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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GUILLERMO CORDOVA,<br><br>Defendant and Appellant. | B239492<br><br>(Los Angeles County<br>Super. Ct. No. TA116148) |

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Modified with directions and, as so modified, affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Guillermo Cordova appeals his convictions for attempted premeditated murder, assault with a firearm, and conspiracy to commit murder. The trial court sentenced him to a term of 25 years to life in prison. Cordova contends the trial court erred by failing to give a unanimity instruction; the abstract of judgment contains clerical errors; and the trial court miscalculated his custody credits. Cordova's second and third contentions have merit, and we order the abstract of judgment modified. In all other respects, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

Viewed in accordance with the principles governing appellate review (*People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303-1304), the evidence relevant to the issues presented on appeal established the following.

a. *The crimes.*

Appellant Cordova was a member of the Compton Varrio Tortilla Flats (CVTF) criminal street gang. In the summer of 2010, Los Angeles County Deputy Sheriff's Sergeant Jose Salgado received information that the gang was "taxing," or extorting money from, small businesses in areas the gang claimed as its territory.

Antonio Cruz Vazquez (Cruz) worked at "Roberto's Auto Shop," an auto body and paint business located on Alameda Boulevard in Compton. The shop was situated within the CVTF's territory. In June or July 2010, an African-American CVTF gang member known as "Easy," accompanied by a Hispanic man, visited the body shop and spoke with the owner's nephews. After the men left, one of the nephews told Cruz that Easy and his companion had demanded a "commission" each month. They said they would be back to pick the money up the following month. The men had threatened that if they were not paid, the people at the shop "would suffer the consequences."

A month later, Easy returned to the shop. He again spoke to one of the owner's nephews and reiterated that there would be consequences for a failure to pay.

On September 30, 2011, Easy and a fellow CVTF gang member demanded that Cordova "go shoot somebody" in the auto body shop, in order to "scare" the business

owners and enable CVTF "[to] tax them." Easy outranked Cordova in the gang's hierarchy. Easy provided Cordova with a .22-caliber gun.

That afternoon, Cruz was working on a Chevrolet Tahoe at the body shop. Wilfredo Valle, another employee, was also present. Cruz saw Cordova walk past the shop, but paid no attention. The body shop's video surveillance system recorded the afternoon's events, and the video was played for the jury. The video showed that at 16:12:26, Cruz was talking to his boss near the Tahoe. Cordova emerged from a side alley, took several steps into the shop's yard area, pointed a gun at Cruz, and retreated back into the alley, outside the video camera's range. Neither Cruz nor his boss saw Cordova.

Two minutes later, Cordova reentered from the same alley, walked into the middle of the shop's yard, and pointed the gun at Cruz, who was standing near the Tahoe. Both Cruz and Valle testified that they saw Cordova point the gun at Cruz's chest from a distance of 15 feet away. Cordova pulled the trigger, but the gun made clicking sounds and failed to fire, indicating it had jammed. According to Cruz and Valle, Cordova then attempted to "rack" the gun's slide, to unjam it. Cruz said, " 'They want to kill me.' " He ran to a storage room outside the video camera's range, locked the door, and screamed for his boss to call police.

The video showed that Cordova then hurried back out of the shop's yard and into the alley. Approximately three seconds later, he reentered the yard with the gun raised, stepped toward the area where Cruz had fled, lowered the gun, and stepped back into the alley area. Cordova then left the shop, talked to Easy, and threw the gun in a parking lot.

Both Cruz and Valle positively identified Cordova as the gunman in pretrial photographic lineups and at trial.

Sergeant Salgado conducted a recorded interview of Cordova in January 2011. Cordova initially denied, but eventually admitted, attempting to shoot Cruz. He claimed the gang had threatened to hurt his family if he refused to commit the shooting. A recording of the interview was played for the jury.

b. *Additional gang evidence.*

Sergeant Salgado testified as a gang expert at trial. He explained that gang members are generally required to "put in work," that is, commit crimes for the gang. Such "work" could include marking the gang's territory with graffiti, committing robberies and shootings, and extorting money from businesses. Commission of violent crimes such as shootings, carjackings, and murders increases a gang member's reputation and status within the gang. If a gang member refuses to commit crimes for the gang, he is often beaten by other gang members.[1]

2. *Procedure.*

Trial was by jury. Cordova was convicted of three counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a)),[2] three counts of assault with a firearm (§ 245, subd. (a)(2)), and conspiracy to commit murder (§ 182, subd. (a)(1)). The jury found the attempted murders were willful, deliberate, and premeditated; Cordova personally used a firearm in commission of the attempted murders and assaults (§ 12022.5, subd. (a)); and all the offenses were committed for the benefit of, at the direction of, or in association with, a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced Cordova to 25 years to life in prison, with a minimum parole eligibility date of 15 years. It imposed a restitution fine, a suspended parole restitution fine, court operations assessments, and a DNA fee. Cordova appeals.

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[1] Sergeant Salgado also testified regarding the CVTF's characteristics, primary activities, territory, rivals, and predicate crimes, as well as Cordova's membership in the gang. Because Cordova does not challenge the sufficiency of the evidence to establish the gang enhancement, we do not detail this evidence here.

[2] All further undesignated statutory references are to the Penal Code.

## DISCUSSION

1. *The trial court did not prejudicially err by failing to give a unanimity instruction.*

a. *Additional facts.*

The People charged Cordova with three counts of attempted murder, one for each time he entered or reentered the shop's yard and pointed the gun at Cruz. (See generally *People v. Rosas* (2010) 191 Cal.App.4th 107, 109-110 [conviction for two counts of attempted murder permissible where the defendant fired a shot at the victim's car, and fired a second shot moments later]; cf. *People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368 [multiple punishment permissible where defendant fired three shots at a pursuing officer in the same brief incident, and was convicted of three counts of assault].) The defense did not request, and the trial court did not give, a unanimity instruction.

During deliberations the jury sent the following question to the court: "In counts 1, 2, 3 [w]e the jury need to know if one trigger pull constitutes one count of attempted murder. Furthermore if defendant is to be found guilty of all three counts, must he first pull [the] trigger three times." The trial court sent back the following written answer: "He need not pull the trigger for an attempt. It is for you to determine what constitutes a completed attempt."

b. *Discussion.*

Cordova argues that the trial court erred by failing to give, sua sponte, a unanimity instruction on the attempted murder counts.[3] We conclude omission of the instruction was not prejudicial error.

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[3] CALCRIM No. 3500, the standard jury instruction on unanimity, provides in pertinent part: "The defendant is charged with _____ <*insert description of alleged offense*> [in Count _____ ] . . . . [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

A jury verdict must be unanimous in a criminal case. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "As a general rule, when violation of a criminal statute is charged and the evidence establishes several acts, any one of which could constitute the crime charged, either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*People v. Jennings* (2010) 50 Cal.4th 616, 679; *People v. Butler* (2012) 212 Cal.App.4th 404, 425; *People v. Dieguez* (2001) 89 Cal.App.4th 266, 274-275; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.) " 'A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.' . . . '[I]f under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary.' " (*People v. Muniz* (1989) 213 Cal.App.3d 1508, 1518; *People v. Champion* (1995) 9 Cal.4th 879, 932, disapproved on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860.) "In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*Russo*, at p. 1135.)[4]

Cordova entered or reentered the shop yard, and appeared on the video, three separate times. The video, coupled with the witnesses' testimony, showed that

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[4] A unanimity instruction is not required when the evidence shows one criminal act or multiple acts in a continuous course of conduct, that is, where the acts alleged are so closely connected as to form part of one continuing transaction. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1533.) This exception is not at issue here because, even if his attempts to shoot Cruz constituted a continuous course of conduct, Cordova was charged with and convicted of three separate counts of attempted murder. The question, therefore, is whether there was a risk jurors might have disagreed about what actions formed the basis for each count.

(1) Cordova emerged from the alley, unobserved by Cruz, and pointed a gun at him. (2) Two minutes later he approached Cruz, pointed the gun at him, pulled the trigger, and attempted to unjam the gun by "racking" it. (3) As Cruz fled, Cordova briefly reentered the alley and almost immediately walked back into the shop's yard, with the gun raised above his head; he then lowered the gun to waist level. Based on these three appearances in the shop yard,[5] Cordova was charged with three counts of attempted murder. A unanimity instruction was required only if there was a risk jurors could disagree on which of Cordova's actions in the three appearances amounted to attempted murder.

Cordova argues that "[w]ithout a unanimity instruction, it cannot be certain the jury agreed on the acts constituting each count of attempted murder[.]" He urges that the evidence suggested he did not pull the gun's trigger in the first appearance, and may have pulled the trigger multiple times in the second appearance.[6] He suggests that the jury's question to the court showed it was equating trigger pulls with attempts. He argues that the jurors could have considered "the first appearance, or several distinct aspects of the second and third appearances, as the basis" for the three attempted murder counts. Thus, different jurors might have found different acts underpinned the three convictions. In his view, the "three convictions did not necessarily (or even probably) correspond to [his] three appearances on the videotape."

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[5] For ease of reference, and in line with the parties' practice in their briefs, we refer to these three events as "appearances."

[6] Cordova argues that Sergeant Salgado stated, when interviewing him, that it appeared from the videotape that he pulled the trigger twice "the second time." This is not an accurate characterization of the record. In the cited portion of the interview, Salgado stated, "I know what I saw on the video. I saw you go in there once. You pulled the trigger. And then, I saw you go in, again, and you pull the trigger, again. And then, you turned around, again, and just pulled it again. So, three times." When Cordova protested that he had only entered the body shop twice, Salgado stated, "Okay. Twice. But, you tried to pull[ ] the trigger three times" and "you tried to shoot the gun twice the second time." It is apparent that in this portion of the conversation, Salgado was simply treating the second and third appearances as one instance.

The People counter that a unanimity instruction was not required because the prosecutor "elected which acts constituted which attempted murder charges and carefully separated the three acts for the jury." Further, in the People's view the evidence showed no more than three acts that could have constituted the three attempted murders, and the jury must have unanimously agreed on the evidentiary basis for the three counts.[7]

Contrary to the People's contention, the prosecutor did not make a clear election.[8] The prosecutor repeatedly stressed that Cordova had come in and out of the shop's yard three times, and pointed a gun at Cruz each time. But the prosecutor did not expressly correlate each instance with each of the three attempted murder counts.
The verdict forms did not specify that each count corresponded to a particular appearance. It is not impossible that a juror might have concluded Cordova pulled the trigger more than once in one appearance, and determined that each trigger pull amounted to a separate attempt. Nothing in the instructions prevented a juror from doing so.

However, the fact it was technically possible for a juror to employ such logic does not mean it was remotely likely. Assuming arguendo that a unanimity instruction was required, its omission was harmless under any standard. (See, e.g., *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 647; *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [applying the *Chapman v. California* (1967) 386 U.S. 18, reasonable doubt

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7 The People cite *People v. Deletto* (1983) 147 Cal.App.3d 458, for the proposition that one of the functions of a unanimity instruction is to prevent jurors from amalgamating evidence of multiple offenses, "no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." (*Id.* at p. 472.) They urge that because Cordova was charged with three counts of attempted murder, there was no danger of improper amalgamation. This is true, but not entirely germane to the issue at hand. Cordova's complaint is not that the jury improperly amalgamated evidence; he complains, instead, that jurors may not have unanimously agreed on which acts underlay the three counts.

**8** In contrast, when arguing against Cordova's section 1118 motion to dismiss, the prosecutor clearly informed the trial court that the three attempted murder counts corresponded to Cordova's three appearances on the videotape.

standard to the erroneous failure to give a unanimity instruction, but observing split of authority on the issue]; *People v. Frederick* (2006) 142 Cal.App.4th 400, 419; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.) Although the prosecutor did not expressly make an election as to which counts correlated to which acts, her argument repeatedly stressed Cordova's three appearances and implicitly correlated them to the three counts.[9]

The prosecutor did not argue that multiple trigger pulls in one appearance provided the evidence to support more than one attempted murder count, and in our view most jurors would have found such a rationale counterintuitive. Instead, the jury was most likely to make the logical connection between the evidence adduced at trial and the sequence of the charges, associating the first appearance with the first count, the second appearance with the second count, and so on. The "prosecutor pointed to the evidence which amply supported the number of counts. It was not a random number" (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1589), but was supported by the evidence of the three appearances on the video.

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**9** During closing argument the prosecutor argued that the video showed Cordova walking into the body shop "three separate times." After describing the three appearances, the prosecutor urged: "So was a gun pointed at Mr. Cruz? Yes. Three times. First time when he didn't see it and the two times he saw it straight in his face." The prosecutor also argued, when discussing the overt acts required to prove the conspiracy charge, that Cordova pointed the gun at Cruz and pulled the trigger in each of Cordova's three appearances on the videotape. When arguing the attempted murders were premeditated and deliberate, the prosecutor stated: "[H]e came back in three times. So was [appellant] trying to kill Mr. Cruz? Yes. As to each time, ladies and gentlemen, each time he walks into that business. His intent is stronger and stronger each time. You can see it on the video. Points the gun at his head. . . . Thankfully it jammed. . . . Walks out. And comes back in. The fact that he comes back in, points the gun again, and pulls the trigger shows you his intent the first time he walked in. Because if he didn't have the intent to kill the first time he walked in, then he wouldn't have walked in the second and third times. If he didn't have the time [*sic*] to kill the first time then he wouldn't have manipulated the slide trying to fix it afterwards and he definitely would not have walked in the third time and pointed the gun at him."

Cordova is correct that it cannot be discerned from the video whether, or how many times, he pulled the trigger in each appearance, nor is it possible to determine from the video alone whether he attempted to "rack" the gun. But for that very reason, the jury would have been unlikely to convict him of all three attempted murder counts unless it correlated each appearance with each count. The most logical interpretation of the evidence, including the video, the witnesses' testimony, and the Salgado interview, was as follows. In the first appearance, Cordova pulled the trigger but the gun jammed. He moved back into the alley to attempt to fix the gun. He came back into the yard and attempted to shoot at Cruz a second time, but the gun jammed again. In the third appearance, he reentered the yard and looked for Cruz, but Cruz had already fled; he may or may not have pulled the trigger. The jury's question to the court, and the court's response that a trigger pull was not necessarily required for each attempt, supports this interpretation. Viewing the totality of the evidence, it is clear beyond a reasonable doubt that jurors would not have disagreed about which acts Cordova committed, but nonetheless convicted him of all three counts. Omission of the unanimity instruction, if error, was harmless.

2. *The abstract of judgment must be corrected.*

At sentencing, the trial court selected count 9, conspiracy, as the base count, and imposed a term of 25 years to life in prison, with a minimum parole eligibility date of 15 years. On counts 1, 2, and 3, attempted murder, the court imposed concurrent terms of life in prison, plus 4-year section 12022.5 gun-use enhancements, to run concurrently with the sentence on count 9. The court stayed the assault convictions pursuant to section 654.

The abstract of judgment states that for each of the attempted murder charges, Cordova was sentenced to a term of life in prison *without* the possibility of parole. However, by statute the sentence for attempted willful, deliberate, premeditated murder is life *with* the possibility of parole. (§ 664, subd. (a).) Although the trial court stated the sentence was simply "life," in light of section 664, subdivision (a), it is clear the court intended to impose sentences of life with the possibility of parole. Cordova argues, and

the People concede, that the abstract of judgment therefore contains a clerical error and must be corrected. We agree, and order the abstract modified. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

3. *Custody credits.*

The trial court correctly awarded Cordova 378 days of actual presentence custody credit. (*People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124.) The abstract of judgment, however, erroneously reflects an award of 278 days of actual custody credit. We order this clerical error corrected. (*People v. Mitchell, supra,* 26 Cal.4th at p. 185; *People v. Gabriel* (2010) 189 Cal.App.4th 1070, 1073.)

At sentencing, defense counsel requested that Cordova be awarded 15 percent presentence conduct credits. The prosecutor questioned whether Cordova was eligible for any conduct credit because he had been convicted of attempted murder. The court took the matter under advisement. The abstract of judgment reflects that no presentence conduct credit was awarded. Cordova contends, and the People agree, that he should have been awarded 56 days of presentence conduct credit. We accept the People's concession.

Section 2933.1 provides that any person who is convicted of a felony offense listed in subdivision (c) of section 667.5 shall accrue no more than 15 percent of worktime credit. Attempted murder is one of the offenses listed in section 667.5, subdivision (c). (§ 667.5, subd. (c)(12).) Section 2933.2, subdivision (a), prohibits an award of conduct credit when the defendant has been convicted of murder. However, Cordova was convicted of attempted murder, not murder. By its plain language, section 2933.2 does not apply. (See generally *People v. Superior Court* (*Kirby*) (2003) 114 Cal.App.4th 102, 104, 106.) Section 182 provides in relevant part that a defendant convicted of conspiracy to commit a felony shall be punished "in the same manner and to the same extent as is provided for the punishment of that felony." Cordova was therefore entitled to accrue presentence conduct credit at the 15 percent rate, for a total of 56 days. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.)

## DISPOSITION

The clerk of the superior court is directed to correct the abstract of judgment to reflect (1) concurrent sentences of life with the possibility of parole on counts 1, 2, and 3; (2) actual custody credits of 378 days; and (3) presentence conduct credits of 56 days, for a total of 434 days. The clerk is directed to forward the modified abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ALDRICH, J.

We concur:

KLEIN, P. J.

CROSKEY, J.