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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. MARY JO MEYER, Defendant and Appellant.	B269169 (Los Angeles County Super. Ct. No. PA079281)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart, Judge. Affirmed, and remanded with directions.

Lynda A. Romero, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and

Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Mary Jo Meyer appeals from a judgment and sentence, following her convictions for assault with a deadly weapon, injuring a cohabitant, murder and gross vehicular manslaughter. She contends the trial court erroneously admitted evidence of her prior arrests, and that her trial counsel was ineffective for "open[ing] the door" to admission of that evidence. She further contends that the conviction for assault with a deadly weapon must be reversed, as it was a lesser included offense of murder. Finally, she contends the abstract of judgment is erroneous with respect to custody credit. For the reasons set forth below, we will correct the abstract of judgment to correct the custody credit, but otherwise affirm.

STATEMENT OF THE CASE

A jury convicted appellant of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1); count 1),[1] injuring a cohabitant (§ 273.5, subd. (a); count 2), murder (§ 187, subd. (a); count 3), and gross vehicular manslaughter (§ 191.5, subd. (a); count 4). As to counts 1 and 2, the jury found true

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[1] All further statutory citations are to the Penal Code, unless otherwise stated.

the allegation that appellant personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (e). As to counts 2 and 3, it found true the allegation that appellant personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1).

Appellant was sentenced to 16 years to life in state prison, consisting of 15 years to life on count 3 (murder), plus a one-year enhancement for personal use of a deadly weapon. The court imposed but stayed the punishments on the other counts; a five-year term on count 1 (assault with a deadly weapon), six-year term on count 2 (injuring a cohabitant), and four-year term on count 4 (gross vehicular manslaughter) pursuant to section 654. The court awarded appellant 668 days of pre-custody credit, based on the date of her arrest. It declined to award good time/work time credits, noting that as a convicted murderer, appellant was not entitled to those credits

Appellant filed a timely notice of appeal.

STATEMENT OF THE FACTS

A. *The Prosecution Case*

According to the prosecution, on January 5, 2014, appellant and her boyfriend, Michael Roberts, had an argument in the home they shared. After both left the house, appellant drove into the driveway gate, pushing the gate into Roberts, and causing him to suffer great bodily injury. As a result of the collision, Roberts died in the hospital 18 days later.

Stephen Parker testified that Roberts was his best friend, and that they saw each other almost daily. According to Parker, the relationship between appellant and Roberts was "rocky at best." The couple fought and argued often. Appellant was a "mean drinker," becoming aggressive when under the influence of alcohol. Parker stated that appellant was always the aggressor in fights with Roberts. After some of the fights, Parker observed scratches on Roberts's face and arms.

Roberts' daughter, Samantha McIntosh, testified that she lived with her father and appellant in their house. Appellant was a registered nurse and worked as a nurse practitioner. On January 5, 2014, at around 10:00 a.m., Samantha observed appellant slam a door before going into the kitchen to pour herself a glass of whiskey. Roberts told Samantha that appellant was yelling at him and claiming that Roberts's children were attempting to steal the house. While the house originally belonged to appellant, she had transferred it to Roberts when she experienced financial problems. Roberts proposed that he and Samantha leave the house, and she suggested running some errands. On the way home after completing the errands, Roberts told his daughter he wished he could sell the house, split the proceeds with appellant, and move out of the area. At around 11:00 a.m., Samantha left the house with a friend.

Jason Endres lived next door to appellant and Roberts. On January 5, at around 3:00 p.m., he was talking on the phone when he heard a loud crash. A few minutes later, he

heard a voice crying for help. He ran outside and saw his trashcan knocked over, with much of its contents spilled into the street. The gate of appellant's house was damaged, "completely pushed inward off" its rail or runner. Endres saw Roberts lying on the ground just inside the gate in a fetal position, next to a green 4Runner SUV. He was clutching his back, and his pants were pulled halfway down. Endres ran to Roberts and asked him if he needed help. Endres observed "a lot of blood near [Roberts's] head. He was bleeding from the head."

Endres saw no other persons nearby, but noticed that appellant's SUV (a white Venza) was parked in the driveway. He ran to the front of the house and knocked. When appellant answered, Endres told her that Roberts had been injured and said, "we need to call 9-1-1." Appellant said, "Okay," and closed the door. Endres waited outside, next to Roberts. After a few minutes, Endres became impatient. He ran back to appellant's house, where she told him she had tried to call 911 but could not get reception on her cell phone. Endres and appellant then returned to Roberts. They moved the damaged gate and Endres called 911. At Roberts's request, appellant gave him a cigarette, but provided no other assistance. Endres stayed on the phone until the police arrived, three to five minutes later.

Arin Salcedo, a 911 dispatcher for the Los Angeles Police Department, testified that on January 5, 2014, at around 3:25 p.m., she received a 911 call. She heard a female's voice mumble something before the line went quiet.

Salcedo called back, but was sent to voicemail. Salcedo left a message, saying she was sending police officers to the location of the caller. Minutes later, a male called 911 from the same location.

Los Angeles Police Officer Peter Mastrocinque responded to the location, after being notified that a felony hit-and-run had occurred. Officer Mastrocinque interviewed appellant, who smelled of alcohol and had a flushed face and bloodshot watery eyes. Appellant initially denied seeing anything or knowing anything about the incident. Later, she told the officer that she and Roberts had been drinking. They began arguing about Roberts's daughter moving in with them, and Roberts told appellant to "get the fuck out of my . . . house." As appellant was backing the Venza out of the residence, she saw Roberts closing the gate, and "that's when she drove forward striking the gate" and hitting Roberts. Officer Mastrocinque examined the Venza, and noticed damage to the passenger side front fender and rear bumper. Based on appellant's statements, the police arrested her for domestic violence.

Los Angeles Police Officer Maricela Vargas also responded to the location. Paramedics were already at the scene, treating Roberts. Officer Vargas asked Roberts about the hit-and-run. Roberts stated that an "unknown vehicle . . . had driven through his gate," struck him and left. When asked about the suspect, Roberts stated he could not provide any information because "he was turning away from the vehicle that had run over him." After Roberts was

brought to Holy Cross Hospital, the police attempted to get a statement from him. However, Roberts was unconscious and unable to communicate.

Dr. Mark Liker, a neurosurgeon, treated Roberts at Holy Cross Hospital. Roberts had moderate to severe head trauma, including a linear skull fracture, a subdural hematoma (blood clot on the surface of the brain) and bruising in the frontal lobe, requiring a drainage tube in the brain. He also had a left facial contusion, left ankle fractures, and a right rib fracture. Roberts's injuries to his buttock area was consistent with "road rash," i.e., scraping of the skin from contact with a surface such as asphalt or concrete. After his condition stabilized, Roberts -- who had Kaiser insurance -- was transferred from Holy Cross to a Kaiser hospital on January 13, 2014. He died 10 days later.

Dr. Scott Luzi, a forensic pathologist, performed the autopsy on Roberts. Dr. Luzi opined that Roberts died from multiple blunt force injuries. Most significantly, Roberts had a skull fracture and internal bleeding in various areas of his brain. Dr. Luzi also observed that Roberts's left leg was fractured and his right forearm had contusions. The injuries were consistent with being hit by a car.

Los Angeles Police Detective Mario Santana testified as an accident reconstruction expert. Based on the damage to the Venza and the 4Runner, Roberts's "road rash," and evidence at the crime scene -- including tire marks and damage to the gate and nearby shrubs -- Detective Santana opined that the collision was not an accident. According to

the detective, the evidence indicated that the 4Runner was parked next to the house, and the Venza was parked on the other side of the metal gate. Appellant was driving the Venza. She backed up and hit a trashcan, turned the steering wheel to the right, accelerated up to 35 to 40 miles per hour, hit the gate, and continued at a high speed, colliding with the parked 4Runner. When appellant's vehicle accelerated though the gate, the collision knocked the gate off its runner, causing it to strike Roberts, who was on the other side of the gate. Roberts was knocked to the ground, and his "road rash" indicated he was dragged or pushed about 10 inches. Appellant backed out the Venza to park it on the street.

B. *Defense Case*

Appellant testified that she met Roberts at a bar in July 2000, and they started living together in her house. They often drank together. After drinking, they became more short tempered and often cursed at each other. Several days before the incident, Roberts got into an argument with a neighbor. When he came home, he yelled at appellant, saying, "pack your shit up and get the fuck out of here now." The next day, he apologized. Appellant did not hold a grudge against him. Appellant denied ever scratching Roberts.

On January 5, 2014, appellant awoke early. She started drinking mid-morning, and drank throughout the day. At around 3:00 p.m., appellant and Roberts had "a little tiff, little words, and he said pack your shit and get the fuck

out of here." Appellant told Roberts that she had told him before, "If you ever say that to me again[,] . . . I'll leave you."

Appellant grabbed her keys and left the house. After opening and walking through the sliding gate, she entered the Venza. While seated in the driver's seat, she noticed a receipt on the floor. She picked it up and placed it on the center console. As she backed up the SUV, the receipt fell down. She shifted the SUV into "Drive," and reached down to grab the receipt. Suddenly, she noticed the SUV moving forward and tried to stop it. She slammed her foot down and the vehicle "jerked forward," hitting the gate. Appellant recalled the gate bending and the SUV stopping. Appellant put the Venza in reverse and parked on the street.

Appellant left the SUV and walked up the driveway. She saw the gate lying down flat and Roberts on the ground. Appellant walked up to Roberts, who said, "Honey, what happened?" Roberts also said that he thought he broke his ankle. Appellant noticed an oval mark on the back of Roberts' head, but did not see any blood. Appellant then noticed their dogs were standing nearby. She took the dogs inside and tried to find a phone to call 911. The next door neighbor, Endres, knocked on the front door and said someone had tried to kill Roberts. Appellant went outside to check on Roberts, and then entered the home to look for a phone. She found a cell phone and tried calling 911, but could not get reception and did not hear any response. She ran back to Endres, saying, "It's not working." Appellant

then noticed that Endres was on the phone with the 911 operator.

After Endres got off the phone, appellant and Endres moved the gate to allow emergency vehicles access. Roberts began yelling for a cigarette, so appellant ran to the garage to get his cigarettes. She noticed a bottle of whiskey in the garage and took a drink to calm down. She then gave Roberts a cigarette.

The paramedics arrived and began treating Roberts. A female officer -- later identified as Officer Vargas -- asked appellant if she hit the gate with her vehicle. Appellant said, "yes." Officer Vargas asked appellant if she ran down Roberts because of a fight. Appellant said, "No." Appellant thought the officer had made up her mind about the incident, so she stated, "I want a lawyer."

Appellant testified that the collision did not damage the 4Runner. Rather, the damage to the 4Runner occurred months earlier. Sometime before Thanksgiving, Roberts was driving the 4Runner and appellant was driving the Venza. They bumped into each other, causing a dent on the Venza and white paint to transfer from the Venza to the 4Runner.

Appellant's daughter, Michelle Garcia, testified that appellant and Roberts loved each other and shared an interest in drinking. Garcia never saw any scratches on Roberts's face. Janice Bommarito, who worked with appellant for 30 years, also testified that she never saw any scratch marks on Roberts. Bommarito acknowledged that the relationship between appellant and Roberts became

"toxic" when alcohol was involved. However, the couple had a "wonderful relationship, and they really loved each other." After appellant was arrested, she called Bommarito, stating that Roberts was injured and asked her to check on him. Appellant was crying and upset.

C. *Rebuttal Case*

Detective Santana testified that the damage to the 4Runner could not have occurred as appellant stated. Detective Santana opined that the damage was more recent than November 2013. He also stated that damage to the Venza and the 4Runner was inconsistent with appellant's version of events.

DISCUSSION

A. *Evidence of Appellant's Prior Arrests*

Appellant contends the admission of evidence of her prior arrests was erroneous and violated her due process rights. She further contends that her trial counsel was ineffective by "open[ing] the door" to admission of prior arrest evidence and by failing to object earlier to the prosecution's inquiry.

1. *Relevant Factual Background*

During the direct examination of appellant, the following colloquy occurred:

Counsel: "Have you ever been arrested?"

Prosecutor: "Objection. Relevance."

The court: "Overruled. You can answer."

Appellant: "Have I ever been -- I have never been in jail before."

Counsel: "I can't hear you."

Appellant: "No jail."

Counsel: "Do you have felony convictions."

Appellant: "No."

Counsel: "Misdemeanor convictions?"

Appellant: "Is that speeding tickets?"

Counsel: "Misdemeanor convictions, drunk driving, anything like that?"

Appellant: "No."

On cross-examination, the following colloquy occurred:

Prosecutor: "Do you consider yourself to be a law-abiding citizen?"

Appellant: "In every way except when I got in the car and drank and I was moving the car, that that [*sic*] was actually considered driving the car after having alcohol and that is not considered law-abiding."

Prosecutor: "And you testified yesterday that you were never convicted of any crime, correct?"

Appellant: "No, I've not been convicted of any crime."

Prosecutor: "And you were never arrested [for] anything, right?"

Appellant: "I did not say that. I said I'd never been in jail before."

[¶] . . . [¶]

Prosecutor: " . . . I'm asking you now, have you ever been arrested?"

Appellant: "Do you mean, I guess, when you get a ticket that you're arrested and when you sign, that mean you appear to --"

Prosecutor: "Have you been arrested for any crime?"

The court: "Well, why don't you define what you mean by 'arrested.'"

[¶] . . . [¶]

Prosecutor: "Even if it's a citation, that counts, yes. Have you ever been arrested or given a citation to appear in court?"

[¶] . . . [¶]

Appellant: "Yes."

Prosecutor: "And isn't it true that you were arrested in 1994 for battery on a peace officer out of Pasadena under the Penal Code section 243(b)?"

Appellant: "Yes, I was taken in; but they dropped the charges and sent me home."

The following exchange later occurred.

Prosecutor: "Were you arrested for any other crime?"

Appellant: "Not that I can recall."

Prosecutor: "You don't remember your 1995 hit-and-run property-damage arrest back on January 28 of 1995 out of Pasadena?"

Appellant: "I mean, I wasn't arrested."

Prosecutor: "Yes or no, do you recall being arrested in 1995 for a hit-and-run/property damage out of Pasadena?"

Appellant: "No, I was not arrested . . . unless I got a ticket."

A sidebar was then held. At the sidebar, the trial court addressed the prosecutor: "You want to drop the hit-and-run part of it and move on?" The prosecutor agreed to do so. Defense counsel moved for a mistrial on the ground of prosecutorial misconduct for inquiring about arrests. The court denied the motion for a mistrial, stating "these are relatively minor offenses, so I don't think that there's been any prejudice here at all. You opened the door, [counsel]."

Following the sidebar, the trial court instructed the jury as follows: "Ladies and gentlemen, those questions and answers about past arrests that we just heard, that is only admissible for the purpose of determining the defendant's credibility. All right? You may not use that evidence to conclude anything other than whether the defendant is credible as a witness. So, for example, you may not conclude or draw any inference as to the defendant's character or likelihood to commit crimes or anything like that, only her credibility as a witness on the stand."

The prosecutor asked no further questions about appellant's prior arrests. Nor did she refer to appellant's prior arrests in closing argument.

2. *Analysis*

Appellant contends that the prosecutor should not have inquired about her prior arrests, and that the admission of that evidence was prejudicial and violated her due process rights. "Generally, evidence of mere arrests that do not result in convictions is inadmissible because such evidence invariably suggests the defendant has a bad character."

(*People v. Williams* (2009) 170 Cal.App.4th 587, 609.) Under Evidence Code section 787, "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." (See also Evid. Code, § 1101, subd. (a) ["evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion"].) However, "a witness who makes a sweeping statement on direct or cross-examination may open the door to use of otherwise inadmissible evidence of prior misconduct for the purpose of contradicting such testimony." (*Andrews v. City and County of San Francisco* (1988) 205 Cal.App.3d 938, 946.) Here, appellant's testimony on direct examination suggested she was a law-abiding citizen who had never been jailed or convicted of any crime. However, her evasive answer to counsel's question about whether she had ever been arrested created an ambiguity, and the prosecutor was entitled to clarify her answer. (See *People v. Shea* (1995) 39 Cal.App.4th 1257, 1267 [where defendant sought to mislead the jury and minimize prior wrongful conduct on direct examination, he was not immune to further questioning on cross-examination]; cf. *People v. Reyes* (1976) 62 Cal.App.3d 53, 61-65 [notwithstanding Evid. Code, §§ 787 & 1101, evidence of prior misdemeanor conviction and prior uncharged offense admissible to contradict defendant's testimony on direct

examination]; see also Evid. Code, § 780 ["jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove . . . [¶] . . . [¶] (i) The existence of nonexistence of any fact testified to by him"]; *People v. Gallagher* (1893) 100 Cal. 466, 476 ["It was not the intention of the legislature to give to a defendant the opportunity of making any statement upon his direct examination which he might choose, in reference to the issue before the court, and to preclude the prosecution from showing out of his own mouth that such statement is false"].)

Even if the prosecutor erred in inquiring further, there was no denial of due process. *People v. Bolden* (2002) 29 Cal.4th 515 (*Bolden*) is instructive. There, the prosecutor asked a police officer about the defendant's address. The officer answered: "'It was at the Department of Corrections parole office located at--,'" before he was interrupted by the prosecutor. (*Id.* at p. 554.) The defense moved for a mistrial, arguing that the officer's reference to a parole office was prejudicial to the defendant because it implied that the defendant had at least one prior felony conviction for which he had served a term in state prison. The trial court denied the motion. The Supreme Court found no error, and no denial of due process. The court concluded: "The incident was not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant's chances of receiving a fair trial had not been irreparably damaged." (*Id.* at p. 555.) Similarly, here, the

questioning about appellant's prior arrests was not significant in the context of the trial, which revolved around the physical evidence of the collision. As noted, after the brief exchange during cross-examination, the prosecutor never mentioned appellant's prior arrests.

Moreover, we agree with the trial court that any prejudice was minimal, and we conclude that any error was harmless. (See *People v. Garcia* (1984) 160 Cal.App.3d 82, 93, fn. 12 ["where jurors are improperly exposed to certain factual matters, the error is usually tested under the standard set out in *People v. Watson* (1956) 46 Cal.2d 818, 836"]; see also *People v. Malone* (1988) 47 Cal.3d 1, 22 [erroneous admission of other crimes-evidence reviewed under *Watson*].) Here, appellant testified she was arrested in 1994 for battery of a peace officer, but the charges were dropped. She denied being arrested for a 1995 hit-and-run resulting in property damage. As the trial court correctly noted, the charged crimes were "relatively minor offenses," especially when compared to the charges in the instant case. More important, the instant case was prosecuted based on the physical evidence. The prosecutor argued that appellant fatally injured Roberts after a heated argument by deliberately ramming her SUV into a metal gate at a sufficient rate of speed to knock the gate off its runner and strike Roberts on the other side. Appellant told Officer Mastrocinque that as she was backing out the Venza, she saw Roberts closing the gate, and "that's when she drove forward striking the gate" and hitting Roberts. The physical

evidence supported that version of events. Officer Santana opined that after hitting a trashcan while backing out of the driveway, the Venza accelerated up to 35 to 40 miles per hour before hitting the gate, pushing it onto Roberts.

Additionally, appellant's own version of events at trial -- that the collision was an accident -- was contradicted by the evidence. It was inconsistent with the physical evidence, as described by Detective Santana. Moreover, appellant's behavior was inconsistent with that of a person who had suddenly and accidentally injured a loved one. A registered nurse, she rendered no medical assistance to Roberts, despite the fact that he was bleeding from the head and in obvious pain. When the police arrived, appellant initially denied any knowledge of the incident, before admitting that she deliberately drove her vehicle through the gate. In short, on the record before us, we find no reasonable probability that a more favorable outcome for appellant would have resulted absent the references to any prior arrests.

In a related claim, appellant argues her trial counsel was ineffective, as (1) counsel should not have asked about her prior arrests, and (2) counsel should have objected earlier to the prosecutor's inquiry into the arrests. "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability

sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) "*Strickland v. Washington* (1984) 466 U.S. 668, 697, informs us that 'there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

Here, appellant has failed to demonstrate prejudice. As stated above, the prosecution did not rely on evidence of appellant's prior arrests to prove its case, but rather, on the physical evidence, on appellant's postcollision conduct, on her initial denial of any knowledge of the incident, and on her later admission that after seeing Roberts on the other side of the gate, she deliberately drove her SUV through it. On this record, appellant has not shown a reasonable probability that her trial counsel's alleged errors undermined confidence in the jury's verdicts. Accordingly, we reject appellant's ineffectiveness claim.

B. *Dual Conviction for Assault with a Deadly Weapon and Murder.*

Appellant was convicted of both assault with a deadly weapon and murder. The trial court stayed the punishment for the assault conviction under section 654. On appeal, appellant contends the conviction for assault with a deadly weapon should be reversed, arguing that it was a lesser included offense of murder. We disagree.

Under California law, although a single act or course of conduct by a defendant can lead to convictions on any number of charged offenses, "a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) "To determine whether a lesser offense is necessarily included in the charged offense, one of two tests (called the 'elements' test and the 'accusatory pleading' test) must be met." (*People v. Lopez* (1998) 19 Cal.4th 282, 288 (*Lopez*).) "The elements test is satisfied when '"all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense." [Citation.]' [Citations.] Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]" (*Ibid.*) As appellant concedes, under the elements test, assault with a deadly weapon is not a lesser included offense of murder, as a murder can be committed without use of a deadly weapon. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988; *People v. Dixie* (1979)

98 Cal.App.3d 852, 856 ["assault with a deadly weapon is not a lesser included offense of murder" because murder can be committed by nonviolent means].)

Appellant contends that the charged assault with a deadly weapon offense was a lesser included offense of the charged murder offense under the accusatory pleading test. "Under the accusatory pleading test, a lesser offense is included within the greater charged offense "'if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.' [Citation.]' [Citations.]" (*Lopez*, *supra*, 19 Cal.4th at pp. 288-289.) However, appellant's argument has been foreclosed by our Supreme Court. In *People v. Reed* (2006) 38 Cal.4th 1224, the court held: "Courts should consider the statutory elements and accusatory pleading in deciding whether a defendant received notice, and therefore may be convicted, of an *uncharged* crime, but only the statutory elements in deciding whether a defendant may be convicted of multiple *charged* crimes." (*Id*. at p. 1231.) Thus, "the accusatory pleading test does not apply in deciding whether multiple conviction of charged offenses is proper." (*Id*. at p. 1229.) Stated differently, "'only a statutorily lesser included offense is subject to the bar against multiple convictions in the same proceeding. An offense that may be a lesser included offense because of the specific nature of the accusatory pleading is not subject to the same bar.'" (*Ibid*., quoting *People v. Scheidt* (1991) 230 Cal.App.3d 162,165-

166.) In short, appellant was properly convicted of both assault with a deadly weapon and murder.[2]

C. *Abstract of Judgment*

The parties agree that appellant was arrested on January 5, 2014, and thus, entitled to 669 days of precustody credit. However, the abstract of judgment reflects 668 days of custody credit. In a letter to this court, appellate counsel submitted a minute order indicating that the trial court had corrected the abstract of judgment to reflect the proper amount of precustody credit. That same minute order stated, "The good time/good work time days remain at 100 days. Total credit is 769 days." However, at the original sentencing hearing, the trial court denied good time/work time credit because appellant was convicted of murder. (See § 2933.2 ["any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933 or Section 2933.05"].) Accordingly, we will order the abstract of judgment corrected to reflect 669 days of precustody credit and 0 days of good time/work time credit.

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[2] *People v. Cook* (2001) 91 Cal.App.4th 910 does not assist appellant, as it involved a conviction of an uncharged offense. In contrast, appellant was charged with both assault with a deadly weapon and murder; thus, the accusatory pleading test does not apply.

DISPOSITION

The convictions are affirmed, and the matter is remanded with directions to the superior court to modify the abstract of judgment to correct the amount of presentence custody credit and to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.