Filed 2/1/17 P. v. Polanco CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE Plaintiff and Respondent, v. RAFAEL POLANCO, Defendant and Appellant.	B258472 (Los Angeles County Super. Ct. No. BA389755)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Modified and, as modified, affirmed with directions.

William L. McKinney; Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Jessica C. Owen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Rafael Polanco appeals from the judgment entered following his conviction by jury of attempted willful, deliberate, and premeditated murder, with findings he personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury. (Pen. Code, §§ 187, 664, subd. (a), 12022.53, subds. (b)-(d)). We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established as follows. About noon on October 7, 2011, Jordan Light was driving her boyfriend, William Rackley, in a car travelling westbound in the number two lane on Sixth Street between Burlington and South Union in Los Angeles. Rackley was the front seat passenger.

Rackley testified that his car was stopped in traffic behind two or three cars when he saw two Hispanic men standing in the middle of the street. The men appeared to be conversing, "possibly having some sort of dispute." One of the two men lifted his left arm and Rackley heard three to five gunshots. The two men were probably within three to five feet of each other. After the gunshots, one of the men, Ernesto Villegas, fell.

The gunman, whom Rackley identified at trial as appellant, was wearing a gray sweatshirt with a hood and denim pants that were possibly jeans.

After the shooting, appellant ran to the sidewalk on the north side of Sixth Street, continued running eastbound towards Rackley's car, then passed it. In his rear view mirror, Rackley last saw appellant running eastbound. Rackley observed appellant continuously from the time he was on the sidewalk to the time Rackley observed him in the rear view mirror. No one else in the area was wearing a gray sweatshirt and running. Within a minute after appellant passed Rackley's car, a crowd assembled around Villegas and police arrived.

Appellant was about five to 10 feet from Rackley when appellant passed him. Appellant was tucking a revolver, light silver in color, into his hoodie. Rackley told police the gun was a chrome, snub-nosed revolver. During a photographic lineup, Rackley identified appellant's photograph as depicting a person who looked like the gunman. At trial, Rackley identified appellant as the person who had the revolver while running on the sidewalk and wearing the gray hoodie. Rackley testified a video depicted the events he had witnessed. The video was admitted into evidence and played to the jury.

Another eyewitness, David Baylon, testified he was in the eastbound left turn lane on Sixth Street near South Union when he heard five or six gunshots behind him and saw a person (identified as Villegas) fall. Immediately after Baylon saw Villegas fall, Baylon observed a Hispanic male, whom Baylon identified at trial as appellant, running eastbound on the sidewalk.

Baylon first saw appellant in his rear view mirror about three seconds after the gunshots. Appellant was running away from Villegas and towards Baylon. Appellant's face was oriented straight ahead. When appellant was running towards Baylon, appellant turned his face to the right and looked in Baylon's direction; Baylon was able to see appellant's entire face. Baylon later looked to his left and saw appellant running eastbound.

Appellant passed Baylon and continued running on the sidewalk to Union. When appellant passed Baylon, Baylon saw only the right profile of appellant's face. Baylon was about eight to 10 meters from him when appellant arrived at Union. Baylon continuously observed appellant from the time Baylon looked to his left to see him to the time appellant reached Union. Appellant was the only person running on the sidewalk. He was wearing a gray sweater and dark pants.[1] Once appellant reached Union, Baylon continued watching him run northbound on Union. After appellant was on Union, he went near "building 517."

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[1] At trial, Baylon initially testified appellant was wearing a T-shirt and gray pants. However, when reminded he had previously told police that appellant was wearing a gray sweater and dark pants, Baylon adopted his prior statement.

Baylon testified that about 10 to 12 seconds after the gunshots, a police car drove from southbound Burlington onto eastbound Sixth with its siren activated. The police car was following appellant. As the police car continued eastbound, people were staring at appellant running on the sidewalk, and the police realized appellant was the suspect. The police car was then travelling 45 to 50 miles per hour with its red lights and siren activated.

Seconds after appellant ran northbound on Union, the police car arrived at Union. Appellant was about 48 feet from the police car when it was northbound on Union. Seconds after turning left onto Union, the officers exited the police car, pointed guns at appellant, and said something to him, but he failed to stop. When officers pointed their guns at appellant, he was the only person running on the sidewalk. Appellant opened the door to an apartment building and entered, with police in pursuit. Baylon did not see anything in appellant's hands when he was running. Appellant's left hand was in his pants pocket and Baylon could see that appellant was not holding anything in his right hand.

Although Baylon testified at trial he "didn't see a gun," Baylon previously told police he had seen appellant holding one. Baylon had believed appellant was holding a gun because appellant's hand was in his pocket while he ran.

During a photographic lineup, Baylon selected a photograph as depicting the person who was running in the gray sweater. Baylon told police he saw a Hispanic male who was about 13 to 14 years old and about 5'4" in height. The photograph depicted someone whom Baylon thought appeared to be 13 to 14 years old. On March 8, 2012, Baylon testified at the preliminary hearing that appellant was depicted in a photograph and was the person whom Baylon had seen running in his direction, then northbound on Union. At trial, Baylon identified appellant as the person depicted in the photographic lineup. Baylon also identified appellant as the man he had seen wearing the gray sweater and running eastbound on Sixth and then northbound on Union before entering the apartment building.

Los Angeles Police Officer Jason Abner and his partner, Los Angeles Police Officer Nick, were on patrol that day in a marked patrol car travelling southbound on Burlington, approaching Sixth Street. Nick was driving. When Abner was probably 30 yards from Sixth, he heard five gunshots. Abner believed they came from the east, so Nick proceeded to Sixth, then east on Sixth with the police car's lights and siren operating. When Nick turned from Burlington to eastbound Sixth, Abner saw a crowd pointing eastward. Nick continued eastbound and Abner saw a male with blood on him. The male, later identified as Villegas, was lying in the center of Sixth. Villegas said he had been shot, and the crowd continued pointing towards Union. Nick proceeded towards Union. Abner saw no one running on Sixth.

Nick drove north on Union because people on the corner at Union were pointing to the west sidewalk of northbound Union. When Nick turned left from Sixth onto Union, Abner saw a Hispanic male, whom Abner identified as appellant. Appellant, wearing a gray sweatshirt and dark shorts, was running northbound on the west sidewalk of Union. One of appellant's hands was holding his right front pocket. Abner believed appellant had a gun in his pocket. From the time Abner saw Villegas in the middle of Sixth to the time Abner saw appellant, Abner saw no one else dressed like appellant. Nick stopped the police car as close as he could to appellant, just short of 525 Union. Abner exited and pursued appellant.

Abner identified himself as a police officer and ordered appellant to stop, but he did not comply. Appellant, running, entered the apartment complex at 525 Union and slammed its gate, which locked. Nick joined Abner at the gate and, once appellant saw that the gate had locked, he turned around, looked at Abner and Nick, and smiled at them. When appellant turned and smiled at Abner, Abner saw appellant's face and knew what appellant looked like. Appellant continued westbound to the back of the apartment complex.

Los Angeles Police Detective Christopher Linscomb went to the scene of the shooting and saw Villegas, who had apparent gunshot wounds to his abdomen and a wound to his hand. Linscomb did not locate any casings at the scene.

Maria Tapia testified that she and her husband lived in an apartment building at 433½ South Union, about a block and a half from Sixth. The building was near 431 South Union. On October 7, 2011, Tapia was in her apartment when she heard more than five gunshots. About four minutes later, she heard someone running upstairs in the building.

Perhaps two minutes after she heard the running, Tapia went upstairs and saw a person whom she had never seen before, and whom she later identified as appellant. Appellant did not live upstairs. He was sitting upstairs, hunched down and nervous. He appeared to be hiding. Appellant was a Hispanic male and Tapia told police he was wearing a gray sweatshirt. From the time Tapia heard the footsteps to the time she exited her apartment to investigate, she heard no other foot traffic on the stairs.

Tapia was later in her apartment when she saw appellant quickly descend the stairs. By then, appellant was wearing a black shirt, not the gray sweatshirt. Appellant was heading towards the nearby apartment at 431 Union when Tapia lost sight of him. Tapia identified appellant at trial as the Hispanic male whom she had observed wearing a gray sweatshirt and sitting at the top of the stairs.

Alex Lopez (Alex) testified that at the time of the shooting he lived with his brother, David Lopez, and Tapia. The address of 431 South Union was two sections from their apartment. An alley was near their apartment. About 11:50 a.m. on October 7, 2011, Alex was in the apartment when he heard about five gunshots. About noon, he heard someone jump a fence near the alley. The fence was about 15 or 20 feet from Alex. About a minute later, Alex heard someone ascending steps at 433½ South Union. Two or three minutes later, Alex heard sirens and helicopters approaching. After Alex heard the sirens, he thought the person ascending the steps was fleeing from someone.

Alex did not see the person who ascended the steps. Police arrested appellant "on 431." Alex believed appellant was the person who ascended the steps because, according to Alex, "who else would they be after?" About 30 minutes passed from the time Alex heard someone jump the fence to the time police arrested appellant. At trial, Alex was asked about his prior statements to the police. During a photographic lineup, Alex selected a photograph

depicting the person whom Alex saw at his apartment complex. When he selected the photograph, Alex wrote on a form, " 'wearing gray sweater and blue dickies when he went up the staircase. [¶] When he came down he had a black shirt.' " Alex also wrote that he heard someone jumping his building fence, then saw someone ascend the staircase " 'as if trying to be sneaky.' "[2] Alex testified at trial that he saw police arrest the person and appellant was the person. Alex, who had grown up in the area, testified the Rockwood and 18th Street gangs claimed or frequented the area.

Abner testified that, between noon and 1:15 p.m., police established a perimeter. Police later entered an apartment building and, using a canine, immediately located appellant "at the top of 431" on the upper landing of the first staircase. At 1:15 p.m., Abner arrested appellant, whom Abner recognized from the foot pursuit. Appellant did not have a weapon. Police searched for a weapon but did not find one that day. At trial, Abner identified appellant as the person who was wearing a grey sweater and who fled from him.

Los Angeles Police Officer Ryan Nguyen was at the scene when police detained appellant. He interviewed Tapia and she told him she heard someone running upstairs and she ascended the stairs to investigate. She saw appellant at the top of the stairs and heard him talking on the phone. Appellant was saying, "Hey, man. I did it, man. I did it, man." Appellant was wearing a gray hoodie sweatshirt and blue shorts. After police arrested appellant, Nguyen found a gray sweatshirt on top of a ladder at the top of a stairwell at "433 and-a-half" (Tapia's address).

Nguyen interviewed Alex, who said he saw a Hispanic male wearing a gray hoodie run past the apartment door. Nguyen never asked Alex what his brother might have seen. Detective John Melendez testified that, when police arrested appellant, police took a black shirt from him and he was wearing long denim shorts.

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[2] However, Alex also denied recognizing the document on which he wrote these things. Alex testified, "I didn't see any of it. That was according to my brother." Nonetheless, he also testified he did not tell police that his statement reflected what his brother told him.

The next day, Los Angeles Police Officer David Guerrero went to 431 South Union after receiving a call that a tenant had found a pistol in a mailbox. From a tenant's mailbox, Guerrero recovered a stainless steel revolver that had been covered by mail. The revolver contained one live round and five casings. No usable fingerprints were found on the revolver.

Los Angeles Police Officer Antonio Hernandez, a gang expert, testified Sixth Street is the southern border of the Rockwood gang and Union is its western border. Hernandez opined at trial that appellant was an associate of the Rockwood gang. Hernandez based his opinion on the fact that on two occasions, Hernandez was on patrol in territory claimed by Rockwood and, each time, Hernandez stopped appellant when he was in the presence of, and openly associating with, documented Rockwood members. Villegas was associated with a tagging crew.

ISSUES

Appellant claims (1) there is insufficient evidence he committed attempted willful, deliberate, and premeditated murder, (2) the trial court erred by admitting into evidence appellant's statement, (3) there is insufficient evidence supporting a true finding on a Penal Code section 186.22 gang allegation,[3] and (4) he is entitled to one additional day of presentence credit.

DISCUSSION

1. *Sufficient Evidence Supported The Jury's Finding of Premeditation and Deliberation.*

Appellant claims there is insufficient evidence of premeditation and deliberation. In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]."

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[3] The record reflects, and respondent agrees, that the jury found not true the gang enhancement allegation. Therefore, we will not discuss it further.

(*People v. Redmond* (1969) 71 Cal.2d 745, 755.) We find the evidence sufficient.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Evidence of attempted murder must establish "the defendant harbored express malice toward the victim, i.e., the defendant either desired the victim's death or knew to a 'substantial certainty' that the victim's death would occur. [Citation.]" (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 389.) The intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) The act of discharging a firearm toward a victim at close range in a manner that can inflict a mortal wound is sufficient to support an inference of intent to kill. (*People v. Smith* (2005) 37 Cal.4th 733, 741.)

"Deliberate" means arrived at as a result of careful thought and weighing of considerations for and against the proposed course of action, and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123 (*Perez*).) "Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection." (*People v. Cook* (2006) 39 Cal.4th 566, 603.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*Perez,* at p. 1127.)

Our Supreme Court has identified three categories of evidence relevant to reviewing findings of murder based on premeditation: (1) planning activity, that is, facts about a defendant's behavior before the killing that show prior planning of it; (2) motive, that is, facts about the defendant's prior relationship, and/or conduct, with the victim from which the jury could infer a motive; and (3) the manner of killing, that is, facts about the manner of the killing from which the jury could infer that the defendant intentionally killed

the victim according to a preconceived plan. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1019; *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).) The court will uphold verdicts whenever there is (1) "extremely strong evidence" (*Anderson,* at p. 27) of planning; or (2) evidence of motive in conjunction with either (a) evidence of planning or (b) evidence of a manner of killing showing that the killer must have had a preconceived design. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348; *People v. Arcega* (1982) 32 Cal.3d 504, 518-519; *Anderson,* at p. 27.) It is important to remember, however, that the "*Anderson* factors provide a 'synthesis of prior case law,' but they 'are not a definitive statement of the prerequisites for proving premeditation and deliberation in every case.' " (*People v. Mayfield (*1997) 14 Cal.4th 668, 768 (*Mayfield*).) "The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way." (*Perez, supra,* 2 Cal.4th at p. 1125.) The above principles also illuminate an inquiry into whether an attempted murder was premeditated.

Here, we find sufficient evidence in all three categories. The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) In broad daylight on October 7, 2011, appellant was armed when he and Villegas stood in the middle of the street conversing. It appeared to witnesses that the two were arguing, but there was no evidence Villegas provoked appellant, much less provoked him to the point that he had a mitigating heat of passion. Appellant raised his arm and intentionally discharged the firearm towards Villegas several times at close range, i.e., from about three to five feet away. Even assuming arguendo Villegas and appellant were arguing, there was no evidence that Villegas himself was armed, displayed a weapon, or reached for a weapon of any kind. An assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333 (*Bolin*).)

Moreover, a defendant's "postoffense statements [may] provide substantial insight into the defendant's thought processes in the crucial moments before the act of killing" (*Mayfield, supra,* 14 Cal.4th at p. 768), and thus evidence of premeditation. (*Ibid*.) In *Mayfield,* the sole evidence of motive consisted of the defendant's post-arrest statements that " 'he had to do it' " and " all I could think about was getting his gun and shooting him so he couldn't arrest me.' " (*Id*. at p. 767.) Here, Tapia told the investigating police officers that she heard appellant state to someone on the telephone, "Hey, man. I did it, man. I did it, man." As the *Mayfield* court stated: "[The *Anderson* factors] are not well adapted to a case like this one in which the defendant's postoffense statements provide substantial insight into the defendant's thought processes in the crucial moments before the act of killing. Even so, . . . his statement that he was determined to prevent [the victim] from arresting him provides a motive . . . ." (*Mayfield,* at p. 768, quoting *People v. Hawkins* (1995) 10 Cal.4th 920, 957.) Here, it is reasonable to infer from appellant's statements on the telephone that he and another had planned to kill Villegas before appellant and Villegas confronted each other on Sixth Street and that appellant was reporting his success on the telephone after the shooting. Finally, that appellant smiled at the officers when he believed he had successfully made his getaway is further support for an inference that appellant felt he had successfully achieved what he had set out to do that day.

As for motive, there was evidence appellant and Villegas were possibly involved in a dispute just prior to the shooting. " 'Evidence showing . . . quarrels, antagonism or enmity between an accused and the victim of a violent offense is proof of motive to commit the offense.' " (*People v. Zack* (1986) 184 Cal.App.3d 409, 413, quoting *People v. Daniels* (1971) 16 Cal.App.3d 36, 46.)

Finally, the manner of killing supports a finding of premeditation. Firing at vital body parts can show preconceived deliberation. (*People v. Thomas* (1992) 2 Cal.4th 489, 517-518.) Here, after a verbal dispute, appellant intently raised his arm, pointed at Villegas, and shot him in the abdomen, a vital body part.

Other factors which may be considered include the nature of the wounds suffered, the fact the attack was unprovoked, the fact the deceased was unarmed, the fact the defendant hid evidence, and the fact the defendant failed to secure medical attention for the victim. (*People v. Clark* (1967) 252 Cal.App.2d 524, 529-530; *People v. Lewis* (1963) 217 Cal.App.2d 246, 259.) After the shooting, appellant fled without securing medical attention for Villegas; hid in nearby apartment buildings; failed to stop upon the officers' command; discarded his sweatshirt and pants and changed into other clothing; and ditched the weapon in a mailbox where it was discovered the next day. His actions betray consciousness of guilt in addition to premeditation and deliberation.

2. Sufficient Evidence Supports the Conviction of Attempted Murder and Identification of Appellant as the Shooter.

Appellant argues there is insufficient evidence of attempted murder and insufficient identification evidence. We disagree.

As for the evidence of attempted murder, the evidence recited above is sufficient to support a conviction for attempted murder. The victim was shot point blank in the abdomen, a vital body part, while apparently unarmed. There was no evidence of heat of passion, accident, or mistake; indeed, the evidence was that the shooter simply raised his arm with weapon in hand, extended it, and pulled the trigger. Moreover, the shooter fled, without attempting to assist the victim, and discarded his clothing and the murder weapon during his flight. This evidence provides sufficient evidence to establish that the shooter acted with intent to kill.

As for identification of appellant as the gunman, the testimony of Rackley and Baylon provided substantial evidence in that regard. Indeed, the testimony of Rackley, Baylon, Abner, Tapia, and Lopez provided a virtual visual unbroken chain of observations establishing appellant's whereabouts from the time of the shooting to the time he entered Tapia's apartment building (while wearing the frequently observed gray sweatshirt). Rackley and Baylon identified appellant as the person running from the shooting scene. At one point during appellant's flight, Baylon looked appellant in the face. Rackley and Baylon testified to the effect they saw no one else running. Rackley saw appellant tucking away a silver revolver, evidence of

consciousness of guilt. Baylon told police he had seen appellant holding a gun. Nguyen, the day after the shooting, found a stainless steel revolver concealed in a mailbox located on appellant's path of flight, a flight which also evidenced consciousness of guilt. Multiple shots were fired but no casings were recovered at the shooting scene; the revolver found in the mailbox had one live round and five casings. There was no testimony that appellant sought medical aid for Villegas.

Officer Abner heard the shooting, arrived at the scene, and citizens helped direct him to appellant. Officers Nick and Abner pursued appellant in their marked police car with lights and siren activated, but appellant did not stop. He did not stop even after the officers, on Union, pointed their guns at him and told him to stop. Abner pursued appellant and saw appellant's face when appellant turned to smile at the officers when he thought he would escape. Tapia identified appellant as running up and later down the stairs of her apartment building. When appellant ascended the stairs, he was wearing the gray sweatshirt he had been wearing at the shooting scene, but he descended the stairs wearing a black shirt after removing the gray sweatshirt and leaving it at the top of the stairs.

When Tapia saw appellant at the top of the staircase, he appeared to be hiding, and he was hunched down and nervous. In that context, and during his flight as a gunman from the shooting scene, Tapia heard appellant say on the phone, "Hey, man. I did it, man. I did it, man." Appellant's postoffense statements provided substantial insight into appellant's thought processes in the crucial moments before his attempt to kill. The jury reasonably could have concluded beyond a reasonable doubt that appellant was the shooter from his own statement that "I did it." The fact there may have been an alternative explanation(s) for appellant's statement does not compel a contrary conclusion.

In sum, there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that someone attempted to murder Villegas by deliberately shooting him in the abdomen, and that the shooter was appellant.

3. *The Trial Court Properly Admitted Appellant's Statement Into Evidence.*

During the People's direct examination of Tapia, the prosecutor asked if she could hear anything as she was going upstairs, and she indicated there was someone there and "That's it." The prosecutor asked if she heard anyone talking, and she replied she heard someone talking on the phone but did not remember what they were saying. The prosecutor asked if a police report would refresh her recollection. She replied she made no police report.

Later, the prosecutor asked Tapia if she told police what she saw and heard on October 7, 2011. She replied, "My sister-in-law was there with me that day. So was my husband." Appellant objected Tapia's answer was nonresponsive. Tapia then testified, "And they told the officers." The court interrupted and asked Tapia if she spoke to police on October 7, 2011. She replied yes. The court asked if she remembered telling police whether she heard anything as she was going up the steps to investigate who was upstairs. She replied, "I didn't tell the officers."

The prosecutor later asked Tapia if she remembered telling police that, as she was ascending the stairs and approaching the top, she heard a male voice on the phone. She replied, "you mean on the phone or speaking on the phone?" The prosecutor said, "Well, yes. Speaking on the phone." She replied, "Yes. I heard someone speaking, but I don't remember what they were saying."

The following then occurred: "Q . . . Do you remember telling the police officers that the person that you heard talking on the phone kept on saying, 'Hey, I did it, man. I did it, man.'? [¶] A I'm not sure. [¶] Q . . . What do you mean you're not sure? Do you not remember making the statement? [¶] A I remember that they were talking, but I don't remember what they were saying. [¶] Q . . . But that's my question I'm asking you right now. Did you tell the police officers that . . . as you were approaching the top of the stairs you heard a male voice on the phone saying, 'Hey, I did it, man. I did it, man'? [¶] . . . [¶] Q . . . Did you make that statement to the police? [¶] A If I heard that maybe I did, but right now I don't remember having done that." The court later excused Tapia as a witness, subject to recall.

Subsequently, during the People's March 13, 2014, direct examination of Officer Nguyen, he testified he interviewed Tapia and she said "she heard someone running upstairs and she just was kind of being nosey so she walked up to check and she saw the suspect on the phone, . . . and heard him talking on the phone." Nguyen testified Tapia told him she heard the man on the phone at the top of the steps saying, "Hey, man. I did it, man. I did it, man."

During trial on March 14, 2014, after other witnesses testified, appellant's counsel, outside the presence of the jury, acknowledged he had failed to object when, the day before, Nguyen testified Tapia had told him she heard appellant say, "I did it. I did it." Appellant posed a hearsay objection and moved to strike the statement. The court indicated it would not have sustained a hearsay objection "because Ms. Tapia was being charitable, equivocal on that point when she testified." The court indicated her statement was admissible as a prior consistent statement or a prior inconsistent statement. The court overruled appellant's belated objection.

Appellant claims the trial court erroneously failed to exclude, as inadmissible hearsay, and pursuant to Evidence Code section 352, Tapia's statement that appellant said, "Hey, man. I did it, man. I did it, man." The claim is unavailing.

Appellant concedes he posed a belated hearsay objection. He waived the hearsay issue. (*Bolin, supra,* 18 Cal.4th at pp. 320, 322; Evid. Code, § 353, subd. (a).)

4. *Appellant Is Entitled to an Additional Day of Presentence Credit.*

On October 7, 2011, police arrested appellant, and he remained in custody until August 22, 2014, the date of sentencing, i.e., a total of 1,051 days, inclusive. Appellant was therefore entitled to 1,208 days of presentence credit, consisting of 1,051 days of Penal Code section 2900.5, subdivision (a) custody credit, and 157 days of conduct credit (as 15 percent of his total period in custody) pursuant to Penal Code sections 2933.1, subdivision (a), 4019, and 667.5, subdivision (c)(12). During sentencing, the trial court acknowledged appellant was entitled to presentence credit but erroneously calculated the total as 1,207 days of presentence credit. The parties agree--and so do we--that appellant is entitled to an additional day of presentence credit.

DISPOSITION

The judgment is modified by awarding appellant a total of 1,208 days of presentence credit, consisting of 1,051 days of Penal Code section 2900.5, subdivision (a) custody credit and 157 days of Penal Code section 4019 conduct credit and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the above modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.*

We concur:

ALDRICH, Acting P. J.

LAVIN, 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.