cal.2d 245, 258 [an unsatisfactory explanation for possession or suspicious circumstances of possession justify an inference of guilt only when, generally, “ ‘ where the accused is found in possession of the articles soon after they were stolen’ ”]). And defendant's hiding the gun under a shoe box on the rooftop shows a guilty conscious as to the days' violent crimes, not specifically, as the Attorney General argues, to the unlawful receipt of the gun.

We therefore agree there was insufficient evidence to support a conviction on count 22.

Conspiracy (Count 4)

Defendant maintains there was insufficient evidence of conspiracy because there was insufficient evidence he took part in any of the substantive crimes. As discussed above, we do not agree. Accordingly, his challenge to the conspiracy count fails.

Active Participation in Criminal Street Gang (Counts 3, 14, & 21)

We separately address whether substantial evidence supports defendant's three convictions for active participation in a criminal street gang. Count 3 pertains to defendant's killing of Russell in March 2009, while counts 14 and 21 pertain to his involvement in the crime spree in September 2009.

Section 186.22, subdivision (a), punishes “[a]ny person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang” (See *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130 (*Rodriguez*)). To be guilty of this street terrorism charge, a defendant must “commit an underlying felony with at least one other gang member.” (*Id.* at p. 1134.) This means there must be “participation of at least two members of the same gang” in the underlying felony. (*People v. Vega* (2015) 236 Cal.App.4th 484, 503.)

Convictions for street terrorism have been reversed when a defendant acted alone; (*Rodriguez, supra*, 55 Cal.4th at p. 1128); when a defendant likely acted alone, or possibly with a girlfriend whose gang membership had not been established (*People v. Rios* (2013) 222 Cal.App.4th 542, 545, 560); when a defendant acted in the presence of another person who was “not a validated gang member” (*People v. Johnson* (2014) 229 Cal.App.4th 910, 923); and when a defendant acted not with a member of *his* gang, but with the member of another gang (*People v. Velasco* (2015) 235 Cal.App.4th 66, 78).

Most recently, in *People v. Vega*, the prosecution offered evidence that the defendant, who admitted gang affiliation, and another person, Giovanni, approached a victim. “One or both” of these men taunted the victim by asking where he was from, a

common provocation in gang culture. The victim identified himself as affiliated with a rival of the defendant's gang. A fight then broke out, the victim died from a stab wound, and the defendant was convicted of voluntary manslaughter and a related street terrorism charge under section 186.22, subdivision (a). The appellate court reversed the street terrorism charge. Despite the fight's obvious relationship to gang rivalry, there was no substantial evidence regarding Giovanni's gang affiliation. (*People v. Vega, supra*, 236 Cal.App.4th at pp. 489, 503–506.)

Here, there is substantial evidence defendant committed the crimes of March and September 2009—those crimes underlying the street terrorism charges—with the help of others. These collaborators may have been members of defendant's Easter Hill Boys gang and may have shared the gang motivation the prosecution ascribed to defendant, but perhaps not. (*People v. Vega, supra*, 236 Cal.App.4th at pp. 503–506; *People v. Johnson, supra*, 229 Cal.App.4th at p. 923.) There is no evidence identifying the other participants. We do not even know their names.

The prosecution's gang expert, Christopher Lllamas, was asked about the March 2009 drive-by shooting of Marcus Russell. He was asked whether the second person in the van with defendant was in defendant's gang. He replied, "Well, I don't know that. But what I will say is that gang members won't participate in these types of crimes without having complete trust amongst the other participants. . . . It doesn't even have to be another gang member, but you can still assist and promote the activities of a gang not being a member."

Lllamas's testimony underscores the lack of evidence in this case regarding defendant's supposed collaborators. Given this lack of evidence, and given the numerous appellate court cases since *Rodriguez* that require more than speculative evidence of collaborators' gang affiliations for convictions under section 186.22, subdivision (a), defendant's three street terrorism convictions cannot stand.

Gang Evidence

Apart from the three street terrorism charges just discussed, the prosecution asserted and successfully proved a multitude of gang-related enhancements. Defendant expansively challenges the admission of testimony concerning his gang involvement.

Gang Expert's Testimony

Defendant first argues gang expert testimony violated his Sixth Amendment right to confront witnesses. According to defendant, the expert, Richmond Police Officer Christopher Llamas, in explaining his opinion that defendant's crimes furthered gang objectives, repackaged out-of-court statements of other officers and reputed gang members, conveying those statements to the jury without defendant having a chance to cross-examine the statements' sources. Defendant asks us to scrutinize 14 parts of the gang expert's testimony.

The Attorney General asserts defendant forfeited the confrontation objection by failing to raise it below. This is only partially so.

Defendant filed a motion in limine on November 28, 2011, labeled number 18, to exclude evidence of six murders potentially related to the Easter Hill gang as irrelevant, time consuming, and more prejudicial than probative. The victims referenced were "Bobo," Alfred Thomas, Kaneesha Mallard, Demario Lee, Tamar Anderson, and Sedric Gadson. The motion cites only Evidence Code sections 350 and 352 and makes no reference to the right of confrontation. After a hearing on the motion, where it became clear that Llamas would be the vehicle for evidence of these and other murders, the trial court denied the motion, but ruled the expert could not opine about defendant's involvement in them—the testimony would be limited to showing the activity of the Easter Hill gang. Also, the trial court acknowledged the defense's need to meaningfully cross examine the expert on these murders and ordered the prosecution to produce discovery ahead of trial, including the information conveyed to Llamas during conversations with other officers about the murders. If discovery was withheld on any given murder, Llamas could not testify about it.

Defendant followed up with another motion in limine on January 9, 2012, seeking to keep Llamas from testifying about “several uncharged homicides” on the basis that “this evidence . . . violates [defendant’s] right[of] confrontation.” This time, using discovery provided by the prosecution, defendant detailed eight killings—those of Reginald Collier, Deondrae Holden, Jewell Mayweather, Dwayne Moore, Demario Lee, Alfred Thomas, Kaneesha Mallard, and Sedric Gadson (several of whom had been named during the hearing on the previous motion to exclude). Citing *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the then-pending case of *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221] (*Williams*), and other Sixth Amendment cases, defendant argued the gang expert’s statements about these crimes would be repetition of testimonial hearsay from various witnesses. The expert, in defendant’s view, would, without facing cross-examination, use the otherwise inadmissible hearsay statements to establish the existence of the crimes, link them to either defendant or the Easter Hill gang, and unfairly deliver the conclusion defendant was actively participating in a criminal street gang. The trial court largely denied the motion, thus again allowing the basis testimony to come in, but excluded any opinion based on a particular interrogation of a person of interest, Dequan Brown, concluding Brown’s statements were unreliable hearsay.

There can be no doubt the confrontation issue was preserved as to testimony by Llamas about these identified murders. And Llamas did, as defendant notes, testify at trial about several of these murders, namely the murders of Sedric Gadson, Demario Lee, Alfred Thomas, and Kaneesha Mallard. Llamas did not claim defendant shot these victims, but did state Murdock’s toolmark evidence linked some casings from these shootings to the .40-caliber weapon used during the September 13, 2009 crime spree (not the .9-milimeter found with defendant). Llamas testified to a gang motivation for these killings, that one of the victims was known as a rival of the Easter Hill gang, and the timing was such that the killings could be in retaliation for a fallen Easter Hill associate (the killings took place in the few days before the September 13, 2009 crime spree that was charged).

Also, defendant did object orally, citing hearsay, foundation, and speculation, to testimony that, based on two other gang experts' knowledge, Brian Jones was an Easter Hill gang member who was hired by a group called Project Trojans to sell drugs and make hits. In addition, defendant objected orally, citing hearsay, to Llamas testifying about defendant's juvenile record, namely a 2005 charge and a 2007 charge of possession of a firearm by a minor. The prosecution entered into evidence the sustained juvenile petitions. We shall assume, without deciding, these objections were sufficient to merit our review of the confrontation issue. (See *People v. Loy* (2011) 52 Cal.4th 46, 66 [“Defendant contends the error also violated his right to confront witnesses under the Sixth Amendment to the United States Constitution. Although he did not specifically invoke the federal Constitution at trial, he may raise this contention on appeal to the extent he argues that the erroneous overruling of the objection actually made also had the consequence of violating his federal confrontation rights.”].)

We note, however, the other objections defendant cites on appeal did not raise the confrontation clause issue, even implicitly, for any particular testimony. For instance, in his November 28, 2011 motion in limine to “exclude/limit gang expert opinion” defendant sought to exclude 12 aspects of Llamas' testimony because the testimony would be unscientific and unreliable (citing *Kelly* and other cases), unsupported by a sound evidentiary foundation (much of the foundational evidence was printed off the Internet), could not establish defendant's intent and could not insinuate guilt based on defendant fitting a certain “profile,” and was irrelevant, prejudicial, a waste of time, and confusing.

Also, though defendant specifically challenges them on appeal, Llamas made these points without any objection and so defendant has forfeited his challenges: (1) Frank Potts was an Easter Hill gang member who was recognized and shot in rival territory; (2) gang member Eric Welch told Llamas, at an interview following an arrest for gun possession, Easter Hill was aligned with Ghost Town of Oakland; (3) suspected gang member C.J. was in a carjacked vehicle in possession of an assault gun; (4) Mainline gang member Roosevelt Poe told Llamas Easter Hill was good with Oakland; (5) there

was a shootout between two rival gangs, Deep C and North Richmond, at a mall in 2009, and defendant knew of it; (5) in a 2009 incident, defendant was loitering with other Easter Hill gang members and a police officer chased defendant and recovered a loaded pistol magazine; (6) suspected gang member Kianti Gix was arrested in 2006 for possession of a firearm; (7) another murder occurred in Richmond on March 17, 2009, near the March 10 killing of Marcus Russell.

We now turn to the merits of the confrontation claim to the extent defendant has not forfeited it.

We first address whether the confrontation clause applies at all to testimony given by a gang expert as the basis of the expert's opinion. Under *Crawford*, the admission of testimonial hearsay at trial violates the Sixth Amendment right to confront and cross examine witnesses, regardless of the reliability of the hearsay statements. (*Crawford*, *supra*, 541 U.S. 36.) In California, however, Evidence Code section 801, subdivision (b), allows expert witnesses to rely on otherwise inadmissible hearsay in forming their opinions, as long as the hearsay is "reliable." (See *People v. Gardeley* (1996) 14 Cal.4th 605, 618–619 (*Gardeley*).) And, since out-of-court statements admitted to show the basis of an expert's opinion are not admitted for their truth, but only to help evaluate the expert's opinion, some case law holds the confrontation clause is not applicable. (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209–1210 (*Thomas*).)

Some more recent cases have questioned *Thomas*'s conclusion. (See *People v. Miller* (2014) 231 Cal.App.4th 1301.) Since *Gardeley* and *Thomas*, "[a] majority of the justices of the United States and the California Supreme Courts have recognized" at least in a non-gang-expert context "that when an expert relies on hearsay basis evidence as true when forming an opinion and relates that basis evidence to the jury as true, the statements are admitted for their truth for purposes of the confrontation clause. (See *Williams*[, *supra*,] 567 U.S. ___ [132 S.Ct. at pp. 2256–2257] (conc. opn. of Thomas, J.); *id.* at p. ___ [132 S.Ct. at p. 2272] (dis. opn. of Kagan, J.); *People v. Dungo* (2012) 55 Cal.4th 608, 627 . . . (conc. opn. of Werdegar, J.); *id.* at p. 635, fn. 3 (dis. opn. of Corrigan, J.); see also *People v. Valadez* (2013) 220 Cal.App.4th 16, 31–32 . . . [discussing various

opinions in *Williams* and *Dungo*].) This conclusion rests on the insight that the jury, in evaluating expert testimony, will almost always assume or determine the truth of this basis evidence. (See, e.g., *Williams*, 567 U.S. at p. ___ [132 S.Ct. at p. 2257] (conc. opn. of Thomas, J.) [“To use the inadmissible information in evaluating the expert’s testimony, the jury must make a preliminary judgment about whether this information is true.” ’]; [*People v.*] *Hill*[(2011)] 191 Cal.App.4th [1104,] 1129–1131.)” (*People v. Miller*, *supra*, 231 Cal.App.4th at pp. 1311–1312.)

Miller’s view might become the law in California: our Supreme Court has granted review in two cases which raise the question whether the Sixth Amendment right to confrontation is violated by a gang expert’s reliance on testimonial hearsay. (See *People v. Archuleta* (2014) 225 Cal.App.4th 527, review granted 326 P.3d 253 (June 11, 2014, No. S218640); *People v. Sanchez* (2014) 223 Cal.App.4th 1, review granted 324 P.3d 273 (May 14, 2014, No. S216681). Until then, and for the reasons stated in *People v. Hill* (2011) 191 Cal.App.4th 1104 at pages 1129–1130, we are bound by existing precedent. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Although *Gardeley* did not squarely address the Sixth Amendment confrontation argument, neither do *Williams* or *People v. Dungo* squarely foreclose *Gardeley*’s conclusion that gang expert basis testimony is not offered for its truth. Thus, we initially conclude that defendant’s confrontation argument fails in the face of *Gardeley*.

But even if the California Supreme Court concludes *Gardeley* is no longer good law in light of recent Sixth Amendment developments, we still conclude there was no error. The properly challenged hearsay statements Llamas made were not “testimonial.”

“To be subject to the confrontation clause, out-of-court statements must be ‘testimonial.’” (*Crawford, supra*, 541 U.S. at p. 59.) In *Crawford*, the court declined to give a comprehensive definition of testimonial statements, although it stated at a minimum the confrontation clause applies to “prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations,” which, under the facts of the case, included recorded statements by a witness in response to structured police questioning. (*People v. Cage* (2007) 40 Cal.4th 965, 978 . . . (*Cage*) [explaining

Crawford].) In *Davis v. Washington* (2006) 547 U.S. 813 . . . (*Davis*), the court reviewed confrontation clause challenges in two cases: one involved out-of-court statements by a domestic violence victim on a 911 call describing the attack as it occurred, which the court held were not testimonial; and the other involved a victim's statements to officers in response to questions after a domestic violence incident had ended, which the court held were testimonial. (*Cage, supra*, at pp. 980–981 [describing facts in *Davis*]; *People v. Barba* (2013) 215 Cal.App.4th 712, 721 . . . (*Barba*) [same].) Without providing an exhaustive list of testimonial statements, the court held: ‘Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.’ (*Davis, supra*, at p. 822; see also *Michigan v. Bryant* (2011) __ U.S. __ [179 L.Ed.2d 93, 131 S.Ct. 1143, 1157] (*Bryant*).)

“Following *Davis*, the court in *Cage* found a victim’s statement made to an officer one hour after an assault was testimonial because the primary purpose was to investigate the crime, but the court found nontestimonial a statement to a doctor for immediate treatment of an injury. (*Cage, supra*, 40 Cal.4th at pp. 984–987.) The court derived ‘several basic principles’ from *Davis*: ‘First, . . . the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and

solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.’ (*Cage*, at p. 984, fns. omitted.) [¶] . . . [¶]

“Most recently, several cases . . . addressed confrontation clause challenges to expert testimony based on forensic evidence. In *Williams*, one of the grounds on which the plurality found no confrontation clause violation was that the report on which the expert relied was prepared for the primary purpose of finding a dangerous rapist still at large, not to target an accused individual. (*Barba, supra*, 215 Cal.App.4th at p. [728], citing *Williams, supra*, 567 U.S. ___ [132 S.Ct. at p. 2243] (plur. opn. of Alito, J.)). In his concurring opinion, Justice Thomas found no confrontation clause violation because the report ‘lack[ed] the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact.’ (*Williams, supra*, at p. ___ [132 S.Ct. at p. 2260] (conc. opn. of Thomas, J.); see *Barba, supra*, at p. [728].)

“Interpreting *Williams* and two other recent cases, our Supreme Court in *Dungo* and [*People v. Lopez* (2012) 55 Cal.4th 569] formulated a two-part test to determine whether an out-of-court statement is testimonial: ‘First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution.’ (*Dungo, supra*, 55 Cal.4th at p. 619; see *Lopez, supra*, 55 Cal.4th at pp. 581–582.) The court recognized the United States Supreme Court has not agreed on a precise definition for either requirement. (*Dungo, supra*, at p. 619; *Lopez, supra*, at p. 582.) In *Dungo*, the court held statements in an autopsy report the testifying expert used to reach independent conclusions (but which was not itself admitted into evidence) met neither requirement because the objective facts in the report were not sufficiently formal to be testimonial, and the primary purpose of the report was not to target an accused individual, but to provide an official explanation for an unusual death. (*Barba,*

supra, 215 Cal.App.4th at p. [729–730] [explaining *Dungo*.])” (*People v. Valadez* (2013) 220 Cal.App.4th 16, 32–35 (*Valadez*).)

In *Valadez*, the court concluded an officer’s gang expert testimony did not include testimonial hearsay. “[U]nder any definition of ‘testimonial’ the general background information [the officer] obtained from gang members, other officers, and written materials on the history of the El Sereno and Lowell Street gangs plainly does not qualify.” (*Valdez, supra*, 220 Cal.App.4th at p. 35.) The information the expert gained through talking with officers and gang members in consensual encounters may be useful for expert testimony, but it “does not mean his *primary purpose* in obtaining this information was to use it against appellants”; rather, “[d]ay in and day out such information would be useful to the police as part of their general community policing responsibilities quite separate from any use in some unspecified criminal prosecution.” (*Id.* at p. 36.)

Turning back to the present case, as to the two juvenile offenses, the questioning of Llamas was very brief and records of the charges being sustained were admitted into evidence. Sustained juvenile petitions are admissible when relevant, including to show a defendant’s affiliation with a criminal street gang. (*In re Ross* (1995) 10 Cal.4th 184, 209; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461 fn. 5.) The petitions are not testimonial hearsay and need not be tested through live cross examination of those involved in the underlying events described therein. (See *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1223–1225 [“[Records] prepared to document acts and events relating to convictions and imprisonments ... are not prepared for the purpose of providing evidence in criminal trials or for determining whether criminal charges should issue . . . [and] are beyond the scope of *Crawford*”].)

As to the various killings in the run up to the September 13, 2009 crime spree, Llamas connected them to gang activity by (1) reviewing the findings of the toolmark expert Murdock; (2) opining that the timing of the killings suggested revenge for a fallen Easter Hill gang member; (3) opining that one of the victims was a rival gang member; (4) noting that Easter Hill gang members bragged about killing that rival gang member on

MySpace. Murdock was available for cross-examination, and was extensively cross examined. The MySpace pages are not testimonial and lack all indicia of formality. No one making statements on MySpace would have believed they were participating in the presenting of evidence for a criminal trial, nor did those statements “pertain to” a criminal investigation. (*Dungo, supra*, 55 Cal.4th at p. 619.) And the general background information Llamas obtained about individuals’ gang affiliations and his review of MySpace pages does not appear to implicate confrontation clause concerns. (See *Valadez, supra*, 220 Cal.App.4th at pp. 35–36.)

Finally, as to evidence that a relative of defendant, Brian Jones, was an Easter Hill gang member hired by a group called Project Trojans to sell drugs and make hits, this was communicated by two other gang experts. Such conversations do not produce testimonial hearsay. (*Valadez, supra*, 220 Cal.App.4th at pp. 35–36.) Accordingly, we find no confrontation clause error.

Authenticity of the MySpace Pages

Next, we consider defendant’s argument the various MySpace pages introduced into evidence and showing gang activity were not properly authenticated. Defendant acknowledges the MySpace materials came directly from MySpace via a subpoena, but faults the absence of an authenticating witness from MySpace and the lack of evidence that any incriminating messages from any given account were truly authored by the relevant person. Defendant warns “anyone can post anything on the Internet.” Some of the MySpace pages had incorrect identification information, including, for instance, defendant’s page, which had the correct birth day but wrong birth year. Llamas acknowledged someone could post on another person’s MySpace page if, for instance, they had the user’s MySpace credentials. Two postings to defendant’s account occurred while he had been incarcerated in 2008.

On the other hand, Llamas identified the requested MySpace accounts by cross-referencing items on the pages—such as photographs, comments, messages, identities of MySpace friends, stated locations associated with the Easter Hill gang territory, birthdates, vanity URLs (shortcut name for the MySpace page), and even true names—

with police records. Llamas reviewed information for approximately 24 accounts and was able to tie 16 of them to individual suspected gang members. For instance, Llamas tied one account to Daniel Barnett because: the profile picture was of Barnett with defendant, the vanity URL was “Danny Bo” (Barnett’s gang moniker), the profile had Barnett’s correct date of birth, photographs depicted Barnett making gang signs with his hands with other gang members, comments on the page were left by rival gang members and insulted Easter Hill gang members, and comments left by Barnett mourning the loss of Easter Hill associates or wishing freedom for incarcerated associates.

Llamas also identified one of the accounts as defendant’s. The profile pictures and other photographs match, there are numerous references to his gang moniker (“Fatter”), the profile name (“Hill Boy Fatter, Beam Team”) references the moniker and his gang clique, the date and month of his birthday was correct (though the year was off—the profile claims an age three years older), his stated location corresponded with the Easter Hill territory, comments concerned his relatives, comments concerned gang associates and rivals and criminal activity, and continuous references to real-life events involving defendant.

In addition, defendant’s mother, when asked at trial if she recognized the page, said “That’s my grandkids on there, yeah.” She admitted commenting on the page, saying “Lovin’ my family” under a picture of her grandkids in December 2009. She admitted the account was defendant’s “at some point,” including when she commented, though she speculated the account had been “hacked” at another point, because there were posts from when defendant was in jail.

We are not at all troubled by the evidentiary foundation laid for the admission of these MySpace profiles. There was sufficient authentication. “[H]acking may occur and . . . documents and other material on the Internet may not be what they seem. But the proponent’s threshold authentication burden for admissibility is *not* to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic.” (*People v. Valdez* (2011) 201 Cal.App.4th 1429, 1436–1437 (*Valdez*); see *People v. Goldsmith* (2014)

59 Cal.4th 258, 267 [only a “prima facie” case needed for admissibility]; accord, *Commonwealth v. Purdy* (2011) 459 Mass. 442, 451 [“The defendant’s uncorroborated testimony that others used his computer regularly and that he did not author the e-mails was relevant to the weight, not the admissibility, of these messages.”].) “ ‘The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.’ ” (*Valdez, supra*, at p. 1435.) *Valdez* found MySpace pages properly authenticated when there was a matching profile picture and greetings addressed to the defendant (including by a relative) which included details matching information known about defendant. (*Ibid.*) *Valdez* could argue to the jury that the profile belonged to someone else, but that was not a decision for the court as gatekeeper of the evidence. (*Ibid.*; accord, *Burgess v. State* (2013) 292 Ga. 821, 823–824 [MySpace records authenticated under similar circumstances].)

This case is readily distinguishable from *People v. Beckley* (2010) 185 Cal.App.4th 509, 515–516 (*Beckley*), which found a photograph downloaded from a MySpace page not properly authenticated. In *Beckley*, there was no testimony regarding the related MySpace page that would suggest the origin and trustworthiness of the photograph. In contrast, here, as in *Valdez*, there was testimony as to “the pervasive consistency of the content of the page, filled with personal photographs, communications, and other details tending together to identify and show owner-management of a page” (*Valdez, supra*, 201 Cal.App.4th at p. 1436.)

Section 352 Challenge to Gang Evidence

Defendant’s final challenge to the prosecution’s gang evidence is under Evidence Code section 352, which allows the trial court, “in its discretion” to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.)

An objection under one prong of section 352 does not necessarily preserve an objection under the other. (*People v. Brady* (2010) 50 Cal.4th 547, 582 [distinguishing the two and finding a cumulative objection forfeited]; *Valdez, supra*, 201 Cal.App.4th at

p. 1438 [“hindsight” objection that gang evidence too broadly admitted in addition to being unduly prejudicial was forfeited]; *People v. Leon* (2010) 181 Cal.App.4th 452, 460 (*Leon*) [entertaining “prejudicial” objection under section 352, but holding “[a]ppellant’s other contentions—that the evidence was irrelevant, cumulative, and constituted inadmissible character evidence—are forfeited because he did not object on these grounds at trial”].)

For the reasons stated in *Valdez* and *Leon*, defendant cannot raise the broad assertion of “cumulative” gang testimony on appeal. The only objection as to the cumulative nature of the gang testimony that defendant cites in the trial court record relates to a narrow slice of evidence, and defendant does not explain on appeal how the trial court erred in admitting that particular material based on it being cumulative. (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com.* (2006) 135 Cal.App.4th 793, 814 [“We need not address points in appellate briefs that are unsupported by adequate factual or legal analysis.”].)

As to the prejudicial nature of the testimony, Evidence Code section 352 gives the trial court discretion to exclude otherwise admissible evidence if the court determines its probative value is “substantially outweighed” by the probability that its admission will “create substantial danger of undue prejudice.” Courts have recognized that gang-related evidence can be inflammatory. (*People v. Williams* (1997) 16 Cal.4th 153, 193.) A trial court’s ruling on an Evidence Code section 352 objection “ ‘must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” (*Rodriguez, supra*, 8 Cal.4th at p. 1124.)

There is no dispute the prosecution, in connection with the criminal street gang charges (§ 186.22, subd. (a) and gang enhancements (§ 186.22, subd. (b)) needed to prove “active participation” in a “criminal street gang” whose members engage in a “pattern of criminal gang activity” by aiding in “felonious criminal conduct.” (See, e.g., *People v. Funes* (1994) 23 Cal.App.4th 1506, 1516.) “To establish a pattern of criminal gang activity, the prosecution was required to prove that defendant’s gang (18th Street)

had committed two or more offenses enumerated in the statute. (§ 186.22, subd. (e).)” (*Funes, supra*, at p. 1516.) “[B]ecause the prosecution is required to establish the defendant was an active participant in a criminal street gang and had knowledge of the gang’s criminal activities, the jury inevitably and necessarily will in any event receive evidence tending to show the defendant actively supported the street gang’s criminal activities.” (*People v. Tran* (2011) 51 Cal.4th 1040, 1048 (*Tran*).)

Ultimately, we conclude the trial court here did not abuse its discretion in admitting the gang testimony. The admissibility of uncharged offenses attributable to the gang is well settled in these cases. (*Tran, supra*, 51 Cal.4th at p. 1048.) The evidence of defendant’s own prior gang-related offenses was admissible, and, as mere firearm possession charges, were not unduly prejudicial in light of the serious violent charges alleged in the case. (*Ibid.* [“That the defendant was personally involved in some of those activities typically will not so increase the prejudicial nature of the evidence as to unfairly bias the jury against the defendant.”].) Even testimony about other murders attributable to the Easter Hill gang (not necessarily defendant) was necessary to show the severity of crimes the gang undertakes and to prove the shootings defendant committed were done for the gang, and not on a rogue basis. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 820 [“This evidence was admissible to prove facts—such as the violent nature of the gang with which defendant was affiliated, and the type of crimes committed by gang members—related to the gang enhancement, even if the evidence was inadmissible to prove the underlying charged offense.”].)

That some of the Easter Hill gang’s online messages and posts or rap lyrics used offenses or language or language suggestive of criminality does not make them “unduly prejudicial.” (*Valdez, supra*, 201 Cal.App.4th at pp. 1437–1438 [that “probative evidence reflects negatively on a defendant is not grounds for its exclusion”].)

Llamas’s opinion that defendant was one of the most “active and violent shooters” the gang “has had based on this investigation” was made in connection with the prosecution’s need to establish the violent nature of the gang and defendant’s active participation in that violence. Defendant cites no authority banning a gang expert from

opining on the extent of a defendant's active participation in a gang. (See *Tran, supra*, 51 Cal.4th at p. 1049 [“the prosecution cannot be compelled to ‘ ‘present its case in the sanitized fashion suggested by the defense’ ’ ”].) Even if it was error to allow Llamas to offer this lone imprudent opinion, we would find the error harmless. The jury was instructed that Llamas's testimony was not offered to establish defendant was a bad person or prone to commit the charged crimes and, moreover, they were free to disregard Llamas's conclusions if unsupported or unbelievable. “[O]ur jury system rests on the assumption jurors are intelligent and capable persons, and we therefore presume the jury adhered to the court's instructions.” (*Valdez, supra*, 201 Cal.App.4th at p. 1437.) Indeed, the jury here might have convicted defendant of all shooting offenses had it credited Llamas's assertion, but it did not, acquitting defendant of some September 13 shootings linked to the Easter Hill gang (those of Bernstine and Lawson) and finding untrue the finding that defendant personally used a gun in the March 2009 murder of Russell.

Severance

Before trial, defendant moved to sever counts 1–3, pertaining to the March 2009 crimes. He conceded the statutory requirements of joinder were met, but nevertheless argued severance, or separate juries, was constitutionally required.

“ ‘Section 954 governs the issue of joinder of counts and it provides in pertinent part: “An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of *the same class of crimes or offenses*, under separate counts, . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.” ’ [Citations.]” (*People v. Capistrano* (2014) 59 Cal.4th 830, 848 (*Capistrano*)).

Here, as defendant concedes, the joinder of the two groups of crimes was proper under section 954, because the two groups were exemplified by the crimes of murder and attempted murder, which are both assaultive offenses of the same class. (*People v. Miller*

(1990) 50 Cal.3d 954, 987 [“murder and attempted murder are both assaultive crimes against the person and, as such, are ‘offenses of the same class’ expressly made joinable by section 954”]; see also *Capistrano*, *supra*, 59 Cal.4th at p. 848.)

“ ‘Because the charges were properly joined under section 954, “defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying defendant’s severance motion.” ’ [Citation.] That is, defendant must demonstrate the denial of his motion exceeded the bounds of reason.” (*Capistrano*, *supra*, 59 Cal.4th at p. 848.) “ ‘ ‘ ‘Refusal to sever [charges] may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a “weak” case has been joined with a “strong” case, or with another “weak” case, so that the “spillover” effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case.’ ” ’ ” (*Ibid.*)

“ ‘[T]he trial court’s discretion under section 954 to deny severance is broader than its discretion to admit evidence of uncharged crimes under Evidence Code section 1101’ because, in large part, a joint trial ‘ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials.’ . . . ‘ “[C]ross-admissibility ordinarily dispels any inference of prejudice” ’ ” (*People v. McKinnon* (2011) 52 Cal.4th 610, 630; *People v. Jenkins* (2000) 22 Cal.4th 900, 948 [“ ‘Cross-admissibility suffices to negate prejudice, but it is not essential for that purpose.’ ”].)

Here, both the March and September crimes included criminal street gang charges and enhancements. The gang expert testimony, which occupied a good deal of court time, would need to be presented in connection with both. The gang glorification and retaliation motives were the same for both. (See *Jenkins*, *supra*, 22 Cal.4th at p. 948 [“Evidence in each case supported the inference that defendant acted for the same motive and with the same intent as in the other case”].) Moreover, as both sets of crimes

involved callous shootings, neither set of crimes, or the supporting evidence, was highly inflammatory in comparison to the other. (See *McKinnon, supra*, 52 Cal.4th at p. 631.) Nor can we say that one set of crimes rested on substantially stronger evidence than the other. Both involved different kinds of evidence, but both raised important questions about whether defendant was adequately indentified as the perpetrator. Finally, the death penalty was not sought in connection with any of the charged offenses. Reviewing the record, we cannot say the trial court abused its discretion in denying severance.

Sentencing

The trial court sentenced defendant, in the aggregate, to life without the possibility of parole (for the Russell murder), plus several terms of life with the possibility of parole, plus a concurrent determinate sentence of 49 years eight months. The Attorney General characterizes the sentence as one for life without the possibility of parole “plus 199 years, 8 months to life.” The defendant states his sentence is life without the possibility of parole plus 198 to life.

Even though defendant was 18 years old at the time of his offenses, he claims he should be treated as a juvenile and therefore subject to more lenient sentencing pursuant to *Miller v. Alabama* (2012) 132 S.Ct. 2455. In short, defendant claims that, when it comes to sentencing and the Eighth Amendment, treating an 18 year old more severely than a juvenile who is 17 years and 364 days old is arbitrary and results in cruel and unusual punishment for the 18 year old. We reject this argument for the reasons stated in *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.

Also, defendant claims his sentence was grossly disproportionate to his moral culpability. He cites, *People v. Dillon* (1983) 34 Cal.3d 441, 488, a case with “peculiar circumstances” in which “the California Supreme Court held that a life sentence imposed for felony murder on an ‘unusually immature’ 17-year-old high school pupil who killed in the belief that he was acting in self-defense constituted cruel and unusual punishment under the state constitution.” (*People v. Abundio* (2013) 221 Cal.App.4th 1211, 1216.) In *Abundio*, the defendant, age 18, had reached the age of adulthood and there was no evidence of unusual immaturity. The defendant also had a sustained juvenile petition for

assault with a stun gun. (*Id.* at pp. 1219–1220.) *Abundio* affirmed a sentence of life without the possibility of parole plus one year for one count of first degree murder with enhancements. (*Id.* at p. 1213.)

Given the egregious nature of the many offenses in this case, we cannot say defendant’s sentence is disproportionate, even if, as defendant notes, his personal actions as regards some particular offenses was not clearly established. (Cf. *People v. Palafox* (2014) 231 Cal.App.4th 68, 73 [affirming two consecutive life without possibility of parole sentences for juvenile].)

DISPOSITION

The judgment is affirmed, except as to the convictions on counts 3, 14, 21, and 22, which are reversed and the sentences vacated. The superior court is directed to amend the abstract of judgment to reflect these changes and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

Banke, J.

We concur:

Humes, P. J.

Dondero, J.

A135721, *People v. Blacknell*