**People v. Payne**

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[Crim. No. 28598. Court of Appeals of California, Second Appellate District, Division Five. January 5, 1977.]

THE PEOPLE, Plaintiff and Respondent, v. DAVID MICHAEL PAYNE, Defendant and Appellant

(Opinion by The Court.)

COUNSEL

Andelson & Andelson and Arlen H. Andelson for Defendant and Appellant.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, S. Clark Moore, Assistant Attorney General, Norman H. Sokolow and Howard J. Schwab, Deputy Attorneys General, for Plaintiff and Respondent. **[65 Cal. App. 3d 681]**

OPINION

THE COURT

David Michael Payne was convicted by plea of two counts of child molestation (Pen. Code, § 288). Prior thereto, he unsuccessfully brought a motion pursuant to Penal Code section 1538.5. Suspended state prison sentences were imposed and probation was granted on certain terms and conditions, inter alia, the service of one year in the county jail. As authorized by Penal Code section 1538.5, subdivision (m), he appeals contending that the suppression motion was erroneously denied.

[1] Preliminarily we note that "[a] proceeding pursuant to section 1538.5 is one in which factual issues are resolved by the court sitting as a finder of fact. [Citation.] 'In such a proceeding the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence.' [Citation.]" (People v. Rios, [16 Cal. 3d 351](https://law.justia.com/cases/california/supreme-court/3d/16/351.html), 357 [128 Cal. Rptr. 5, 546 P.2d 293].)

On various occasions, Steve Scott, a reliable informant, told Police Officer Lloyd Martin "... that a male by the name of David Payne was a child molester, that David Payne lived in Pasadena near the -- or next to the Mercedes-Benz dealership, that Mr. Payne was a photographer, that he had photographed kids in the nude, that he had a bedroom and a photo lab in his garage, that he committed acts of child molest with kids in this bedroom, that Mr. Payne had an orange Datsun pickup, and the informant gave me a telephone number which he said was the residence of Mr. Payne." fn. 1 Scott described appellant's modus operandi as follows: "... Dave Payne would bring the juveniles to his home, that he did not wish his mother or his housekeeper to know that the juveniles were there, and that prior to going into his driveway, the juvenile would secrete himself somewhat in Payne's vehicle, and that Payne would get out, leave his door open on his vehicle, go into the house and then the juvenile would go into the bedroom while Payne was inside."

A surveillance of appellant and his residence was set up. On September 17, 1974, appellant was observed to drive his orange pickup fn. 2 **[65 Cal. App. 3d 682]** to various locations in the City of Pasadena. He finally pulled into a driveway at the intersection of Orange and Montecito Streets. He exited the vehicle for a brief period. Upon his return thereto he was accompanied by a male juvenile (later identified as David S.) who was estimated to be between 10 and 12 years of age. After stopping at a grocery store, appellant and David S. went to appellant's residence. Appellant entered the main portion of the residence while David went into the garage. Appellant then entered the garage.

Officer Martin became "apprehensive" about "... the welfare of the juvenile" and "... thought that a crime was being committed ...." He testified, "Agent McPherson and myself, along with other members of the Los Angeles Police Department, went to the bedroom door of the garage. I observed Officer McPherson knock on the door, identify himself as a police officer, stated that he was there to conduct a child molesting investigation. I heard McPherson do the same [thing] over again, repeating the same thing. From the inside of the location there was a male voice that stated, 'What do you want?' [¶] Against Officer McPherson stated that he was a police officer there conducting a child molest investigation, to open the door. There was no response. I heard movement inside the location, at which time Agent McPherson and myself forced the door at the bedroom." David S., only partially dressed, was on the bed located in the garage-bedroom. Appellant was placed under arrest. David S. was taken into custody. Thereafter, David S. detailed the various sexual activities that he and appellant had been engaging in for an extended period of time. He also indicated that another juvenile, 13-year-old Andy C. had also engaged in sexual activities with appellant. fn. 3

The suppression motion was submitted, in part, on the testimony taken at the preliminary hearing where the magistrate determined, "... that under the doctrine of the Roberts case [People v. Roberts, [47 Cal. 2d 374](https://law.justia.com/cases/california/supreme-court/2d/47/374.html) (303 P.2d 721)], the cases that follow that line of authority justifying entry on emergency, that the officers had the right to enter, and the objection to the introduction of further evidence at this time is overruled." In denying the suppression motion in the superior court, the court concluded, "I concur with the magistrate ... that the entry was ... based upon the doctrine of necessity and emergency ...."

[2a] In the seminal California case of People v. Roberts, supra, "[t]he trial court found [as in the instant case] that the officers reasonably **[65 Cal. App. 3d 683]** believed that someone inside the apartment was in distress and in need of assistance and that they entered for the purpose of giving aid. [3] Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for the purpose. [Citations.]" (People v. Roberts, supra, p. 377.)

In People v. Roberts, supra, while conducting a burglary investigation the police went to an apartment, knocked on the door and received no response. "They heard several moans or groans that sounded as if a person in the apartment were in distress ..." and entered to investigate and render aid to a person in need thereof (People v. Roberts, supra, pp. 376, 380). Our Supreme Court held that the "... officers did not act unreasonably or in violation of defendant's constitutional rights." (People v. Roberts, supra, p. 380.)

The "emergency doctrine" also has been held to justify police conduct in a variety of situations which otherwise would have infringed constitutional restraints. In People v. Johnson, [15 Cal. App. 3d 936](https://law.justia.com/cases/california/court-of-appeal/3d/15/936.html) [93 Cal. Rptr. 534], where the police were investigating a report of a mother that her child had been abducted, the court said, "... the heinous and dangerous nature of the reported crime is such that responding officers should not be required to insist that the reporting mother 'prove her case' in the street before acting in reliance upon her representations." (People v. Johnson, supra, p. 940.) Likewise, in People v. Brown, [12 Cal. App. 3d 600](https://law.justia.com/cases/california/court-of-appeal/3d/12/600.html) [[90 Cal. Rptr. 881](https://law.justia.com/cases/california/court-of-appeal/3d/12/600.html)], where "... information was that a helpless child, physically and mentally impaired, was about to be, or might be in the process of being, violently and feloniously assaulted," the court said, "... the rights of privacy and domestic security extend no impenetrable protective cloak against the prevention of a felonious assault upon a helpless victim whose right to physical and mental integrity outweighs the right of the aggressor to remain secure in his domestic sanctuary when used for such a purpose." (People v. Brown, supra, p. 605.)

[2b] In the instant case the fortuitous, and only subsequently determined, fact that the suspected crime was occurring with the assent of its child-victim, a fact which retroactively explained the lack of any overt indicia of ongoing harm (e.g., a scream for help), did not make the situation any less of an "emergency." The police officers reasonably believed that David S. was in need of their assistance. (People v. Roberts, supra, [47 Cal. 2d 374](https://law.justia.com/cases/california/supreme-court/2d/47/374.html), 477.) The potential crimes for which appellant was being investigated were particularly "heinous and dangerous." (People v. **[65 Cal. App. 3d 684]** Johnson, supra, p. 940.) David S.'s "... right to physical and mental integrity [simply] outweigh[ed] the right of [appellant] to remain secure in his domestic sanctuary ...." (People v. Brown, supra, p. 605.)

Since we have concluded that the officers did not act unreasonably or in violation of defendant's rights (People v. Roberts, supra, p. 380) we need not consider appellant's contention that the testimony of the victims was the "fruit of the poisonous tree." (Wong Sun v. United States, [371 U.S. 471](https://supreme.justia.com/cases/federal/us/371/471/) [9 L. Ed. 2d 441, 83 S. Ct. 407].)

The judgment (order granting probation) is affirmed.

FN 1. The telephone number "... was registered to a Joan Payne at 45 North San Marino in Pasadena."

FN 2. The police had determined that this vehicle was registered in appellant's name.

FN 3. Both David S. and Andy C. testified at the preliminary hearing about their sexual activities with appellant which included oral copulation and sodomy.

# PEOPLE v. PAYNE

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*THE PEOPLE, Plaintiff and Respondent, v. MICHAEL PAYNE, Defendant and Appellant.*

Court of Appeals of California, Second Appellate District, Division Six

October 20, 2009

Not to be Published in the Official Reports

#### Attorney(s) appearing for the Case

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GILBERT, P.J.

Michael Payne appeals a judgment following his conviction of first degree murder (Pen. Code, § 187, subd. (a), 189),[1](https://www.leagle.com/decision/incaco20091020016#fid1) with jury findings that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)), and that he used and discharged a firearm causing the death of Anthony Boyd (§ 12022.53, subds. (b), (c) & (d)). We conclude, among other things, that 1) a trial witness who stood near Payne at the scene of the shooting was not an accomplice; 2) but, even so, there was sufficient evidence to corroborate his testimony; 3) Payne has not shown ineffective assistance of his trial counsel; but 4) the trial court committed sentencing error by imposing a 10-year gang enhancement. We strike the enhancement. In all other respects, we affirm.

#### FACTS

Delvon Hebrard had known Payne "[f]or a couple of years." Hebrard testified that Payne was a member of the Mob Piru, a "Blood gang." At 1:00 a.m., on June 12, 2006, Hebrard was at home when he heard Payne arguing with Anthony Boyd. Boyd was across the street from Payne. Hebrard went outside and walked to the side of the street where Payne was standing, in front of an apartment building. He observed the continuing argument between Payne and Boyd, but he did not participate.

At one point during the argument, Payne went to the rear of the apartment building, obtained a gun and came back to the street. As the arguing continued, Hebrard started to walk away. He then saw Payne point a gun at Boyd, and he heard two or three gunshots. Hebrard said Boyd had not pointed a gun at Payne, and he did not see Boyd holding any gun. He did not know that Payne was going to shoot Boyd. Hebrard was six feet two inches tall and, at the time of the shooting, wore his hair in braids. He said that he was taller than Payne.

Frank Cano testified that at 1:00 a.m., on June 12, 2006, he was in the bathroom of his home when he heard an argument on the street. He looked out his window. He saw a tall man with braided hair and a short man holding a gun behind his back on one side of the street. Boyd was across the street. The short man yelled at Boyd, "Where you from?" Boyd responded, "I ain't from nowhere." The short man replied, "Man, I'm from the Mob. [¶] . . . [¶] Fuck it then." He then pointed the gun at Boyd and fired three shots. Boyd did not have a gun or knife in his hands.

Cano testified that the man with braided hair did not say anything to Boyd and did not have a gun. "He was just standing there . . . ." Cano said that nothing blocked his vision. He saw the face of the taller man, but he was not able to "clearly" see the face of the shorter man with the gun. He was subsequently able to identify the taller man with braided hair as Hebrard.

The police showed Cano six photographs. Cano picked out a photo of Payne and told police it "looks like the guy with the gun." On cross-examination, Cano said he was unable to say that Payne was the shooter; he could only say "it looks like him." Payne's counsel asked Cano, "You're not even really certain it looks like him, right?" Cano: "Right." Payne's counsel: "And the reason you couldn't identify the shooter is because you never got a good look at him, right?" Cano: "Right."

Sheriff's Detective Peter Hecht, a gang expert, testified that Payne was a member of the Mob Piru gang and his tattoos on his body show his gang affiliation. The area where the shooting occurred is Mob Piru turf. Hecht said, "When someone asks you where are you from in the gang community that's generally a challenge." When a gang member is confronted, "he will almost always retaliate. [¶] . . . If he doesn't he will be considered weak and he could become a victim of his own gang for not standing up for his gang."

Vladimir Levicky, a deputy medical examiner, testified that Boyd died as a result of a gunshot wound to the head. The autopsy photographs were admitted into evidence without objection.

Payne did not testify, and the defense called no witnesses.

#### DISCUSSION

#### I. Accomplice Testimony

Payne contends there is insufficient evidence to support the judgment. He claims Hebrard was an accomplice and there was no evidence to corroborate his testimony. We disagree.

A conviction may not be based on the testimony of an accomplice unless that testimony is corroborated by other evidence. (*People v. Hoover* (1974) [12 Cal.3d 875](https://www.leagle.com/cite/12%20Cal.3d%20875), 879.) To be an accomplice, the witness must have aided the defendant and acted with "`guilty knowledge and intent with regard to the commission of the crime.'" (*Ibid.*) On appeal, we "resolve all inferences and inconsistencies in favor of the jury's implied finding that [the witness] was not an accomplice." (*People v. Tewksbury* (1976) [15 Cal.3d 953](https://www.leagle.com/cite/15%20Cal.3d%20953), 962.)

Hebrard testified that he was not a "lookout" for Payne. He stood near him, but he did not "provide moral support" for him. He said that he did not know that Payne was going to shoot Boyd. Cano testified that Hebrard did not yell at Boyd and did not have a gun. Hebrard "was just standing there . . . ." From this testimony, the reasonable inference is that Hebrard did not assist Payne in committing the crime and was not an accomplice.

But, even if he was, the result is the same because there was evidence to corroborate his testimony. "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (1999) [21 Cal.4th 1211](https://www.leagle.com/cite/21%20Cal.4th%201211), 1271.) Although Cano could not see the shooter's face, his testimony nevertheless corroborated Hebrard on many of the details of the shooting incident. The evidence was sufficient. (*Ibid.*)

#### II. Ineffective Assistance of Counsel

Payne contends that he received ineffective assistance of counsel. We disagree.

To establish ineffective assistance, Payne must show that 1) his counsel's performance was deficient, and 2) "the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) [466 U.S. 668](https://www.leagle.com/cite/466%20U.S.%20668), 687.)

#### A. Not Making a Section 1118 Motion

Payne claims his trial counsel was ineffective by not making a motion for acquittal (§ 1118) at the close of the prosecution's case. He argues the evidence was insufficient because there was no corroboration of Hebrard's testimony. But as discussed in point I, there is no merit to this claim. Consequently, even if there was an omission by counsel, Payne cannot satisfy the second *Strickland* prong.

#### B. Not Objecting To Autopsy Photos

Payne contends his lawyer's performance was deficient because he did not object to the admission of autopsy photos. But trial counsel may decide not to object to highly relevant prosecution evidence. A mere claim on appeal that this was an omission, without any showing of incompetence or inadvertence from the record, "is an insufficient basis from which to infer that counsel rendered ineffective assistance." (*People v. Williams* (1988) [44 Cal.3d 883](https://www.leagle.com/cite/44%20Cal.3d%20883), 934; see also *People v. Mendoza Tello* (1997) [15 Cal.4th 264](https://www.leagle.com/cite/15%20Cal.4th%20264), 266.)

The photographs were relevant evidence. They were used to assist the prosecution in establishing its case. "Autopsy photographs of a murder victim are always relevant at trial to prove how the crime occurred; the prosecution need not prove these details solely through witness testimony." (*People v. Carey* (2007) [41 Cal.4th 109](https://www.leagle.com/cite/41%20Cal.4th%20109), 127.) "[T]heir relevance is not lessened . . . because the cause of death was undisputed." (*Id.* at p. 128.) From this record, Payne has not shown ineffective assistance.

#### C. Not Objecting to Gang Tattoo Evidence

Hecht testified about several different gang tattoos on Payne's body. In describing the tattoos on his shoulders, Hecht said, "On the left shoulder he has the letter CK . . . . CK represents Crip Killer." Payne's trial counsel did not object. Payne claims this was ineffective assistance because this evidence should have been excluded and the term Crip Killer was prejudicial.

But in a case where a defendant's gang membership is at issue, a gang expert may testify about gang culture and habits. (*People v. Gardeley* (1997) [14 Cal.4th 605](https://www.leagle.com/cite/14%20Cal.4th%20605), 617.) "The use of expert testimony in the area of gang sociology and psychology is well established." (*People v. Olguin* (1994) [31 Cal.App.4th 1355](https://www.leagle.com/cite/31%20Cal.App.4th%201355), 1370.) Evidence that the defendant had gang tattoos on his body is relevant to demonstrate his membership in a particular gang. (*People v. Martinez* (2008) [158 Cal.App.4th 1324](https://www.leagle.com/cite/158%20Cal.App.4th%201324), 1331.) Here Hecht said that Payne had tattoos that showed his affiliation with the Mob Piru gang.

Payne contends his counsel failed "to [a]ddress" the "[c]haracterization of the [i]nitials `CK.'" He claims this was a critical omission because Hecht "offered no reason nor explanation of the term `Crip Killer.'" But Hecht's testimony showed that CK for "Crip Killers" referred to the Mob Piru gang's rivalry with another gang. He said the Crips gang was a rival of both the Bloods and Mob Piru gangs. That explained the reason why a member of the Mob Piru gang would have a tattoo that showed derision for the Crips. This evidence was highly probative as it showed Payne's gang identity, a relevant fact for the prosecution's case.

Payne suggests that his counsel should have asked Hecht additional questions about his knowledge about the derivation of the terms CK and Crip Killer. But counsel may have had a sound tactical reason for not doing so. Further inquiry could have invited Hecht to testify about a history of retaliatory gang murders between these gangs, a topic reasonable defense counsel would want to avoid.

But even if counsel had been deficient in not objecting, Payne has not shown any reasonable probability that the result would change had the terms CK and Cript Killer been excluded. Hecht's testimony on this issue was very short. The prosecution's case was strong and the evidence of Payne's guilt is compelling.

#### D. Not Calling an Expert Witness on Eyewitness Identification

Payne contends his trial counsel should have called an expert witness on eyewitness identification. He claims this would have helped to refute the prosecution's evidence.

But, as the Attorney General notes, Payne's counsel conducted an extensive cross-examination of Cano. He was able to obtain an admission that when first questioned by the police, Cano did not mention that he had seen the shooting. He examined Cano about his inability to see Payne's face and the distance from which he observed the shooting.

Payne suggests that an expert on eyewitness testimony would have been able to explain to the jurors the various factors that they should consider before accepting such testimony. But he has not shown how that would change the result.

The trial court instructed the jury with CALCRIM No. 315, an instruction on how to evaluate eyewitness testimony. It provides, in relevant part, "In evaluating identification testimony, consider the following questions: [¶] Did the witness know or have contact with the defendant before the event? [¶] How well could the witness see the perpetrator? [¶] What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance, and duration of observation[?] [¶] How closely was the witness paying attention? [¶] Was the witness under stress when he or she made the observation? [¶] Did the witness give a description and how does that description compare to the defendant? [¶] How much time passed between the event and the time when the witness identified the defendant? [¶] Was the witness asked to pick the perpetrator out of a group? [¶] Did the witness ever fail to identify the defendant? [¶] Did the witness ever change his or her mind about the identification? [¶] How certain was the witness when he or she made an identification? [¶] Are the witness and the defendant of different races? [¶] Was the witness able to identify other participants in the crime? [¶] Was the witness able to identify the defendant in a photographic or physical lineup? [¶] Were there any other circumstances affecting the witness's ability to make an accurate identification? [¶] The People have the burden of proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

This instruction gave jurors comprehensive guidance on the various methods to evaluate eyewitness testimony. Consequently, a reasonable juror would know the factors to be considered in evaluating Cano's and Hebrard's testimony. Because of this, Payne's counsel could reasonably conclude that calling an expert to discuss these factors would be unnecessary or duplicative. He could be satisfied that his cross-examination of Cano was extensive and effective. Moreover, an expert on eyewitness testimony would not assist the defense in challenging Hebrard's ability to identify Payne. Hebrard testified that he had known Payne "[f]or a couple of years." Payne also has not shown from this record how this alleged omission was prejudicial.

#### III. The 10-Year Gang Enhancement

The trial court sentenced Payne to 25 years to life on count one, first degree murder. It imposed a 25-year consecutive term for the firearm enhancement. It then stated, "For the gang findings pursuant to Penal Code section 186.22 (B)(1)(C), the court is going to impose an additional ten years consecutive." But because the court had sentenced Payne to 25 years to life, the 10-year gang enhancement was unauthorized. (*People v. Lopez* (2005) [34 Cal.4th 1002](https://www.leagle.com/cite/34%20Cal.4th%201002), 1007.)

The 10-year gang enhancement is stricken. In all other respects, the judgment is affirmed.

We concur:

YEGAN, J.

COFFEE, J.