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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID JOSEPH MADRID, Defendant and Appellant.	B229781 (Los Angeles County Super. Ct. No. BA332987)

APPEAL from a judgment of the Superior Court of Los Angeles County, John S. Fisher, Judge. Affirmed as Modified.

Carla Castillo, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant David Joseph Madrid of three counts of assault with a firearm (§ 245, subd. (a)(2))[1] with findings that he committed the assaults to benefit a street gang (§ 186.22, subd. (b)(1)(A)); that he personally inflicted great bodily injury upon the victims (§ 12022.7, subd. (a)); and that he personally used a firearm (§ 12022.5, subd. (a) & (d)). In addition, the jury convicted him of three counts of attempted murder (§§ 664/187, subd. (a)) with findings that each attempted murder was committed willfully, deliberately and with premeditation (§§ 664/187, subd. (a)); that he committed each crime to benefit a street gang (§ 186.22, subd. (b)(1)(A)); that he personally inflicted great bodily injury upon the victims (§ 12022.7, subd. (a)); that he personally used a firearm (§12022.53, subd. (b)); that he personally and intentionally discharged a firearm (§12022.53, subd. (c)); that he personally and intentionally discharged a firearm causing great bodily injury to the victims (§12022.53, subd. (d)); and that during the commission of the offense for the benefit of a street gang, a principal personally used a firearm (§ 12022.53, subd. (e)). In addition, defendant admitted that he had suffered two prior convictions. The trial court sentenced him to an aggregate term of 122 years to life in state prison.

In this appeal, defendant advances multiple and varied contentions. Other than correcting a minor error regarding computation of custody credits, we find no merit to his contentions and therefore affirm the judgment as modified.

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

STATEMENT OF FACTS

The crimes are gang-motivated. Defendant is a member of the Arizona Maravilla gang. He shot three men in the territory of the rival Mariana Maravilla gang.

During the evening of November 3, 2007, a group of friends gathered at the home of Rigoberto Meza located in East Los Angeles. Two of them, Roberto Romero and a man identified only as Josue, walked to a nearby store. As they returned to Meza's home, a black Cadillac driven by defendant (who had a shaved head) and a blue Honda Civic driven by an unidentified man pulled up alongside them. Each car's headlights were turned off. A man alighted from the Honda and asked Josue "Hey, what's up? Where you from?" Josue replied: "No, we're from nowhere." After Romero told the men to leave them alone, six or seven men (including defendant) exited the two cars and began chasing Romero and Josue who ran toward Meza's home. Some of the men carried bats; defendant was armed with a revolver.

At this point, Meza, Jose Beltran, Pedro Covarrubias and several other men left Meza's home and ran towards Romero and Josue. Defendant shot at the group with a black .38 caliber revolver as he stood behind a pole.[2] Romero, Covarrubias, and Beltran were hit and each sustained serious injuries. After the shooting, defendant threw a gang sign, "AMV," with his fingers. Omar Arredondo, a neighbor, witnessed the shootings.

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[2] Some evidence was presented that there was an unidentified second shooter. We will set forth this evidence when we discuss defendant's contention that the evidence is insufficient to sustain the jury's findings that he *personally* inflicted great bodily injury on the three victims.

Law enforcement arrived shortly thereafter. No gun casings were found at the scene, a fact consistent with a revolver having been used. The three victims were transported to the hospital and treated for gunshot wounds.

On November 29, 2007, Detective Jorge Valdez executed a search warrant at defendant's home and arrested defendant. Defendant's head was shaved, just as the witnesses to the shooting had described him. The black Cadillac that defendant had driven the night of the shooting was parked in the driveway. In defendant's room, the detective found the keys to the black Cadillac as well as gang-related paraphernalia. Multiple receipts with defendant's name were found in the black Cadillac. In the backyard of the home, the police recovered from under a pallet a loaded and operable chrome .357 Colt Python revolver wrapped in a towel. The firearm was not registered.

Detective Valdez, qualified as a gang expert, testified as follows. The Arizona Maravilla gang was established in the mid-1970's and has 40 to 50 members. Its primary activities include vandalism, narcotics sales, shootings, attempted murders and murder. Defendant "is a very hardcore [self-admitted] gang member. He's down. He's very well respected within not only his own gang but other gangs." Defendant's gang moniker is "Drifter," the name by which several witnesses to the shooting identified him. Defendant has several Arizona Maravilla gang tattoos.

In response to a hypothetical question based upon the evidence produced at trial, Detective Valdez opined that the shootings were committed to benefit the Arizona Maravilla gang by scaring and intimidating the community in an area controlled by the rival Mariana Maravilla gang.

Following his arrest, defendant remained in custody pending his preliminary hearing. His visits at the jail were recorded. In several conversations, defendant told his visitors that he was deliberately changing his appearance (e.g., growing his

hair long, shaving and gaining weight) to avoid being identified at the preliminary hearing and in a lineup.[3,4]

At trial, defendant testified on his behalf. He had been in the Arizona Maravilla gang as a teenager but was no longer a member. He raised an alibi defense to the charges: he was in Montebello with "a big household" at the time of the shootings. Further, he testified that the black Cadillac was not operable on November 3, 2007. As for the chrome revolver the police found hidden in his backyard, first he testified that it was not his but then explained: "I take full responsibility because it's in that household on that property so I can't really say that it's not mine, you know? . . . [My family has] registered firearms too, but in this case it was an unregistered one."

Defendant presented no witnesses to support his alibi defense.

DISCUSSION

A. DENIAL OF MOTION TO DISCHARGE RETAINED COUNSEL

Defendant contends that the trial court abused its discretion in denying his motion to discharge retained counsel and to replace him with another privately retained attorney. Defendant, who had a history of changing counsel, made the motion on the day set for trial, immediately before voir dire was to commence. The case had been pending in the superior court for over two years and both parties were ready to proceed. Defendant's choice for new counsel was not prepared to

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[3] The trial court submitted a modified version of CALCRIM No. 371 ("Consciousness of Guilty: Suppression and Fabrication of Evidence") to the jury.

[4] At trial, Romero (one of the victims) testified that he could not make an in-court identification of defendant "because of his hair. I can't recognize him because in my mind he was bald." Meza, who witnessed the shooting, testified that defendant "didn't look like that at that time. [He] was bald. He has hair right now, you know?"

try the case that day. The trial court denied the motion as untimely. We explain below in detail why the ruling was not an abuse of discretion. As we noted in *People v. Keshishian* (2008) 162 Cal.App.4th 425, "'"[t]he right to counsel cannot mean that a defendant may continually delay his day of judgment by discharging prior counsel,"' and the court is within its discretion to deny a last-minute motion for continuance" to permit new counsel time to prepare. (*Id*. at p. 429.)

1. *Factual and Procedural Background*

The crimes were committed on November 3, 2007.

Defendant was arrested on November 29, 2007.

On April 21, 2008, the preliminary hearing was conducted. Anthony Contreras, privately retained counsel, represented defendant.

On May 5, 2008, the information was filed and defendant was arraigned. That day, the trial court relieved Contreras as defendant's attorney and appointed alternate public defender Francis Bennett.

On May 20, 2008, the Alternate Public Defender's office declared a conflict and Bennett was relieved as counsel. The trial court appointed Samuel Saltalamacchia, an ICDA bar panel attorney, as defendant's counsel. Saltalamacchia indicated the case would soon be reassigned to another attorney and asked the matter to be set over for two weeks. Trial was set for July 11, 2008.

On June 2, 2008, the trial court appointed bar panel attorney Judith Rochlin to represent defendant and vacated the trial date.

On November 7, 2008, the parties appeared on discovery issues. The trial court continued the matter for several months, stating: "[T]his case is quite old" and "There is not going to be any further continuance."

On February 9, 2009, the trial court, after proper advisements and waivers, granted defendant's motion to represent himself. (*Faretta v. California* (1975) 422

U.S. 806.) The court relieved Rochlin as counsel and appointed her as stand-by counsel.

On March 4, 2009, the trial court granted Rochlin's motion to be relieved as stand-by counsel. Defendant stated he intended to be ready for trial in 45 days. The trial court told him: "[Y]ou're not getting any more continuances."

On March 13, 2009, the trial court appointed Jeff Yanuck as stand-by counsel.

On May 28, 2009, the parties appeared regarding a *Pitchess* motion. During the hearing, the trial court informed defendant it would grant him "one more continuance of 60 days and then that's it." "You were arraigned a year ago. . . . [¶] The People have the right to get the case to trial in a reasonable time period because they have to rely on witness memories and whatnot." In a similar vein, the court suggested to defendant that if he intended to "give up [his] pro. per. status, [he should] do it soon so that [he could] get an attorney who has the chance to get this case ready for trial, pick up where you've left off. . . . I'm not going to have an attorney come in here 60 days from now and say they want a continuance. The case is too old."

On July 1, 2009, the trial court rejected defendant's request to be appointed co-counsel with Yanuck. The trial court again told defendant that if he was considering being represented by Yanuck, he should decide sooner rather than later because it would not grant him any extension if he decided "at the last minute." The court stated that it would not give defendant "a continuance beyond 90 days from now." The prosecution objected to a continuance of that length.

On July 29, 2009, the matter was called because defendant had chosen to withdraw his pro. per. status. Pursuant to defendant's request, the trial court appointed Yanuck as defense counsel.

In September 2009, Yanuck successfully moved to continue the matter.

On December 7, 2009, the court continued the trial date to January 11, 2010, indicating that no further continuances would be granted. Yanuck still represented defendant.

In January 2010, defendant elected *again* to be represented by privately retained counsel. On January 11 (the date set for trial), Nicolas Estrada appeared and asked to substitute in for Yanuck and to continue the matter. The prosecutor did not oppose the request, stating: "I honestly believe defendant's current counsel, Mr. Yanuck, may have a potential conflict." The trial court relieved Yanuck, substituted Estrada as defense counsel, and, finding good cause, continued the matter to March 2, 2010.

From March 2 through June 11, the court continued the matter four times, primarily because Estrada was engaged in trial. The court stated several times that it would grant no further continuances.

On June 11, both parties announced ready for trial.

On June 17, the case was called for a jury trial and then continued to June 23.

On June 23, the parties again announced ready for trial. That morning, the case was transferred to Department 115 "forthwith for trial."

In Department 115, each side reiterated it was ready for trial. The prosecutor stated that he intended to call four or five civilian witnesses (including the three victims), "several" police officers from a group of seven, and two expert witnesses. The prosecutor noted that "if witnesses recant or choose not to testify truthfully . . . or forget things[,] . . . I have recorded statements of all five of my civilian witnesses." Defense counsel Estrada stated that he intended to move to dismiss three counts in the amended information. Both parties indicated that an Evidence Code section 402 hearing would be required to determine the admissibility of the recordings of defendant's jailhouse visits. The court recessed

for lunch, stating that when the parties returned, "we'll rule on your motion, your argument and go from there."

When proceedings resumed in the afternoon, the following colloquy occurred.

> "THE COURT: On the record in the trial matter. The defendant's present.
>
> "We have a representation issue to go over before we bring in the jury. So we'll get – Mr. Estrada's present.
>
> "MR. ESTRADA [Defense Counsel]: Yes.
>
> "THE COURT: We have another gentleman here who's an attorney. We'll get his name for the record, his request or statement and then go from there.
>
> "MR. CONTRERAS: Thank you, Your Honor. Anthony Contreras seeking to substitute in *at this late stage in the game*, Your Honor.
>
> "THE COURT: Okay. And, for the record, you did represent him at the prelim?
>
> "MR. CONTRERAS: I did represent him at prelim, Your Honor. I am familiar with the facts of the case.
>
> "*I could not say that I'm ready to pick a jury today*, but I think if the court, you know, I've known the defendant. I've represented him in the past in a juvenile matter.
>
> "*The family sought me out last week. I don't know why*, but they did seek me out last week. I did notify court and counsel that I *may* be seeking to substitute in and so that's my request now that I have been retained as the family has – was able to get some funds together and pay me to come here.
>
> "THE COURT: I understand.

> "MR. CONTRERAS: So I am making the request. And I understand the court is in a difficult position.
>
> "THE COURT: I understand. I thank you. I'll ask the D.A. if he knows just to give me a history of the representation versus public lawyer, appointed lawyer, pro. per., private lawyer." (Italics added.)

The District Attorney reviewed the history of defendant's representations in the case and concluded: "I'm ready to go for trial and I would object to any continuance at this point."

The trial judge explicitly denied defendant's motion as "untimely." He noted to Attorney Contreras: "It would also seem there's no guarantee that you would even stay on the case in the future in light of the history of the representations."[5]

Thereafter, the trial court heard and denied the defense motion to dismiss the amended information[6] and commenced jury selection.

2. *Discussion*

"The right of a nonindigent criminal defendant to discharge his retained attorney, with or without cause, has long been recognized in this state [citations]." (*People v. Ortiz* (1990) 51 Cal.3d 975, 983.) "Because the right to discharge retained counsel is broader than the right to discharge appointed counsel, a *Marsden*-type hearing at which the court determines whether counsel is providing

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[5] The trial court was prescient. After the jury found defendant guilty, defendant discharged Estrada and elected, again, to represent himself. After approximately a month, defendant successfully moved to withdraw his pro. per. status and to have Contreras substitute in as retained counsel. Contreras represented defendant through sentencing.

[6] In this appeal, defendant does not assign that ruling as error.

adequate representation or is tangled in irreconcilable differences with the defendant is '"[an] inappropriate vehicle in which to consider [the defendant's] complaints against his retained counsel."' [Citations.]" (*People v. Keshishian, supra*, 162 Cal.App.4th at p. 429.) Nonetheless, the right to discharge retained counsel is not absolute. (*Id*. at p. 428.) The trial court may deny a request to discharge retained counsel "if it is not timely, i.e., if it will result in 'disruption of the orderly processes of justice' [citations]." (*People v. Ortiz, supra*, 51 Cal.3d at p. 983.) This is because the defendant's Sixth Amendment right to obtain counsel of his choice is necessarily limited by "'"the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of 'assembling the witnesses, lawyers, and jurors at the same place at the same time.'"' [Citation.]" (*People v. Keshishian, supra*, 162 Cal.App.4th at p. 428.)

The trial court's denial of a motion to discharge retained counsel is reviewed for an abuse of discretion. (*People v. Ortiz, supra*, 51 Cal.3d at pp. 983-984.) The trial court abuses its discretion if it bases its decision on impermissible factors. (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) On appeal, it is the defendant's burden to establish an abuse of discretion. (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850.) If the defendant establishes the trial court abused its discretion in denying his motion to discharge retained counsel, reversal is automatic. (*People v. Ortiz, supra*, 51 Cal.3d at pp. 987-988.)

Here, the trial court's denial of defendant's motion as untimely was not an abuse of discretion. When defendant moved to discharge Estrada and substitute Contreras in his place, the case had been pending in the superior court for more than two years. Defendant's representation had changed multiple times in that period. Two different court-appointed attorneys (Rochlin and Yanuck) had represented him for significant periods and, for the six months prior to the

substitution request, privately retained Estrada had represented him. In addition, for five months, defendant had been in pro. per., assisted by two different stand-by counsel. The trial court had granted numerous continuances, and, since November 2008 (six months after the information had been filed), had consistently admonished the defense that it would not entertain further continuances.

On the day of the motion to discharge, each party was ready to commence trial. The prosecutor indicated he would call, at least, nine or ten witnesses, (including four or five civilian witnesses) and objected to any continuance at that point. Defense counsel Estrada was prepared to argue two pretrial motions. A jury panel was available. Contreras explicitly stated he was not ready to begin jury selection. Further, Contreras did not indicate he was prepared to argue any of the pretrial motions or that he had reviewed any of the discovery provided since the preliminary hearing. Consequently, a continuance of an uncertain length would have been required if the trial court had granted the motion and substituted Contreras in Estrada's place. That Contreras had represented defendant at the preliminary hearing more than two years earlier[7] and had represented him in the past in a juvenile case[8] does nothing to change that conclusion. In addition, because the prosecutor had indicated a concern over the reluctance or refusal of civilian witnesses to testify truthfully, the trial court could have reasonably concluded that a continuance would have unreasonably impacted the People's

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[7] At the preliminary hearing, the People called only three witnesses: two police officers and one of the victims.

[8] The December 17, 2007 probation report indicates that juvenile court petitions were sustained against defendant in 2000 and 2001. Assuming that Contreras represented defendant in one or both of these matters, nothing in the record suggests any nexus between that representation and the present case (a multi-count felony prosecution).

ability to proceed.[9] We therefore reject defendant's claim that the "record contains no basis for [the trial court] finding the motion was untimely." (See *People v. Keshishian, supra*, 162 Cal.App.4th at p. 429 [request to discharge retained counsel made on day set for trial properly ruled untimely]; *People v. Turner* (1992) 7 Cal.App.4th 913, 918-919 [motion to discharge retained counsel on day of trial would properly have been denied]; *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [finding request untimely when "made literally the moment jury selection was to begin"]; see also *People v. Hernandez* (2006) 139 Cal.App.4th 101, 109 [request to discharge retained counsel properly denied, having been "made almost immediately before jury selection was to begin in a two-defendant case"].)

Defendant's two contrary arguments are not persuasive.

First, relying upon *People v. Chavez* (1980) 26 Cal.3d 334 (*Chavez*), defendant argues that the trial court abused its discretion because it never gave him an opportunity to explain his reason(s) for seeking to substitute Contreras for Estrada. *Chavez* does not support this argument. *Chavez* did not involve a defendant's attempt to discharge retained attorney, but, instead, a defendant's request that the appointed attorney who had represented him at the preliminary hearing be appointed to represent him at trial. The superior court refused to give the defendant an opportunity to explain his reasons for that request and appointed different counsel for him. (*Id*. at pp. 340-341.) Relying upon decisional law, *Chavez* concluded that in that particular situation, the trial court abused its

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[9] The prosecutor's concerns were well-founded. Romero (one of the victims) testified at trial that he was scared. Meza, a witness to the shootings, testified that he had received multiple threats not to testify at trial. And at the sentencing hearing, the prosecutor told the court: "I spoke with the investigating officer. The victims are uncooperative and do not want to come to court. They are afraid . . . to come back." The court replied: "Understood."

discretion in not giving the defendant an opportunity to explain his request. (*Id*. at p. 346.)

In contrast to the situation addressed by *Chavez* (a request that the court appoint a specific attorney to represent the indigent defendant), decisional law holds that in making a request to discharge retained counsel, the defendant is *not* required to explain his request by showing inadequate representation or irreconcilable conflict, and that, in fact, to require such a showing is error. (*People v. Ortiz, supra,* 51 Cal.3d at pp. 984 and 987; see also *People v. Hernandez, supra,* 139 Cal.App.4th at p. 108 and *People v. Lara* (2001) 86 Cal.App.4th 139, 155.) It therefore follows that the trial court was not obligated to ask defendant to give his reasons for seeking to discharge Estrada and such a request, depending on how phrased, could well have constituted error. In any event, nothing in the colloquy set forth earlier suggests that defendant requested an opportunity to explain why he sought to discharge Estrada and to retain Contreras and that the trial court rebuffed that request.[10]

Second, defendant argues that the trial court erred in finding his motion untimely because a grant of his motion would have required only a "brief" continuance and thus would not have disrupted the proceedings. Defendant's argument relies upon a one-sided interpretation of the facts and essentially asks us to reweigh all the pertinent factors and to substitute our judgment for that of the trial court. This approach is not persuasive. "When the question on appeal is whether the trial court abused its discretion, the [defense] showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial

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10 Contreras specifically advised the court that he did not know why defendant wished to substitute him in Estrada's place. He said: "The [defendant's] family sought me out last week. *I don't know why.*" (Italics added.)

court. [Citation.] A trial court's exercise of discretion will not be disturbed unless it appears that . . . the court[']s ruling] exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) As explained earlier in detail, the trial court's finding that the motion was untimely did not exceed the bounds of reason and thus cannot be considered an abuse of discretion.[11]

B. FAILURE TO PLEAD THE THREE ATTEMPTED MURDER COUNTS AS WILLFUL, DELIBERATE AND PREMEDITATED

The trial court sentenced defendant to three consecutive life sentences on his convictions for the attempted willful, deliberate and premeditated murders of Beltran, Covarrubias, and Romero. Defendant contends that the life sentences must be set aside and the matter remanded for resentencing to determinate terms because the information failed to allege that the crimes were willful, deliberate and premeditated. Based upon recent authority from our Supreme Court, we find that the contention has been forfeited.

1. *Factual Background*

The operative pleading, the amended information, charged defendant with three counts of attempted murder. The pleading did not include an allegation that the attempted murders were willful, deliberate and premeditated.

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[11] To a certain extent, defendant suggests that the trial court's ruling that his request was untimely was deficient because it did not specify the reasons underlying that conclusion. That approach is not persuasive. For one thing, there is no such requirement. (See *People v. Turner, supra,* 7 Cal.App.4th at p. 919, fn. 8.) Further, it ignores the well-settled principle that as a reviewing court, we must imply all findings, reasonably supported by the record, that support the trial court's ruling. (*People v. Mosley* (1997) 53 Cal.App.4th 489, 496.)

As indicated earlier, immediately before jury selection commenced, defense counsel orally moved, pursuant to section 995, to dismiss the three attempted murder counts based on insufficient evidence. The trial court reviewed the transcript of the preliminary hearing and asked the prosecutor to respond. The following colloquy occurred:

> "[THE PROSECUTOR]: I'd just argue that for the standard of determining probable cause that three people were actually shot and at least by one of them the defendant was identified as the shooter. I think that's sufficient to uphold an attempt murder.
>
> "THE COURT: Yeah, I agree. I mean, so the motion to dismiss the attempted murder – *are they alleged to be premeditated* or just – let's double check.
>
> "[THE PROSECUTOR]: *I believe they are. I would submit to the premeditation as to the nature of the way the cars pulled up*.
>
> "It seemed to be an organized attack. There were multiple guns, multiple shooters, multiple people involved.
>
> "THE COURT: I think for purposes of a prelim, you know, *there's enough to hold somebody to answer on a premeditation* based on that. . . . I'll allow it." (Italics added.)

The matter proceeded to trial.

At the close of trial, the parties discussed jury instructions. The trial court stated that the attempted murder charges "are specific intent with the mental state involving premeditation potentially." Defense counsel did not object to this characterization of the charges. The court stated that it intended to submit CALCRIM No. 601 explaining to the jury that if it found defendant guilty of attempted murder, then it must decide whether the crime was done willfully and

with deliberation and premeditation as defined by the instruction. Defense counsel did not object to submission of this instruction.

In closing argument, the prosecutor relied upon CALCRIM No. 601 to argue that the attempted murders were premeditated. Defense counsel's argument centered on the sufficiency of the evidence to identify defendant as the shooter; he did not challenge the prosecutor's assertion that the attempted murders were willful, deliberate and premeditated.

The jury found true the allegation that the three attempted murders were committed willfully, deliberately and with premeditation.

The prosecutor's sentencing memorandum sought imposition of a life term on each attempted murder conviction.

Without any objection from the defense, the trial court sentenced defendant to a consecutive life term (plus enhancements) on each of the three counts.

2. *Discussion*

Attempted murder, unlike murder, is not separated into different degrees. (*People v. Bright* (1996) 12 Cal.4th 652, 654-655, 658.) However, pursuant to section 664, subdivision (a), "the punishment for attempted murder can be increased from the prescribed maximum determinate term to a life sentence when it is pleaded and proved that the murder attempted was willful, deliberate, and premeditated. [Citations.]"[12] (*People v. Arias* (2010) 182 Cal.App.4th 1009, 1011,

[12] Subdivision (a) of section 664 provides, in relevant part: "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. . . . The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact."

fn. 2 (*Arias*).) But "[u]nless the jury finds this premeditation allegation to be true, a defendant convicted of attempted murder is subject to a determinate sentence of five, seven, or nine years. (§ 664(a).)" (*People v. Seel* (2004) 34 Cal.4th 535, 541.) Section 664, subdivision (a) therefore "constitutes a penalty provision increasing the punishment for attempted murder beyond the maximum otherwise prescribed." (*People v. Lee* (2003) 31 Cal.4th 613, 616.)

Defendant contends that the People's failure to formally allege that the attempted murders were willful, deliberate and premeditated requires us to set aside the jury's findings on that issue and remand the case for resentencing. We disagree. Based upon our Supreme Court's recent opinion in *People v. Houston* (2012) 54 Cal.4th 1186 (*Houston*), we find that the contention has been forfeited. Defendant had opportunities in the trial court to object to the prosecution's theory of willful, deliberate and premeditated attempted murders and to the jury's consideration of that theory but failed to do so.

In *Houston*, the defendant was charged, among other crimes, with 10 counts of attempted murder. (*Id*. at p. 1226.) Similar to this case, the charging indictment failed to allege that the attempted murders were willful, deliberate and premeditated. However, the issue came up three times during trial, but on none of those occasions did defense counsel object. The first time was during presentation of the defense case. The trial court presented the parties with a preliminary draft of the verdict forms, indicating that the jury would be asked to determine if the attempted murders were willful, deliberate and premeditated. The court stated that it believed that was the prosecution's theory and that findings on that issue would increase the defendant's sentence to life imprisonment. The court asked the parties if its understanding was correct. Defense counsel did not object. (*Ibid*.) The second time was approximately a week later when, during the case, the court announced it would submit verdict forms on the theory of a premeditated

attempted murder. Again, defense counsel did not object. (*Ibid*.) Lastly, after the close of evidence, the trial court instructed the jury. It defined attempted murder and told the jury that if it found defendant had committed attempted murder, the jury was to determine if the attempted murder was willful, deliberate and premeditated. Defense counsel did not object to use of those instructions. (*Ibid*.) The jury found the ten attempted murders were willful, deliberate and premeditated.

On appeal, the defendant contended that the findings had to be set aside. He urged that his due process right to fair notice of allegations that would be invoked to increase his punishment had been violated because the indictment had failed to comply with the pleading requirements of section 664, subdivision (a). The Supreme Court was not persuaded. After reviewing the three instances during trial in which the defense had been informed that the jury would be called upon to determine whether the attempted murders were willful, deliberate and premeditated, *Houston* concluded: "Had defendant raised a timely objection to the jury instructions and verdict forms at any of these stages of the trial on the ground that the indictment did not allege that the attempted murders were deliberate and premeditated, the court could have heard arguments on whether to permit the prosecutor to amend the indictment. [Citation.] If the trial court was inclined to permit amendment, defendant could have requested a continuance to permit him to prepare a defense. [Citation.] On the facts here, defendant received adequate notice of the sentence he faced, and the jury made an express finding that the attempted murders were willful, deliberate, and premeditated. A timely objection to the adequacy of the indictment would have provided an opportunity to craft an appropriate remedy. Because defendant had notice of the sentence he faced and did not raise an objection in the trial court, he has forfeited this claim on appeal. [Citation.]" (*Id*. at pp. 1227-1228.)

The same is true in this case. Shortly before trial began, defense counsel orally moved to set aside the amended information. (§ 995.) In the course of discussing that motion, both the trial court and the prosecutor stated their belief that the information alleged that the attempted murders were willful, deliberate and premeditated. Defense counsel did not object to this characterization of the charging pleading. If he had objected, the trial court could have considered whether to allow the prosecutor to file another amended information. Further, we agree with the Attorney General that given the colloquy surrounding the section 995 motion, "it appears the parties mistakenly believed the premeditation allegation was properly alleged in the amended information, and that the trial court's denial of [the] motion made certain [defendant] was aware that the allegation remained."

In addition, after the close of evidence, the parties discussed jury instructions. The trial judge stated that defendant was charged with willful, deliberate and premeditated attempted murders. Defense counsel did not disagree. The trial judge stated his intent to submit CALCRIM No. 601 directing the jury to decide the truth of that allegation. Defense counsel did not object. And without any objection from defense counsel, the court supplied the jury with verdict forms in which it was to indicate whether it found the allegation of a willful, deliberate and premeditated attempted murder to be true. Again, if defendant had objected to the jury instructions or verdict forms, the trial court could have considered the propriety of permitting another amended information.

On the totality of this record, we conclude that defendant received adequate notice that the People were proceeding on the theory of willful, deliberate and premeditated attempted murders. While it is true that, unlike *Houston*, the trial court never expressly told defendant that the allegation of a willful, deliberate and

premeditated attempted murder increased his potential sentence to a life term, we do not find that point material.

For one thing, if the People, in response to a timely defense objection, had filed another information with the required allegations, defendant would simply have been arraigned on the new pleading. The new allegations would have been read to him but there is no requirement that he be informed of their potential affect on his sentence. (4 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Pretrial Proceedings, §§ 252 & 257, pp. 516-517, 522.)

Further, given defendant's theory of case (as set forth in his testimony and counsel's closing argument) that he was not present at the crime scene and had no involvement in the shooting, he could not have been harmed by any failure to inform him of the sentence for a willful, deliberate and premeditated attempted murder. There is no reason to believe that such knowledge would have changed the defense strategy in any way.

Defendant's reliance on *Arias, supra,* 182 Cal.App.4th 1009 to support a contrary conclusion is misplaced in light of the subsequent *Houston* decision. In *Arias*, the defendant was charged with two counts of attempted murder. The information did not allege that the attempted murders were willful, deliberate and premeditated. Nonetheless, the trial court instructed the jury that if it convicted the defendant of the attempted murders, it was to determine whether those crimes were done willfully and with premeditation and deliberation. The jury convicted the defendant of two "'first degree attempted murder[s]'" and the trial court imposed a life term for those convictions. (*Id*. at p. 1017.)

On appeal, the defendant contended that his life sentences were unauthorized and imposed in violation of due process because the prosecution failed to allege, as required by section 664, subdivision (a), that the attempted murders were committed willfully, deliberately and with premeditation. The *Arias* court agreed.

In particular, it rejected that Attorney General's argument that the defendant had forfeited his contention by failing to raise the point below. (*Arias, supra,* 182 Cal.App.4th at pp. 1017-1020.)

Houston found that it "need not and [did] not decide whether the *Arias* court erred in ruling that the defendant there did not forfeit his claim that the [information] was inadequate." (*Houston, supra,* 54 Cal.4th at p. 1229.) Instead, *Houston* distinguished *Arias*, writing that "[t]he *Arias* jury was instructed that if it found the defendant guilty of attempted murder, it must determine whether the attempted murder was willful, deliberate, and premeditated, and the defendant did not object to that instruction. *But it is unclear when the trial court issued its proposed jury instructions and verdict forms to the parties and whether this issue was discussed.* In contrast, the trial court here [in *Houston*] actually notified defendant of the possible sentence he faced before his case was submitted to the jury, and defendant had sufficient opportunity to object to the indictment and request additional time to formulate a defense. In addition, the jury was properly instructed and made an express finding that the attempted murders were willful, deliberate, and premeditated. On these facts, we conclude that defendant forfeited his claim that the indictment did not comply with section 664." (*Ibid*., italics added.)

Houston's observations on *Arias* apply equally to this case. As set forth earlier, the parties discussed twice—first in arguing the section 995 motion and later in reviewing jury instructions—that the People were proceeding upon the theory that the attempted murders were willful, deliberate and premeditated. In neither instance did defendant object. The jury was properly instructed on the allegation and expressly found it to be true in regard to the three attempted murders. These facts distinguish our case from *Arias* and support the conclusion that defendant had fair notice of the sentence-enhancing allegation but did not

object, thereby forfeiting any claim that the amended information's failure to allege that the attempted murders were willful, deliberate and premeditated requires us to strike the jury's findings and remand for resentencing.

C. SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE FINDINGS THAT DEFENDANT PERSONALLY INFLICTED GREAT BODILY INJURY ON THE VICTIMS

In regard to the three attempted murder convictions, the jury found that defendant had personally inflicted great bodily injury on the victims under sections 12022.53, subdivision (d) and 12022.7, subdivision (a).[13] The enhancements require a showing that the defendant "directly perform[ed] the act that causes the physical injury to the victim." (*People v. Cole* (1982) 31 Cal.3d 568, 579.) Defendant contends that there is insufficient evidence that he, as opposed to another shooter, shot each of the three victims. We disagree.

1. *The Evidence*

The evidence about who shot the victims is the following.

At trial, Meza, a witness to the shootings, testified as follows. Defendant alighted from the black Cadillac and fired "[a]round five to six shots." Defendant stood behind a pole as he fired his gun. As Meza ran to hide behind a truck, he

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[13] Section 12022.53, subdivision (d) requires imposition of "an additional and consecutive term of imprisonment in the state prison for 25 years to life" when a defendant, in the course of committing enumerated crimes including attempted murder, "*personally* and intentionally *discharges a firearm* and proximately causes great bodily injury." (Italics added.)

Section 12022.7, subdivision (a) provides, in relevant part, that "[a]ny person *who personally inflicts great bodily injury on any person* . . . in the commission of a[n] . . . attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years." (Italics added.)

heard "a round go close by [him]." Defendant's gun "sounded like a .38 revolver." Meza opined: "There was no casings. It was probably a revolver." Meza "believe[d] only one" gun was fired. Meza testified that no shots were fired from the blue Honda.

However, in an interview with Detective Valdez conducted two days after the shootings, Meza stated that two shooters had been involved. Meza told the detective that he heard two guns being fired: a .38 black revolver shot by defendant and a .22 caliber revolver shot from inside the Honda by an unidentified man. Meza said that defendant "just started shooting on my friends" and "shot six times." The man in the Honda opened the car door and shot at Meza twice. When asked at trial about these statements, Meza responded that he did not remember making them.

According to Romero (one of the victims), only one gun was used that night. Romero heard either "five, six" shots or "like seven or six" shots from the same gun. Romero identified defendant as the driver of the black Cadillac. Romero was not able to identify the shooter but he did place the shooter in the same position as had Meza: shooting from behind a pole.

Arredondo (a neighbor who witnessed the shootings) testified that he could not remember whether "more than one gun [was] fired." He "just remember[ed] the shots." In an interview conducted with Detective Valdez three days after the shootings, Arredondo stated that he heard "[s]even[,] around eight" rounds shot. He heard two guns: "The first one was, like, boom! Like that, and then the other ones like regular, like it was a .22 or .25, that's what I heard, when they got my friend." Arredondo could not identify the shooter(s) either at trial or in the interview with the detective.

Neither of the two other victims was able to shed light on this issue. Beltran testified that he did not see any handguns or hear any shots and Covarrubias did not appear at trial.

2. *The Trial Court's Instructions and the Parties' Theories*

The trial court submitted modified versions of the pattern instructions about aiding and abetting to establish liability for a crime. (CALCRIM Nos. 400 & 401.) However, the trial court deleted from the pattern instruction about infliction of great bodily injury (CALCRIM No. 3160) the language about liability for a group assault. And the attempted murder instruction (CALCRIM No. 600) included, in the context of explaining the intent for attempted murder, the concept of a "kill zone."

The prosecutor, relying upon Meza's trial testimony, argued that defendant was the individual who shot and injured the three victims, personally inflicting great bodily injury upon them. The prosecutor made passing references to liability for attempted murder based upon a theory of aiding and abetting and/or creating a "kill zone" with the shooter in the blue Honda. In regard to the "kill zone" theory, the prosecutor stated that defendant shot at and hit the three victims but that the second shooter fired at Meza.

Defense counsel argued this was a case of "mistaken identity" because defendant had not been involved in the shooting. As for the presence of a second shooter at the crime, defense counsel stated: "That's the first time I had heard about this. And I never heard any evidence about a second shooter."

3. *Discussion*

Whether defendant personally used a firearm and inflicted great bodily injury on the three victims was for the trier of fact to decide. We review the

sufficiency of the evidence to support the jury's findings on these enhancements using the same standard we use to evaluate the sufficiency of the evidence to sustain a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806.) We must "review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the [enhancement true] beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Two witnesses (Meza and Romero) testified at trial that there was only one shooter. Meza testified that the shooter was defendant; that defendant shot five to six times at the victims; and that defendant shot from behind a pole. Romero could not identify the shooter but placed him in the same position as had Meza: shooting from behind a pole. In finding the enhancements to be true, the jury implicitly credited the testimony of these two men and concluded that defendant had shot the three victims. It is not our role as a reviewing court to reweigh this evidence or reevaluate the credibility of these witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Stated another way, the testimony of Meza and Romero constitutes substantial evidence to support the jury's findings that defendant personally discharged a firearm, causing great bodily injury to the three men.[14]

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[14] The jury also found true the enhancement allegations that a principal used a firearm within the meaning of section 12022.53, subdivision (e). This statutory provision authorizes application of the enhancement in subdivision (d) of section 12022.53 even if the defendant did not personally use a firearm if two other enhancements are pled and proved: a section 186.22, subdivision (b) gang allegation and a section 12022.53, subdivision (d) allegation that *any principal* used a firearm.

In this case, the amended information did not include a section 12022.53, subdivision (e) allegation. Toward the end of the People's case, the prosecutor indicated that he would move to amend the information to include that allegation and that he would request a jury instruction on it. The trial court responded: "Show the defense. Nothing really changes factually so I would probably allow that. But, you know, you can do that

Defendant's contrary arguments are not persuasive. He relies heavily upon the pretrial statements of Arredondo and Meza in which each said that two shooters were involved to argue that the People failed to prove beyond a reasonable doubt that it was defendant who shot the three victims. Contrary to what defendant suggests, Meza's pretrial statements do not undermine the jury's findings. Although Meza told Detective Valdez there was a second shooter (the man in the Honda), Meza did not say that the man shot at the three victims. Instead, Meza said that the man shot at him (Meza). Similarly, Arredondo's statements do nothing to undermine the jury's findings because Arredondo was never able to identify either shooter or whom each shooter hit.

Next, defendant argues that the prosecution failed to meet its burden of proof because "[t]wo different people fired two different guns. The prosecutor presented no evidence to prove the bullets which entered the victims were fired by the .38 revolver

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formally and try to come up with an instruction on that." Defense counsel made no objection. The prosecutor, however, never moved to amend the information.

In a subsequent discussion about instructions, the court referred to the pattern instruction about section 12022.53, subdivision (e) (CALCRIM No. 1402) and asked: "It's the theory of the prosecution that [the shooter] it's the defendant, right? You've got one other guy too." The prosecutor responded: "My theory is the defendant, but only one of the witnesses actually says the defendant is the shooter. Everybody says he's the driver [of the black Cadillac]." Without any objection from defense counsel, the court submitted CALCRIM No. 1402. The jury found the section 12022.53, subdivision (e) enhancements to be true on the three attempted murder convictions.

The prosecutor's sentencing memorandum did not mention the section 12022.53, subdivision (e) findings and the trial court did not rely upon them in sentencing defendant.

The Attorney General contends that if we find the evidence is insufficient to sustain the jury's findings that defendant personally inflicted great bodily injury on the victims, "section 12022.53, subdivision (e) could properly be applied to impose the firearm enhancements under section 12022.53, subdivision (d)." Defendant, relying upon our decision in *People v. Botello* (2010) 183 Cal.App.4th 1014, disagrees because the section 12022.53, subdivision (e) enhancement was never alleged in the information. Because we find that substantial evidence supports the jury's finding that defendant used a firearm to personally inflict great bodily injury, we need not reach this issue.

used by [defendant] as opposed to the .22 revolver used by the other shooter. A fifty percent possibility bullets fired from [defendant's] gun caused the injuries to three victims does not meet the state's burden to establish his personal infliction of great bodily injury beyond a reasonable doubt." This approach is not persuasive. The prosecution was not required to bring forth such evidence and, instead, could rely upon the evidence that defendant was the only shooter; that he shot at the victims; and that the victims were injured.[15]

The remainder of defendant's arguments essentially ask us to reweigh the evidence and substitute our judgment for that of the jury. We decline to do so. "Due process of law does not require a reviewing court to reweigh evidence or redetermine witness credibility. In fact, it would distort the process if this court, reading a 'cold' record, substituted its judgment for that of the trier of fact who saw and heard the live witnesses. Our role is to determine the legal sufficiency of the found facts and not to second guess the reasoning or wisdom of the fact finder." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 946.)

D. ENHANCEMENT ALLEGATIONS ON COUNTS 1 AND 2

Counts 1 through 3 of the amended information alleged that defendant had committed an assault with a firearm on the three victims. (§ 245, subd. (a)(2).) Each count included the allegation that defendant personally inflicted great bodily injury upon the victim within the meaning of section 12022.7, subdivision (a). In

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[15] In rebuttal argument, the prosecution stated: "The evidence in this case is clear. . . . [¶] [What makes] defendant the actual personal shooter in this case is Rigoberto Meza's testimony. He lays [it] out in great detail. He maps it out for you exactly what happened and what happened is . . . [t]hree people in defendant's zone of danger. Three . . . people in the range of his gun that he shot. [¶] The evidence is beyond a reasonable doubt that he's the shooter and that he's guilty of attempted murder and assault, that he's guilty of the personal use of a firearm. [¶] He's guilty of inflicting great bodily injury and he's guilty of doing it all for the gang, for Arizona Maravilla."

addition, count 3 included the allegation that defendant personally used a firearm within the meaning of section 12022.5; however, neither of the first two counts included that allegation.

The first page of the eight-page amended information, entitled "Summary," listed each count and its allegation. On this page, the section 12022.5 allegation was included with each of the first three counts and its sentencing effect was noted (an additional three, four or ten-year term).

Defense counsel never brought this inconsistency to the attention of the trial court or the prosecutor. When the parties discussed jury instructions, the prosecutor stated the section 12022.5 allegation applied to counts 1 through 3 and suggested use of the pattern instruction CALCRIM No. 3146. Defense counsel never objected that the section 12022.5 allegation applied only to count 3. The trial court submitted CALCRIM No. 3146, indicating that it applied (potentially) to counts 1 through 3. In addition, the jury's verdict form indicated it was to determine whether it found the section 12022.5 allegation true as to each of the first three counts. The prosecutor argued for a true finding on each count. The jury found the allegation true on all three counts.

At sentencing, the trial court stayed, pursuant to section 654, the sentences on counts 1 through 3, including the enhancements.

In his opening brief, defendant contended that because the amended information did not allege the section 12022.5 enhancements in regard to counts 1 and 2, "the punishment imposed and stayed on [those two counts] must be stricken." (Capitalization and boldface omitted.) He claimed that the failure of the charging information to allege these enhancements violated due process.

The Attorney General's brief correctly pointed out that the summary page of the amended information listed the section 12022.5 enhancement as to counts 1 and 2 as well as count 3.

Defendant's reply brief acknowledges that "[t]he information summary is part of the 'accusatory pleading'," and, as a result, he "therefore withdraws" this claim of error. The concession is well-taken. (See also *Houston, supra*, 54 Cal.4th at pp. 1225-1229 [forfeiture of claim of deficiency in the charging pleading].)

E. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Defendant contends that trial counsel provided ineffective assistance because he failed to object when Detective Valdez testified about the recovery of a loaded and operable revolver during the search (authorized by warrant) of defendant's backyard that was carried out 26 days after the shooting. Defendant argues that trial counsel should have raised an Evidence Code section 352 objection that that the evidence was irrelevant and prejudicial. Because the prosecutor could not tie the seized gun to the shootings, defendant argues the evidence "was prejudicial because it invited the jury to convict [him] based on a propensity for violence" because it "suggested [defendant] must have fired the black .38 revolver on November 3 and must have had the intent to kill because he was a man of violence, a gang member who always had a deadly weapon nearby to facilitate commission of crimes." We are not persuaded.

1. *Governing Legal Principles*

A claim of ineffective assistance of trial counsel is subject to a two-prong test. To prevail, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) he was prejudiced in that there is a reasonable probability that the result of the trial would have been different absent the alleged deficient representation. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685.) "A reasonable probability is a probability

sufficient to undermine confidence in the outcome." (*People v. Williams* (1997) 16 Cal.4th 153, 215.)

2. *Discussion*

As for the first prong of the test, "the failure to make objections is a matter of trial tactics which appellate courts will not second-guess." (*People v. Torres* (1995) 33 Cal.App.4th 37, 48.) "If [, as here,] the record on appeal fails to show why counsel . . . failed to act in the instance[s] asserted to be ineffective, unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation, the claim must be rejected on appeal." (*People v. Kraft* (2000) 23 Cal.4th 978, 1068-1069.)

In this case, a satisfactory explanation exists for trial counsel's failure to object: he intended to use and did use the fact that the recovered revolver did not link defendant to the shootings to argue that the People failed to prove guilt beyond a reasonable doubt. In closing argument, defense counsel asked: "Also, where's the weapon? If the weapon was a revolver why do witnesses say they heard seven or eight shots? That's inconsistent with a revolver being used. [¶] If a revolver ever was, in fact, used that night[,] where's the evidence to establish that? It was not presented because the prosecution cannot prove . . . the gun found at my client's residence was the one being used. . . . [¶] But as you know the evidence says it [the gun found in defendant's backyard] was a chrome revolver. Chrome does not equal black and black was the gun used on the night in question. [¶] This is a case of mistaken identity, Ladies and Gentlemen. It's on conjecture and speculation."

That defense counsel's argument was unsuccessful does not change our conclusion that a reasonable tactical basis existed for his decision not to challenge the detective's testimony about the recovery of the gun. "Judicial scrutiny of

counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making that evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington, supra,* 466 U.S. at p. 689.)

In any event, defendant has failed to demonstrate prejudice as a result of the alleged deficient representation. That is, he cannot establish that but for trial counsel's failure to object to Detective Valdez' testimony about the recovery of the gun, the jury would not have found him guilty. For one thing, the prosecutor never argued that that gun was the weapon used in the shootings. He made only passing reference to it, and, contrary to defendant's suggestion, never used the gun as propensity evidence to argue that defendant was guilty.[16] Further, in light of defense counsel's argument about the gun set forth above, we reject defendant's argument that "the evidence could *only* be used by the jury to conclude [he] had a

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[16] The entirety of the prosecutor's argument about the gun is the following: "Well, it looks like there's a revolver used in the crime. I'm not hinging the whole case on that. It is what it is. But he [defendant] does have an unregistered revolver at his home and he actually admits to knowing about it, knowing it's unregistered and knowing it was hidden in the backyard. And, by the way, it is loaded."

propensity for violence." (Italics added.) In sum, given the overwhelming evidence of defendant's guilt, defendant cannot establish that trial counsel's failure to object to the evidence of the gun constitutes prejudicial ineffective assistance of counsel.

F. DEFENDANT'S REMOVAL FROM THE SENTENCING HEARING

Defendant contends that the trial court committed prejudicial error because it ordered him removed from his sentencing hearing. We are not persuaded.

1. *Factual Background*

At the December 3rd sentencing hearing, the trial court asked if there was any legal cause judgment should not be pronounced. Defense counsel argued motions for a continuance and a new trial, both of which the trial court denied. The matter proceeded to sentencing. The prosecutor submitted on his sentencing memorandum. The following exchange then occurred:

"THE COURT: All right. I'll now sentence the defendant.

"THE DEFENDANT: Your Honor, may I have a minute?

"THE COURT: No.

"THE DEFENDANT: Your Honor, Your Honor, canon 3B7 –

[**17**]

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17 Defendant's opening brief alleges that defendant's reference to "canon 3B7" was to the California Code of Judicial Ethics. According to defendant, the pertinent provisions read as follows: "Canon 3, 'A Judge Should Perform the Duties of Judicial Office Impartially and Diligently,' section B 'Adjudicative Responsibilities,' subsection (7) states: 'A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.'"

"THE COURT: *If you say one more word you're going in the back.*

"THE DEFENDANT: I'm not trying to –

"THE COURT: He's going in the back.

"[DEFENSE COUNSEL]: Your Honor, let the record reflect that the defendant is being removed for the purposes of the record.

"THE COURT: Right.

"[DEFENSE COUNSEL]: And also if the court would also please let the record reflect that the defense counsel's choosing to stand mute at this point and not move forward with the sentencing because I believe legal points exist.

"THE COURT: Absolutely. And you have a right to say nothing. The People have the burden of proof and they've done so." (Italics added.)

The trial court proceeded to sentence defendant. After completing that process, the court stated:

"The reason why the defendant is not present, *we've had issues with [defendant] throughout this* case and I'm not going to put up with it any more with his – with his verbal high jinx. *So I told him to keep quiet. I knew he wouldn't. He didn't and he's out of here.* It's as simple as that." (Italics added.)

2. *Governing Legal Principles*

A defendant has constitutional and statutory rights to be present at sentencing. (*People v. Rodriguez* (1998) 17 Cal.4th 253, 260; §§ 977, subd. (b)(1) & 1043, subd. (a).) However, the right is not unqualified. The defendant waives his right to be present if he engages in disruptive behavior "and appellate courts

must give considerable deference to the trial court's judgment as to when disruption has occurred *or may reasonably be anticipated.* [Citations.]" (*People v. Welch* (1999) 20 Cal.4th 701, 773, italics added.) "The trial court's ability to remove a disruptive or potentially disruptive defendant follows not only from section 1043, subdivision (b)(1), but also from the trial court's inherent power to establish order in its courtroom. [Citation.]" (*People v. Jackson* (1996) 13 Cal.4th 1164, 1211.)

3. *Discussion*

As the trial court indicated that one of the reasons it had removed defendant from the sentencing hearing was because of previous disruptive behavior, we begin with a recitation of those events.

On June 23 when counsel were discussing pretrial motions, defendant interrupted. The court responded: "Time out. Time out. Okay. You got to kind of keep quiet. [¶] . . . [Defense counsel is] going to do his level best to help you out here. So you relax and basically keep your mouth shut."

On July 8, after the jury returned with its verdicts, defendant stated he wanted "to exercise [his] *Faretta* rights . . . and ask for a retrial." The trial court responded it would handle that issue the following week. As the court attempted to explain the procedure it would follow, defendant interrupted and said: "If we could have all the discovery then?" The trial court replied: "Time out. Time out. Let me say what I want to say. And then we'll go through the drill on the pro. per. or if you want to hire a new lawyer."

On July 12, defendant appeared and asked that his right to represent himself be reinstated. The court granted the request and relieved Estrada as counsel. The court asked the prosecutor if he objected to turning over the discovery to defendant. During that discussion, defendant interrupted the court to raise the

possibility that he may (again) retain counsel. The court replied: "No. Listen to me. I'm not going back and forth. If you want to be a pro. per. this is it. [¶] . . . [¶] Is that what you want?" Defendant replied: "Yes." The court set the matter for sentencing.

In the following month, defendant represented himself but later moved to withdraw his pro. per. status and to have private counsel Contreras substitute in as his attorney.[18] The court granted defendant's motions.

On August 25, during a discussion between the trial court and Contreras, defendant interrupted. The court responded: "Time out. Go ahead[, defense counsel]." Thereafter, with the parties' consent, the matter was continued several times until the December 3rd sentencing hearing during which the trial court ordered defendant's removal.

Coupling the above events with defendant's conduct at the sentencing hearing, we find that the trial court did not err when it ordered defendant removed from the sentencing hearing. On four separate occasions occurring over the previous six months, defendant had interrupted the trial judge. Each time, the judge rebuked defendant, essentially telling him to let the court finish before he spoke. Nonetheless, during sentencing, defendant started to speak just as the court was about to impose sentence. When the court warned him that if he continued to speak he would be removed, defendant defied the court's admonition and continued to speak. Given the deference we must accord the lower court's decision, we find that the trial court did not abuse its discretion in implicitly finding that defendant would continue to disrupt the sentencing hearing through unwarranted verbal outbursts if he had been permitted to stay.

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[18] As explained earlier in our discussion of defendant's first contention, Contreras had represented defendant at the preliminary hearing and was the attorney defendant unsuccessfully sought to substitute in place of Estrada the day that trial commenced.

In any event, even if the trial court's removal order was error (a finding we do not make), "we are convinced beyond a reasonable doubt that the order did not prejudice [defendant]. [Citation.]" (*People v. Powell* (2004) 114 Cal.App.4th 1153, 1160; see also *People v. Robertson* (1989) 48 Cal.3d 18, 62.) The prosecutor's sentencing memorandum, filed more than four months earlier, set forth in detail a proposed sentence on all counts and enhancements. Defense counsel raised no objection to any of the prosecutor's recommendations at the sentencing hearing, either before or after defendant's removal. And in this appeal, defendant has made no formal assignment of error in regard to any aspect of his sentence other than a minor claim about six days of custody credits.[19]

To support a contrary conclusion, defendant urges: "[T]he [trial] court had no mitigating evidence to consider. . . . *One can only speculate* about the sobering effect the jury's guilty verdicts may have had on [him] and the statements he wished to offer the court at the sentencing hearing." (Italics added.) Defendant's argument is indeed speculative, and unsupported by the record. We find, beyond a

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[19] In his reply brief, defendant, in the context of arguing that he was prejudiced by his removal from the sentencing hearing, urges that another sentencing error occurred. He states that "the [trial] court could not sentence [him] for two prison priors because he only had served one block of prison time for the priors [as] noted in the probation report." To the extent that defendant is assigning his sentencing on the prior convictions as error, the claim is forfeited for two separate reasons. The first is that he raised it for the first time in his reply brief. (*People v. Zamudio* (2008) 43 Cal.4th 327, 353-354, and cases cited therein.) The second is that he failed to comply with the requirement that each claim of error be placed "under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rules 8.204 (a)(1)(B) & 8.360(a); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 542.) And to the extent defendant is arguing that this potential sentencing error shows that he was prejudiced by his removal from the court because: (1) had he been there, he "could have alerted the court" to it and (2) "this error shows- other errors also may exist which only would be apparent to [him]", we reject the argument as unfounded speculation.

reasonable doubt, that defendant's absence from the sentencing hearing did not affect his sentence.

In a similar vein, we reject defendant's contention that the trial court's removal order violated his "right to make a personal statement in mitigation of punishment . . . under oath and subject to cross-examination by the prosecutor." (*People v. Evans* (2008) 44 Cal.4th 590, 592-593, interpreting § 1204.) For one thing, this claim has been forfeited because it was not raised below. At the beginning of the December 3rd hearing, the trial court asked if there was any legal cause why judgment should not be pronounced. Defense counsel did not indicate that defendant intended to give a sworn statement in mitigation, but, instead, argued two motions. Shortly thereafter when defendant interrupted the judge and was warned not to do so again, defense counsel never stated that his client intended to testify in mitigation of punishment. Since the defense failed to advise the trial court that defendant intended to exercise his right under section 1204, the trial court cannot now be faulted for failing to give defendant that opportunity. (*People v. Nitschmann* (2010) 182 Cal.App.4th 705, 708 [the right is forfeited if the defendant does not offer to testify before sentence is pronounced because the trial court has no obligation to offer the defendant that opportunity].)

In any event, if the trial court erred (a finding we do not make), the error was harmless. Because the error was "of a purely statutory dimension," we measure it under the deferential *Watson* standard.[20] (See, e.g., *People v. Jackson, supra*, 13 Cal.4th at p. 1211.) In this case, defendant, a hardcore member of the Arizona Maravilla gang, was convicted of serious crimes with multiple enhancements, including the findings the crimes were committed to benefit his gang. Defendant's probation report indicated an extensive criminal history. Juvenile court petitions

[20] *People v. Watson* (1956) 46 Cal.2d 818, 836.

had been sustained against him in 2000 and 2001, the second one resulting in placement in the California Youth Authority. He was convicted of felonies in 2004, 2005 and 2007, was twice sentenced to state prison and was on parole when he committed the instant crimes. Given this record, it is not reasonably probable that defendant would have received a lesser sentence if he had been given the opportunity to present a sworn statement in mitigation of his punishment to the trial court.

G. CORRECTION IN AWARD OF CUSTODY CREDITS

Defendant contends, and the Attorney General concedes, that the trial court miscalculated his presentence custody credits by six days. We direct preparation of an amended abstract of judgment indicating entitlement to 1,101 days of credit for actual time served and 165 days of conduct credit, for a total of 1,266 days.

DISPOSITION

The judgment is modified to reflect that defendant is entitled to 1,101 days of credit for actual time served and 165 days of conduct credit, for a total of 1,266 days. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting these changes. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.