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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLTON WILLIAM HENDERSON, Defendant and Appellant.	B270673 (Los Angeles County Super. Ct. No. BA431938)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling, Judge. Affirmed as modified with directions.

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

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Carlton William Henderson appeals from the judgment entered after his conviction of three counts of attempted murder and other felonies committed for the benefit of or in association with a criminal street gang. He contends: that the trial court erroneously instructed the jury regarding concurrent intent to kill; that substantial evidence did not support a finding that his gang was a criminal street gang; that the gang enhancements imposed as to two of the attempted murders must be stayed pursuant to Penal Code section 654;[1] and that he is entitled to an additional day of presentence custody credit. We agree that defendant is entitled to an additional day of custody credit, and modify the judgment accordingly. However, as we find no reversible error, we affirm the judgment as modified.

Defendant has also filed a petition for writ of habeas corpus challenging the exclusion of evidence, which we summarily deny by separate order.

BACKGROUND

Defendant was charged with the following felonies: counts 1, 2, and 3, attempted willful, deliberate, and premeditated murder in violation of sections 664 and 187, subdivision (a); count 4, shooting at an occupied motor vehicle, in violation of section 246; count 5, carrying a loaded firearm in a vehicle, in violation of section 25850, subdivision (a), while he was an active gang participant within the meaning of section 25850, subdivision (c)(3); and count 6, possession of a firearm by a felon in violation of section 29800, subdivision (a)(1). As to all counts, the information alleged that defendant had served a prior prison term within the meaning of 667.5, subdivision (b); that he had

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

been convicted of a serious or violent felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d); and pursuant to section 186.22, subdivision (b)(1), that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. As to counts 1 through 4, the information alleged that defendant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c), and (d); and pursuant to 667, subdivision (a)(1), that he had suffered a prior serious felony conviction.

A jury found defendant guilty as charged of all counts and found true all special allegations. In a bifurcated proceeding, defendant waived jury trial on the prior conviction allegations, and the court found the allegations to be true. On March 3, 2016, the trial court sentenced defendant to a total prison term of 180 years to life. As to count 1, the base term, the court imposed 15 years to life, doubled as a second strike, plus a 25-year-to-life firearm enhancement, and a five-year recidivist enhancement. The court imposed and stayed two additional firearm enhancements. As to each of counts 2 and 3, the court imposed 15 years to life, doubled as a second strike, plus a 25-year-to-life firearm enhancement, and ordered each term to run consecutively. As to count 4, the court sentenced defendant to the upper term of seven years, doubled as a second strike, plus a 10-year gang enhancement, and stayed the sentence pursuant to section 654. As to each of counts 5 and 6, the court imposed the upper term of three years, doubled as a second strike, plus a four-year gang allegation to run consecutively to counts 1, 2, and 3. The court ran the count 5 sentence consecutively, but stayed count 6 pursuant to section 654. Defendant was ordered to pay mandatory fines and fees and was granted 525 days of

presentence custody credit, comprised of 458 days of actual custody and 67 days of conduct credit.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The shooting

Annie Estis (Estis) and her daughter Marlesha Carter (Carter) lived together in a home which was situated in the territory of the Hoover gang, close to the territory claimed by the Rolling 40's gang. Carter's boyfriend at the time, Michael Harrison (Harrison), belonged to a subset of the Hoover gang known as Eight Trey Hoover. Carter explained that the Hoover gang and the Rolling 40's did not get along, they said or emailed nasty things to one another, and their members often fought and sometimes shot members of the other gang. The term, "Snoova" was a derogatory term used by members of the Rolling 40's gang to show disrespect for Hoover gang members.

On the morning of June 28, 2014, Estis was the right front passenger in Harrison's white Tahoe truck with Carter in the backseat behind her. As they traveled to visit Estis's sister, Harrison parked in a liquor store parking lot and waited while Carter went inside to make a purchase. As she returned, Carter saw defendant's red Tahoe truck. She immediately recognized the truck and defendant, as she had seen them both before, and associated them with the Rolling 40's gang. As Harrison drove out of the parking lot, Carter saw defendant driving up behind them through Harrison's rear window. When Harrison stopped for a red light, defendant pulled alongside them, lowered his window and asked Harrison "Where you from?" To which Harrison responded: "Hoover." Defendant replied "Fuck, Snoova," and as Harrison attempted to turn right, defendant fired multiple gunshots into the driver's side of the white Tahoe.

Harrison completed the turn and stopped the car midblock. He had been struck by two bullets, one in the back and the other in the buttock. One bullet struck Estis in her hip, and another bullet grazed Carter's left thigh.

The shooting left eight bullet holes in the driver's side of Harrison's white Tahoe, five of them in the driver's door and the rest in the back seat. The driver's side front window was shattered, the rear left tire flattened by a gunshot, and a bullet was later found on the floor behind the driver's seat.

The next night police stopped and arrested defendant as he was driving his red Tahoe truck near 46th Street and Vermont Avenue, in Rolling 40's gang territory. Officers found .40-caliber bullet casings in the Tahoe, and later a semiautomatic handgun was also found in a hidden compartment above the glove box, along with what looked to be rock cocaine, a California identification card in defendant's name, several credit cards that appeared to be fraudulent, and a 10-round magazine with 11 .40-caliber bullets. A DNA sample taken from the bag of narcotics was determined to belong to defendant, and his fingerprint was found on the gun. The gun was tested and determined to have fired one of the bullets found at the scene of the shooting.

Gang evidence

Los Angeles Police Officer Filiberto Garcia testified regarding his previous assignment to Southwest Division's Cyber Support Unit. In that role, he obtained and served search warrants for social media accounts, and assisted detectives in investigating the data obtained. Here he obtained a copy of the data in defendant's Facebook account and verified from the content that it belonged to defendant. Excerpts were admitted into evidence. The site contained defendant's name, a "selfie" and other photos of defendant, his birth date, birthday greetings, and

the following message from defendant: "I'm from 40, 46 Top Dolla Vermont." Officer Garcia noted some derogatory language on the site about the Hoover gang, such as "Snoovas" and "H-K 40's." He explained that H-K stood for Hoover Killer. The site also noted that defendant's friend Joe had died and that defendant had been shot in the leg. Investigating officer Brad Golden later testified that "Joe" was Joseph Bush, a Rolling 40's affiliate who was murdered in October 2015, during the same incident in which defendant was shot.

Officer Michael Alvarez testified as the prosecution's gang expert. Officer Alvarez has family members who were gang members, and learned about gang culture while growing up around gangs. He joined the military at age 17 and then became a Navy recruiter in Los Angeles, trained to identify gang members and gang-related tattoos, in order to keep gang members from the military. After the Navy, he joined the Los Angeles Police Department, where he received additional training about gang culture and gang crime.

Officer Alvarez had been a police officer for five years, assigned to patrol in the Southeast Division for three years, then to the 77th Division Gang Enforcement Detail up to the time of trial. One of the largest African-American gangs in the Southeast Division was the Hoover Crip gang (Hoover Crips). African-American street gangs operating in the 77th Division include the Neighborhood Crip gang and its subset, the Rolling 40's, as well as the 46 Neighborhood Crips and the 46 Top Dollar Crips, both subsets of the Rolling 40's. Since being with the Gang Enforcement Detail, Officer Alvarez has been assigned to the Rolling 40's and its subsets.

Rivals of the Rolling 40's included the Hoover Crips, with whom they had been "at war" since before Officer Alvarez was assigned to the Gang Enforcement Detail. The war consisted of

shooting at one another and committing other violent crimes against one another. Officer Alvarez had investigated violent crimes involving both the Hoover Crips and the Rolling 40's, and had familiarized himself with investigations by other gang enforcement officers. Rolling 40's territory, which covered a large part of the 77th Division, spilled over into the Southwest Division, and included the area near 46th Street and Vermont Avenue, where Officer Alvarez had often seen approximately 40 gang members congregating outside an apartment complex. The Rolling 40's shared their southern border with the Hoover Crips at 52nd Street, and they clashed most frequently near Hoover Street and Figueroa Avenue. The intersection of Hoover and 54th Streets, where the shooting occurred, was considered Hoover Crips territory.

As a patrol officer, Officer Alvarez had daily contact with gang members. Like other officers working in gang neighborhoods, he prepared field identification cards (F.I. cards) following any consensual encounter with a suspected gang member. If available, the information included on the card was the person's name, date and place of birth, address, phone number, description of clothing worn during the interview, any gang affiliation, moniker, and location of the contact. In 2014, there were approximately 500 documented Rolling 40's gang members, with common signs and symbols such as the letter F, a four-leaf clover, and the Audi automobile symbol of four 0's. The primary activities of the Rolling 40's were tagging, robberies, murders, assault with a deadly weapon, including shootings, possession and selling of narcotics such as methamphetamine and cocaine, especially in the area of 46th Street and Vermont Avenue.

Officer Alvarez explained that reputation was important to the members of both the Rolling 40's gang and the Hoover Crips.

A gang member "puts in work" for the gang in order to enhance his reputation within his gang. Putting in work means helping the gang by doing anything from shooting the enemy, committing robberies or burglaries to earn money for guns, to carrying a gun for another member. Shooting a rival gang member would be the sort of "work" highly admired in both the Rolling 40's and the Hoover Crips, and would be likely to elevate the status of the shooter within his own gang. A gang member might challenge someone by asking, "Where are you from?" and if given the wrong answer or no answer, the gang member might shoot the challenged person. "Snitching" or just talking to the police is viewed negatively, whether it is done by a rival gang member or a member of one's own gang. The consequences could be a beating or getting killed.

Officer Alvarez also presented evidence of the predicate crimes committed by two members of the gang. Certified conviction records showed that James Williams (Williams) committed an attempted murder on or about June 17, 2012, with a true finding that the crime was gang related and that Williams had used a firearm in its commission. At the time, Williams was a member of the 46 Neighborhood Crip gang, one of the Rolling 40's sets, and the crime took place on 51st Street between Hoover and Figueroa Streets, in Hoover Crips territory. Officer Alvarez familiarized himself with the facts of the case by reading the report and speaking to Officer Golden, who had been the investigating officer in that case, as well. The second certified conviction record showed that Elijah Jillett (Jillet) was convicted of robbery, committed on or about June 4, 2014. Officer Alvarez familiarized himself with the case by reading the report and speaking to one of the arresting officers. The crime took place near 42nd Street and Vermont Avenue, within Rolling 40's

territory. Jillett was also a member of the 46 Neighborhood Crips set of the Rolling 40's.

Officer Alvarez reviewed F.I. cards documenting contacts in 2013 and 2014. The F.I. cards indicated that defendant had been stopped several times with other Rolling 40's gang members at the gang's 46th and Vermont Streets "hangout." Officer Alvarez also reviewed the excerpts from defendant's Facebook account which were in evidence, observed defendant's tattoos, and spoke to other officers familiar with defendant. Based on such investigations, Officer Alvarez concluded that defendant was a member of the Rolling 40's gang.

In response to a hypothetical question mirroring the facts in evidence, Officer Alvarez opined that the shooting was committed for the benefit of the Rolling 40's gang. He explained that the commission of a brazen act of violence, especially in daylight, benefited the gang by sending a message to the community that they have weapons which they are not afraid to use. This type of shooting bolstered the gang's reputation for violence and viciousness, causing the community to fear coming forward. Officer Alvarez further explained that the shooter in the hypothetical would have been "putting in work" for the gang, thereby enhancing his own reputation within the gang.

Defense evidence

Defendant testified that not only did he not commit the shooting, he was not at all involved. Defendant admitted to having been in Top Dolla, but joined the Rolling 40's with other Top Dolla members. He also denied being an active gang member. Defendant claimed to have spent the night of June 27, 2014, at the home of his baby's mother, adding that he drove there in a gray Mazda, and had not seen the red Tahoe for a week before the shooting. Only defendant, defendant's mother, and his close friend Joseph Bush had keys to the red Tahoe. On June 28,

defendant arose around 10:30 a.m., and when he left to go to his mother's house, he saw helicopters and police activity. Defendant then left his mother's house about 2:00 p.m. that day. The next day he noticed that someone had washed the red Tahoe. That evening after receiving a call from Bush, they met in front of the liquor store at of 47th Street and Vermont Avenue. When Bush said that he did not want to go out, defendant left and was arrested on his way home while in possession of a bag of narcotics.

After defendant was released from jail in late September, Bush told defendant that he had committed the shootings. As a result, defendant stopped speaking to Bush for awhile. On November 19, 2014, when defendant went to pick up Bush at a liquor store, someone approached them and started shooting. Bush was struck in the head and died. Defendant was struck in his leg.

Rebuttal

Officer Golden testified that he interviewed defendant twice, and defendant told him that defendant's two brothers sometimes drove his Tahoe. Defendant never mentioned Bush or told Officer Golden that Bush ever drove the car. One of defendant's brothers was a gang member, and Officer Golden included a photograph of that brother in the six-pack photographic lineup from which Carter identified defendant. Bush's fingerprints were not found inside the car, and although Bush received 15 citations for different moving violations between 2012 and 2014, none were ever issued while Bush was driving defendant's vehicle.

DISCUSSION

I. Kill zone instruction

A. Contentions

Defendant contends that the instruction was erroneous for two reasons: (1) the court failed to define the term "kill zone" and to specifically instruct the jurors that "the establishment of a 'kill zone' includes an objectively reasonable awareness of the presence of other persons within the zone around the specifically targeted victim"; and (2) "the court's modification of the pattern instruction, CALCRIM No. 600, to accommodate two 'kill zone' victims by its use of the disjunctive 'or' . . . created a situation in which the jurors could have convicted [defendant] of the attempted murder of Carter and Estis without the jurors finding separate specific intents to kill as to each of them."[2]

B. Concurrent intent to kill

Defendant contends that the attempted murder counts must be reversed because the trial court gave an improper jury instruction regarding the kill zone theory of concurrent intent to kill.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee*

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[2] Respondent contends that defendant has forfeited his challenge to the instruction by failing to object in the trial court, but acknowledges that where instructional error implicates defendant's substantial rights, there is no forfeiture. (*People v. Prieto* (2003) 30 Cal.4th 226, 247; § 1259.) As respondent also acknowledges,"[a]scertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim -- at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.)

(2003) 31 Cal.4th 613, 623-624.) "'[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may . . . be inferred from the defendant's acts and the circumstances of the crime.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) The kill zone "theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons." (*People v. Stone* (2009) 46 Cal.4th 131, 138.) "[A]lthough the intent to kill a primary target does not *transfer* to a [nontargeted] survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [is] termed the 'kill zone.'" (*People v. Bland* (2002) 28 Cal.4th 313, 329 (*Bland*).) Thus, a concurrent intent to kill nontargeted victims may be inferred when the defendant uses lethal force calculated to kill everyone within an area around the intended target as a means of ensuring the target's death. (*Ibid.*) Thus, firing multiple shots directly at a small group at close range will give rise to a reasonable inference that the shooter intended to kill all in the group. (*People v. Garcia* (2012) 204 Cal.App.4th 542, 554.) And under such circumstances, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone*, *supra*, 46 Cal.4th at p. 140.)

Here, the trial court instructed the jury with CALCRIM No. 600, which unless modified, applies to a single target and one other person in the kill zone.[3] The trial court modified the

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[3] Unmodified, CALCRIM No. 600 reads: "[A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of *<insert name or description of victim charged in attempted*

instruction to refer to one target and two other victims in the kill zone, as follows:

> "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or kill zone. In order to convict the defendant of the attempted murder of Annie Estis and Marlesha Carter, the People must prove that the defendant not only intended to kill Michael Wayne Harrison, but also either intended to kill Annie Estis or Marlesha Carter or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Annie Estis or Marlesha Carter or intended to kill Michael Wayne Harrison by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Annie Estis and Marlesha Carter."

C. Kill zone definition

We find no merit to defendant's contention that the trial court failed to define the term "kill zone." CALCRIM No. 600 defines kill zone in the first sentence of the instruction: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or

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murder count[s] on concurrent-intent theory>, the People must prove that the defendant not only intended to kill <*insert name of primary target alleged*> but also either intended to kill <*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill <*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill <*insert name or description of primary target alleged*> by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of <*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>.]"

'*kill zone*.'" (Italics added.) This correctly informs the jury that the kill zone is a zone in which the defendant intends to kill everyone to ensure harm to a target victim. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1241; see *Bland*, *supra*, 28 Cal.4th at p. 330.) Defendant has cited no authority requiring a different definition.

D. Awareness of victims' presence

We find no merit to defendant's contention that the trial court was required to specifically instruct that "the establishment of a 'kill zone' includes an objectively reasonable awareness of the presence of other persons within the zone around the specifically targeted victim."

Initially, we note that throughout his arguments, defendant uses the phrases, "objectively reasonable awareness," "reasonably objective knowledge," "objective knowledge," "objectively aware," "objectively knew," and "objective awareness" without defining the term. We assume defendant uses this shorthand to mean not only that a reasonable person would have known that there were people other than Harrison inside Harrison's Tahoe, but also that defendant *actually* knew there were others present. In general, a defendant has constructive knowledge of something under an objective test, if a reasonable person in defendant's position would have been aware of the fact. (See *Williams v. Garcetti* (1993) 5 Cal.4th 561, 574.) Actual knowledge is a subjective, not an objective state of mind. (See *People v. Chiu* (2014) 59 Cal.4th 155, 165.) Thus, defendant's shorthand results in ambiguous and confusing arguments.

Regardless, we reject defendant's contention that the trial court was required to give a specific instruction regarding actual or constructive knowledge. There is no requirement of actual or constructive knowledge that people in the area were within the kill zone. (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1022-

1023 (*Adams*).) "Kill zone victims can include those not seen by the defendant or of which the defendant is unaware. [Citations.]" (*People v. Windfield* (2016) 3 Cal.App.5th 739, 756, review granted Jan. 11, 2017, S238073.) A defendant may be convicted of attempted murder where he "intentionally created a kill zone in order to ensure the [his] primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die. Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm. [Citation.]" (*Adams*, *supra*, at p. 1023; see also *People v. Vang* (2001) 87 Cal.App.4th 554, 564, cited with approval in *Bland*, *supra*, 28 Cal.4th at p. 330.)

Defendant disagrees with *Adams* and contends that it is not persuasive authority against the "instructional obligation" regarding the "objective knowledge elemental issue" which defendant proposes here. Defendant contends that the California Supreme Court enunciated such a knowledge requirement in *Bland*, *supra*, 28 Cal.4th at pages 329-331, which was restated in *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*), and later "adopted" in *People v. Perez* (2010) 50 Cal.4th 222, *People v. Stone*, *supra*, 46 Cal.4th 131, and *People v. McCloud* (2012) 211 Cal.App.4th 788. Defendant relies on language in *Smith*, in which the court explained its holding in *Bland* by stating that "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. [Citation.]" (*Smith*, *supra*, at p. 746, italics added.) However, the quoted sentence states merely that defendant's knowledge that victims were in the zone of fatal harm will support a conviction; it does

not indicate that there *must* be such knowledge to support a conviction. Neither *Bland*, *Smith*, nor the other cases cited by defendant enunciated a rule that created a requirement of awareness that other persons were in the zone of fatal harm.

We decline defendant's invitation to reject the reasoning of *Adams*. Far from creating a stricter rule, the California Supreme Court gave an example of the concept in *Bland*, by quoting *People v. Vang*, *supra*, 87 Cal.App.4th at page 564, where the defendants had fired multiple shots toward an occupied house using high-powered, wall-piercing weapons in a pattern, from which a jury could reasonably infer that they "'harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.' [Citations.]" (*Bland*, *supra*, 28 Cal.4th at p. 330.) Thus, *Bland* did not adopt, explicitly or implicitly, a knowledge element for the kill zone theory, as defendant suggests. Nor did it adopt *any* element that must be explained to the jury, as the theory "is not a legal doctrine requiring special jury instructions, [but] 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." (*Bland*, *supra*, at p. 331, fn. 6.)

Defendant argues that there was "a paucity of evidence from which a reasonable juror could have concluded that [defendant] knew, or reasonably should have known, that there were other persons, other than Harrison, present inside of Harrison's Tahoe." Defendant has however, summarized only that evidence suggesting that defendant had no actual awareness of the presence of passengers in Harrison's car, and then concludes that the evidence failed to show that defendant had an "objective awareness" of their presence.

Contrary to defendant's conclusion, we find overwhelming evidence that defendant actually knew that at least one other person was in the car. Harrison parked in the parking lot of a liquor store and waited while Carter went in, made a purchase, and returned to the car; during which time, Carter saw defendant's car pass by. As defendant immediately began following Harrison's car as it left the parking lot, it is unlikely that defendant failed to see Carter emerge from the store and get back into the car. Carter was seated in the back seat, and as defendant drove up directly behind Harrison's vehicle, Carter could see defendant through Harrison's rear window. The jury could reasonably infer that defendant saw her looking back at him, and thus that defendant was actually aware there was at least one passenger in the car. The jury could also reasonably conclude that defendant saw Estis as he pointed the gun at Harrison at close range, since she was in the line of fire.[4]

Further, the evidence that defendant harbored the specific intent to kill the three victims was also overwhelming. At the intersection, defendant pulled directly alongside the Harrison vehicle, lowered his window, and sprayed at least eight bullets from a semiautomatic handgun into the driver's side of the white Tahoe. A shooter who fires eight gunshots at a group of people "surely has the specific intent to kill whomever he hits." (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1243.) Indeed, a jury could reasonably infer that defendant targeted all three victims, as bullets struck Harrison and Estis, and grazed Carter. Under such circumstances, no kill zone instruction was required at all, as spraying an occupied car with automatic weapon fire raises an

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[4] Defendant argues that the evidence showed he did not see Estis seated next to Harrison due to tinted windows; however, Carter described the tint as, "not black tinted like you cannot see anything."

reasonable inference that the shooter intended to kill everyone in the car, quite apart from any kill zone theory. (*Bland*, *supra*, 28 Cal.4th at pp. 330-331 & fn. 6; see *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"].)

E. Use of disjunctive

Defendant contends that the trial court erred by using the disjunctive "or" when instructing the jury that "[i]n order to convict the defendant of the attempted murder of [Estis] and [Carter], the People must prove that the defendant not only intended to kill [Harrison], but also either intended to kill [Estis] *or* [Carter] *or* intended to kill everyone within the kill zone."

Defendant compares the trial court's modified instruction with the modified version of CALCRIM No. 600 given in *People v. Falaniko* (2016) 1 Cal.App.5th 1234, as follows: "'In order to convict the defendant of the attempted murder of Meki Siafega as charged in count 2, Esther Vaafuti as charged in count 3, and Kelly Kese as charged in count 4, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Meki Siafega, Esther Vaafuti *and/or* Kelly Kese, *and/or* intended to kill everyone within the kill zone.'" (*Id*. at p. 1242.)[5] There, the appellate court concluded that the instruction

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[5] The use of the expression "and/or" in jury instructions was long ago condemned by the California Supreme Court and the courts of many other jurisdictions, as it makes possible a conviction couched in general and ambiguous terms. (*In re Bell* (1942) 19 Cal.2d 488, 499.) The court observed that the expression "cannot intelligibly be used to fix the occurrence of past events. A purported conclusion that either one or both of

misstated the law, explaining: "Even if the jury rejected the kill zone inference, the court's modification of the instruction with the disjunctive 'or' permitted the jury to convict on all charges of attempted murder in each of the three shooting incidents without finding specific intent as to each victim individually." (*People v. Falaniko*, *supra*, at p. 1244.)

The ambiguity in the instruction given here bears little resemblance to the instruction given in *Falaniko*. While the first part of the instruction suggests that the jury could convict defendant of the attempted murder of both women if it found an intent to kill either one or the other, it also conflicts with the second part the instruction, which suggests the converse. The court instructed: "If you have a reasonable doubt whether the defendant intended to kill Annie Estis or Marlesha Carter or intended to kill Michael Wayne Harrison by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Annie Estis *and* Marlesha Carter." (Italics added.) Thus, the language suggests (favorably to defendant) that the jury must find defendant *not* guilty of the attempted murder of *both* women if it found that he intended to kill just one of them, while at the same time, it instructs that if the jury found defendant did not intend to kill both women, it must acquit defendant unless it found that he intended to kill everyone within the kill zone.

Regardless, it does not appear that defendant was harmed by the erroneous instruction. Defendant contends that we must apply the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, under which respondent must demonstrate that the error was harmless beyond a reasonable doubt. However, "'"[m]isdirection of the jury, including incorrect, ambiguous,

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two events occurred is a mere restatement of the problem, not a decision as to which event actually occurred." (*Id*. at p. 500.)

conflicting, or wrongly omitted instructions that do not amount to federal constitutional error are reviewed under the harmless error standard articulated" in [*People v.*] *Watson* [(1956) 46 Cal.2d 818, 836].' [Citations.] '[U]nder *Watson*, a defendant must show it is reasonably probable a more favorable result would have been obtained absent the error.' [Citation.]" (*People v. Beltran* (2013) 56 Cal.4th 935, 955.)

Defendant contends that the erroneous instruction was prejudicial because there was a possibility that the jury convicted defendant of attempting to murder both women after finding an intent to kill only one of the two women. However, "the *Watson* test for harmless error 'focuses not on what a reasonable jury *could* do, but what such a jury is *likely* to have done in the absence of the error under consideration. In making that evaluation, an appellate court may consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.' [Citations.]" (*People v. Beltran*, *supra*, 56 Cal.4th at p. 956.)

The trial court instructed the jury with the elements of attempted murder, including the following language: "[T]he People must prove, that, number one, the defendant took at least one direct but ineffective step toward killing another person; and, two, the defendant intended to kill *that* person." (Italics added.) The court explained what was meant by a direct step, including the requirement that a direct step must be one that "indicates a definite and unambiguous intent to kill." Reading these instructions along with the second part of the modified CALCRIM No. 600, requiring the jury to acquit defendant of the attempted murder of both women if it found that he intended to kill only one of them, unless it found he intended to kill everyone

in the kill zone, lead us to conclude that the jury did not rely on the kill zone theory, but found that defendant specifically intended to kill both Estis and Carter. We have already found overwhelming evidence supporting such a finding, as well as a finding that in carrying out his intention to kill Henderson, defendant intended to kill everyone who might be in the car, and we have found no substantial evidence to the contrary. We thus discern no reasonable probability that the erroneous instruction affected the verdict.

II. Substantial evidence of gang enhancement

Defendant contends that evidence of the primary activities of the Rolling 40's gang and its pattern of criminal activities was insufficient to establish that the gang was a criminal street gang, a prerequisite to imposing the gang enhancement under section 186.22, subdivision (b).

A jury's true finding of the gang enhancement allegation is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657.) Thus, we review the evidence in the light most favorable to the judgment and we draw all inferences the jury could reasonably have drawn. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) "[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.)

An additional and consecutive punishment shall be imposed upon conviction of a felony or attempted felony "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "'criminal street gang' means any ongoing organization, association, or group of three or more

persons, whether formal or informal, having as one of its primary activities the commission of one or more of the [specified] criminal acts enumerated in . . . subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).) As relevant here, a "pattern of criminal gang activity" means the commission or conviction of two or more enumerated offenses, including robbery and attempted murder, where the last of such offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons. (§ 186.22, subd. (e)(2), (e)(3).)

The two required enumerated offenses, or "predicate offenses" need not be gang related, and may be proven with official court records establishing the convictions of two or more predicate offenses by members of the gang. (*People v. Gardeley* (1996) 14 Cal.4th 605, 610, 622-624 (*Gardeley*), disapproved on another point in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13 (*Sanchez*).) "[I]nstances of current criminal conduct can satisfy the statutory requirement for a 'pattern of criminal gang activity.'" (*People v. Loeun* (1997) 17 Cal.4th 1, 10-11.) In addition, the opinion of an expert as to the gang's primary activities may satisfy the requirement. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324 (*Sengpadychith*).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal

activity listed in the gang statute." (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324.) "Also sufficient might be expert testimony, as occurred in *Gardeley* . . . [where] a police gang expert testified that the [defendant's] gang . . . was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies[, basing] his opinion on conversations he had with [the defendant] and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies. [Citation.]" (*Sengpadychith*, at p. 324, quoting *Gardeley, supra*, 14 Cal.4th at p. 620.)

Defendant asserts that Officer Alvarez gave no specific information regarding how he reached his opinion that the primary activities of the Rolling 40's were robberies, murders, assaults with deadly weapons, including firearms, and possession and selling such narcotics as methamphetamine and cocaine. He relies on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander*) to illustrate his contention that the expert's testimony was insufficiently supported by a factual foundation. Any comparison to the facts of *Alexander* fails, however, as those facts were markedly different from the facts in this case. In *Alexander*, other than hearsay statements about two crimes committed in a single year, the entire testimony of the officer regarding the gang's primary activities consisted of the following: "'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic violations.'" (*Id.* at pp. 611-613.) There were no follow-up questions, no certified records of conviction, no testimony regarding extensive experience, personal contacts, or research, as in this case.

In contrast to the conclusory and insufficient offerings in *Alexander*, Officer Alvarez gave detailed testimony concerning the basis for his opinion, including his training, his several years of experience in Rolling 40's territory, his personal contacts with the Rolling 40's gang, his own investigation of the gang, his review of F.I. cards and police reports, as well as his inquiries to other officers with knowledge of the details of the gang's crimes. Further, Officer Alvarez's opinion regarding the primary activities of the Rolling 40's gang was supported by evidence of two predicate offenses committed by Williams (attempted murder) and Jillett (robbery), who were both members of the Rolling 40's gang, as well as by evidence of defendant's current offense. The convictions of Williams and Jillett were established with certified copies of court records, which were admissible and presumptively reliable. (See *People v. Duran* (2002) 97 Cal.App.4th 1448, 1461; Evid. Code, § 452.5, subd. (b).)

Defendant suggests that in *Sanchez*, the California Supreme Court disapproved an expert's reliance on such hearsay as police reports and interviews with other officers. We disagree. *Sanchez* reaffirmed the rule that inadmissible hearsay may not be admitted under the guise of expert opinion when it is based on "case-specific," "out-of-court statements" of "which [the expert] has no personal knowledge," and that "relat[e] to the particular events and participants alleged to have been involved in the case being tried." (*Sanchez, supra*, 63 Cal.4th at pp. 676-679, 684, 686.) However, "an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds." (*Id*. at pp. 676.) Thus, to demonstrate a "pattern of criminal gang activity" an expert may still rely on knowledge gained in his training, investigations, personal experience and contacts, and research, to testify about

gang behavior or descriptions of a particular gang's conduct and its territory. (*Id*. at pp. 685, 698.)

Defendant also contends that the reasoning of *Sanchez* requires that the Williams and Jillett convictions be disregarded in the substantial evidence analysis, because Officer Alvarez's testimony that they were members of the Rolling 40's gang was not based on his personal knowledge. As those convictions did not involve the case being tried, Officer Alvarez properly testified from information gained from his research which included reading a report and speaking to an arresting officer. (See *Sanchez*, *supra*, 63 Cal.4th at pp. 676, 685, 698.) Further, as defendant did not object to the testimony as hearsay, it must be considered as competent evidence for purposes of a substantial evidence review. (See *People v. Panah* (2005) 35 Cal.4th 395, 476.)

Defendant contends that evidence of just three predicate crimes over a three-year period was insufficient proof that the predicate crimes were "consistently and repeatedly" committed, because Officer Alvarez testified that there were 500 members of the Rolling 40's gang. Proof of primary activities may be satisfied by *either* evidence that crimes were "consistently and repeatedly" committed, *or* by the opinion of an expert, based on his experience, investigations, and information obtained from other police officers. (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324.) Defendant again relies on a comparison to *Alexander*, and again, defendant's comparison fails, as that expert did not give an opinion that the crimes mentioned were the gang's primary activities, and there was no other evidence of predicate crimes. (See *Alexander*, *supra*, 149 Cal.App.4th at pp. 611-612.) Defendant's reliance on *People v. Perez* (2004) 118 Cal.App.4th 151, also fails, as there was no expert testimony in that case regarding the primary activities of the gang. (See *id*. at p. 160.)

Here, the primary activities requirement was sufficiently supported by Officer Alvarez's testimony.

We conclude that the gang enhancement, and in particular, the finding that the Rolling 40's was a criminal street gang whose primary activities included robbery and attempted murder, were supported by substantial evidence.

III. Section 654 is inapplicable (counts 2 and 3)

Defendant contends that the gang enhancements imposed as to the attempted murders of Carter and Estis (counts 2 & 3), must be stayed pursuant to section 654, which provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

Defendant acknowledges that the multiple victims exception to section 654 was applied in *People v. Bragg* (2008) 161 Cal.App.4th 1385 (*Bragg*) to impose gang enhancements for each of two attempted murders of separate victims under circumstances similar to those in this case. The *Bragg* court in turn relied on *People v. Oates* (2004) 32 Cal.4th 1048, 1063, which held that section 654 does not apply to violent acts against multiple victims. (*Bragg*, *supra*, at pp. 1402-1403.) Defendant suggests that *Bragg* should be rejected as unpersuasive because it considered only the fact that there were multiple victims. Noting that the enhancement is imposed due to the *intent* to promote, further, or assist the gang, defendant reasons the intent is not itself a crime of violence; thus it cannot come within the multiple victims exception.

We need not find *Bragg* persuasive or unpersuasive, as its reasoning was rendered unnecessary by the publication of *People v. Correa* (2012) 54 Cal.4th 331 (*Correa*). In *Correa* the

California Supreme Court disapproved dictum in *Neal v. State of California* (1960) 55 Cal.2d 11, 18, footnote 1, indicating that section 654 might also apply to violations of the same provision of law. The court held: "By its plain language section 654 does not bar multiple punishment for multiple violations of the same criminal statute"; instead, "the express language of section 654 applies to an act that is punishable in *different* ways by *different* provisions of law." (*Correa*, *supra*, at pp. 334, 337, see also pp. 341, 344.) The court explained that it had previously declined to follow the *Neal* footnote in cases of sexual assaults against one victim and violent crimes committed against multiple victims. (*Ibid*.) Now, as the plain language of the statute controls over the *Neal* footnote, it follows that such exceptions are no longer necessary.

Thus, section 654 is inapplicable here. Defendant was convicted of three counts of attempted murder in violation of the same statute (§ 187/664), and the gang allegation as to each was found true. Section 186.22, subdivision (b), expressly requires punishment "in addition and consecutive to the punishment prescribed" for each crime.

IV. Presentence credit

Defendant contends that he is entitled to one additional day of presentence custody credit, as the trial court's math was wrong. Respondent agrees. The court found that defendant was entitled to credit for 458 actual days spent in custody. As defendant was convicted of attempted murder, a violent felony, he was entitled to no more than 15 percent of the actual days as conduct credit. (See § 2933.1, subds. (a) & (c); 667.5, subd. (c)(12).) Fifteen percent of 458 days is 68.7, which must be rounded down to the highest number less than the maximum allowed. (See *People v. Ramos* (1996) 50 Cal.App.4th 810, 815-816.) The result is 68, not the 67 days calculated by the trial

court. We thus amend the judgment accordingly. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.)

V. Habeas Corpus

After briefing was complete in this case, defendant filed a petition for writ of habeas corpus under case No. B279510. After an initial review of the petition, it was ordered it to be considered concurrently with this appeal. The sole ground for relief alleged in the petition is stated as follows: "The trial court denied Petitioner due process under the Sixth and Fourteenth Amendments when it excluded Petitioner's proffered Eyewitness Identification expert from testifying at trial." The only stated reason for not raising this issue on appeal is "because the proffered statement from the eyewitness expert (attached as Exhibit A) was not part of the appellate record." Defendant has attached excerpts from the trial record reflecting that he offered the testimony of an eyewitness expert at trial. The trial court excluded it on the ground that defendant's identity was independently corroborated by other evidence.[6] The trial court indicated that it would revisit the issue if defendant testified. Our review of the appellate record shows that defendant subsequently testified, but did not renew the issue of expert eyewitness evidence.

In his petition, defendant contends that the trial court erred, because the there was no substantial evidence supporting

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[6] The court relied on *People v. Lucas* (2014) 60 Cal.4th 153, 277 (disapproved on another point in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19). In *Lucas*, the California Supreme Court held that exclusion of expert testimony on eyewitness identification is "'justified . . . if there is other evidence that substantially corroborates the eyewitness identification and gives it independent reliability.' [Citation.]" (*Lucas*, at p. 277; see also *People v. Jones* (2003) 30 Cal.4th 1084, 1112.)

the finding of corroboration. A claim that the trial court erroneously excluded evidence may not be raised by habeas corpus when it was or could have been raised on appeal. (*In re Harris* (1993) 5 Cal.4th 813, 829; *In re Dixon* (1953) 41 Cal.2d 756, 759.) Further, a claim that the trial court's evidentiary ruling violated the Fourteenth Amendment is not cognizable in a habeas proceeding. (See *Harris*, *supra*, at pp. 830, 834.) As we conclude that the petition fails to state a prima facie case for relief, we summarily deny it by separate order.

DISPOSITION

The judgment is modified to add one additional day to defendant's presentence custody credit, for a total of 526 days, comprised of 458 actual days in custody and 68 days of conduct credit. The trial court is directed to prepare an amended abstract of judgment reflecting the modified presentence custody credit, and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. As so modified and in all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT