People v. Cliett

2003 | Cited 0 times | California Court of Appeal | January 24, 2003

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A jury convicted appellant Ian Cliett of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1)) [1] (count 1) and first degree murder (§ 187, subd. (a)) (count 2). The jury found true the allegations in both counts that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). The trial court found true the allegation that appellant had been convicted of a robbery, a serious or violent felony within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) (the Three Strikes Law).

The trial court sentenced appellant to a base term of 25 years to life on count 2, doubled to 50 years because of the prior strike. The court added one year for the arming enhancement and stayed the sentence on count 1 pursuant to section 654. Appellant's total prison sentence is 51 years to life.

On appeal appellant contends: (1) the trial court erred in concluding appellant had not unequivocally invoked his rights to silence and counsel under Miranda v. Arizona, [2] and the admission of any of appellant's post-arrest statements cannot be deemed harmless beyond a reasonable doubt; (2) absent appellant's statements the evidence was legally insufficient to establish appellant's conduct as a coconspirator or an aider and abettor to the murder, which requires that the judgment be dismissed and all charges dismissed under principles of double jeopardy; (3) assuming the testimony of witnesses Cole, Moses, and Batts is otherwise credible for sustaining a guilty verdict on the murder charge, their testimony clearly was insufficient to establish the crime of conspiracy, and the jury's verdict on that count must be vacated; (4) the trial court's refusal to order disclosure of the state's confidential informant prejudiced appellant's right to a fair trial and due process of law; and (5) the trial court erred in refusing to award appellant any presentence custody credit for actual time spent in confinement from his date of arrest through sentencing.

STATEMENT OF FACTS

I. Trial Evidence

A. Prosecution

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The members of the Mansfield Gangster Crips gang and the Marvin Gangster Crips gang had a history of being friendly with one another. In April 1996, however, a member of the Marvin Gangster Crips shot and killed a member of the Mansfield Gangster Crips. Since that time, the Mansfield Gangster Crips and Marvin Gangster Crips have been rivals. The Mansfield Gangster Crips claimed the territory north of Venice Boulevard, and the Marvin Gangster Crips claimed the territory south of Venice Boulevard. In August 1998 both gangs had about 200 members. At that time, Keith Stewart (also known as Lazy and Lazy Boy) and Lawrence Moses (also known as Bingo) were members of the Marvin Gangster Crips. Appellant, Anthony McMillian (also known as Ant Dog and Baby Dog) and Marcus Brown (also known as Looney and Baby Looney) were members of the Mansfield Gangster Crips.

Rendell Batts lives at 1927 Thurman Avenue in Los Angeles. Batts had seen Keith Stewart, the victim in this case, on Thurman Avenue from time to time, apparently going into a house across the street from Batts's home. Stewart did not live on Thurman Avenue. About a week prior to August 15, 1998, the day Stewart was shot, Batts saw Stewart shoot at Anthony McMillian. Batts was unable to tell if McMillian was hit by the shot Stewart fired at him. Batts was not a gang member.

Lawrence Moses joined the Marvin Gangster Crips criminal street gang in 1993 or 1994. In August 1998, Moses's son was receiving day care at the Batts's home. Moses had known Stewart, or Lazy, since 1989 but did not know his real name. Moses knew Stewart to be a member of the Marvin Gangster Crips as well. However, after Stewart suffered an accident, he was not really "gang banging."

At approximately 11:00 to 11:45 p.m. on August 15, 1998, Moses and Batts were on the front porch of the Batts home on Thurman Avenue when Moses saw Stewart driving a blue Camaro up and down the street. He eventually parked his car on the west side of the street, where the Batts home is located. Stewart got out of his car and walked across the street in a diagonal direction toward a house at 1842 Thurman Avenue. About five to 10 minutes after Stewart walked across the street, Moses saw two men walking southbound on the sidewalk on the east side of Thurman Avenue. Moses later identified one of the men as appellant, who was accompanied by someone shorter than he was. The two men walked across to the west side of the street. Moses had known appellant since 1991, when appellant and Moses were members of the Homeboy Criminals gang.

Approximately 10 to 20 minutes after Stewart had walked over to the east side of Thurman Avenue, Moses saw Stewart begin walking back across the street toward his car. Moses then heard two shots fired, and he turned around and saw appellant and the shorter man on the grass beside the spot where Stewart's car was parked. Moses then heard more shots fired, and he saw Stewart down on the ground. Moses saw appellant and the shorter man running almost side-by-side toward Venice Boulevard. Batts also looked out to the street after the shots were fired, and he saw Stewart lying in the street and two men running off together toward Venice Boulevard. One of the men was tall and the other was short. Moses told Batts to call 911 and went over to Stewart. Moses saw that he was

kicking his feet and bleeding from the back of his head. Moses recalled that Stewart did not have a gun on his person, and there was no gun lying anywhere around him.

Batts called 911 and then ran outside and went to the spot where Stewart was lying on the ground and coughing up blood. He saw no gun lying near Stewart. Some police officers and an ambulance arrived. The ambulance took Stewart away.

Moses did not know whether it was appellant, the shorter man, or both who had shot at Stewart. At the time of the shooting, Moses did not see Stewart throw or point anything at appellant and the shorter man. The man or men shot at Stewart over the top of Stewart's car. When the shooting occurred, streetlights, porch lights, and light coming through windows of houses illuminated Thurman Avenue.

On the following day, Moses spoke with police and told them he was unable to see who the shooters were. Moses said this because he did not want to get involved. His son was attending day care in the area, and he had other family nearby and was frequently there himself. Moses did not want anything "coming back" on him or his family. At a later date, police showed Moses some photographs that included a photograph of appellant. Moses identified appellant's photograph and wrote on the back of it that appellant was the taller of the two men who shot at Stewart. Moses was shown a photograph of McMillian, and he wrote on it that he was not the one who shot Stewart.

In January 2001, Moses was transported from Las Vegas to Los Angeles to testify at appellant's trial. Moses was held in custody at Los Angeles County jail. While there, he saw appellant, who also was in custody at the jail. Appellant asked Moses if he was going to "tell on him." Moses said he would not. The day before Moses testified at trial, appellant again asked Moses if he would tell on him. Moses again denied he would. Moses was not offered special consideration or a plea bargain for testifying at appellant's trial. Moses was facing federal drug charges in Nevada and had two felony convictions.

Los Angeles Police Officer James Hwang responded to Thurman Avenue at approximately 11:45 or 11:50 p.m. on August 15 and set up a crime scene perimeter in the area where Keith Stewart had been shot. Hwang found Stewart lying face down on the pavement with a pool of blood around his head. Stewart was having difficulty breathing. Hwang observed seven expended bullet casings near Stewart's blue Camaro.

Detectives Tracey Benjamin and Robert Felix of the Los Angeles Police Department were assigned to investigate the shooting of Keith Stewart. They arrived at the shooting scene on the early morning of August 16. While Detective Benjamin was at the scene, seven expended bullet casings were collected. Five of the casings were found in the grass and sidewalk areas to the west of Stewart's car, and two of the shell casings were found in the street near Stewart's car. Near where Stewart had lain, Benjamin saw a white substance resembling rock cocaine, some marijuana, $84.14, and a pager. The paramedics apparently had removed these items from Stewart's clothing while treating him.

Benjamin saw that three bullets were embedded in Stewart's Camaro. There were also two bullet strike marks on the exterior of the vehicle. Benjamin later learned that Stewart was involved in narcotics sales.

Stewart's autopsy revealed that the cause of death was a single gunshot wound to the back of the head. Five bullet fragments were removed from Stewart's head. Gunshot residue testing was performed on Stewart's hands, and the test revealed no gunshot residue.

Pamara Cole had known appellant since she and appellant were in kindergarten. They were good friends who "hung out" with each other. After Stewart's murder, an acquaintance of Cole's named Troy told her he had seen appellant's picture on the Internet. When Cole saw appellant, she asked him about his picture on the Internet and about information there that stated he was wanted for murder. Cole testified that appellant told her it was a lie.

Detective Daryn Dupree of the Los Angeles Police Department was one of the investigating officers in the Stewart shooting. On June 25, 1999, Detective Dupree and Detective Felix interviewed Cole at her home. On June 29, Cole went to the police station at the request of Detectives Dupree and Felix, and underwent another interview with the detectives. Cole was not aware that the interview was being tape-recorded. The tape recording was played to the jury. During the tape-recorded interview, Cole told Dupree and Felix that she had known appellant for 12 years, and she was familiar with the area on Thurman Avenue where Stewart was killed. She had seen Stewart driving around the neighborhood in a black car. A boy named Troy had told her that he had seen on the Internet that appellant was wanted for a murder.

Cole told the detectives she asked appellant "about it." She told appellant that his picture was on the Internet for a murder. Appellant then told her that he and Anthony McMillian had been "over there," and Stewart pulled a gun on them. McMillian had a gun but was taking too long to pull the trigger. Appellant took the gun away from McMillian and shot Stewart. Appellant noticed that Batts and Moses were there, and "[t]hey kn[e]w who he was." According to Cole, appellant was talking about turning himself in.

A tape recording of Detective Dupree's and Detective Felix's conversation with appellant outside the interview room at the police station was played to the jury at appellant's trial. Appellant said "they" were supposed to go to the hospital where McMillian's girlfriend was having a baby. While they were driving, Looney said, "These niggers is out here." Looney then drove to the area where Stewart was shot. Appellant did not know Looney was going to go there. Appellant told Looney to stop the car. Looney did so, and he and appellant got out of the car and started walking. Appellant tried to talk Looney out of whatever he was going to do. They were walking back toward Looney's car when Stewart walked out of the house. Stewart pulled out a pistol. Appellant was scared and began running toward Pico Boulevard. He heard shots being fired. Looney shot Stewart. Later that evening, appellant, McMillian, and Looney went to the hospital in the San Fernando Valley where

McMillian's girlfriend had a baby. McMillian did not shoot Stewart. McMillian tried to negotiate a truce with Stewart's gang, but Looney did not want a truce. After Stewart fired a shot at McMillian, there was no hope for a truce.

Detective Felix knew that Marcus Brown (Looney) had been killed on April 20, 1999. Detective Felix had spoken with Brown's mother, Candyace Brown, several times since appellant's arrest in the instant case. During these contacts, Candyace Brown had never told Felix that her son Marcus had confessed to her that he was involved in the murder of Stewart.

Stephanie Evans is appellant's girlfriend, and they have a child together. Evans testified that she was with appellant all day and all night on August 15, 1998. She and appellant attended a birthday party for Candyace Brown's daughter during the day, and at night they were at Evans's home in Hyde Park. Detective Dupree testified that appellant never mentioned during his interview on July 1 that he was with Stephanie Evans on the night Stewart was killed.

Starr Sachs, a firearms examiner with the Los Angeles Police Department, examined the seven expended bullet casings that were found at the scene. Sachs determined that the casings were all fired from the same firearm. Six of the expended bullet cases were manufactured by the CCI Company and the seventh was made by the Remington Company. All of the expended casings were from either .22-caliber long or .22-caliber long rifle ammunition.

Sachs said that the live ammunition found in the apartment where appellant was arrested on July 1, 1999, was .22-caliber long rifle ammunition manufactured by CCI Company. Although the cartridge casings near Stewart's body were consistent with the live ammunition found in the apartment, the seven cartridge casings found by Stewart's body were not fired from the .22-caliber rifle that was found in the apartment. Ammunition that is .22-caliber long rifle can be fired from a .22- caliber semiautomatic handgun or a revolver. Sachs also examined a fragmented bullet that was removed from Stewart's body. The fragments were consistent with .22-caliber long rifle ammunition.

Daniel Woo, a fingerprint analysis expert with the Los Angeles Police Department, examined the expended shell casings as well. He did not find any identifiable fingerprints on the casings. During his career, Woo has analyzed more than 40,000 sets of fingerprints for comparison purposes and has never found an identifiable fingerprint on a .22-caliber shell casing because of the small size of such casings. He was not aware of any case in which an identifying fingerprint had been obtained from a .22-caliber shell casing.

Officer Shands McCoy testified as a gang expert at appellant's trial. He informed the jury that when members of one street gang go into a rival street gang's territory, especially at night, they go there for the purpose of doing harm, engaging in criminal activity, shooting someone, and more than likely killing someone, such as a rival gang member. If a gang member goes into a rival gang's territory, he would not go there unarmed. A gang member who goes into a rival gang's territory in a car would not

get out of the car in the rival gang's territory if he was unarmed.

B. Defense

One or two days before Marcus Brown (Looney) died, he told his mother, Candyace, that he shot Stewart after Stewart had reached for his gun and tried to kill him. Brown did not tell his mother whether he was alone or with someone else when he shot Stewart.

Appellant's mother testified that she had no daughters, and appellant had no sisters. Therefore, Officer McCoy, the prosecution's gang expert, was incorrect in saying that appellant and McMillian knew each other because McMillian had dated appellant's sister.

II. Evidence Presented at the Suppression Hearing

A. Defense Evidence

Charles Flowers lives at 8914 Rose Avenue in Long Beach. He was present when appellant was arrested there by Detectives Dupree and Felix. Flowers was at home with his children, his father, his girlfriend, and appellant when the police knocked on the door. The police told Flowers to go outside, where Detective Dupree stayed with him. The police said they were looking for appellant, whom they eventually brought outside. Detective Felix was talking to appellant, reading him his rights "or whatever" while Flowers was standing about 12 feet away. When Flowers asked if he could go back in the house, the officers told him that he could. As Flowers started walking back toward his apartment, he heard appellant say that he wanted his lawyer. Flowers watched the officers search the apartment. Police found guns inside Flowers's apartment. Flowers observed that appellant was handcuffed when he was outside of the apartment with the officers.

Appellant took the witness stand at the suppression hearing. He testified that he had seen Detective Dupree approximately five to 10 times before appellant's July 1 arrest. He had also spoken with Detective Felix previously. Both detectives previously had interviewed appellant about things that were going on in the neighborhood. As appellant stood outside Flowers's apartment next to Detective Felix, Felix asked appellant about the Stewart homicide. Appellant did not say anything about it because he did not know anything at that time. He and Felix engaged in "small talk." Felix advised appellant of his "Miranda rights," including his right to remain silent and his right to have an attorney. When Detective Felix asked appellant if he wanted to give up his rights, appellant replied, "No, I want an attorney." Felix talked briefly about why appellant did not want to talk to him. Detective Felix also said that he already knew the truth.

On the way to the police station, appellant and the officers again engaged in small talk. The detectives did not bring up the Stewart shooting, but appellant brought it up. He told the detectives he "didn't want him to go above and beyond any duty to try to stick me with something I didn't do."

While they were waiting for the interview room to be prepared, Detective Felix said that he knew appellant had done it, and he had 11 witnesses. Appellant told Detective Felix he did not want to talk to him and he wanted an attorney. Appellant said this more than once.

In the interview room, the detectives read him his rights, and appellant understood them. Detective Dupree asked appellant if he wanted to talk to him and Detective Dupree. Appellant chose to remain silent. Detective Felix then said, "You don't want to talk to us?"; and Detective Dupree said, "Okay, you don't want to talk to me?" Appellant was intimidated by Detectives Felix and Dupree because he had dealt with them before and knew what they were capable of doing and what they had done to other people. Detective Felix seemed pretty upset about appellant saying he did not want to talk. He sat back in his chair and patted his stomach, "like he was Santa Claus or something." Appellant interpreted this as meaning that Felix had a "gut feeling" that appellant had done it.

Appellant agreed to talk to the officers because he was intimidated. Appellant subsequently asked the detectives for an attorney. The officers did not stop questioning appellant after he said this. They did not stop questioning him no matter what he said. Appellant felt intimidated by Detectives Dupree and Felix when he signed the advisement and waiver of rights form. From the time appellant was in contact with the detectives in Long Beach until he entered the interview room, appellant asked for an attorney more than 10 times, and appellant told the detectives that his attorney was Mr. Kaplan. During the interview appellant also said that he wanted Mr. Kaplan. Appellant acknowledged he had never spoken with Mr. Kaplan before, and Mr. Kaplan had never been his attorney on another case.

B. Prosecution Evidence

Detective Dupree testified that he engaged in small talk with appellant outside the apartment building while the Flowers residence was being searched. Dupree said he had come into contact with appellant on approximately 10 prior occasions. He said he and appellant had mutual respect for each other. While Dupree and appellant were outside the apartment building, appellant did not indicate he did not want to speak with Dupree, and he did not say he wanted an attorney. After the two guns were found, Dupree, Felix, and another officer drove appellant to the police station. During the drive they continued to engage in small talk. Dupree did not ask appellant about Keith Stewart's murder during the drive.

Dupree said he asked his partner, Felix, if he had advised appellant of his rights in Long Beach, and Felix said he had. Felix told Dupree that appellant said he was willing to speak with them. At the Wilshire station, Dupree told appellant for the first time that he and Felix wanted to talk about the Stewart murder. Appellant said he was willing to tell the detectives what he knew. The three then went into the interview room.

The detectives tape-recorded the interview with appellant. At the beginning of the interview, Felix

advised appellant of his Miranda rights. Based on the interaction in Long Beach, in the car, and at the police station before the interview, Dupree had formed the opinion that appellant wanted to talk with the detectives. Before the interview, appellant did not tell Dupree he did not want to talk to him, and appellant did not ask for an attorney.

After interviewing appellant for approximately half an hour inside the room, the detectives and appellant went outside the interview room. There, appellant made more statements. Afterwards, appellant and the detectives entered the interview room again, where appellant made more statements.

At the request of the prosecution, the trial court reviewed transcripts of Detective Felix's testimony at preliminary hearings on March 2, 2002, and October 3, 2002.

DISCUSSION

I. Admission of Appellant's Statements to Police

Appellant argues that the trial court erred when it concluded that appellant had not unequivocally invoked his right to silence and right to counsel under Miranda. According to appellant, the admission of appellant's post-arrest statements cannot be deemed harmless beyond a reasonable doubt.

In determining whether a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's Miranda rights, the reviewing court "`"must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] [But it] must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' [Citation.]" (People v. Box (2000) 23 Cal.4th 1153, 1194.)

If the accused indicates that he wishes counsel, "the interrogation must cease until an attorney is present." (Miranda v. Arizona, supra, 384 U.S. at p. 474.) The invocation of the right to counsel is "per se an invocation of . . . Fifth Amendment rights," and bars any further interrogation by police. (Fare v. Michael C. (1979) 442 U. S. 707, 719.) Further questioning without counsel is possible only if the suspect himself initiates further communication. (People v. Waidla (2000) 22 Cal.4th 690, 727-728.)

If the suspect's ambiguous remarks fall short of a clear invocation of his right to counsel, the police may continue talking with the suspect "for the limited purpose of clarifying whether he is waiving or invoking those rights. [Citations.]" (People v. Johnson (1993) 6 Cal.4th 1, 27.) The inquiry into whether the suspect has unambiguously requested counsel is an objective one. (Davis v. United States (1994) 512 U.S. 452, 458-459.) The test is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (Id. at p. 459.)

As noted, appellant presented evidence that he had invoked his right to counsel at the apartment of Charles Flowers in Long Beach, and Flowers himself testified that he heard appellant ask for a lawyer. Appellant also testified that he had repeatedly requested a lawyer. The trial court made adverse credibility determinations as to these two witnesses. The trial court accepted the testimony of Detective Dupree at the suppression hearing and the preliminary hearing testimony of Detective Felix, which was offered at the hearing by the People. On appeal, appellant addresses only the issue of whether the colloquy among him and the detectives at the police station showed that the detectives legitimately asked for clarification when appellant said, "I choose to remain silent."

The record shows that, after appellant was taken from the arrest site in Long Beach to the Wilshire Division police station, the interview room discussion among appellant and detectives Felix and Dupree proceeded as follows:

"Det.: You've had this read before now, right?

"Cliett: Um-hmm.

"Det.: The rights *** before. Now listen up here. You have the right to remain silent.[3]

"Cliett: Um-hmm.

"Det.: If you give up the right to remain silent anything you say can and will be used against you in a court of law.

"Cliett: Um-hmm.

"Det.: You have a right to speak with an attorney and to have an attorney present during questioning.

"Cliett: Um-hmm.

"Det.: If you so desire and cannot afford one an attorney will be appointed for you without charge before questioning. Do you understand that?

"Cliett: Um-hmm. ***

"Det.: *** If you understand, write *** in front of you.

"Cliett: Personal waiver. On one of them, is it an attorney *** or a public defender?

"Det.: Ok, let me put it this way. We are going to ask you some questions about a situation that happened out there. You have a right to have an attorney present.

"Cliett: Is it going to be an attorney or --

"Det.: An attorney's an attorney.

"Cliett: All I'm saying is, is it going to be an attorney or a damn plain public defender?

"Det.: I don't know who it'll be. It'll probably be a public defender. I don't know.

"Cliett: O.K.

"Det.: Do you understand these rights I have explained to you?

"Cliett: Yeah.

"Det.: O.K., do you wish to give up your right to remain silent, in other words do you want to talk to me now about what we talked to you about?

"Cliett: Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahhh [approximately 11 seconds of silence] Uhhh [3 seconds of silence] I, I choose to remain silent.

"Det: OK, you don't want to talk to us? You don't want to talk to me?

"Cliett: I'll talk.

"Det. Do you wish to give up the right to speak to an attorney and have an attorney present during questioning, so in other words you want to talk to us, huh?

"Cliett: Right.

"Det: Okay, okay, now this thing right here, this form here, you sign, right here, your true name, okay?

"Cliett: ***

"Det: ***

"Det: It's about 10 o'clock now."

The detectives then proceeded to question appellant. Appellant denied his involvement in the shooting. This portion of appellant's interview was admitted into evidence and presented to the jury by means of questions posed by the prosecutor to Detective Dupree. The discussion later moved

outside the interview room, and appellant was unaware that this portion was being recorded. As stated previously, appellant made statements indicating he was at the scene of the shooting, but he ran when Stewart pulled out a gun. He said Looney did the shooting, and Baby Dog (McMillian) was not at the shooting. The trial court admitted the first interview room statements and the outside statements up to a certain point where the court believed appellant invoked his right to an attorney. The jury heard the audio tape of the admissible portion of the conversation that took place outside the interview room.

At the hearing, Detective Dupree testified that the reason he asked appellant, "You don't want to talk to me?" was because Detective Dupree was surprised when appellant said he chose to remain silent. This was because of their relationship and because appellant "didn't ask for an attorney or anything like that prior to that. He acted like he wanted to talk."

In making its ruling, the trial court stated: "The principal area of the defense argument deals with what was said at the beginning of the interview in the interview room, and that is pages 2 through 3 of the transcript marked as court exhibit 1. [¶] I conclude that was not a sufficient assertion of the defendant's right to remain silent, and the entire context of it has been reviewed. [¶] First, the defendant did make a statement about an attorney. He asked about an attorney that would be provided to him. I do not find that is a demand for counsel. It was simply a question as to whether he would be provided with a public defender or some other lawyer. It's not an assertion of his right to counsel. [¶] The principal argument is the interchange at the bottom of page 2 of the transcript when the defendant did use the words, `I cho[o]se to remain silent.' [¶] I think in the entire context of the interaction between the detectives and the defendant on July 1st, that was an unclear statement of the defendant's intent. [¶] Detective Dupree indicated that the defendant had been entirely cooperative up to that point. He had said that he was willing to talk to the detectives about the shooting. He had never indicated anything to the contrary. [¶] The detectives both asked questions after the defendant made his statement, and I don't find them to have been coercive. [¶] I don't find that they raised their voices in any kind of intimidating manner. I received those statements and evaluated them as what Detective Dupree said, a statement of surprise. They were surprised at what he said and they were simply asking for clarification. [¶] I think it's very important that these were simple and direct questions. They were asked immediately after the defendant made his statement. There was not some prolonged period in which the defendant was exposed to state prison, other kinds of statements or threats or anything of that kind. It was a simple, direct statement of his intent to clarify his intention. [¶] I think it's equally significant that he immediately responded by saying I'll talk. It was not a long period of delay where he was thinking about it. He simply said, yes, I'll talk. Then he immediately signed a written statement which expressed that intent. [¶] Under cases such as People versus Box, . . . 23 Cal[.]4th at 1194; People versus Johnson, 6 Cal[.]4th at 27, and People versus Ri[c]e[(1971) 16 Cal.App.3d 337,] at 343, the police are entitled to ask questions to clarify the defendant's words. They did so here, and I find those questions were appropriate. [¶] There was no waiver or no assertion of the defendant's right to counsel that was stated at that time."

Appellant argues that there was not one iota of equivocation or ambiguity in his expressed choice to invoke his right to remain silent. Therefore, he maintains, there was no need for Detective Dupree to "clarify" appellant's express statement of purpose.

We disagree with appellant and conclude the trial court's ruling was correct. As stated previously, the inquiry into whether the suspect has unambiguously requested counsel is an objective one. (Davis v. United States, supra, 512 U.S. 452, 458-459.) The issue is what a reasonable officer in light of the circumstances would have understood. (Id. at p. 459.) Detective Dupree, whom the court found a credible witness, testified that both he and Detective Felix spontaneously uttered expressions of surprise when appellant said he chose to remain silent. The tape recording, the transcript, and the testimony of the detective confirm this to be the case. The detectives' questions can reasonably be interpreted as spontaneous expressions of surprise rather than direct requests for clarification. Even if we were to consider the questions as requests for clarification, the officers did not act unreasonably given the circumstances of their interaction with appellant up to that point. Appellant had told the officers before entering the interview room that he was willing to tell the detectives what he knew about the murder of Keith Stewart. We conclude the trial court did not err. (See People v. McGreen (1980) 107 Cal.App.3d 504, 520-523, overruled on another point in People v. Wolcott (1983) 34 Cal.3d 92, 101.)

II. Sufficiency of the Evidence

Appellant argues that, absent his statements, the evidence was legally insufficient to establish his guilt as either a coconspirator or an aider and abettor to the murder of Keith Stewart. He contends the judgment must be reversed and all charges must be dismissed under principles of double jeopardy.

Because we have found that the trial court properly admitted appellant's statements, we need not address this claim. Nevertheless, we conclude that the other evidence presented at trial would have been sufficient to establish appellant's guilt as an aider and abettor or coconspirator. The evidence established that there was an ongoing conflict between the Mansfield Gangster Crips and the Marvin Gangster Crips. Keith Stewart was a Marvin Gangster Crip and was in the Marvin Gangster Crips's territory when shot. Appellant and Marcus Brown were Mansfield Gangster Crips in their rival's territory. The two were prowling around enemy territory at night and on foot. Evidence showed that gang members do not enter a rival's territory, especially at night and when armed, unless they have a criminal purpose in mind -- usually to attack a rival gang member. Approximately a week before Keith Stewart was killed, he fired a shot at Mansfield Gangster Crips member Anthony McMillian.

Moses identified appellant as one of the two men who attacked Stewart. He had recognized appellant when he saw the two walking around before the attack. Cole testified that appellant told her that he and Anthony McMillian had been there when Stewart pulled a gun on them. Appellant told Cole he shot Stewart and that he knew Batts and Moses had seen him. It is well established that the

uncorroborated testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to sustain a criminal conviction. (People v. Scott (1978) 21 Cal.3d 284, 296.) It is clear beyond a reasonable doubt that the jury would have convicted appellant of counts 1 and 2 even if the trial court had excluded the statements made to the detectives. (People v. Cahill (1993) 5 Cal.4th 478, 509-510.)

Appellant also contends in a third argument that, even assuming the testimony of Cole, Moses, and Batts is credible for sustaining a guilty verdict on the charge of murder, the testimony of these witnesses is clearly insufficient to establish the crime of conspiracy. Appellant argues that the existence of a conspiracy must be established by proof independent of a defendant's extra-judicial statements. Therefore, the verdict on that count must be vacated.

We conclude that the evidence was sufficient to establish the corpus delicti of the crime of conspiracy to murder Stewart independent of appellant's judicial statements. The corpus delicti of a crime consists of the fact of the injury or harm and the fact that a criminal agency caused the harm. (People v. Jennings (1991) 53 Cal.3d 334, 364.) Proof of the corpus delicti of a crime, apart from defendant's statements, may consist of circumstantial evidence. Only a slight or prima facie showing permitting a reasonable inference that a crime was committed is necessary. (Ibid.) The required mental state can be inferred from the circumstances. (Ibid.)

The evidence outlined in the preceding paragraphs was sufficient to establish the existence of a conspiracy to commit murder. The evidence showed Stewart was shot to death and that two men committed the crime. The entry of appellant and Marcus Brown, armed with a gun, into enemy gang territory was sufficient circumstantial evidence to make a prima facie showing that the two had the required agreement and specific intent for the crime of conspiracy to commit murder. Therefore, there was sufficient evidence to establish the corpus delicti of the crime, and appellant's argument fails.

III. Trial Court's Denial of Appellant's Motion to Identify Confidential Informant

Defense counsel filed a pretrial motion seeking disclosure of a confidential police informant who had provided police with information about the perpetrators of the murder of Stewart. The prosecution filed written opposition to the motion. After a hearing, the trial court denied the defense motion.

Along with his written motion, defense counsel submitted the declaration of Los Angeles Police Department Officer Lionel Lindquist. In his declaration, Lindquist stated that he had worked in the gang division at the Wilshire Police Station for the previous three to four years and had worked with the Mansfield Gangster Crips, appellant's gang. Lindquist stated he had participated in the investigation of Keith Stewart's murder and, in the course of that investigation, he had spoken with a Mansfield Gangster Crips gang member who was a confidential informant. The informant had asked to remain anonymous because he feared for his safety. This informant told Lindquist that the persons

responsible for the shooting were "Baby Dog" (McMillian) and "Looney" (Marcus Brown). The informant had learned this information from other persons whom the informant would not name. The informant had not been a percipient witness to the shooting. Lindquist stated that, because of the informant's affiliation with the Mansfield Gangster Crips, and based on Lindquist's own knowledge of the gang and McMillian, disclosure of the informant would place the informant and his family in danger.

Defense counsel acknowledged that the informant had not been a percipient witness to the shooting. He argued, however, that the informant was a material witness on the issue of appellant's guilt in that he "possesses the names of the individuals who provided him with the information that he passed on to Officer Lindquist."

The prosecution stated in opposition that Lindquist had agreed to keep the informant's identity secret, and the informant was certain his life would be in danger if his gang found out about his cooperation with Lindquist. The informant had not witnessed the shooting and had not spoken to anyone who admitted committing the crime. The informant was merely relating hearsay about who might be responsible for the shooting. The informant did not tell Lindquist the identity of the person who had given him the information. Furthermore, appellant told Felix and Dupree that he had gone to Thurman Avenue with McMillian and Marcus Brown, although he denied he had participated in the shooting. Therefore, appellant had identified the same two persons as the confidential informant. Also, appellant told Pamara Cole that he was at the scene and that he shot Keith Stewart. As the first judge who denied appellant's motion stated, nothing in the informant's statement excluded appellant from culpability for Stewart's murder, and the informant had only heard the two individuals' names through the grapevine.

During oral argument, the prosecutor pointed out that Lindquist had not even disclosed the informant's identity to the People. He added that, since the firearms evidence demonstrated there was only one shooter, the rumors repeated by the informant were inconsistent with the known facts and would not lead to anything exculpatory for appellant.

In denying the defense motion, the trial court stated: "I don't need to speak with Officer Lindquist. I don't think there's been an adequate showing to compel this informant to come into court. I think it would be foolhardy to believe that we can protect the safety of this gentleman. I think it's risky when we make these people come to court. I don't know if we could find him. It's risky. It's not like we live in -- not like we live in a shroud. This is a public building. And . . . [¶] . . . [¶] . . . I don't have any reason to disbelieve the statement of Officer Lindquist. [¶] . . . [¶] . . . He does say it was some anonymous witness heard from others whom he did not name. [¶] . . . [¶] In other words, there is no reason to believe that this is credible, reliable or can lead to the discovery of exculpatory evidence. And motion to disclose the identity of the confidential informant is denied."

Appellant argues that the trial court's refusal to order disclosure of the informant's identity

prejudiced his right to a fair trial and due process of law. He maintains there can be no doubt that the informant was a material witness on the issue of appellant's guilt. Since the crucial question for the jury to resolve was the identity of who was present and who participated in the shooting of Stewart, the informant's ability to name eyewitnesses who could confirm that McMillian and Brown were the two men present was crucial to appellant's defense. Appellant contends the court's error was not harmless beyond a reasonable doubt and the jury's verdicts must be vacated. Alternatively, he maintains that this court should remand the case to the trial court with directions to hold an in camera hearing on the issue.

Courts have long recognized the common law privilege to refuse disclosure of the identity of a confidential informant who has furnished information to a law enforcement officer. As our Supreme Court explained in People v. Hobbs (1994) 7 Cal.4th 948, 960: "The common law privilege to refuse disclosure of the identity of a confidential informant has been codified in Evidence Code section 1041, which provides in relevant part: `[A] public entity has a privilege to refuse to disclose the identity of a person who has furnished information [in confidence to a law enforcement officer] . . . purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state . . . if . . . (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice. . . .' (Fn. omitted.) [4]

"[Evidence Code] [s]section 1042 sets forth the consequences to the People of successfully invoking the informant's privilege.[[5]] Subdivision (a) of that section states the general rule requiring the court to `make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law . . .' when the privilege is sustained." (People v. Hobbs, supra, 7 Cal.4th at pp. 960-961.) However, this rule is subject to exceptions. (See id. at p. 961.) Evidence Code section 1042, subdivision (d) provides that, when the defendant demands disclosure of an informant's identity on the ground that the informant is a material witness on the issue of guilt, a hearing must be held. If the prosecutor requests, the hearing must be held in camera. (Hobbs, at p. 961.) After the hearing, the trial court need not order disclosure unless "there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (§ 1042, subd. (d).)

"An informant is a material witness under Evidence Code section 1041 if it appears there is a reasonable possibility the informant could give evidence on the issue of guilt which might result in a defendant's exoneration. [Citation.] `However, defendant's showing to obtain disclosure of an informant's identity must rise above the level of sheer or unreasonable speculation, and reach at least the low plateau of reasonable possibility.' [Citation.]" (People v. Luera (2001) 86 Cal.App.4th 513, 525-526.)

"`The standard of "reasonable possibility" has "vague and almost limitless perimeters which must be determined on a case-by-case basis." The courts have indicated that the measure of the "reasonable possibility" standard to be utilized in individual cases is predicated upon the relative proximity of the

informant to the offense charged. "[T]he evidentiary showing required by those decisions is . . . as to the quality of the vantage point from which the informer viewed either the commission or the immediate antecedents of the alleged crime." The existence of a reasonable possibility that testimony given by an unnamed informant could be relevant to the issue of defendant's guilt becomes less probable as "the degree of attenuation which marked the informer's nexus with the crime" decreases. If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence of a charge or information which rises from the arrest. Thus, "when the informer is shown to have been neither a participant in nor a non-participant eyewitness to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility."' [Citation.]" (In re Benny S. (1991) 230 Cal.App.3d 102, 108.)

It is true that, although a defendant has the burden of producing some evidence on this issue, he or she need not prove that the informer was a participant in, nor an eyewitness to, the crime. (People v. Garcia (1967) 67 Cal.2d 830, 837.) In the instant case, however, there was no reasonable possibility that appellant could reasonably expect to glean from the informant any evidence that tended to exonerate him of the crime for which he was convicted. Therefore, the trial court correctly denied the defense motion. (People v. Luera, supra, 86 Cal.App.4th at pp. 525-526.)

The record shows that appellant admitted to police officers that he was present when the shooting took place. He also admitted to Pamara Cole that he was present, stating that he actually shot Stewart. The confidential informant was not a percipient witness to the crime, and the information he had that Baby Dog and Looney were "responsible" for the shooting was "something [he] heard from others, whom he did not name." This information, even if it could be shown to be reliable, does not tend to exonerate appellant of the crimes for which he was convicted as an aider and abettor and coconspirator. We discern no error in the trial court's decision on appellant's motion. Nothing in the record indicates any reasonable possibility that the informant might have provided exculpatory evidence on the issue of appellant's guilt.

IV. Credits

Appellant contends the trial court erred when it denied him any presentence custody credits -- even those relating to actual time spent in presentence detention. Appellant claims the court misread section 2933.2. [6]

Respondent concedes that section 2933.2 prohibits a grant of only presentence conduct credits to persons convicted of murder. The unambiguous language of section 2900.5, subdivision (a), grants credit for actual time spent in presentence custody to defendants in all felony and misdemeanor cases.

As stated in People v. Herrera (2001) 88 Cal.App.4th 1353, 1366, "[n]othing in section 190, subdivision (e) [7] denies presentence credits for time actually served to a post-June 2, 1998, first degree murderer."

Therefore appellant is entitled to credits for time he served from the date of his arrest until the day of his sentencing. The record indicates appellant was arrested on July 1, 1999, and that he was sentenced on August 27, 2001. Accordingly, as appellant requests, the abstract of judgment must be amended to reflect a total of 788 days of presentence custody credits to reflect this time period.

DISPOSITION

The superior court is ordered to correct the abstract of judgment to reflect an award of 788 days of presentence credits to appellant and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

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

2. Miranda v. Arizona (1966) 384 U.S. 436.

3. Asterisks represent unintelligible words.

4. Evidence Code section 1041 provides: "(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered. [¶] (b) This section applies only if the information is furnished in confidence by the informer to: [¶] (1) A law enforcement officer; [¶] (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or [¶] (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2). [¶] (c) There is no privilege under this section to prevent the informer from disclosing his identity."

5. Evidence Code section 1042 provides: "(a) Except where disclosure is forbidden by an act of the Congress of the United

States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material. [¶] (b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it. [¶] (c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure. [¶] (d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial."

6. Section 2933.2 provides in pertinent part that "(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933. [¶] . . . [¶] (c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4010 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)." Section 2933 describes worktime credit. Section 4019 describes credit for work and good behavior.

7. Section 190 prescribes the punishment for murder. Section 190, subdivision (e) states that "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce any minimum term of a sentence imposed pursuant to this section. . . ."