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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JAMES BURTON WILLIAMS, Defendant and Appellant.	2d Crim. No. B232001 (Super. Ct. No. YA067398) (Los Angeles County)

James Burton Williams appeals the judgment entered after a jury convicted him of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189), three counts of attempted willful, deliberate, and premeditated murder (§§ 664/187, subd. (a)), and assault with a firearm (§ 245, subd. (a)(2)). The jury also found true allegations that appellant personally and intentionally discharged a firearm in committing the murder (§ 12022.53, subds. (b)-(d)), and personally used a firearm in committing the attempted murders (§ 12022.53, subd. (b)), as well as allegations that all of the crimes were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The trial court sentenced him to an aggregate prison term of 50 years to life plus 59 years, plus three consecutive terms

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

of life with the possibility of parole.[2] Appellant contends that prosecutorial misconduct, instructional error, and juror misconduct compel reversal of the judgment. He also challenges two of his attempted murder convictions on grounds of insufficient evidence, and claims the court erroneously failed to award presentence custody credit.

We shall strike the consecutive 10-year gang enhancements imposed on each of the three attempted murder counts, and order the sentences on each of those counts modified to reflect a 15-year minimum parole eligibility term. We also order the judgment modified to reflect an award of 1,180 days of presentence custody credit, and to correct a clerical error in the abstract of judgment. In all other respects, we affirm.

STATEMENT OF FACTS

On the night of August 22, 2006, Queens Street Bloods (QSB) gang members Terreal Reid and Terry Webbs were in Reid's Jeep along with Tiya Rutledge and Karla Anderson. As the Jeep was stopped at the intersection of Manchester and Crenshaw Boulevards in Inglewood, Rutledge and Anderson saw appellant, a member of the rival Inglewood Family Bloods (IFB) gang known as "Jimbo," in a Dodge Durango along with several other men at the corner Shell gas station. Appellant and his companions pointed at the Jeep and yelled, "I-F" and "We're going to kill you." When the Jeep turned left onto Manchester, the Durango followed them as appellant and his companions hung out of the windows and continued to scream and yell.

After the Jeep made several turns, it appeared to Rutledge that the Durango was no longer following them. Reid continued to their destination at the intersection of Inglewood Avenue and Queen Street, where Khia Eaton was waiting for them. As Eaton was standing near the Jeep talking to Reid, the Durango slowly pulled up alongside the driver's side of the Jeep with its headlights dimmed. Appellant fired several shots at the

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[2] On the murder count, appellant was sentenced to 25 years to life plus a consecutive 25 years to life under section 12022.53, subdivision (d), plus a consecutive 10-year enhancement under section 186.22. On each of the attempted murder counts, the court imposed a consecutive term of life with the possibility of parole plus two consecutive 10-year enhancements under former section 12022.53, subdivision (b), and section 186.22. Appellant was sentenced to a total of nine years on the assault count, consisting of a consecutive four-year upper term plus a consecutive 5-year enhancement under section 186.22.

Jeep from the Durango's front passenger seat, hitting Reid in the chest, right upper arm, and right upper back. Webbs was sitting next to Reid and escaped being hit by bending down in his seat. Anderson, who was sitting directly behind Reid, sat up during a pause in the shooting and saw appellant hand the gun to the passenger sitting behind him. The rear passenger then pointed the gun at Anderson's head and fired, hitting her in the left temple. Rutledge, who was sitting next to Anderson directly behind Webbs, got out of the Jeep through the right rear passenger door and crawled under the vehicle to avoid being hit. After Anderson was shot, the Durango drove away.

Reid was pronounced dead after being transported to the hospital. Anderson was in a coma for a few days and underwent surgeries on her face and neck. As a result of her injuries, she is permanently blind in her left eye.

Eight expended shell casings were found at the scene and expended bullets were recovered from the Jeep's driver seat and within the driver-side door. There were seven bullet holes and two bullet strikes in and on the Jeep. Two bullet holes and strikes were on the driver-side door and one bullet hole was in the door's window. There were also bullet holes in the driver and front passenger seats, the driver's side mirror, and the left rear bumper. Forensic testing verified that an expended bullet recovered from Reid's body and those found at the scene were all fired from the same .45-caliber firearm.

Rutledge was interviewed by Inglewood Police Officer Peter Lopresti at the scene of the shooting. She identified appellant as the shooter sitting in the Durango's front passenger seat and said he was wearing a white t-shirt and a green baseball cap with a white "I" on it.[3] As the officer was interviewing Rutledge, Webbs and Eaton became upset with her and said, "Don't tell him anything" and "We'll handle it."[4]

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[3] Rutledge knew appellant as her friend Kim Miguel's ex-boyfriend "Jimbo." Immediately after the shooting, Rutledge called Miguel and asked her what "Jimbo's" actual name was. Miguel replied that his name was "James Burt Williams."

[4] When Officer Lopresti testified to these statements at trial, he acknowledged that they were not included in his police report.

Rutledge identified appellant again when she was interviewed several hours later by Inglewood Police Detective Jeff Steinhoff.[5] Rutledge was shown a six-pack lineup and immediately pointed to appellant's photograph and said, "That's him." Rutledge also told the detective she had first seen the Durango that night when the Jeep was stopped at the intersection of Manchester and Crenshaw Boulevards. Rutledge identified "E Mac" and "J Stone" as the Durango's rear-right and rear-middle seat passengers.

The day after the shooting, Detective Steinhoff went to the Shell gas station at the intersection of Crenshaw and Manchester and viewed surveillance video recorded the previous night during the time Rutledge said appellant had been in there. The video was of poor quality and was recorded on a camera placed approximately 40 to 50 feet away from the gas pumps. Although the detective could not make out any facial features, he was able to see four black men in a "grayish"-looking Durango pull up and stop at a gas pump. The men, three of whom were wearing white t-shirts, got out of the Durango and intermingled as another car pulled up on the other side of the pump. After the Durango was fueled, the four men got in the vehicle and drove away. Detective Steinhoff did not notice whether any of the suspects was wearing a hat. The detective attempted to download the video recording but was unable to do so. The video was taped over a week or two later by the gas station, before the police had obtained a copy.

Rutledge identified appellant for a third time during a recorded interview conducted by Detective Steinhoff on August 25, 2006. She also reiterated having seen appellant in the Durango at the Shell gas station before the shootings. Rutledge recounted the same information yet again during an interview conducted by Deputy District Attorney Warren Kato on July 28, 2008.[6] She also recalled that Reid's last words

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[5] An audio recording of this interview was inadvertently destroyed when the police department's IT department erased the hard drive on Detective Steinhoff's computer following his promotion and transfer.

[6] Portions of Detective Steinhoff's second interview and Kato's interview, the latter of which was recorded without Rutledge's knowledge, were played for the jury.

after being shot were, "J Stone and Jimbo." She was sure that Reid was hit by the bullets fired by appellant, who was "grinning" when he started shooting.

Anderson was interviewed by Detective Steinhoff on August 30, 2006, shortly after she regained consciousness.[7] Anderson identified appellant from a six-pack lineup as one of the men in the Durango and said, "I think he was driving." She refused to circle and initial the photograph because she was scared. Anderson reported seeing appellant in the Durango at the Shell gas station while the Jeep was stopped at the intersection of Manchester and Crenshaw. She knew some of the other suspects in the Durango as "Tape-off" and "J Stone." During a subsequent interview with Kato, Anderson clarified that the photograph of appellant she had identified in the six-pack lineup was of the shooter sitting in the front passenger seat of the Durango.

Both Rutledge and Anderson recanted their identifications of appellant when they testified at trial. Rutledge also denied seeing appellant and the other occupants of the Durango prior to the shooting when the Jeep was stopped at the intersection. Rutledge testified that she was concerned for her safety, while Anderson said she was aware she could be assaulted or murdered in retaliation for testifying against an IFB member. Rutledge also testified to receiving a telephone call from appellant two weeks prior to her testimony. A recording of the call was played for the jury. Rutledge was "shocked" to receive the call because she had never given appellant her telephone number and had not spoken to him for several years. When appellant said "Jimbo" was calling to speak to Rutledge, she pretended to be someone else and said she would have her call him back. Appellant, who had a third party make the call while appellant stayed on the line, replied, "Just tell her I'll try to call her back." Rutledge was "panicked" by the call and later reported it to the police.

Inglewood Police Detective Kerry Tripp testified as the prosecution's gang expert. At the time of the crimes, the rival IFB and QSB gangs were engaged in a shooting war. When a gang member calls from custody to a witness against him in a

[7] An audio recording of this interview was also on the hard drive that was erased after the detective was promoted and transferred.

murder trial and identifies himself by his gang moniker, there need not be an overt threat in order for the witness to be intimidated. In this case, the mere fact that appellant called Rutledge was enough to cause her to be upset and frightened. Moreover, a witness who testifies against an IFB member is subject to being killed as a "snitch." Based on a hypothetical question, Detective Tripp opined that appellant committed the charged crimes for the benefit of his gang.

Webbs testified for the defense. Although he and appellant were members of rival gangs, they were friends and remained friends at the time of trial. Webbs denied that appellant was the shooter and denied ever telling anyone otherwise. Even if appellant was the perpetrator, he would not say so. As an active QSB member, he would never cooperate with or seek help from law enforcement. He did not recall speaking to an officer at the scene of the shooting, nor did he see Rutledge do so. Although he would not want to rely on the police to arrest the shooter and would want to take care of it himself, he denied telling Rutledge, "We will take care of this ourselves."

Webbs told Detective Steinhoff what had happened when the detective interviewed him on the night of the shooting. When shown a six-pack of potential subjects, he placed a date underneath appellant's photograph. He denied, however, that the accompanying signature was his. He also denied telling the detective that he recognized the front seat passenger of the pursuing vehicle as "Jimbo." Webbs would be considered a "snitch" if he identified the shooter.

On rebuttal, Detective Steinhoff testified regarding his interview of Webbs a few hours after the shooting, a recording of which was lost when the hard drive on the detective's computer was inadvertently erased by the police department's IT department. During that interview, Webbs identified appellant as the shooter from a six-pack lineup by circling his photo and signing and dating it. Webbs also recounted seeing appellant shortly before the shooting at the Shell gas station at the corner of Crenshaw and Manchester. Appellant and his companions followed the Jeep in a gray Dodge SUV and yelled, "I'm going to get you two niggers." The jury also heard Detective Tripp's testimony that he was at the scene of the shooting when he overheard Webbs and Eaton

say that "J Stone," "E-Mac," and "Jimbo" were the perpetrators. The detective could not recall whether he told this to Deputy District Attorney Kato.

On surrebuttal, Officer Lopresti testified that when he interviewed Webbs at the scene Webbs identified the perpetrators' vehicle as a silver Grand Am. Webbs also said he could not identify any of the suspects because he was busy trying to regain control of the Jeep after Reid was shot.

DISCUSSION

I.

New Trial Motion

Appellant moved for a new trial alleging prosecutorial misconduct and appeals its denial. He asserts that misconduct was established by the prosecution's failure to (1) preserve the surveillance video from the Shell gas station and the audio recordings of the interviews Detective Steinhoff conducted several hours after the shootings; and (2) provide the defense with certain statements that would have provided the basis for bringing a pretrial *Pitchess*[8] motion. We reject these claims.

"'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] '"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."' [Citations.]" (*People v. Thompson* (2010) 49 Cal.4th 79, 140.)

Appellant fails to demonstrate any error in the denial of his motion on the ground the prosecution failed to either obtain a copy or prevent destruction of the Shell gas station video. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be

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

unable to obtain comparable evidence by other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489, fn. omitted (*Trombetta*).) When the lost evidence was only *potentially* exculpatory, the defendant must demonstrate bad faith on the part of the police in order to establish that the failure to preserve the evidence constitutes a violation of his or her due process rights. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

Appellant argues that the video was exculpatory because (1) Detective Steinhoff described the Durango depicted in the video as gray or "grayish," while Rutledge described it as silver or champagne-colored and Anderson also described it as champagne-colored; and (2) the detective did not notice whether any of the subjects was wearing a hat, while Rutledge said appellant was wearing a green baseball cap with a white "I" on it.

We are not persuaded. Considering the video as a whole, its apparent exculpatory value is questionable at best. Indeed, the video is at least as *in*culpatory as it is *ex*culpatory. Detective Steinhoff's description of the Durango as "grayish" corroborates Webbs' statement that appellant was in a gray Dodge SUV. Detective Steinhoff's stated observations also support Rutledge and Anderson's statements that appellant was with several other men in a Dodge Durango, as well as Rutledge's statement that appellant was wearing a white t-shirt. Moreover, Detective Steinhoff viewed the Durango on video of "poor" quality recorded on a camera mounted approximately 40 to 50 feet away. Given the quality of the image and the distance from which it was shot, it may simply have been impossible to distinguish between the relatively similar colors of gray, silver, and champagne.

With regard to the hat Rutledge said appellant was wearing, the detective did not definitively state that none of the men were wearing a hat. Rather, he merely said he had not "notice[d]" any hats. Appellant also fails to account for the possibility that Rutledge and Anderson would have identified appellant as one of the men depicted in the video if the video had been preserved for their viewing.

Even if the video had apparent exculpatory value, appellant was able to obtain comparable evidence in the form of Detective Steinhoff's testimony. In arguing to the contrary, appellant asserts that "the videotape was *sui generis* since it provided a contemporaneous visual record of the persons and vehicles present at the station at the time specified in Rutledge's account of events." Appellant offers no authority for this position. Detective Steinhoff gave a thorough description of the visual record to which appellant refers. Moreover, appellant does not suggest that the detective gave an inaccurate description of what he saw. Given the poor quality of the video and Detective Steinhoff's ability to report his observations, the trial court could reasonably find that the detective's testimony was sufficiently comparable to the lost video such that its absence did not warrant a new trial. (*Trombetta, supra*, 467 U.S. at pp. 488-489.)[9]

In any event, an error in the prosecution's failure to preserve the video would be harmless under any standard of review. The independent evidence of appellant's guilt was overwhelming. All three surviving victims identified appellant, an individual they all knew, as one of the shooters. (*People v. Alvarez* (1996) 14 Cal.4th 155, 224.) Although those identifications were recanted at trial, their motives for doing so were patently evident.

Appellant fares no better in claiming the prosecution withheld statements that would have provided the basis for bringing a *Pitchess* motion. The statements at issue are (1) Officer Lopresti's previously undisclosed statements that the crime scene was "large" and "angry" and that Webbs and Eaton attempted to prevent Rutledge from

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9 In arguing that the police had a duty to preserve the video, appellant also argues that its preservation "could have led to an enhancement of its quality which would have facilitated its use as a more precise identification tool, both for ruling in and ruling out suspects." Aside from the speculative nature of this position, appellant's reliance on the possibility that the video could be enhanced would only further his position if he could establish that the police acted in bad faith in failing to preserve it. (*Arizona v. Youngblood*, *supra*, 488 U.S. at p. 58.) Appellant purports to make such a showing by asserting that "one can infer bad faith based on the officer's knowledge that the content of the tape would have undermined the prosecution case." No such inference can be reasonably made. Detective Steinhoff testified that he made reasonable efforts to obtain a copy of the video before it was destroyed without his knowledge. In denying appellant's new trial motion, the court apparently found this testimony credible. We have no authority to disregard that finding. (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

cooperating with the police; and (2) Detective Tripp's undisclosed statement that he overheard Webbs and Eaton at the crime scene identifying appellant as one of the shooters. According to appellant, these statements demonstrate dishonesty such that appellant could have brought a meritorious *Pitchess* motion for discovery of reports of dishonesty in their personnel files. We disagree. In order to prevail on a *Pitchess* motion, appellant would have needed to make a showing of good cause by providing a "specific factual scenario" establishing a "plausible factual foundation" for his allegation that Officer Lopresti and Detective Tripp were dishonest. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86.) Appellant contends he could have made this showing by offering that Webbs would give testimony contrary to the officers' statements. The prosecution, however, had no reason to know that Webbs would take the stand and contradict the undisclosed statements. Indeed, Webbs identified appellant as one of the shooters when he was interviewed by the police. In any event, appellant made no effort to seek discovery of either Officer Lopresti or Detective Tripp's personnel files after their statements were disclosed at trial. Having failed to do so, he cannot now be heard to claim he was deprived of the opportunity to do so. Appellant's perfunctory claim that the court's denial of his new trial motion amounts to a violation of his constitutional rights was not raised below and is thus forfeited. (*People v. Romero* (2008) 44 Cal.4th 386, 411.)

II.

CALJIC No. 2.06

Over appellant's objection, the jury was instructed pursuant to CALJIC No. 2.06 that it would consider appellant's telephone call to Rutledge as a means of intimidation that reflected a consciousness of his guilt. The court also rejected appellant's request for an instruction based on CALJIC No. 2.06 providing that the jury could "view . . . with caution" any testimony regarding the Shell gas station video and the audio-recorded interviews Detective Steinhoff conducted several hours after the shootings on the ground that the prosecution had failed to preserve the video and audio tapes.

Appellant claims the court erred in both giving CALJIC No. 2.06 and in denying his own proffered instruction. We conclude that both rulings were proper.

A.

The Prosecution's Instruction

The jury was instructed pursuant to CALJIC No. 2.06 as follows: "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness by placing a telephone call to Tiya Rutledge on September 29, 2010, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide." Appellant reiterates his claim below that the evidence is insufficient to support the instruction. We reject this claim.

"'"[I]n order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference." [Citation.]'" (*People v. Wilson* (2005) 36 Cal.4th 309, 330; see also *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102 [before CALJIC No. 2.06 may be given, "there need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference"].) Here, there is some evidence from which the jury could have inferred that appellant called Rutledge with the intent to dissuade her from testifying against him and thereby displayed a consciousness of his guilt. Although appellant characterizes the call as "entirely innocuous," the jury was free to infer otherwise. Appellant, who had not spoken to Rutledge for several years, made the call two weeks before she was scheduled to testify against him. He had never called Rutledge before, nor had she ever given him her telephone number. Instead of placing the call directly, appellant had a third party make the call while he stayed on the line. When Rutledge asked who was calling, appellant identified himself by his gang moniker "Jimbo." To the extent there may have been an innocent motive for the call, "that was a matter properly left for argument and for determination by the jury." (*People v. Farnam*

(2002) 28 Cal.4th 107, 164.) Given the overwhelming evidence of appellant's guilt, any error in giving the instruction was in any event harmless. (*People v. Breverman* (1998) 19 Cal.4th 142, 178.)

B.

Appellant's Proffered Instruction

Appellant submitted three different instructions standing for the proposition that the jury should view with caution any testimony regarding documentary evidence the prosecution had failed to preserve, i.e., the Shell gas station video and the audio-recorded interviews Detective Steinhoff conducted of all three surviving victims several hours after the shootings. The instructions were not marked and are not included in the record on appeal, and appellate counsel's attempts to include them have been unsuccessful. In discussing one of the instructions, however, the court asked whether the prosecution would object to language stating, "If you find the prosecution or the Inglewood Police Department had failed to preserve evidence such as, the tape of Tiya Rutledge and Carla Anderson [and Terry Webbs], you should view the testimony regarding such evidence with caution. You may or may not choose to accept or reject any or all of this evidence." In submitting the proposed instructions, appellant's trial counsel also stated they were "pretty much based on Evidence Code section 412 and *Arizona [v.] Youngblood*."**10** The court declined the proposed instructions but emphasized that the defense was free to argue that the evidence should be viewed with caution in his closing argument. Counsel did so.

Appellant contends the court abused its discretion in refusing to instruct the jury as requested. We disagree. Trial courts have broad discretion to determine whether sanctions are proper when material evidence has been lost or destroyed. (*People v. Sassounian* (1986) 182 Cal.App.3d 361, 395.) As we have explained, the Shell gas station video was of limited material value to appellant and evidence of the same facts

10 Evidence Code section 412 provides: "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

was presented at trial. The audio recordings of Detective Steinhoff's initial interviews were entirely *in*culpatory and were testified to by him. Accordingly, the court did not abuse its discretion in denying appellant's requested sanction instruction. (*People v. Farnam, supra,* 28 Cal.4th at pp. 166-167.) The cases appellant cites in which similar sanctions instructions have been given are inapposite. (*Sassounian,* at pp. 394-395 [jury instructed to presume that the defendant's lost or destroyed jail record would be unfavorable to the People if it believed the record had been willfully suppressed]; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 793 [police destroyed potentially exculpatory physical evidence]; *People v. Zamora* (1980) 28 Cal.3d 88, 99-103 [city's destruction of police files prevented the defendant from obtaining *Pitchess* discovery].) As the court in *Zamora* recognized, "the courts enjoy a large measure of discretion in determining the appropriate sanction that should be imposed because of the destruction of discoverable records and evidence." (*Id.* at p. 99.) Pursuant to this large measure of discretion, the court in this case determined that allowing appellant to argue that the jury would view any testimony relating to the lost evidence with caution was the appropriate sanction and that no instruction was warranted. Appellant fails to demonstrate the court abused its discretion in so finding. Moreover, in light of the overwhelming evidence of appellant's guilt that is independent of the evidence and testimony at issue, any error in declining to give appellant's instruction was harmless. (*People v. Earp* (1999) 20 Cal.4th 826, 887; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III.

Sufficiency of the Evidence - Attempted Murder

Appellant contends the evidence is insufficient to sustain his convictions for the attempted murders of Rutledge and Webbs. We conclude otherwise.

In reviewing a sufficiency of the evidence claim, we consider the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1273.) We presume the existence of facts favorable to the judgment that

could reasonably be deduced from the evidence, and will uphold a conviction if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Farnam*, *supra*, 28 Cal.4th at pp. 142-143.)

"'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] 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. . . ." [Citation.]' [Citations.] "'The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Id.* at p. 741.)

A defendant can also be convicted of attempted murder under the "kill zone" theory, i.e., "where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm." (*Smith*, *supra*, 37 Cal.4th at pp. 745-746.) "This concurrent intent theory . . . is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. 6 (*Bland*).)

Appellant claims the evidence is insufficient to support his convictions for the attempted murders of Rutledge and Webbs under either theory of criminal liability because the evidence shows that all but two of the bullets fired at the vehicle in which they were sitting appear to have been aimed at the driver's side door. According to appellant, "th[is] evidence indicates that the shooters were gunning specifically for Reid, whom they succeeded in killing, and no one else in the car, except perhaps for Anderson, who drew their attention and apparently was then targeted because she had the misfortune of raising her head after the first pause in the shooting."

We conclude that the evidence, viewed in the light most favorable to the judgment, supports the jury's findings that appellant had the specific intent to kill not only Reid but everyone in the Jeep he was driving. Although appellant characterizes the bullets as being aimed exclusively at Reid, Webbs was sitting right next to him in the direct line of fire of bullets that were fired at close range. This fact is sufficient to support the finding that appellant intended to kill both men. (*Smith, supra*, 37 Cal.4th at p. 743 ["evidence that defendant purposefully discharged a lethal firearm at the victims, both of whom were seated in the vehicle, one behind the other, with each directly in his line of fire, can support an inference that he acted with intent to kill both"].) Indeed, Webbs would have been hit by one of the bullets, which passed through the center of the front passenger seat, had he not ducked down when the firing began.**11** The same rationale applies with regard to Rutledge, who was sitting in the direct line of fire of the bullet fired at Anderson close enough for Anderson's blood to spatter onto her clothing.

The evidence is also sufficient to support appellant's convictions for the attempted murders of Rutledge and Webbs on the ground that he intended to create a "kill zone" around Reid. Appellant and his accomplice fired at least eight close-range rounds at a stopped vehicle in which all three victims were sitting. Given the relatively confined space of a vehicle, appellant's position is not aided by the fact that most of the bullets

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11 The evidence that appellant and his companions were heard yelling,"I'm going to get you two niggers" prior to the shooting provides further support for the jury's finding that both men were intended targets.

appeared to have been directed at the driver's seat. "When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets . . . , the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death." (*Bland, supra*, 28 Cal.4th at p. 330.) Appellant's attempt to characterize the shooting as something less than a "hail" or "flurry" of bullets essentially disregards the applicable standard of review. Given the manner and circumstances in which the multiple shots were fired at Reid's Jeep, the jury could reasonably infer that appellant and his accomplice intended to kill every occupant of the vehicle, notwithstanding the fact that Reid was their primary target. Appellant's claim of insufficient evidence thus fails.

IV.

Juror Misconduct

Appellant asserts the court denied his constitutional right to an unbiased jury by denying his motion to excuse Juror No. 2 for misconduct. We disagree.

A.

Background

After the jury had been excused one afternoon during a break in Rutledge's testimony, the court was notified that Detective Tripp had been approached by Juror No. 2. The detective said the juror had approached him and asked if he could ask a question. The detective responded, "No, we can't talk." The juror replied, "It's not about this case. It's personal." Detective Tripp told the juror, "We can't talk about anything, period," and the encounter was terminated.

Juror No. 2 was then brought into the courtroom. The court asked the juror whether he had attempted to talk to any of the parties that afternoon, and the juror responded, "With all due respect, your Honor, yes. I was just asking a question." The court asked the juror why he had disregarded its repeated admonitions not to have any contact with the parties. Juror No. 2 said it was a mistake and that he was not trying to approach the detective about anything regarding the case. Rather, he simply wanted to

ask the detective if he knew him because he thought he may have seen him before at a family get-together.

After once again reminding Juror No. 2 about its numerous admonitions, the court ordered the juror to pay a $200 fine and added, "If you have any further contact again, I will put you in jail for 15 days." The court also told him, "Do not have any conversation or discuss or repeat anything I've said with your fellow jurors. Go on back and join the crowd."

After Juror No. 2 left the courtroom, appellant's attorney asked that the juror be excused. Although the prosecutor stated his concern that the court's sanctions might undermine the juror's ability to deliberate, he ultimately opposed appellant's request and the court proceeded to deny it. The following day, the court indicated it would not be sanctioning Juror No. 2 so that the juror could completely focus on the proceedings without fear of reprisal. Appellant's renewed motion to dismiss the juror was denied.

B.

Analysis

Section 1089 provides in part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order the juror to be discharged . . . ." A decision whether to discharge a juror for cause and substitute an alternate lies within the broad discretion of the trial court and is rarely disturbed on appeal. (*People v. Lomax* (2010) 49 Cal.4th 530, 565.) ""'Before an appellate court will find error in failing to excuse a seated juror, the juror's inability to perform a juror's functions must be shown by the record to be a 'demonstrable reality.' The court will not presume bias, and will uphold the trial court's exercise of discretion on whether a seated juror should be discharged for good cause under section 1089 if supported by substantial evidence.'"' (*People v. Martinez* (2010) 47 Cal.4th 911, 943.)

Substantial evidence supports the court's denial of appellant's motion to dismiss Juror No. 2. Although the juror violated the court's admonitions to refrain from

speaking to any witnesses, the encounter was brief, innocuous, and completely unrelated to the case. Contrary to appellant's claim, the mere fact that Juror No. 2 engaged in a prohibited communication does not give rise to a presumption of prejudice where, as here, the content of the communication was unrelated to the case. (*People v. Federico* (1981) 127 Cal.App.3d 20, 38 ["[W]hen the alleged misconduct involves an unauthorized communication with or by a juror, the presumption [of prejudice] does not arise unless there is a showing that the content of the communication was about the matter pending before the jury, i.e., the guilt or innocence of the defendant"].) To the extent appellant purports to find contrary authority in *People v. Ryner* (1985) 164 Cal.App.3d 1075 (*Ryner*), that case has been criticized on that point as contrary to controlling Supreme Court precedent (*People v. Chavez* (1991) 213 Cal.App.3d 1471, 1485, citing *People v. Cobb* (1955) 45 Cal.2d 158, 161 (*Cobb*) [unauthorized conversation between juror and defendant's relative raised no presumption of prejudice where the subject of conversation did not relate to the trial]). We are, of course, bound to follow that precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[12] Because the record does not disclose a demonstrable reality that Juror No. 2 was biased or otherwise unable to fulfill his duties as a juror, the court did not abuse its discretion in denying appellant's motion to dismiss the juror for good cause as contemplated in section 1089.

V.

Presentence Custody Credit

Appellant contends he is entitled to 1,543 days of presentence custody credit. He claims the court erroneously found he is not entitled to any credit under section 2933.2. The People agree that appellant is entitled to credit for his time spent in actual custody, and dispute his claim that the court found otherwise. They assert,

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12 Appellant purports to distinguish *Cobb* from *Ryner* on the ground that the former case involved a juror's communication with a relative of the defendant, while the latter dealt with communications between jurors and a police officer witness who was testifying for the prosecution. Even if a presumption of prejudice arose by virtue of Juror No. 2's communication with Detective Tripp, any such presumption was rebutted. In *Ryner*, the misconduct involved an extensive conversation between a testifying police officer and several jurors. (*Ryner, supra*, 164 Cal.App.3d at p. 1080.) Here, the communication involved one juror and a detective who immediately stated they could not talk.

however, that appellant is only entitled to 1,180 days of credit, which represents the amount of time he spent in actual custody prior to sentencing.

The People's position is well taken. The abstract of judgment reflects that appellant was awarded 1,543 days of presentence custody credit, although it fails to specify whether those credits were awarded for time spent in actual custody or work/conduct. The court simply misspoke when it said appellant was "not entitled to presentence custody credits" under section 2933.2. It is clear the court meant to state that appellant is not entitled to any *conduct* credits because he was convicted of murder. (§ 2933.2.) In calculating appellant's actual custody credits, however, the court made a computational error. Appellant was arrested on November 18, 2007, and sentenced on February 9, 2011. Including the dates of his arrest and sentencing (see *People v. Downey* (2000) 82 Cal.App.4th 899, 921), appellant is thus entitled to 1,180 days of presentence custody credit. We shall order the abstract modified accordingly.

VI.

Sentencing and Clerical Errors

The People ask us to correct sentencing and clerical errors with regard to appellant's sentencing for attempted murder on counts 2 through 4. First, they correctly note that consecutive 10-year enhancements were imposed on each count under subdivision (b) of section 12022.53, and not subdivision (d) as indicated in the abstract of judgment. They also accurately note that instead of imposing a consecutive 10-year gang enhancement as to each count under subdivision (b) of section 186.22, the court should have imposed a 15-year minimum parole eligibility term as to each count. (§ 186.22, subd. (b)(5).) We shall order the judgment so modified in both respects.

DISPOSITION

The judgment is modified as to counts 2 through 4 as follows: (1) the 10-year gang enhancements imposed on each count under section 186.22, subdivision (b), are stricken; (2) a minimum parole eligibility term of 15 years is imposed on each count under section 186.22, subdivision (b)(5); (3) the 10-year firearm enhancements are imposed under subdivision (b) of section 12022.53, and not subdivision (d). The

judgment is further modified to reflect that appellant is entitled to 1,180 days of presentence custody credit, all of which are for days spent in actual custody. The clerk shall prepare an amended abstract of judgment incorporating these changes and forward a certified copy to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Vincent H. Okamoto, Judge

Superior Court County of Los Angeles

Steven Schorr, 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, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.