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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALBERT MANUEL CASTRO, Defendant and Appellant.	B230675 (Los Angeles County Super. Ct. Nos. GAO66656, GA067405)

APPEAL from a judgment of the Superior Court of Los Angeles County. Candace J. Beason, Judge. Affirmed as modified.

William J. Capriola, 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, Linda C. Johnson and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Manuel Castro appeals from the judgment entered upon his convictions by jury of attempted murder (Pen. Code, §§ 664, 187, subd. (a), count 1),[1] assault with a firearm (§ 245, subd. (a)(2), count 3), and aggravated mayhem (§ 205, count 7). The jury found to be true with respect to count 1 the allegation that the attempted murder was committed willfully, deliberately and with premeditation (§ 664, subd. (a)), with respect to all counts the allegations that the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)) and the allegation that appellant personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)), and with respect to counts 1 and 7 the allegation that a principal personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)). The trial court sentenced appellant to an aggregate state prison term of 40 years to life. Appellant contends that (1) the trial court erroneously admitted his statements made to police after he unambiguously invoked his *Miranda*[2] right to counsel, in violation of the Fifth and Fourteenth Amendments, (2) his statements to police should have been suppressed because the *Miranda* warning he received failed to advise him that anything he said could be used against him in court, (3) admission in evidence of appellant's involuntary statements to police violated his due process rights under the California and United States Constitutions, (4) there is insufficient evidence to support appellant's aggravated mayhem conviction, and (5) the trial court erroneously failed to award him presentence conduct credits. Appellant also requests that this court conduct an independent in camera examination of the *Pitchess*[3] hearing.

We modify the conduct credits and otherwise affirm.

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

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

3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

FACTUAL BACKGROUND

The shooting

On August 9, 2006, at 7:00 p.m., Robert Graves, Jr. (Graves), who was not a gang member, was washing his car in front of his residence on East Cherry Street in Monrovia. He saw a silver Chrysler approach, driving at normal speed, with two people inside. Graves heard a male in the front passenger seat say, "What's up, homey?" When Graves turned to look at him, he saw the male holding a chrome or silver-colored gun on the car windowsill. Though Graves could not see the passenger's face to identify him, he did see that the passenger was the shooter. A shot was fired, hitting Graves in the face. He fell to the ground and heard three more shots.

Graves was hospitalized for five days, suffering from a bullet wound to the right side of his face, requiring surgery to his right eye and a prosthetic device in his left eye in which he lost his vision. He also had blurry vision in his right eye.

Sharmaine Currie (Currie) lived on East Cherry Avenue, on the opposite side from Graves, a few houses down. She had exited her residence when she heard what sounded like fireworks. She saw a gray or silver Stratus or Intrepid drive by her house heading towards Graves's house. Currie saw that the driver and front passenger were Hispanics. She did not see a gun.

The investigation

Near 7:00 p.m., Monrovia Police Officer Kevin Oberon responded to the scene of the shooting. He saw Graves lying face down on the street with a gunshot wound to the right side of his head. Bullet fragments consistent with .22-caliber ammunition were recovered at the scene.

The next day, a silver Dodge Intrepid was found parked near codefendant, Jonathan Henley's (Henley) residence in Azusa.[4] A Monrovia High School athletic jersey containing

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4 Henley is not a party to this appeal, having previously appealed in case No. B215829.

the word "Monrovia," was laid out above the backseat headrest so that the word "Monrovia" was clearly visible through the rear window. A box of .22-caliber bullets was found in the center console, and a revolver was found underneath the driver's seat. The revolver contained .22-caliber ammunition and several expended casings in the gun.

Henley was the registered owner of the car and was arrested. A cell phone taken from him contained two photographs depicting two Hispanics making Monrovia Nuevo Varrio (MNV) gang signs, a photograph of an MNV gang tattoo on someone's body and phone numbers for people with MNV gang monikers.

The Dodge was "processed" on August 11, 2006. Dozens of latent prints were recovered from the interior and exterior of the car. Appellant's palm print was found on the right front fender. No prints were found on the gun, bullets or box of ammunition.

In a statement to police after appellant was arrested, he admitted being in the silver Dodge at the time of the shootings, but denied being the shooter. He was just "at the wrong place at the wrong time."

Detectives obtained a video taken from a surveillance camera at Certified Market in Monrovia. The video depicted appellant with Henley between 8:36 and 8:46 p.m. on the night of the shooting.

Gang evidence

Officer William Burkhalter testified as the People's gang expert. He was familiar with the MNV gang, an Hispanic street gang, whose territory was primarily in the City of Monrovia and surrounding areas. The gang's primary activities included vandalism, firearms possession, assaults, assaults with deadly weapons, attempted murder, robbery and burglary.

Officer Burkhalter was also familiar with the Duroc Crips gang, a violent, predominantly African-American gang in the Monrovia and Duarte area. The MNV and Duroc Crips gangs were at war, which had a racial overtone. The war between them targeted both gang and nongang members.

Officer Burkhalter opined that in August 2006 appellant was an MNV gang member, based upon his personal contacts with appellant, appellant's admission that he had been

associating with MNV gang members for years, appellant's shaved head, attire, gang tattoos, and moniker, "Little Vulture."

Officer Burkhalter also opined that Henley was an MNV gang member at the time of the charged incident based upon Henley's arrest in this case, his association with known MNV gang members, and his being shot by Duroc Crips in January 2006.

In response to a hypothetical based upon the facts in this case, Officer Burkhalter opined that the shooting was for the benefit of the MNV gang. He testified that a person at the shooting scene would know that the person driving in the silver car was with MNV because two Hispanics were in a Black neighborhood shooting at Blacks, and the victim was a young Black. The Monrovia jersey in the back of Henley's car could indicate that the shooting in this case was gang related. This crime instills fear. Gang drive-by shootings virtually always have two people in the car because one person must drive and the other shoot. Typically it is the passenger who does the shooting.

DISCUSSION

I. Statement obtained in violation of *Miranda* right to counsel

A. Background

1. Police interview of appellant

On October 10, 2006, Detectives Robert Wilken and Robert Manuel located the 16-year-old appellant at East Lake Juvenile Hall, where he had been placed in custody the previous day for a probation violation. Detective Wilken explained to appellant that "what we want to talk to you about . . . has nothing to do with why you're here." The detectives conducted a two-and-one-half-hour recorded interview with appellant.

Before questioning appellant about the shooting, Detective Manuel advised him of his constitutional rights, as follows: "[MANUEL]: I want to talk to you about some things. Before I do that let me read you this, okay? . . . Listen up and answer me yes or no, okay. You have the right to remain silent. Do you understand that? [APPELLANT]: Yes. . . . [MANUEL]: *Anything you say can and will be used against you in a court of law; do you understand that?* [APPELLANT]: *Yes.* [MANUEL]: . . . You have the right to talk to a lawyer before we talk to you and have him present while we talk to you; do you

understand that? You don't understand that? You have the right to have a lawyer present while we talk to you to be—you know, for you. . . . [APPELLANT]: So I can have a lawyer right here? [MANUEL]: But that's not how it works. That's what it says, but what it means is that you can be represented by a lawyer and have him present during questioning, if you want, but that won't happen today[.] [APPELLANT]: In court? [MANUEL]: In court, yeah. [APPELLANT]: Tomorrow? [MANUEL]: Not tomorrow, this is – a separate case than what you're in here for. . . ." (Italics added.) "[MANUEL]: . . . So any way, do you understand then you have the right to talk to a lawyer before we talk to you and have him present while we talk to you? Do you understand that? [APPELLANT]: Okay. [MANUEL]: If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, free of charge and that's like what you get in court, right? You know you get an attorney if you can't afford one. [APPELLANT]: Yeah. . . . [MANUEL]: Okay. Do you understand each of those rights that I explained to you? Do you want to talk—tell us about this case? [APPELLANT]: Yes I do. [MANUEL]: Okay. And we can't have a lawyer today. Do you want a lawyer before you talk to us? [APPELLANT]: What is it exactly do you want to talk about?"

Detective Manuel then explained that they wanted to talk to appellant about the Monrovia shooting. He told appellant that someone "kind of manned up already" and that he was pretty sure there was "somebody with him" and that somebody was appellant. He asked appellant, "You want to talk to us? Just sign right here." Appellant signed the waiver of rights form.

Appellant initially denied any involvement in, or knowledge of, the shooting. Detective Manuel told him that there were lots of people on the street and "saw things," that "there's . . . some video from a store." Detective Wilken said that the other person they have in custody is an adult, and that appellant's "worst case scenario is maybe being in custody until [he's] 25." ~

Later in the interview, Detective Manuel asked appellant, "[O]n August 9th, were you in the vehicle, maybe you didn't shoot, maybe you weren't . . . involved in the actual shooting, but were you in the vehicle?" Appellant replied, "I don't even have my lawyer

here to talk to you guys." Detective Manuel then asked, "That's all I'm asking you, do you want a lawyer then? [APPELLANT]: Yeah. [MANUEL]: You can do whatever the heck you'd like . . . you don't want to talk to us? [APPELLANT]: Why would I have to get me a . . . lawyer[?] [MANUEL]: If you say you want a lawyer, I'm not going to talk to you. You have to wait till you're arrested on this, then you talk to your lawyer and I guarantee you're not going to have this opportunity again because there's no attorney alive that's going to sit in here and let us talk to you."

Detective Manuel continued: "So it's up to you, whether you want to talk to us or whether you want an attorney . . . [.] [APPELLANT]: Call my mom and ask if I should talk to you guys. [MANUEL]: I can't do that . . . [I]f you say you don't want to talk, I'm not pressuring you. If you don't want to talk, or if you're not sure, then absolutely don't talk to me." The detectives continued talking to appellant, seeking to persuade him to tell them what happened. Among other things, for example, they told him that if he wanted to straighten out his life, he had to clean up the mess he had made.

After being told that "[t]here might be an explanation about [his] involvement in this," and "something that you think about . . . is a lot different than something that just happens," appellant stated, "I was at the wrong place at the wrong time." He denied he was the shooter. He said he was "high as fuck and . . . didn't know what was going on." He said that he only remembered that night a "little bit."

Appellant explained that he was at his house getting high with a person named Jonathan, who appellant had met just that day. Jonathan wanted to buy some beer, so he and appellant went to the store in a silver or gray-colored car. After purchasing the beer, Jonathan, who was driving, took a little detour. Appellant was in the front seat, with his window up. Jonathan drove down Cherry Avenue. Appellant was high and rolling a "joint," when "all [he] heard were gunshots." The gun came from Jonathan's lap. Appellant said that Jonathan, who "hates niggers," shot out of appellant's window. Appellant continued to deny being the shooter. Officer Manuel told him that his fingerprints were on the gun.

2. Evidence Code section 402 hearing

Appellant filed a motion in limine to suppress his pretrial statements to police on the grounds that they were involuntary under the due process clause and obtained in violation of *Miranda*. The People filed no written response.

The trial court conducted an Evidence Code section 402 hearing and reviewed the transcript of appellant's interview and was provided the CD's of the interview, which were later played for the jury at trial. The prosecutor informed the trial court that he and appellant's attorney looked at the *Miranda* waiver form and that it listed appellant's rights including the right to remain silent, after each one of which it said "yes." The words "Yes" were in quotes and were written by Detective Manuel. "Yes" was written next to the question whether the signer wanted to talk about the case. "No" was written next to the question of whether he wanted a lawyer. Appellant signed the form next to where it stated that he will talk to the law enforcement officers and willingly waived his rights. The form was admitted into evidence at trial.

The trial court denied the suppression motion. It found appellant's request for counsel equivocal because he continued the conversation with the officers after saying he wanted counsel. Though the detectives continued talking to appellant after the request for counsel, the trial court concluded that they were simply educating appellant, not badgering him. It stated that while the police cannot continue to question a defendant who asks for a lawyer, they can still "tell him other things." That is not prohibited.

B. Contention

Appellant contends that the trial court erred in allowing admission of his interview by detectives because it was obtained in violation of his *Miranda* right to counsel. He argues that when asked by counsel, "[D]o you want a lawyer then?," he unequivocally responded, "Yeah." Therefore, his responses to further interrogation could not be used to cast doubt on his unambiguous request for counsel. This contention is without merit.

C. Standard of review

In reviewing a trial court's ruling on the admissibility of a statement or confession against a claim that it was obtained in violation of the defendant's *Miranda* rights, we accept

the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence, and independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained. (*People v. Whitson* (1998) 17 Cal.4th 229, 248; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1465.)

D. The* Miranda *requirements

To protect a suspect's privilege against self-incrimination, when the suspect is taken into custody "[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda*, *supra*, 384 U.S. at p. 479.) Advising the suspect of these *Miranda* rights "is the first line of defense against the suspect's involuntary waiver of the privilege against self-incrimination." (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122.)

Once properly warned of *Miranda* rights, a suspect may waive them provided the waiver is voluntarily, knowingly and intelligently made. (*Miranda*, *supra*, 384 U.S. at p. 479.) If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. (See *North Carolina v. Butler* (1979) 441 U.S. 369, 372–376.)

But if a suspect unequivocally requests counsel at any time during the interview, there is a second layer of protection for the suspect's *Miranda* rights; he or she is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. (*Davis v. United States* (1994) 512 U.S. 452, 458 (*Davis*); *People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1122.) This second layer of protection is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." (*Michigan v. Harvey* (1990) 494 U.S. 344, 350.)

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of

his rights." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484) Similarly, under the *Davis* standard, it is not sufficient for a suspect to merely make an ambiguous reference to an attorney or suggest that he might be invoking his right to counsel. (*Davis, supra*, 512 U.S. at p. 459.) Rather, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*; *Gonzalez, supra*, 34 Cal.4th at p. 1126; *People v. Nelson* (2012) 53 Cal.4th 367, 371–372.) Whether a suspect has actually invoked his or her right to counsel is an objective inquiry. (*People v. Gonzalez, supra*, at p. 1124.)

If the suspect makes a clear and unequivocal request for counsel, the officers must "immediately cease questioning." (*Davis, supra*, 512 U.S. at p. 454.) Any "postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." (*Smith v. Illinois* (1984) 469 U.S. 91, 92.) If a suspect's request for counsel or invocation of the right to remain silent is ambiguous, the police may "continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights." (*People v. Johnson* (1993) 6 Cal.4th 1, 27, disapproved on other grounds in *People v. Rogers* (2006) 39 Cal.4th 826, 879; see *Davis, supra*, 512 U.S. at p. 461.)

E. No violation of right to counsel here

1. The request for counsel is ambiguous in context

In light of all of the circumstances, the record here supports a finding that appellant was given and understood his *Miranda* rights and agreed to waive them and speak with the detectives. Appellant was told of his right to remain silent, that anything he said could and would be used against him in a court of law, and that he had the right to have a lawyer. His responses reflected that he understood these rights. When he asked whether he could "have a lawyer right here" and in court the next day, the detectives correctly explained that although he had the right to have counsel during questioning, practically speaking, it simply could not happen that day. They explained that he could have the attorney in court, but not in the juvenile matter for which he was then in custody. After this explanation, the detective asked, "So any way, do you understand then you have the right to talk to a lawyer before we talk to you and have him present while we talk to you?" Appellant responded "Okay." He

also indicated that he understood that if he could not afford an attorney, one would be provided to him for free. Appellant said he understood his rights and wanted to talk to the detectives. He signed a written waiver form corroborating his oral statements that he understood his rights and desired to talk to the detectives. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver . . ." (*North Carolina v. Butler*, *supra*, 441 U.S. at p. 373.)

When substantive questioning began, appellant denied involvement in the shooting. Detective Manuel then told him that there were many people on the street who "saw things" and that there was video from a store. He told appellant that maybe he did not do the shooting, but he was in the car. At that juncture, appellant stated: "I don't even have my lawyer here to talk to you guys." Detective Manuel then asked, "That's all I'm asking you, do you want a lawyer then," to which appellant responded "Yeah." Appellant argues that this response was an unequivocal request for counsel that mandated that all further questioning immediately cease. We disagree.

"In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that in *context* it would not be clear to the reasonable listener what the defendant intends." (*People v. Williams* (2010) 49 Cal.4th 405, 429 (*Williams*).) Appellant's request for counsel here, evaluated in the entire context of the interview, fully supports the conclusion that the request was sufficiently ambiguous to justify clarification by the detectives. Appellant evidenced an intent to speak with the detectives throughout the initial portion of the interview, as reflected in his oral statement that he understood his rights and assented to talking to the detectives and his signed waiver form. During that part of the interview he repeatedly denied involvement in the shooting.

But when the detectives suggested that appellant might not have been the shooter, but was only in the vehicle, appellant stated, "I don't even have my lawyer here to talk to you guys." This statement was not an unequivocal request for an attorney but merely an observation that he did not have one. It was after this comment that Detective Manuel again asked, "[D]o you want a lawyer then?" Appellant responded, "Yeah." In light of

appellant's previous desire to talk, his previous confusion as to whether he was entitled to a lawyer in this case or in his probation matter, his statement that he did not have a lawyer, and his one word answer to the detectives question whether he wanted one, it was not inappropriate for the detectives to confirm that he no longer wanted to speak with them without counsel. The detectives did not continue questioning appellant regarding the shooting but only asked if he no longer wished to speak with them without counsel.

This second layer of protection for the privilege against self-incrimination, requiring immediate cessation of questioning once a defendant requests counsel during interrogation, is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." (*Michigan v. Harvey, supra,* 494 U.S. at p. 350.) The detectives' simple question whether appellant wanted counsel was not badgering appellant. (*Williams, supra,* 49 Cal.4th at pp. 426, 429 [question "Are you sure?" not badgering]; *People v. Bacon* (2010) 50 Cal.4th 1082, 1107 [comment "I'm giving you the opportunity to talk," not badgering].) Hence, the purpose behind the immediate cessation rule was not undermined.

It was appellant who then initiated a discussion by asking, "Why would I have to get me a lawyer[?]" This question suggests that appellant had not definitively decided that he wanted a lawyer, as he was unsure of why he needed one. When asked this question, the detectives did not immediately launch into questioning regarding the shooting, but reiterated again that, "If you say you want a lawyer, I'm not going to talk to you.'' Minutes later, Detective Manuel repeated, "[I]f you say you don't want to talk, I'm not pressuring you. If you don't want to talk, or if you're not sure, then absolutely don't talk to me."

We agree with the People that *Williams* is instructive. In that case, Detectives John Knebel and Lionel Salgado sought to interview the defendant after giving him the *Miranda* admonitions. The defendant said he understood his rights and responded affirmatively when asked if he wished to give up his right to remain silent. Detective Knebel then asked, "'Do you wish to give up the right to speak to an attorney and have him present during questioning?'" The defendant responded with a question, "'You talking about now?'" (*Williams, supra,* 49 Cal.4th at p. 426.) Detective Knebel responded with a question: "'Do you want an attorney here while you talk to us?'" The defendant answered: "'Yeah.'"

Detective Knebel asked, "'Yes you do.'" The defendant answered, "'Uh huh.'" Detective Knebel asked, "'Are you sure?'" The defendant answered, "'Yes.'" Detective Salgado then stated: "'You don't want to talk to us right now.'" The defendant answered: "'Yeah, I'll talk to you right now.'" Detective Knebel stated: "'Without an attorney.'" The defendant responded: "'Yeah.'" (*Williams*, *supra*, at p. 426.)

Detective Knebel then explained: "'OK, let's be real clear. If you . . . if you want an attorney here while we're talking to you we'll wait till Monday and they'll send a public defender over, unless you can afford a private attorney, so he can act as your . . . your attorney.'" Defendant responded: "'No I don't want to wait till Monday.'" Detective Knebel repeated: "'You don't want to wait till Monday.'" The defendant replied: "'No.'" Detective Knebel clarified: "'You want to talk now.'" The defendant replied: "'Yes.'" Detective Knebel inquired: "'OK, do you want to talk now because you're free to give up your right to have an attorney here now?'" Defendant responded: "'Yes, yes, yes.'" (*Williams*, *supra*, 49 Cal.4th at p. 426.)

The *Williams* court rejected appellant's *Miranda* claim. It concluded that at the outset of the interrogation, the defendant was properly admonished and evinced a willingness to waive the right to remain silent and stated, "In light of defendant's evident intent to answer questions, and the confusion observed by [Detective] Knebel concerning when an attorney would be available, a reasonable listener might be uncertain whether defendant's affirmative remarks concerning counsel were intended to invoke his right to counsel. Furthermore, under the circumstances, it does not appear that the officers were 'badgering' defendant into waiving his rights; his response reasonably warranted clarification." (*Williams*, *supra*, 49 Cal.4th at p. 429.)

As in *Williams*, in the case before us, after receiving his *Miranda* admonitions, appellant initially indicated his desire to speak with the officers after some confusion regarding whether his right to an attorney was in this case or in the probation violation case for which he was then incarcerated. Here, the officers did not "badger" appellant, but simply sought confirmation that appellant then wanted counsel. As the trial court found, the

detectives were only educating appellant. They did not question him about the incident until it was clear that he wanted to continue the interview without counsel.

2. Request to call mother is not invocation of Miranda right to counsel

a. Contentions

Appellant contends that his request to speak with his mother was also an invocation of his *Miranda* right to counsel. He argues that "any reasonable officer would understand that appellant was 'actually invoke[ing]' his *Miranda* rights when . . . he requested to call his mother," just moments after he told detectives he wanted a lawyer.

The People contend that appellant forfeited this contention by conceding it at the suppression hearing. Appellant responds that if this claim was forfeited, he suffered ineffective assistance of counsel.

We conclude that whether or not forfeited, this claim is meritless. Because it is meritless, he suffered no ineffective assistance of counsel.

b. Request not unequivocal

A minor's request to speak with a parent is not a per se nor presumptive invocation of Fifth Amendment rights. (*People v. Nelson*, *supra*, 53 Cal.4th at p. 381.) "[A] postwaiver request for a parent is insufficient to halt questioning unless the circumstances are such that a reasonable officer would understand that the juvenile is *actually* invoking—as opposed to *might be* invoking—the right to counsel or silence." (*Ibid.*)

Appellant's request for his mother here appeared to be a "might be" rather than an "actual[]" invocation of the right to counsel or silence. After being told by the detectives that it was up to appellant as to whether he wanted to speak to them, appellant replied, "Call my mom and ask if I should talk to you guys." This language was not a request for an attorney or for silence, but merely a request to speak to his mother to determine if he should get an attorney or be silent. Hence, it did not require the detectives to immediately stop all questioning.

c. Ineffective assistance of counsel

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient,

falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) Because appellant's claim that his request to call his mother was a request for counsel is meritless, it is not reasonably probable that the verdict would have been more favorable to appellant had the claim been raised. Consequently, appellant suffered no ineffective assistance of counsel.

II. Failure to advise that interview could be used in court

Appellant contends that the failure to advise him that his statement could be used against him in court required its suppression. The People point out that appellant was in fact given that admonition. In his reply brief, appellant acknowledges that this warning was given and withdrew this contention. We therefore need not consider it.

III. Voluntariness of appellant's statement

A. Contention

Appellant contends that his statement was not voluntarily given, and therefore its admission in evidence deprived him of due process. He argues that at the time of the questioning, he was only 16 years old, had little experience with the criminal justice system, suffered from psychological disorders which had required the suspension of these proceedings for a period of time, and the transcript of the interview shows that he did not want to confess. He further argues that the detectives used chicanery in obtaining his inculpatory statements by lying to him that he would not be confined past age 25, he would not be going to prison, his fingerprints were found on the gun, and that if he bucked the system it would be harder on him, implying he would get lenient treatment if he confessed. This contention is without merit.

B. Standard of review

A defendant's statement challenged as involuntary cannot be admitted into evidence at trial unless the People prove by a preponderance of the evidence that the statement was voluntary. (*Missouri v. Seibert* (2004) 542 U.S. 600, 608, fn. 1; *People v. Carrington*

(2009) 47 Cal.4th 145, 169.) When the interview is recorded, the facts surrounding the interview are undisputed, and we independently review the trial court's determination of voluntariness. (*People v. McWhorter* (2009) 47 Cal.4th 318, 346.)

C. Applicable legal principles

"It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it 'was "'extracted by any sort of threats . . . , [or] obtained by any direct or implied promises, however slight. . . .'"' [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.' [Citations.]" (*People v. Neal* (2003) 31 Cal.4th 63, 79.)

"'[C]oercion can be mental as well as physical . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 287.) The question raised by the due process clause where psychological coercion is claimed "is whether the influences brought to bear upon the accused were 'such as to overbear [the defendants] will to resist and bring about [statements or admissions] not freely self-determined.'" (*People v. Hogan* (1982) 31 Cal.3d 815, 841, disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836; *People v. McWhorter*, *supra*, 47 Cal.4th at pp. 346–347.)

The due process test of voluntariness takes into consideration the totality of all the surrounding circumstances including both the characteristics of the accused and the details of the interrogation. (*Dickerson v. United States* (2000) 530 U.S. 428, 434; *People v. Williams* (1997) 16 Cal.4th 635, 660.) Relevant considerations as to whether a confession is voluntary are the length of the interrogation, its location, its continuity, and the defendant's maturity, education, physical condition and mental health. (*Withrow v. Williams* (1993) 507 U.S 680, 693; *People v. Williams*, *supra*, at p. 660.) A statement is considered voluntary "if the accused's decision to speak is entirely 'self-motivated' [citation], i.e., if he freely and voluntarily chooses to speak without 'any form of compulsion or promise of reward. . . .'

[Citation.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 327–328 overruled on other grounds in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

D. Appellant's statement was voluntary

Evaluating the totality of the surrounding circumstances, we conclude that appellant's inculpatory statements given to detectives were the product of rational intellect and free will.

1. Proper Miranda warnings given

Appellant was properly advised of his *Miranda* rights, which he stated that he understood. He also said that he would waive his right to have counsel present when talking to the detectives. Appellant signed the *Miranda* waiver form corroborating these oral agreements. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver . . ." (*North Carolina v. Butler, supra,* 441 U.S. at p. 373.)

Appellant's argument that he did not receive appropriate *Miranda* warnings was premised upon an incorrect belief that he was not told that anything he said could and would be used against him in a court of law. As we point out in part II, *ante*, in fact, that warning was given. As discussed in part IF (1) and (2), *ante*, at no time after the waiver of his *Miranda* rights did appellant unambiguously request counsel.

2. Conditions at interrogation not coercive

Appellant makes no claim that the duration of his interrogation or the conditions during the interview rendered his inculpatory statements involuntary. His interrogation did not continue over an extended period, but lasted only approximately two hours and 20 minutes. He did not suggest that he was sleep deprived, hungry, thirsty or otherwise uncomfortable or physically incapable of proceeding. Thus, the conditions at the interrogation were not coercive.

3. Appellant's youth, inexperience and mental deficiencies

In arguing that his statements were involuntary, appellant stresses his young age, mental deficiencies and lack of experience with law enforcement. We are not convinced that these factors rendered his statements involuntary. We find nothing presented in

connection with the suppression motion to suggest that appellant's I.Q. was below average, that he had any learning disabilities or that any deficiencies in his youthful intellect precluded rational decision making. There is also nothing in that record that suggests that appellant suffered any mental deficiencies at the time of the interrogation, or that any mental deficiencies that he might have suffered were of the type that impaired his understanding of the *Miranda* rights he waived or his free will to waive them. The fact that these proceedings, that had previously been suspended because of appellant's incompetence, were now going forward, suggests that he was competent to proceed. Finally, the record is bereft of any evidence that appellant's lack of experience with law enforcement was a factor in his making the inculpatory statements.

4. Promises of lenity

Appellant also claims that his statements were involuntary because made in reliance upon promises of lenity. The detectives told him that, "[I]f you buck the system, if you fight everything, you're just going to make it that much harder on yourself," which he argues implies lenity if he confessed. Promises of lenity, express or implied, or advantage to the accused, if it is a motivating cause of the confession is sufficient to invalidate the confession and render it involuntary as a matter of law. (See *People v. Hogan*, *supra*, 31 Cal.3d at p. 838.) We fail to see how the detectives' statement can be construed to imply leniency. The detectives were merely telling appellant that it was better to tell the truth. "[M]erely advising a suspect that it would be better to tell the truth, when unaccompanied by either a threat or a promise, does not render a confession involuntary." (*People v. Davis* (2009) 46 Cal.4th 539, 600.)

Even if we considered the statement a promise of lenity, it was an isolated statement and did not permeate the entire interrogation. Where such promises have invalidated confessions, they often permeate the questioning. (See, i.e., *In re Shawn D.* (1993) 20 Cal.App.4th 200, 216.)

Finally, "'"[w]hen the benefit pointed out by the police . . . is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will

not be considered involuntarily made.'" (*People v. Howard* (1988) 44 Cal.3d 375, 398.) We view the detectives' statement to be of this type.

5. Use of deception and lies

Appellant argues that his statements to detectives were involuntary because of lies they told him. He points to being told (1) on two occasions that "your worst case scenario is maybe being in custody till you're 25," (2) once that he was not going to prison, and (3) that his fingerprints were found on the gun. However, there is no evidence that any of these statements caused appellant to make his inculpatory statements.

Use of deception or communication of false information to a suspect can affect the voluntariness of an ensuing confession but they are not per se sufficient to make it involuntary. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240.) However, there must be a proximate causal connection between the deception and the confession. (*Ibid.*) Causation in fact is insufficient. (*Ibid.*; see also *People v. Benson* (1990) 52 Cal.3d 754, 778 ["A confession is 'obtained'. . . if and only if inducement and statement are linked, as it were, by 'proximate' causation. . . . The requisite causal connection between promise [or deception] and confession must be more than 'but for': causation-in-fact is insufficient"].)

The record fails to indicate that the detectives' statement that appellant might be in custody only until he was 25 was the proximate cause of his admissions. The detectives' brief comment was first made long before appellant's admissions, and the second time it was made, appellant had already made the admissions. The statement that appellant was "not going to prison" was followed by an inaudible comment, the absence of which makes that statement unclear and ambiguous as to its precise meaning. Finally, the lie that they found appellant's fingerprint on the gun was told to appellant after he had already admitted that he was at the wrong place at the wrong time and had given his inculpatory version of what had occurred. Hence none of the allegedly false statements made by the detectives were the proximate cause of appellant's admissions.

6. Coercive police activity

A statement is voluntary unless there is "coercive police activity." (*Colorado v. Connelly* (1986) 479 U.S. 157, 167.) At no time did the detectives say or do anything here

to imply that defendant was required to talk. In fact, they reiterated on multiple occasions that he was free to remain silent or to have counsel present at the interrogation. We therefore independently conclude that, as the trial court ruled, defendant's statements were voluntary.

IV. Sufficiency of evidence to support mayhem conviction

A. Contention

Appellant was convicted of aggravated mayhem in count 7. Sentencing on that count was stayed pursuant to section 654. Appellant contends that there is insufficient evidence to support the conviction. He argues that aggravated mayhem requires the specific intent to cause maiming injury and not a random or indiscriminate attack. The attack here, he asserts, was a random, unprovoked attack by a 16-year-old boy who was "probably intoxicated." This contention lacks merit.

B. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) "'[T]he appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.] This standard applies whether direct or circumstantial evidence is involved." (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Reversal is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.)

C. Castro's intent to maim

Aggravated mayhem is defined in section 205, as follows: "'A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, *intentionally*

causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill.'" (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 833 (*Ferrell*), italics added.) Specific intent to cause the maiming injury is an element of aggravated mayhem.

"Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) A jury may infer a defendant's specific intent from the circumstances attending the act, the manner in which it is done, and the means used among other factors. (*Ferrell*, *supra*, 218 Cal.App.3d at p. 834.)

The requisite intent to maim may not be inferred solely from evidence that the injury inflicted actually caused mayhem type injury. (*Ferrell*, *supra*, 218 Cal.App.3d at p. 835.) Evidence of a controlled and directed attack or an attack of focused or limited scope may provide substantial evidence of a specific intent to maim. (*People v. Lee* (1990) 220 Cal.App.3d 320, 326.) On the other hand, where the evidence shows no more than an "'indiscriminate,' . . . 'random attack' or 'an explosion of violence upon the victim,'" it is insufficient to prove an intent to maim. (*People v. Quintero* (2008) 135 Cal.App.4th 1152, 1162.)

In *Ferrell*, the defendant was a stranger to her victim, but came looking for her by name, stating that she had been sent by a friend from jail. The defendant pointed her gun at her victim's mother and threatened to kill her. When the victim's father moved toward defendant, she calmly and deliberately lowered her aim and shot him in the knee. The defendant then turned and shot her victim once in the neck. Once her victim was down, defendant did not fire additional shots. As a result of her injury, the victim was permanently partially paralyzed. The Court of Appeal observed that it takes no special expertise to know that a shot to the neck from close range, if not fatal, is highly likely to disable permanently. The evidence did not show an indiscriminate random attack on the victim's body or an explosion of violence. Instead, the attack was directed, controlled, and of focused or limited scope. (*Ferrell*, *supra*, 218 Cal.App.3d at pp. 835–836.)

While there are considerable differences between the facts in *Ferrell* and those presented here, consideration of the salient facts here leads us to a similar conclusion. Appellant, the shooter, an Hispanic MNV gang member, was in a car driving on Cherry Avenue in rival Black Duroc gang territory. There was evidence that the MNV gang and Duroc gang were at war, that there was racial animus between Blacks and Hispanics involved in the war and that nongang members were often the victims. Appellant shot Graves in the head and sped away. This evidence was sufficient for the jury to reasonably conclude that the attack on Graves was not indiscriminate or a random explosion of violence. Rather, it was a "cold and deliberate" (*Ferrell*, *supra*, 218 Cal.App.3d at p. 835), calculated, and a pinpointed attack by an Hispanic gang member on a Black individual residing in a rival Black gang territory. The jury so found, having concluded that the special allegation that the attempted murder was willful, deliberate and premeditated was true.

Further, the shot was made from point blank range and was aimed at Grave's head, a part of his body that made it extremely likely that the victim would be killed or severely disabled. Firing a gun at someone from point blank range is circumstantial evidence of intent to kill that person (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [shooting at point-blank range "undoubtedly creates a strong inference that the killing was intentional"]; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 ["The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill'"].) It can also be circumstantial evidence of an intent to maim the person if the person does not die, especially when the shot is aimed at a vulnerable area of the body. A defendant may intend to both kill and disable or disfigure his victim if the attempt to kill is unsuccessful. (*Ferrell*, *supra*, 218 Cal.App.3d at pp. 833–834.)

V. Pitchess motion in camera inspection

A. Background

Before trial, appellant filed a *Pitchess* motion, seeking complaints against Detectives Manuel and Wilken related to "use of bias, perjury, false imprisonment, false testimony, improper and coercive conduct, dishonesty, fabrication of charges and evidence, personal

bias of interrogating detectives which would affect their credibility as witnesses, violation of constitutional rights, character and custom to coerce confessions, charges and evidence, verbal abuse; conduct unbecoming an officer; harassment and/or false arrest; giving false testimony; wrongful accusations whether it led to a conviction or not; or preparing false police reports, . . ." The trial court denied the motion, finding that "there is not a specific factual scenario, plausible factual foundation for the discovery or even for review of the officer's personnel records . . ."

Later, appellant filed a supplemental discovery motion seeking certain evidence bearing on Detective Manuel's credibility. Appellant also sought evidence establishing that Detective Manuel has been guilty of misconduct involving evidence or unauthorized removal of evidence from the evidence locker. The People filed their own motion seeking *Brady*[5] discovery from the Monrovia Police Department. The People's motion sought discovery related to Detective Manuel "referenced in the *Brady* Request Form (attached herein and incorporated by reference)."[6] The *Brady* Request Form is not included in the record on appeal. The record before us also fails to include any order granting either appellant's supplemental discovery motion or the People's *Brady* motion.

Nonetheless, on October 18, 2010, the trial court conducted an in camera hearing at which it concluded that there was no discoverable evidence. At the hearing, the trial court stated: "We are on the record in chambers on a notice of motion re discovery filed by the People on the Monrovia Police Department." The court made no reference in that hearing to any *Pitchess* motion or to appellant's supplemental discovery motion. The minute order of that hearing, however, states that there was no discoverable evidence as to "*Brady/Pitchess* issues."

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5 *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

6 The record on appeal fails to include any "*Brady* Request Form."

B. Contention

Appellant requests that we conduct an independent review of the sealed reporter's transcript of the in camera *Pitchess* hearing to determine whether "the trial court abused its discretion in failing to turn over records to the defense." Appellant further requests that we review "the sealed materials to determine what documents were produced or not produced for the trial court's review and the sufficiency of any explanation of such production."

C. Pitchess review

In *Pitchess*, the California Supreme Court held that a criminal defendant is entitled to discovery of officer personnel records if the information contained in the records is relevant to his ability to defend against the charge. Later-enacted legislation implementing the court's rule permitting discovery (§§ 832.5, 832.7, 832.8; Evid. Code, §§ 1043–1047) balanced the accused's need for disclosure of relevant information against a law enforcement officer's legitimate expectation of privacy in his or her personnel records. The Legislature concluded that a defendant, by written motion, may obtain information contained in a police officer's personnel records if it is material to the facts of the case. (Evid. Code, § 1043, subd. (b)(3).) When presented with such a motion, the trial court rules as to whether there is good cause for disclosure. (Evid. Code, §§ 1043, 1045.) If the court orders disclosure, the custodian of the officer's records brings to court all the potentially relevant personnel records and, in camera, the trial court determines whether any of the records are to be disclosed to the defense. During the in camera hearing, neither the defense nor the prosecution is present. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226–1227, 1229 (*Mooc*).)

Mooc requires that, at the time of the in camera hearing, the trial court facilitates appellate review of its in camera rulings as follows. "The trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to

obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. Of course, to protect the officer's privacy, the examination of documents and questioning of the custodian should be done in camera in accordance with the requirements of Evidence Code section 915, and the transcript of the in camera hearing and all copies of the documents should be sealed." (*Mooc, supra,* 26 Cal.4th at p. 1229, fn. omitted.)

There are numerous impediments to our reviewing the in camera hearing as requested by appellant. Initially, we observe, that the record is unclear whether the in camera hearing was solely with respect to the People's *Brady* discovery or whether it included appellant's supplemental *Pitchess* discovery request. At that hearing, the trial court made no reference to appellant's discovery request and mentioned only that the hearing pertained to the People's *Brady* motion, though the minute order of that hearing refers to both.

Further, there is no ruling in the appellate record on appellant's motion for supplemental discovery and, therefore, no indication of the scope of the discovery that the trial court was going to permit, if any. It is therefore impossible for us to determine whether the documents produced at the in camera hearing are within the categories of documents that the trial court would permit.

The *Brady* discovery does not present this problem, as it requires the prosecutor to disclose all evidence, in whatever category, that is *favorable* to the defendant and *material* on the issues of guilt or punishment. (See *People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1471.)

Finally, the transcript of the in camera proceeding does not precisely describe the claims against Detective Manuel. The custodian of records at that hearing stated that there was one disciplinary matter, as a result of which the detective resigned. The trial court reviewed a document dated July 28, 2010, indicating a "Notice of Intent to Terminate Employment," file-stamped August 9, 2010. The court stated that "there are a number of incidents that are referenced here which go to the issues of inappropriate conduct, interfering with investigations, and not being candid with other law enforcement." The trial

court then merely indicated in general terms the nature of the incidents, without specification of each.

In light of these difficulties, we cannot properly evaluate the propriety of the trial court's conclusion that no disclosure to appellant was required. However, it is unnecessary for us in the circumstances presented, to remand this matter for a clarification of the discovery proceedings. Regardless of whether some of the information should have been disclosed to appellant and was not, he suffered no prejudice under either *Pitchess* or *Brady*, under even the more stringent beyond a reasonable doubt standard.

Both *Pitchess* and *Brady* discovery require a showing of prejudice. With regard to *Pitchess* discovery, the failure to have provided the appellant with discoverable material will only support a motion for a new trial if there was a reasonable probability that there would be a different result had the *Pitchess* evidence been available to the defendant at trial. (*People v. Gaines* (2009) 46 Cal.4th 172, 181 ["'It is settled that an accused must demonstrate that prejudice resulted from a trial court's error in denying discovery'"]; *People v. Clauson* (1969) 275 Cal.App.2d 699, 706.)

Similarly, *Brady* disclosure is required by the prosecution if the evidence is favorable to the defendant and material on the issues of guilt or punishment. (See *People v. Gutierrez*, *supra*, 112 Cal.App.4th at p. 1471.) *Brady* evidence is "'material'" if there is a reasonable probability that if the evidence had been disclosed to the defendant, the result of the proceeding would have been different. (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 7–8.) There is a reasonable probability of a different result if the government's suppression of evidence "'undermines confidence in the outcome of the trial.'" (*Kyles v. Whitley* (1995) 514 U.S. 419, 434; *In re Williams* (1994) 7 Cal.4th 572, 611.)

As appellant's supplemental discovery motion points out, the sole purpose of the discovery of Detective Manuel's personnel records of wrongdoing was to support its motion to suppress appellant's statement given to the detectives based upon alleged *Miranda* violations and to impeach his credibility. But the entire interrogation of appellant was recorded in two CD's. There is no evidence in the record to suggest that the CD's were

manipulated or that any portion of the interrogation was not recorded. Hence, Detective Manuel's other potential wrongful conduct will have no effect on the assessment of whether he deprived appellant of his *Miranda* rights, or engaged in any other wrongful conduct in connection with the interrogation of appellant. The recorded statement itself is the uncontradicted evidence of what transpired.

VI. Conduct credits

A. Background

Appellant was sentenced to 40 years to life for the attempted murder of Graves, which was calculated as 15 years to life for the attempted murder and 25 years to life for the firearm enhancement. The trial court awarded appellant 1,576 days credit for time actually served in presentence custody. It failed to award any presentence conduct credit.

B. Contentions

Appellant contends that the trial court erred in failing to award him an additional 236 days of presentence conduct credits. He argues that he is entitled to conduct credit of 15 percent of the actual days in custody pursuant to section 2933.1 for a person convicted of a violent felony. The People agree with appellant, as do we.

C. Conduct credit should have been awarded

Section 2900.5 awards defendants presentence credits for actual time spent in custody. (§ 2900.5, subd. (a).) Former section 4019, applicable when the charged offenses occurred, provided that in addition to the credit for actual time served, a defendant was also entitled to conduct credit such that for each period of four actual days served in custody, the defendant would be deemed to have served six days; conduct credit of 50 percent of the time actually served was awarded. (§ 4019, subd. (f).)

However, section 2933.1 operates as an exception to section 4019 and provides that individuals convicted of a violent felony, as described in section 667.5, subdivision (c), would be entitled to conduct credits equal to only 15 percent of the actual time served. (§ 2933.1, subd. (a).) Appellant was convicted of attempted murder, a violent felony under section 667.5, subdivision (c)(12) and hence entitled to 15 percent conduct credits. The fact

that appellant received an indeterminate sentence does not preclude awarding the 15 percent conduct credits. (*People v. Brewer* (2011) 192 Cal.App.4th 457, 460–461.)

The trial court failed to award appellant any conduct credits. Therefore, the judgment must be modified to award appellant an additional 236 days of conduct credits (15 percent of the 1,576 days in actual presentence custody).

DISPOSITION

The judgment is modified to provide that appellant is entitled to 236 days of conduct credits and is otherwise affirmed. On remand, the trial court is directed to prepare a corrected abstract of judgment to reflect the additional days of conduct credits.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ