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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EVELYN BARAHONA et al., Defendants and Appellants.	B262713 (Los Angeles County Super. Ct. No. BA426438)

APPEALS from a judgment of the Superior Court of Los Angeles County, Craig J. Mitchell, Judge. Affirmed as modified with directions.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant Evelyn Barahona.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant Kevin Danilo Barahona.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant Jorge Martin Zamora.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants Kevin Danilo Barahona, Evelyn Barahona and Jorge Martin Zamora of three counts of deadly weapon assault with a BB gun, against three separate victims: Youssouf Ba; Tina Hodgin; and Booker T. Wren. (Pen. Code, § 245, subd. (a)(1).)[1] The jury found defendants not guilty of assaulting a fourth person, Jose Pineda. Kevin was sentenced to four years in state prison.[2] Evelyn and Mr. Zamora were each sentenced to state prison for two years.

II. THE EVIDENCE

The four charged assaults—as well as an encounter with a potential victim—took place in the same general area of downtown Los Angeles on June 21 and 22, 2014. Defendants were arrested in that area on June 22, 2014, minutes after the fourth charged assault. Their Toyota matched the color, make, model and license plate number of one sought in connection with BB gun assaults in the neighborhood. There was a BB gun in the trunk together with ammunition. Following their arrests, Evelyn and Kevin both made incriminating statements.

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[1] Further statutory references are to the Penal Code except where otherwise noted.

[2] Because the two Barahona defendants have the same last name, to avoid confusion, we refer to them by their first names.

A. The Alleged Victims and a Potential Victim

1. June 21, 2014

a. 2:16 p.m.: Mr. Pineda (Count 1: Not Guilty)

On June 21, 2014, at 2:16 p.m., Mr. Pineda was at work as a uniformed security guard in downtown Los Angeles. Mr. Pineda was speaking with a friend and had his back to the street. He heard a loud noise like a firecracker. He felt pain in his right shoulder blade. Mr. Pineda turned immediately and saw a tan Toyota Camry about 30 to 40 yards away. The windows were down. The driver was a young, "bald," male Latino with "a real chubby" face. Mr. Pineda described the look on the driver's face, "He was just staring me down, like we call it, like, dogging me, like this, just looking at me." Mr. Pineda did not see anyone else in the car. He thought there was a front seat passenger, however, because the seat was tilted back. Mr. Pineda did not see any sort of weapon. The incident was captured on surveillance video. In the video, at the moment Mr. Pineda was shot, a tan sedan with a missing right rear hubcap stopped briefly and then passed slowly by. Mr. Pineda suffered a small bruise on his shoulder and was examined at a hospital. The bruise lasted about two weeks.

Officer Brendy Ponce created two photographic lineups. The first photographic lineup included Mr. Zamora's June 22, 2014 booking photograph in position No. 4. The second photographic lineup included a photograph of Kevin in position No. 2. Officer Ponce did not place a photograph of Evelyn in any lineup. Officer Ponce could not recall why he had not done so. On June 24, 2014, Mr. Pineda viewed the photographic lineups but did not identify either of the depicted defendants. On June 24, 2014, Mr. Pineda was unable to identify the driver. Exhibit No. 4, a photographic lineup, states in the comments section, "Unable to ID, vict[im] stated the susp[ect] was blocking his face with right arm." During the July 7, 2014 preliminary hearing, Mr. Pineda identified Mr. Zamora as the driver of the Toyota. At trial, in early 2015, Mr. Pineda did not identify

any defendant. However, Mr. Pineda thought he had identified Mr. Zamora in the photographic lineup.

b. 2:33 p.m.: Mr. Ba (Count 2)

Mr. Ba also worked as a security guard in downtown Los Angeles. At 2:33 p.m. Mr. Ba was shot in his left pinkie with a BB gun. This occurred within minutes of Mr. Pineda's reported assault. A 4-door chocolate or gray Toyota Camry pulled close to him, about 10 feet away. The windows were down. A male voice said, "What's up, bro?" Mr. Ba heard a pop. He saw the head or nozzle of a black gun. Mr. Ba saw three young male Hispanics in the Toyota. Mr. Ba told an emergency operator the license plate's last three digits were 398. The license plate on defendants' Toyota Camry was 3VGP928.

On June 23, 2014, Mr. Ba viewed the photographic lineups. Mr. Ba identified an individual in position No. 3 as the front seat passenger who fired the BB gun. Mr. Zamora's booking photograph was in position No. 4. Mr. Ba testified at the July 7, 2014 preliminary hearing after having the BB pellet extracted from his finger that morning. He was still feeling the effects of medication when he testified. Mr. Ba identified Mr. Zamora as the passenger. At the preliminary hearing Mr. Ba testified: "I have blurred vision, and I don't feel good right now." At trial, Mr. Ba testified that as a result of the surgery he was "high" during the preliminary hearing. He explained: "I just had medication put on me, and my pinkie literally opened up . . . and when I came straight up to court, medically I was - - my finger was numbed. . . . I had blurry vision. I was confused. I didn't even want to show up, because I was hurt."

At trial, Mr. Ba identified: Kevin as the front seat passenger; Mr. Zamora as the driver; and Evelyn as the backseat passenger. Mr. Ba admitted this was the first time he had mentioned seeing a woman. Mr. Ba explained: "[W]hen they were driving by and I take a look at them, they all had tank tops, white tank tops, all of them, all three of them. And for some reason, the lady, she had her hair tied in the back, or whatever the case was. I thought it was three young male[s] that were in the car. She seem[ed] like a male

to me when I saw her." Mr. Ba also identified defendants' Toyota. Mr. Ba testified, "That's the car that drove by me when I got shot." Mr. Ba recognized the BB gun found in defendants' trunk as the weapon he had seen the day he was shot. At one point during trial, Mr. Ba described the car as a Nissan Altima. He subsequently testified: "I'm not confused. My first statement - - I stand by what I sa[id] from the beginning, it was a Toyota Camry."

c. 2:39 p.m.: an unidentified woman

At 2:39 p.m., several minutes after Mr. Ba was shot and just a few blocks away, an unidentified woman conversed with three individuals in a car. A video of the encounter was extracted from Kevin's cell phone. The video depicts the woman sitting against a wall and engaging in conversation. Three voices are heard coming from the car, two male and one female. The conversation was as follows: "FEMALE 1: Do you have cigs with you? [¶] MALE 1: I don't sorry, how you doing though? [¶] FEMALE 1: Just trying to hang in there. [¶] MALE 1: That's what I'm trying to do man. I'm trying to get the day going you know, smoke some bud drink some . . . . [¶] FEMALE 1: I'm trying to get back to Oakland man. [¶] MALE 1: Oakland?! Naw! That's where my team's, that's where my team's at. Oakland Raiders. [¶] MALE 2: Ay what's up with those things man? They kinda look like a hooker. [¶] FEMALE 1: Huh? [¶] MALE 1: He's just tripping man, he's tripping. [¶] MALE 2: Nah I'm just saying like not in a bad way but I don't know they look kinda weird. [¶] FEMALE 1: Oh, okay. I'm trying, I'm trying, I'm trying to get back to Oakland. [¶] MALE 1: I like your tattoo man. [¶] [An individual walks between the vehicle and FEMALE 1.] FEMALE 2: [No, no, no,] [v]amonos a la verga. [¶] MALE 1: Alright have a good one." The car left after an individual walked between the unidentified woman and the car. The female voice in the car said, "Vamonos a la verga." "Vamonos a la verga" is slang for "[L]et's get the fuck out of here." (The jury heard the two Barahona defendants' voices on their audio-taped

interviews with a detective. The jury was able to compare those voices to the voices captured on the cell phone video.)

d. 2:55 p.m.: Ms. Hodgin (Count 3)

Also on June 21, 2014, Ms. Hodgin was working as a prostitute in downtown Los Angeles. Ms. Hodgin was two or three blocks from the unidentified woman's location. At 2:55 p.m., a car she described as a four-door, gray and white late-90s Honda pulled up next to Ms. Hodgin. All four windows were down. There were three people in the car, two men and one woman. Ms. Hodgin twice heard "a loud boom." Ms. Hodgin, "a retired cop," was familiar with weapons. Ms. Hodgin saw a small gray or dull silver weapon that looked like a handgun. Ms. Hodgin saw the female holding the gun. The female's hand was on the trigger. Ms. Hodgin suffered a wound in the arm. She required medical attention to remove a BB pellet.

Five days later, on June 26, 2014, Ms. Hodgin failed to identify either Kevin or Mr. Zamora in the photographic lineups. She identified the person in position No. 1 as the driver. Kevin's photograph was in position No. 2. As the jury could observe, however, the person in position No. 1 bore a very strong resemblance to Mr. Zamora. Ms. Hodgin told Detective Ponce, "[T]he person in pic[ture] #1 looks like the driver wearing glasses." At the July 7, 2014 preliminary hearing, Ms. Hodgin identified Mr. Zamora as the driver and Kevin as the front seat passenger. At trial, Mr. Zamora was wearing glasses. At the trial, Ms. Hodgin identified: Kevin as the driver; Mr. Zamora as the front seat passenger; and Evelyn as the back seat passenger. She testified that when she viewed the photographic lineups, she had identified Kevin as the driver. Also at trial, Ms. Hodgin identified defendants' Toyota Camry and the BB gun found in the sedan's trunk. She said she mistook the BB gun for a handgun because at the time of the shooting she saw only the weapon's barrel.

2. June 22, 2014

9:32 p.m.: Mr. Wren (Count 4)

Mr. Wren was 69 years old and blind in his right eye. On June 22, 2014, at approximately 9:32 p.m., Mr. Wren was on a dark street in downtown Los Angeles. A woman drove by in "a gray car like a little sports car" with four doors. There were two males in the back seat. The woman stopped and looked around, then backed up. The occupants of the car asked Mr. Wren for directions. As Mr. Wren gave directions, he heard a "pow." Mr. Wren's right hand began to bleed between his pinkie and ring fingers. He did not see a weapon. He wore prescription glasses; but, during the assault, they fell off. Mr. Wren told an emergency operator and a paramedic that "some Spanish people" had shot him with a pellet gun. Someone said, "Fuck you, you son of a bitch," and then they drove off. A pellet was subsequently removed from Mr. Wren's hand.

During a field showup in the aftermath of the shooting, Mr. Wren did not identify Evelyn. He told the law enforcement officers, "No, that's not her." When shown defendants' Toyota, Mr. Wren said it was not the sedan he had seen earlier. At the preliminary hearing, Mr. Wren did not identify any defendant. At trial, Mr. Wren identified Evelyn as the driver and Kevin as a backseat passenger.

B. The Law Enforcement Investigation

1. Defendants' detention and arrest

During roll call on June 22, 2014, officers John Boverie and Rolando Reyes each received a flyer with the license plate number and description of a vehicle sought in connection with BB gun assaults. Between 9:30 and 10:00 p.m. that evening, Officer Boverie arrived at the scene of the assault on Mr. Wren. Officer Boverie then broadcasted information about the shooting including a vehicle description, a gray

compact sports vehicle, and the suspect as related by Mr. Wren—a Latina. Officer Reyes and a partner, identified only as Officer Vega, heard the broadcast and went to where Officer Boverie was waiting. Officer Boverie advised Officers Reyes and Vega, "[A] victim was possibly shot with a BB gun that kind of matches the description of previous occurring crimes that had been occurring in [the area] involving a BB gun." He told them to be on the lookout for the car described in the flyer received at roll call.

At 10:10 p.m., less than 40 minutes after Mr. Wren was assaulted and three blocks away, Officers Reyes and Vega stopped defendants' Toyota. Mr. Zamora was driving and Kevin was in the front passenger seat. Evelyn was seated behind Mr. Zamora. Mr. Zamora was 20 years old at the time of his arrest. Kevin was 21. Evelyn was 18. Both Mr. Zamora and Kevin had closely shaved heads. Consistent with the car seen in the Pineda assault surveillance video, the Toyota was missing its right rear hubcap. Kevin's cell phone was in the center console. The right rear headrest was missing, allowing access to the vehicle's trunk. There was a black BB gun in the trunk near the access point. The truck also held a container of BB pellets. There was a warning label imprinted on the gun. It read: "Warning: Not a toy. Misuse or careless use may cause fatal injury. Before use, read owner's manual . . . ." Officer Boverie described the gun's functioning: "Most BB guns are CO2 cartridge activated, so it's more of a pump action. The more pumps, the more air you can expell out, the faster the projectile comes out of the barrel of the BB gun." The BB gun did not require a permit and could be purchased by a "kid," depending on age.

2. The interviews

Detective Tommy Thompson interviewed Evelyn following her arrest. The audio recording of the interview was played for the jury. Evelyn admitted her involvement. She acknowledged it was "silly" and "dumb." She said she was, "[J]ust playing around." Detective Thompson asked Evelyn to explain why she had been shooting people with a BB gun: "[Detective] Thompson: . . . I mean you aren't out there killing people. [¶]

[Ms.] Barahona: [Y]eah. [¶] [Detective] Thompson: [S]o this is just kinda bein' you're just being silly. [¶] [Ms.] Barahona: [Y]eah. [¶] [Detective] Thompson: but . . . this can't keep happening . . . . You can't just go around, you know, . . . it might be funny but . . . that thing doesn't feel good when you get hit with it, you know what I mean? So we gotta make sure this doesn't happen ah anymore. So uh I'm just trying to understand . . . why do it? [¶] [Ms.] Barahona: Yeah, well I don't know, I was, being like, like dumb. [¶] [Detective] Thompson: You were just being dumb? [¶] [Ms.] Barahona: Yeah. [Detective] Thompson: I mean like what? Is it just for – because it's funny or? [¶] [Ms.] Barahona: Mmm, no umm [¶] [Detective] Thompson: Well I mean like just get laughs out of it? Or, you know I know there's a couple security guards that you hit up and. So I mean it's like, I don't know I'm just trying to understand why, I wanna make sure it doesn't escalate into you doing something worse . . . . So I'm just trying to understand what why you're doing it. [¶] [Ms.] Barahona: Mmm It's I don't know it's [¶] [Detective] Thompson: Just cause it's funny or . . . [¶] [Ms.] Barahona: Umm yeah. [¶] [Detective] Thompson: Yeah pretty much? [¶] [Ms.] Barahona: [Y]eah[.]"

Evelyn said she had no reason to target security guards or prostitutes. They just happened to be there. Evelyn did not know why the unidentified woman on the sidewalk was targeted. Evelyn said she had never shot anybody with a "real gun," just the BB gun. She did not take money from the people. She was, in her words, "just playing around." Evelyn promised she was "gonna stop now." The interview concluded as follows: "[Detective] Thompson: But you're gonna stop now cuz . . . uh . . . alright well. Okay do you wanna add anything? Say anything, say you're sorry to the people that you hurt? [¶] [Ms.] Barahona: Mmm, yeah. [¶] [Detective] Thompson: Okay." The trial court instructed the jury to consider Evelyn's statements only as to her.

Detective Thompson also interviewed Kevin. The jury heard the audio recording of the interview. Kevin denied being involved in the assaults. He described the conduct as "childish immature little kid crap," and "not homicide." Kevin said he had lent his car to a friend and, "I don't know if they did some bullshit."

During the interview, Detective Thompson related there was videotape of Kevin shooting at a lady with a pellet gun, and, "[W]e also got your car on video." (At the time, Detective Thompson thought the unidentified woman in the video on Kevin's cell phone was one of the victims, Ms. Hodgin.) Kevin commented, "I don't know how you guys got me in the tape but that's good, you guys got it, that's good." Kevin also stated, "It's not homicide, you know." Kevin denied shooting anyone with a pellet gun: "That's not me . . . . All I do is just go in my backyard, get the rats . . . . I didn't do none of this." During the interview, the following transpired: "[Detective] Thompson: Okay, so are you telling me that you didn't shoot anybody with the pellet gun? [¶] [Mr.] Barahona: I'm telling you straight up -- [¶] [Detective] Thompson: Are you telling me that nobody that was with, in there with you in the car? [¶] [Mr.] Barahona: I had my friend borrowing my car so I don't know if they did some bullshit. [¶] [Detective] Thompson: So you're saying you don't know what your friends are doing in your car that you're two feet away from? Is that what you are telling me? [¶] [Mr.] Barahona: Nah."

At the conclusion of the interview, Detective Thompson said he was going to present the case to the district attorney. Kevin responded in reference to the presentation of the case to the prosecutor, "They're gonna be like, 'dang, this is just some childish immature little kid crap.'" The trial court instructed the jury to consider the evidence only as to Kevin.

C. The Defense Case

1. Dr. Mitchell Eisen

Dr. Eisen testified as an expert on memory and eyewitness identification. Dr. Eisen discussed multiple factors affecting memory and the accuracy of eyewitness identifications. With particular relevance to the present case, Dr. Eisen discussed the carry-over effect of exposure to an individual in a photographic lineup on subsequent identifications.

2. Officer Gina Bracht

Officer Bracht interviewed Mr. Pineda after he was shot. Mr. Pineda told Officer Bracht he saw two male Hispanics, both wearing black shirts, one with a shaved head. Officer Bracht also spoke with Mr. Ba later that same day. Mr. Ba said there were three male Hispanic assailants. He described the assailants' vehicle as an early 90s brown or tan Toyota Camry. Officer Bracht thought Mr. Ba had said one of the individuals had a shaved head.

3. Officer Albert Enriquez

Officer Enriquez interviewed Ms. Hodgin at a nearby medical center on the day she was shot. Ms. Hodgin described her assailants as two Latinos and a Latina in a white four-door Toyota. She did not give any additional description of the suspects. She was unable to say which of the individuals fired the BB gun.

III. DISCUSSION

A. The Offense

Defendants were convicted of deadly weapon assault in violation of section 245, subdivision (a)(1). Section 245, subdivision (a)(1) states: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished . . . ." In *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029, our Supreme Court defined a deadly weapon: "As used in section 245, subdivision (a)(1), a 'deadly weapon' is 'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' [Citation.] Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their

character as such. [Citation.] Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury. In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it was used, and all other facts relevant to the issue. [Citation.]" (Accord, *In re David V.* (2010) 48 Cal.4th 23, 30, fn. 5.) The jury was so instructed. With respect to a deadly weapon other than a firearm, the jury was instructed: "A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury."

Great bodily injury in this context means significant or substantial injury. (*People v. Brown* (2012) 210 Cal.App.4th 1, 7; *In re Brandon T.* (2011) 191 Cal.App.4th 1491, 1496; *People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087.) Insignificant, trivial or moderate injury is not great bodily injury. (*People v. McDaniel* (2008) 159 Cal.App.4th 736, 748; *People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066.) The jury was instructed: "*Great bodily injury* means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm." A deadly weapon assault conviction does not require proof of an actual injury. (*People v. Aguilar, supra,* 16 Cal.4th at p. 1028; *In re D.T.* (2015) 237 Cal.App.4th 693, 698; *People v. White* (2015) 241 Cal.App.4th 881, 886.) However, when, as here, an injury does result, the extent of the injury and its location are relevant considerations in determining whether an object was used in a manner likely to produce death or great bodily injury. (*People v. Brown, supra*, 210 Cal.App.4th at p. 7; *In re Brandon T., supra*, 191 Cal.App.4th at p. 1497; *People v. Beasley, supra,* 105 Cal.App.4th at p. 1086.) The jury was instructed: "No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact . . . in deciding whether the defendant committed an assault . . . ."

A BB gun, divorced from the manner in which it is used, is not an inherently deadly weapon. (See *People v. Brown, supra*, 210 Cal.App.4th at p. 8 [evidence supported jury finding BB gun was a deadly weapon under section 245, subdivision (a)(1)]; *People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 541 [jury entitled to find on the

evidence presented that pellet gun was deadly weapon]; cf., e.g., *People v. McCoy* (1944) 25 Cal.2d 177, 188 [knife]; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054 [chain]; *People v. Kersey* (1957) 154 Cal.App.2d 364, 366 [pocket knife].) Whether an object's use is capable of producing and likely to produce, death or great bodily injury is a factual question for the trier of fact's resolution. (*People v. McCoy, supra*, 25 Cal.2d at p. 188; *People v. Maldonado* (2005) 134 Cal.App.4th 627, 635, fn. 10; *People v. Savedra* (1993) 15 Cal.App.4th 738, 744.)

B. Lesser Included Simple Assault Instruction

Defendants argue the jury should have been instructed on simple assault as a lesser included offense because there was insufficient evidence the BB gun was a deadly weapon. Simple assault is defined thusly, "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Simple assault is a lesser included offense of deadly weapon assault. (*People v. Carmen* (1951) 36 Cal.2d 768, 775; *People v. McDaniel, supra*, 159 Cal.App.4th 736, 747-748; *People v. Jones* (1981) 119 Cal.App.3d 749, 754.) We find no error and, even if there was error, no prejudice.

A trial court has a sua sponte duty to instruct on a lesser included offense whenever substantial evidence raises a question whether all the elements of the charged offense are present. (*People v. Smith* (2013) 57 Cal.4th 232, 239; *People v. Booker* (2011) 51 Cal.4th 141, 181.) The duty prevents a jury from being confronted with an unwarranted all or nothing choice. (*People v. Smith, supra*, 57 Cal.4th at p. 239; *People v. Breverman* (1998) 19 Cal.4th 142, 155.) Conversely, there is no sua sponte duty to instruct on a lesser included offense when there is no substantial evidence the offense was less than that charged. (*People v. Smith, supra*, 57 Cal.4th at p. 239; *People v. Booker, supra*, 51 Cal.4th at p. 181.) Stated differently, our Supreme Court has held: "The law is well settled in this state that the trial court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all,

he [or she] is guilty of the higher offense. [Citations.]" (*People v. McCoy, supra,* 25 Cal.2d at pp. 187-188; see *People v. Yeats* (1977) 66 Cal.App.3d 874, 879.) The question is whether there was substantial evidence defendants committed an assault but not an assault with a deadly weapon. (*People v. Golde* (2008) 163 Cal.App.4th 101, 117; *People v. Page* (2004) 123 Cal.App.4th 1466, 1474.) Substantial evidence in this context is evidence sufficient to deserve the jury's consideration, that is, evidence that could persuade a reasonable jury. (*People v. Harris* (2008) 43 Cal.4th 1269, 1289; *People v. Breverman, supra,* 19 Cal.4th at p. 162.) Our review is de novo. (*People v. Booker, supra,* 51 Cal.4th at p. 181; *People v. Avila* (2009) 46 Cal.4th 680, 705.)

There was no duty to instruct on simple assault in this case. Defendants were either not at fault because they were misidentified or they were guilty of assault with a deadly weapon. All the three victims were shot with a BB gun. The shootings were intentional. They were accomplished at close range. In each case, the victim could see his or her attackers. The BB pellets were expelled from the gun with sufficient force to penetrate each victim's skin. This meant that the weapon had been intentionally primed to expel the projectile with the requisite speed. In each case the BB pellets had to be surgically extracted. No substantial evidence raised a question whether the deadly weapon element of the offense was present. (See *People v. Page, supra,* 123 Cal.App.4th 1466, 1474 [defendant threatened to stab victim with sharp pencil]; *People v. Golde, supra,* 163 Cal.App.4th 101, 116-117 [defendant drove car toward victim]; *People v. Simons* (1996) 42 Cal.App.4th 1100, 1107 [defendant threatened police officers with screwdriver].)

Defendants argue each victim was hit in the hand or arm and no victim was hit in the face or other vital area. They suggest the BB gun was aimed away from vital areas. They characterize the inflicted injuries as "minor or moderate," "not deeply penetrating," not "through and through" and requiring "only simple medical procedures" to resolve. They assert the BB pellets penetrated only the victims' "outer layer of skin" and did not "substantially penetrat[e] any skin and/or muscle tissue in a manner that would cause a great bodily injury." The evidence was to the contrary. All of the victims were struck in

or near the upper body. Their injuries were not trivial. Mr. Ba's hand was in front of him and just below his chest when he was shot in the left pinkie. He was sitting on a chair looking down at his cell phone. He was holding his cell phone just slightly below chest level and in front of him. After he was shot, his finger swelled. Mr. Ba testified that between the date he was shot, June 21, 2014, and the date the BB pellet was extracted from his finger, July 7, 2014, he experienced serious pain and was unable to sleep or work. Mr. Ba testified: "My finger was swollen. I had a hard time sleeping at night. I was heavy on pain medication, pills, because I just couldn't take the pain. I couldn't sleep. I didn't go to work, and I was traumatized." The BB pellet had to be extracted. Mr. Ba explained: "I . . . had . . . my pinkie literally opened up to take [the BB pellet] out, because it was so deep in my finger . . . ." Ms. Hodgin was shot in the back of her left arm, about four inches above her elbow. She required medical attention to remove the BB pellet from her arm. Mr. Wren was holding a recycling bag in his hand. His hand was at about waist level near his mid-section. He was shot in the hand between his pinkie and ring fingers. Mr. Wren testified, "I went to my hospital . . . and they had to cut it open and pull out a little pellet . . . , [and] I was in excruciating pain." Mr. Wren's pain continued to the time of trial. That the victims escaped more serious injury is not dispositive. The fortuitous fact no victim was struck in a more vital area of the body does not detract from the fact the weapon was capable of causing great bodily injury or death. (See *People v. Brown, supra*, 210 Cal.App.4th at p. 8 ["the jury could have reasonably inferred the location and severity of [the victims'] injuries were fortuitous"]; see *In re D.T., supra*, 237 Cal.App.4th 693, 698 [citing *Brown*, "this definition focuses on potentiality, the People need not prove an actual injury to a victim. . . ."].) Defendants also point to the absence of expert testimony about the particular BB gun's condition, functioning or capacity. However, as Division Seven of the Court of Appeal for this appellate district has observed, such evidence is not essential. (*People v. Brown, supra*, 210 Cal.App.4th at p. 8; see *People v. Aguilar, supra,* 16 Cal.4th at p. 1028.)

Even if the trial court erred, there was insufficient evidence of prejudice to permit reversal. In a noncapital case, a trial court's failure to sua sponte instruct on a lesser

included offense is reviewed for prejudice under the *Watson* standard of review. (*People v. Breverman, supra*, 19 Cal.4th at p. 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here the evidence of intentional, close-range assaults with a BB gun and the injuries suffered was uncontradicted. Thus, it is not reasonably probable the result would have been more favorable to defendants had the simple assault instruction been given.

C. The BB Gun Warning

As noted above, the BB gun had a warning embedded on its handle. The warning stated: "Warning: Not a toy. Misuse or careless use may cause fatal injury. Before use, read owner's manual . . . ." The trial court admitted the warning into evidence over defense hearsay, lack of probative value, and legal conclusion objections. The trial court ruled: "I believe my instruction . . . was quite clear that [whether the BB gun was a deadly weapon] was a determination that was within the purview of the jury. [¶] I do believe its probative value is whoever possesses this gun has a gun that has a warning with respect to its use on it, and it is instructive to anyone who uses it in that fashion." On appeal, defendants challenge the ruling on hearsay grounds.

The trial court admitted the warning for a non-hearsay purpose—to show that whoever possessed the weapon had been warned not to misuse it. But even if the trial court abused its discretion (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1308; *People v. Jones* (2013) 57 Cal.4th 899, 956), there was no prejudice to defendants. Error in admitting hearsay evidence is reviewed under the *People v. Watson, supra,* 46 Cal.2d at page 836, standard of review. (*People v. Seumanu, supra*, 61 Cal.4th at p. 1308; *People v. Riccardi* (2012) 54 Cal.4th 758, 830.) The prosecutor did not urge the jury to find that the BB gun was a deadly weapon per se, that is, divorced from the manner in which it was used. The issue before the jury was whether the BB gun was *used* in a manner likely to cause great bodily injury or death. The warning label had no direct bearing on the manner in which defendants used the BB gun. Therefore, it is not reasonably probable

the jury's verdicts would have been more favorable to defendants absent evidence of the warning.

We are unpersuaded that the deputy district attorney's brief reference to the warning in her closing argument exacerbated any potential prejudice. The argument was: "Let's go back to this issue of the deadly weapon. Was the BB gun in this case a deadly weapon? If you remember the instructions, it has to either be a deadly weapon or it was used in a manner that could cause and was likely to produce death or great bodily injury. [¶] You have to remember it doesn't have to cause death or great bodily injury, but in the manner it was used, could it have done that? And the answer is absolutely yes. [¶] First of all, *a manufacturer puts a warning on it so that people don't use it in a careless manner*. And there's a reason that before we give our children a BB gun, we don't just give it to them and say go have fun. We train them on it. We give them safety tips. We say don't point it at other people. [¶] Why? Because it's a deadly weapon, because it can really hurt someone. It can cause injuries that last a lifetime. [¶] . . . [¶] . . . Could it hit someone in the eye? Absolutely . . . . Great bodily injury. [¶] And when Mr. Pineda was hit, it hit his upper shoulder, and he's standing right in front of his friend, who was facing the direction of the car. [¶] So these are not sharp shooters. They don't have precise aim. They could have very easily have hit someone and injured them greatly or even killed them." (Italics added.) The prosecutor's emphasis was not on what the label said but on the manner in which defendants used the weapon.

D. Evidence of "Transactionally Unrelated" Counts as Evidence of Bad Character or Propensity

Evelyn asserts due process considerations require that a limiting instruction akin to CALCRIM No. 375 be given sua sponte when, as here, "transactionally unrelated" counts are joined for trial. CALCRIM No. 375 instructs a jury it may consider evidence of *uncharged offenses or other bad acts* for limited purposes. CALCRIM No. 375 instructs the jurors that uncharged offense evidence may not be utilized to conclude the accused

was disposed to commit a crime. Evelyn proposes, "[T]he [trial] court [should] instruct the jurors that although the defendant has been charged with multiple counts of the same species of crime, they may not consider the fact of the multiple charges to conclude that the defendant is a person of bad character who is disposed to commit such crimes." Mr. Zamora joins in the argument.

We hold the trial court had no sua sponte duty to give a limiting instruction. (*People v. Rodriguez* (2014) 58 Cal.4th 587, 647-648 ["The court has no duty to give a limiting instruction absent a request."]; *People v. Murtishaw* (2011) 51 Cal.4th 574, 590 ["'Absent a request, a trial court generally has no duty to instruct as to the limited purpose for which evidence has been admitted.'"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051 ["[A]lthough a court should give a limiting instruction on request, it has no sua sponte duty to give one."]; see *People v. Cottone* (2013) 57 Cal.4th 269, 293 ["'[T]he trial court ordinarily has no sua sponte duty to instruct the jury as to the admissibility or use of other crimes evidence'"]; *People v. Maury* (2003) 30 Cal.4th 342, 394 [trial court had no sua sponte duty to give a limiting instruction on cross-admissible evidence in trial of multiple crimes].) The foregoing authority is consistent with Evidence Code section 355, which states, "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Italics added.)

Further, Evelyn's trial counsel did not render ineffective assistance in failing to request the instruction. Whether to request a limiting instruction is a tactical decision properly left to a defendant's trial attorney. As our Supreme Court had held, "A reasonable attorney may have tactically concluded that the risk of a limiting instruction . . . outweighed the questionable benefits such instruction would provide." (*People v. Maury*, *supra*, 30 Cal.4th at p. 394; accord, *People v. Hernandez*, *supra*, 33 Cal.4th 1040, 1053; *People v. Mateo* (2016) 243 Cal.App.4th 1063, 1076; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1141.) And, as Evelyn admits, there is no California authority addressing a need for, let alone requiring, the proposed instruction.

Moreover, the jury was instructed to consider each crime separately as to each defendant. The jury was instructed: "You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." The jury was further instructed: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." These instructions adequately directed the jury to consider each crime separately. (*People v. Manriquez* (2005) 37 Cal.4th 547, 579-580.) In view of the instructions given, there is no reasonable probability the jury's verdict would have been more favorable to defendants had the proposed instruction been given. (*Id.* at p. 580.) The prosecutor did not urge the jury to infer defendants' propensity to commit crimes. And the jury in fact acquitted defendants of the charged assault on Mr. Pineda.

E. Probable Cause to Arrest

1. Kevin's arguments

Mr. Zamora argues the officers lacked probable cause to arrest defendants, therefore the vehicle search was unlawful. On appeal, we defer to the trial court's factual findings based on substantial evidence but independently apply the requisite legal standard to the facts. (*People v. Carter* (2005) 36 Cal.4th 1114, 1140; *People v. Ayala* (2000) 23 Cal.4th 225, 255.) We find the officers had probable cause to arrest defendants. In addition, Mr. Zamora argues that the prosecution failed to comply with the so-called *Harvey-Madden* rule concerning police reliance on information from informants. As to this latter contention concerning the *Harvey-Madden* rule, we find Mr. Zamora has forfeited this argument.

First, the officers had probable cause to arrest defendants. The United States Supreme Court has described the probable cause standard: "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing

the law in the community's protection.' *Brinegar v. United States,* 338 U.S. 160, 176 (1949) [(*Brinegar*)]. On many occasions, we have reiterated that the probable-cause standard is a '"practical, nontechnical conception"' that deals with '"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."' *Illinois v. Gates,* 462 U.S. 213, 231 (1983) (quoting *Brinegar, supra,* [338 U.S.] at [pp.] 175-176; see, e.g., *Ornelas v. United States,* 517 U.S. 690, 695 (1996) [(*Ornelas*)]; *United States v. Sokolow,* 490 U.S. 1, 7-8 (1989). '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.' [*Illinois v.*] *Gates,* 462 U.S. [213,] 232 [(*Gates*)]. [¶] The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances. See [*Gates, supra,* 462 U.S. at p. 232]; *Brinegar,* 338 U.S. at [p.] 175. We have stated, however, that "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt," *ibid.* (internal quotation marks and citations omitted), and that the belief of guilt must be particularized with respect to the person to be searched or seized, *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979). . . . [¶] To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause, *Ornelas, supra,* [517 U.S.] at [p.] 696." (*Maryland v. Pringle* (2003) 540 U.S. 366, 370-371; accord, *People v. Scott* (2011) 52 Cal.4th 452, 474; *People v. Celis* (2004) 33 Cal.4th 667, 673.)

Here, arresting officers had received information during roll call that a Toyota described by color, make, model and license plate number was sought in connection with BB gun assaults in the area. Three people had been shot the previous day. Defendants occupied a Toyota matching that description. Moreover, defendants were driving the Toyota in the downtown Los Angeles area in which the prior assaults had occurred. And a fourth victim had been assaulted less than 40 minutes prior to defendant's detention. They were detained just a few blocks from the location of the final assault. Officer

Boverie consulted with Detective Thompson. Detective Thompson was investigating the BB gun assaults—prior to arresting defendants. Given these facts, an objectively reasonable police officer could believe defendants guilty of the assaults. (*People v. Rhinehart* (1973) 9 Cal.3d 139, 152, fn. 2, disapproved on another point in *People v. Bolton* (1979) 23 Cal.3d 208, 213, and *People v. Blair* (2005) 36 Cal.4th 686, 715, fn. 11 ["Probable cause (to arrest) can . . . be supplied by the matching description of vehicles"]; *People v. Schader* (1965) 62 Cal.2d 716, 722 [arresting officer advised by police radio that suspects were traveling easterly in a late model red Cadillac]; *People v. Jones* (1981) 126 Cal.App.3d 308, 313-314 [arresting officer observed vehicle and suspects matching dispatch description plus assault had recently occurred nearby].)

Second, we turn to Mr. Zamora's *Harvey-Madden* rule contention. Our colleague, Retired Associate Justice Stephen M. Vartabedian described the so-called Harvey-Madden rule thusly: "These evidentiary rules are often referred to as the '*Harvey-Madden* rule,' after *People v. Harvey* [(1957)] 156 Cal.App.2d 516 and *People v. Madden* [(1970)] 2 Cal.3d 1017. The rationale and general scope of the rule was summarized in *Madden*: '[A]lthough an officer may make an arrest based on information received through "official channels," the prosecution is required to show that the officer who originally furnished the information had probable cause to believe that the suspect committed a felony. We reaffirmed this principle in the recent case of *Remers v. Superior Court* [(1970) 2 Cal.3d] 659, 666-667 . . . , where we pointed out: "It is well settled that while it may be perfectly reasonable for officers in the field to make arrests on the basis of information furnished to them by other officers, 'when it comes to justifying the total police activity in a court, the People must prove that the source of the information is something other than the imagination of an officer who does not become a witness.' . . . To hold otherwise would permit the manufacture of reasonable grounds for arrest within a police department by one officer transmitting information purportedly known by him to another officer who did not know such information, without establishing under oath how the information had in fact been obtained by the former is officer. . . . 'If this were so, every utterance of a police officer would instantly and

automatically acquire the dignity of official information; "reasonable cause" or "reasonable grounds," . . . could be conveniently fashioned out of a two-step communication; and all Fourth Amendment safeguards would dissolve as a consequence.'"' (2 Cal.3d at p. 1021, citations omitted.)" (*People v. Collins* (1997) 59 Cal.App.4th 988, 993-994.) Mr. Zamora premises his argument on a belief the Toyota description came from an anonymous source. Mr. Zamora reasons, "As far as the record shows the information on the flyer came from an anonymous tip because no one testified to its source." He argues that information from an anonymous source must be corroborated by independent police investigation.

We agree with the Attorney General, however, that Mr. Zamora forfeited any *Harvey/Madden* objection. The forfeiture occured because Mr. Zamora failed to specifically *argue* the *Harvey*/*Madden* rule in the trial court after the prosecution concluded its presentation of evidence. Mr. Zamora did not file a written evidence suppression motion in the trial court. (§ 1538.5, subd. (a)(2).) Mr. Zamora did, however, join in Kevin's written motion. In his written motion, Kevin twice asserted in a single sentence: "The defendant hereby demands the source of probable cause in this case. (*Harvey* /*Madden*)" In the remainder of his motion, Kevin argued the warrantless cell phone search was invalid as either an inventory search or a search incident to arrest. Kevin sought to exclude the cell phone video. In his written motion, Kevin did not state the *Harvey/Madden* grounds for his motion to give the prosecution notice it needed to present evidence in response. No reference was made to the flyer nor its sources including the roll call. We assume for purposes of argument the notice was adequate.

This case involves a warrantless arrest and is thus subject to the burden of proof requirements imposed by *People v. Williams* (1999) 20 Cal.4th 119, 128-130 (*Williams*, hereafter). The first step in preservation of an issue is providing notice of the suppression of evidence motion's grounds: "Before addressing these arguments, we emphasize the distinction between the burden of raising an issue and the burden of proof. By 'burden of raising an issue,' we refer to a party's obligation to bring an issue to the attention of the trial court and the opposing party, with the consequence that, if the party fails to do so, it

waives the right to raise the issue on appeal. On the other hand, by 'burden of proof,' we refer to a party's 'obligation . . . to establish by evidence a requisite degree of belief concerning a fact.' (Evid. Code, § 115.)" (*Id.* at p. 128.) Here, albeit in questionably sufficient form, the *Harvey/Madden* objection was mentioned in the written notice of motion and Mr. Zamora's oral joinder. Our Supreme Court has explained that a motion must specify a ground for suppression of evidence other than the lack of a warrant: "[I]f defendants have a specific argument *other than the lack of a warrant* as to why a warrantless search or seizure was unreasonable, they must specify that argument as part of their motion to suppress and give the prosecution an opportunity to offer evidence on the point." (*Id*. at p. 130.)

But once the question has been posited and testimony presented, the issue must be the subject of argument in order for the issue to be preserved. Our Supreme Court explained, "Moreover, once the prosecution has offered a justification for a warrantless search or seizure, defendants must present any arguments as to why that justification is inadequate. [Citation] Otherwise, defendants would not meet their burden under section 1538.5 of specifying why the search or seizure without a warrant was 'unreasonable.' The specificity requirement does not place the burden of proof on defendants. [Citation.] As noted, the burden of raising an issue is distinct from the burden of proof. The prosecution retains the burden of proving that the warrantless search or seizure was reasonable under the circumstances. [Citation.] But, if defendants detect a critical gap in the prosecution's proof or a flaw in its legal analysis, they must object on that basis to admission of the evidence or risk forfeiting the issue on appeal." (*Williams, supra,* 20 Cal.4th at p. 130; *People v. Schmitz* (2012) 55 Cal.4th 909, 915 ["The defendant does have the burden to file a motion asserting the absence of a warrant and, if the prosecution offers a justification for the warrantless search or seizure, to present arguments as to why that justification is inadequate."].)

We now turn to the argument presented at the conclusion of the prosecution's proof. No argument was raised concerning the *Harvey-Madden* theory. Thus, the failure to object to the purported critical gap in the prosecution's proof or a flaw in its legal at

analysis forfeits the *Harvey-Madden* issue on appeal. (*Williams, supra,* 20 Cal.4th at p. 130; see *People v. Ermi* (2013) 216 Cal.App.4th 277, 283, fn. 1.)

2. The warrantless cell phone search

Kevin asserts the trial court committed reversible error when it denied his motion to suppress the cell phone video of the encounter with the unidentified woman. Kevin reasons the warrantless cell phone search was invalid as incident to arrest or pursuant to an inventory search. We hold the cell phone search was conducted in good faith under the law in effect at the time Kevin was arrested, therefore, the failure to exclude the cell phone video was not reversible error.

Here, as discussed above, defendants were lawfully arrested. During a search of the Toyota prior to impounding it, Officer Boverie removed a cell phone from the center console. Kevin admitted that the cell phone was his. Officer Boverie gave the cellular phone to an unidentified officer responsible for driving Kevin to the police station. Approximately 50 minutes after Officer Boverie first arrived on the scene, he returned to the station and assisted in booking defendants. Ten minutes after returning to the station, Officer Boverie took the cell phone from Kevin's property bag and searched it. This occurred while Kevin was being booked. The cell phone was not password protected. As discussed above, a video retrieved from the phone was introduced as evidence at trial. It was also replayed at the jury's request during deliberations.

Our Supreme Court recently reiterated the applicable standard of review: "'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. [Citation.] We review the court's resolution of the factual inquiry under the deferential substantial evidence standard. Whether the relevant law applies to the facts is a mixed question of law and fact that is subject to independent review.' (*People v. Thompson* (2010) 49 Cal.4th 79, 111-112.)" (*People v. Casares* (2016) 62 Cal.4th 808, 835.)

The law in effect at the time defendants were arrested was as follows. A police officer may search a automobile's passenger compartment incident to a recent occupant's arrest where it is reasonable to believe that the car contains evidence of a crime. (*Davis v. United States* (2011) 564 U.S. 229, 234-235; *Arizona v. Gant* (2009) 556 U.S. 332, 343; *People v. Nottoli* (2011) 199 Cal.App.4th 531, 549, 550-554.) Moreover, when the search was conducted, the officer could examine the contents of any container, including a cell phone, found within the passenger compartment. (*Arizona v. Gant, supra*, 556 U.S. at p. 345; *New York v. Belton* (1981) 453 U.S. 454, 460-461; *People v. Nottoli, supra*, 199 Cal.App.4th at p. 559.) Contrary to Kevin's assertion, the container search "does not require any degree of probability that evidence bearing on th[e] offense" will be found in a particular container that is searched. (*People v. Nottoli, supra*, 199 Cal.App.4th at p. 556; see *People v. Schmitz, supra*, 55 Cal.4th 909, 927, fn. 19.) Further, the search is valid even if a substantial period of time has elapsed since the arrest—including when effects are held in a property room and later searched. (*United States v. Edwards* (1974) 415 U.S. 800, 807-808 [10 hours]; *People v. Diaz* (2011) 51 Cal.4th 84, 88, 93-94 [90 minutes].) And, the warrantless search is valid whether the cell phone is found on the arrestee's person or in his or her automobile. (*People v. Nottoli, supra*, 199 Cal.App.4th at p. 559 [cell phone found in vehicle's center cup holder area].) In *Nottoli*, the Court of Appeal held: "[I]t is our conclusion that, after [the defendant] was arrested for being under the influence, it was reasonable to believe that evidence relevant to that offense might be found in his vehicle. Consequently, the deputies had unqualified authority under *Gant* to search the passenger compartment of the vehicle and any container found therein (*Gant, surpra*, 556 U.S. at p. 1719), including [the defendant's] cell phone." (*People v. Nottoli, supra*, 199 Cal.App.4th at p. 559.) Here, under the existing authority at the time, the delayed warrantless search of Kevin's cell phone was a valid search incident to his lawful arrest.

Defendant asserts it was unreasonable for officers to believe evidence relevant to the arrest offense might be found in the vehicle or in the cell phone itself. We disagree. Objectively, Officer Boverie could reasonably believe defendants' Toyota contained

evidence relevant to the BB gun assaults. Officer Boverie knew defendants' Toyota had been identified in connection with the assaults. He knew a victim had just been assaulted in the vicinity. It was reasonable to expect the Toyota would contain a BB gun and ammunition. With respect to the cell phone itself, as noted above, articulable facts indicating that contained evidence relevant to the arrest offense were not required. (*People v. Evans* (2011) 200 Cal.App.4th 735, 747; *People v. Nottoli, supra*, 199 Cal.App.4th at p. 556.) In *Nottoli*, the court explained: "We reject respondents' assertion that there must be specific, articulable facts 'indicating that the cell phone held relevant evidence of the offenses for which [the defendant] was arrested.' Respondents cannot point to any language in *Gant* imposing such a requirement. Under *Gant,* a vehicular search incident to arrest is justified 'when it is reasonable to believe that evidence of the offense of arrest might be found in the *vehicle.*' (*Gant, supra*, 556 U.S. at p. 335, italics added.) It does not require any degree of probability that evidence bearing on that offense will be found in a particular container that is searched." (*People v. Nottoli, supra,* 199 Cal.App.4th at p. 556; see *People v. Evans, supra*, 200 Cal.App.4th at p. 747.) And even if articulable facts were necessary, Officer Boverie could reasonably believe the cell phone would contain evidence linking Kevin to the time and place of the assaults.

It is true Officer Boverie described the search during which the cell phone was recovered as an inventory search. But his subjective intention or motive did not invalidate actions objectively justifiable under the Fourth Amendment. (*Brigham City v. Stuart* (2006) 547 U.S. 398, 404; *Whren v. United States* (1996) 517 U.S. 806, 812, 813; *People v. Nottoli, supra,* 199 Cal.App.4th at pp. 557-558.) In *Brigham,* the United States Supreme Court held: "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action.' *Scott v. United States,* 436 U.S. 128, 138. The officer's subjective motivation is irrelevant. [Citations.]" (*Brigham City v. Stuart, supra*, 547 U.S. at p. 404.)

That a substantial amount of time elapsed between defendants' arrest and Officer Boverie's cell phone search does not alter the analysis. (*United States v. Edwards, supra,*

415 U.S. 800, 807; *People v. Diaz, supra*, 51 Cal.4th at pp. 88, 94, 99, fn. 13.) In *Edwards,* the United States Supreme Court explained: "It is also plain that searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." (*United States v. Edwards, supra,* 415 U.S. at p. 803; see *In re Charles C.* (1999) 76 Cal.App.4th 420, 425.) The high court reasoned: "[The defendant] was no more imposed upon than he could have been at the time and place of arrest or immediately upon arrival at the place of detention. The police did no more on [a later date] than they were entitled to do incident to the usual custodial arrest and incarceration." (*United States v. Edwards, supra*, 415 U.S. at p. 805; see *People v. Smith* (1980) 103 Cal.App.3d 840, 844.)

In *Diaz,* our Supreme Court followed *Edwards.* In *Diaz,* the cell phone was on the defendant's person when he was arrested. The defendant was driven to a sheriff's station where the telephone was seized by a detective and given to the arresting deputy. The arresting deputy placed it with other evidence. Sometime later, the arresting deputy retrieved the telephone and examined its text message folder. (*People v. Diaz*, *supra*, 51 Cal.4th at p. 89.) In support of his evidence suppression motion, the defendant emphasized that the telephone "'was exclusively held in police custody well before the search'" of the text message folder. (*Id.* at p. 91.) Our Supreme Court held: effects in a suspect's possession when arrested may be searched even after a substantial period of time has elapsed between the arrest and the search (citing *United States v. Edwards, supra*, 415 U.S. 800, 807-808); the delayed warrantless search may be made of any "'personal property . . . immediately associated with [the arrestee's] person" (*People v. Diaz, supra,* 51 Cal.4th at pp. 92-93, discussing *United States v. Chadwick* (1977) 433 U.S. 1, 14-15); and personal property immediately associated with a defendant's person includes items and containers found within the passenger compartment of a automobile (*People v. Diaz, supra*, 51 Cal.4th at pp. 93-95) including a cell phone and its contents (*id.* at p. 98). (*People v. Nottoli, supra,* 199 Cal.App.4th at pp. 554-555; see also, e.g., *People v. Ingham* (1992) 5 Cal.App.4th 326, 331 [purse on floor of room in which arrest took place was immediately associated with arrestee's person]; *People v. Bundesen*

(1980) 106 Cal.App.3d 508, 510, 516 [wallet found underneath passenger seat where defendant had been seated was immediately association with his person].) Here, at the time of his arrest, Kevin was the front seat passenger and his cell phone was in the center console.

Three days after Kevin's arrest, on June 25, 2014, the United States Supreme Court reached a conclusion contrary to *Diaz*. (*Riley v. California* (2014) 573 U.S. __, __ [134 S.Ct. 2473, 2495] (*Riley*, hereafter).) In *Riley*, the United States Supreme Court held police officers must secure a warrant before searching a cell phone seized incident to an arrest. Although the present search is unlawful under *Riley*, and although *Riley* applies retroactively to this case because it is pending on direct review (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328), Officer Boverie acted in good faith reliance on binding appellate precedent, therefore the exclusionary rule does not apply. (*Davis v. United States, supra*, 564 U.S. 229, ___ [131 S.Ct. 2419, 2423-2424, 2434].) This issue is before our Supreme Court in *People v. Macabeo*, a decision of this court, review granted November 25, 2014, S221852. The case was orally argued and submitted on May 4, 2016. The cause was subsequently resubmitted.

3. Evelyn's suppression of evidence joinder

Evelyn joins in any arguments advanced by Kevin that may inure to her benefit. This includes the arrest and auto search contentions. However, as the Attorney General correctly observes, Evelyn was a passenger in the Toyota in which the cell phone was found. She did not assert a property or possessory interest in the Toyota or the property seized. She lacked a legitimate expectation of privacy in the area searched or the property seized. Therefore, she may not challenge the cell phone search. (*Rakas v. Illinois* (1978) 439 U.S. 128, 130-131, 148; *People v. Valdez* (2004) 32 Cal.4th 73, 122.)

F. Cumulative Error

Defendants contend they are entitled to reversal because of cumulative error. We find no prejudicial error. Therefore, we reject defendant's argument the cumulative effect of all the errors requires reversal. (*People v. Jones, supra,* 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

G. Sentencing Error

1. The Court Facilities and Operations Assessments

The trial court was required to orally impose a $30 court facilities assessment as to each count for a total of $90 as to each defendant. (Gov. Code, § 70373, subd. (a)(1); *People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3.) And the trial court was required to orally impose a $40 court operations assessment as to each count for a total of $120 as to each defendant. (§ 1465.8, subd. (a)(1); *People v. Crittle* (2007) 154 Cal.App.4th 368, 370-371; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865-866; see *People v. Alford* (2007) 42 Cal.4th 749, 758, fn. 6). The judgments are modified to so reflect. The abstracts of judgment are correct in this regard and need not be amended.

2. Presentence Custody and Conduct Credit

The trial court awarded Kevin and Evelyn credit for 261 days in presentence custody plus 261 days for good conduct. The conduct credit award is in error; the correct award is 260 days. (*People v. Dieck* (2009) 46 Cal.4th 934, 943; *People v. Whitaker* (2015) 238 Cal.App.4th 1354, 1357-1362; *People v. Chilelli* (2014) 225 Cal.App.4th 581, 591; *People v. Smith* (1989) 211 Cal.App.3d 523, 527.) The judgments must be modified and the abstracts of judgment amended to so provide.

The trial court gave Mr. Zamora credit for 163 days in presentence custody and 163 days for good conduct. However, Mr. Zamora was arrested on June 22, 2014, posted bail on November 10, 2014, was convicted and remanded to custody on February 18, 2015, and sentenced on March 9, 2015. Therefore, Mr. Zamora was in custody for 162 days. He was entitled to 162 days' custody credit and 162 days' conduct credit. (*People v. Rajanayagam* (2012) 211 Cal.App.4th 42, 48; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469.) Mr. Zamora's judgment must be modified and his abstract of judgment amended to so reflect.

3. Abstracts of Judgment

The abstracts of judgment for Evelyn and Mr. Zamora reflect concurrent *and* "1/3 consecutive" one-year, middle-term sentences on counts 3 and 4. However, the trial court orally imposed concurrent two-year terms. Therefore, the abstracts of judgment for Evelyn and Mr. Zamora must be amended to reflect a low-term, concurrent two-year sentence as to each of counts 3 and 4.

IV. DISPOSITION

The judgments are modified: as to each defendant, to impose a $30 court facilities assessment as to each count for a total of $90 (Gov. Code, § 70373, subd. (a)(1)); as to each defendant, to impose a court operations assessment as to each count for a total of $120 (Pen. Code, § 1465.8, subd. (a)(1)); as to Kevin Danilo Barahona and Evelyn Barahona, to award 260 days of presentence conduct credit; and, as to Jorge Martin Zamora, to award 162 days of presentence custody credit and 162 days of conduct credit. Upon remittitur issuance, the clerk of the superior court is to amend the abstracts of judgment to reflect the foregoing assessments and credits. The clerk of the superior court is to further amend the abstracts of judgment for Evelyn Barahona and Jorge Martin Zamora to reflect a *concurrent* two-year sentence on each of counts 3 and 4. The clerk of the superior court shall deliver copies of the amended abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

BAKER, J.

RAPHAEL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.