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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. BERNARD GLENN, Defendant and Appellant.	B267109 (Los Angeles County Super. Ct. No. TA136709)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael J. Shultz, Judge. Affirmed in part and remanded in part with directions.

Paul Kleven, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Mercer and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Bernard Glenn guilty of two counts of attempted murder. They also found the allegations that he used a firearm and committed the offenses for the benefit of a criminal street gang to be true. Glenn, who was 17 years old at the time the crimes were committed, was sentenced to two consecutive terms of 35 years to life. On appeal, he argues primarily that he received ineffective assistance of counsel. We remand the matter for the limited purpose of allowing Glenn to present mitigating evidence for use at a future juvenile offender Parole Board hearing in line with the holding of *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*). We also modify the judgment to award Glenn additional presentence custody credits to which the parties agree he is entitled. We otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

In April 2015, an information charged Glenn with four counts of willful, deliberate, and intentional attempted murder (Pen. Code, §§ 664, 187, subd. (a)).[1] Counts one and two alleged the attempted murders of Wanya Smith and James Lamont on April 29, 2014. Counts three and four alleged the attempted murders of Christy Johnson and John Doe on May 5, 2014. As to all counts, the information specially alleged firearm-use enhancements and a gang enhancement (§§ 12022.53, subds. (b) & (c); 186.22, subd. (b)(5)). Glenn pled not guilty and denied the special allegations.

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

2. *The Smith Shooting*

At trial, Los Angeles Police Sergeant Scott Wilhelm testified that on April 29, 2014, he responded to an emergency call of a shooting and spoke with Wanya Smith. Smith said he had been standing outside his house with a friend, James Lamont, when he saw "BJ" from the Ten Line gang and two other individuals walking toward them. BJ pulled out a gun and started shooting at Smith and Lamont. Smith was shot in the hand as he ran away.

Los Angeles Police Detective Christopher Marsico testified that he had interviewed Smith the day after the shooting. Smith identified Glenn as the shooter and said he knew Glenn from when they had both been enrolled at Los Padrinos Juvenile Hall.

When Smith was called to the stand to testify, he denied having been shot at on April 29, 2014, and said he did not know Glenn.

3. *The Johnson Shooting*

Christy Johnson testified about the shooting on May 5, 2014. At 9:00 p.m., she was sitting on her front porch with her two-year-old granddaughter and her cousin who she called Knock-Knock. Knock-Knock was a member of the Imperial Courts gang. Johnson saw a gray Jaguar drive up the street. Glenn got out of the Jaguar and started shooting. Johnson testified that Glenn was "shooting at guys on the street" and she "didn't feel he was shooting at me" but that she also believed she "was getting shot at." She recognized Glenn because she had seen him in the neighborhood before. Earlier that day, she had seen Glenn "pass [her] street."

Los Angeles County Sheriff's Deputy David Rodriguez testified that he responded to the shooting and interviewed

Johnson. Johnson told him she had seen BJ from the Ten Line gang drive up in a gray Jaguar. He got out of the car and walked towards her, firing eight to ten shots at her and her cousin. Deputy Rodriguez identified Glenn as a suspect in the shooting. He and other deputies went to Glenn's home address and detained him.

Deputy Rafael Cardenas testified that he also responded to the shooting and had transported Johnson to where Glenn was detained. Glenn was shown to Johnson and she identified him as the shooter. Johnson also identified a silver Jaguar parked nearby as the car Glenn had been driving.

The day after the shooting, Los Angeles Sheriff's Department Detective Scott Giles interviewed Johnson. According to a transcript of their recorded conversation, Johnson said that Glenn had "jumped out of the car" and "started shooting" at her, Knock-Knock, and her granddaughter. Although there was another guy on the street, Glenn was not shooting at him; he was "shooting at us."

Detective Giles also interviewed Glenn about the shooting. Glenn denied any involvement and said, "They saying that my—they seen my car or whatever the case may be, but it, it, it's a million gray, gray Jags. It ain't, they can't necessarily say it was just me." Detective Marsico testified that he had also interviewed Glenn who said he had driven his stepfather's Jaguar on May 5, 2014.

A criminalist testified about the cartridge cases recovered from both the Smith and Johnson shootings. He concluded that ten of the cartridges from the Smith shooting matched ten of those recovered from the Johnson shooting. He concluded that the same gun was used to fire those cartridges. An employee at

the Los Angeles County Sheriff's crime lab testified that one particle of gunshot residue was found on Glenn's left hand based on a sample taken several hours after the shooting.

A gang expert testified about the "Ten Line Gangster Crips" gang, its primary activities, and two predicate offenses committed by members of the gang. Glenn had "self-admitted to being a member of the Ten Line Gangster Crips with [the] moniker of BJ." The expert stated that the Imperial Courts or "Project Crips" gang (Knock-Knock's gang) was one of the rival gangs to the Ten Line Gangster Crips. When given a hypothetical question tracking the facts of the shootings, the expert opined that the shootings had been committed for the benefit of the Ten Line gang.

4. *The Defense Case*

Ronald Jones, Glenn's stepfather, testified that he met up with Glenn at 7:00 p.m. on May 5, 2014, the day of the Johnson shooting. Glenn drove a Buick to McDonald's with his girlfriend, Takiera Cervantes; Jones followed them in his Jaguar. They purchased food and returned home by 8:30 p.m. A McDonald's food receipt time-stamped 7:44 p.m. was introduced into evidence. Glenn was at home with Jones the rest of the evening until the police arrested him.

On cross-examination, the People played a recording of the stepfather's interview with Detective Giles the day after the shooting. Detective Giles asked Jones, " 'where did BJ go, go to get food at?' " and Jones said, "from what, uh, his cousin told me they went to, uh, McDonald's, got something to eat." When confronted with these recorded statements, Jones insisted that he had, in fact, accompanied Glenn to McDonald's the evening of the shooting.

Cervantes testified that, on May 5, 2014, at approximately 7:40 p.m., Glenn drove with her to McDonald's in a Buick, and Jones followed them in his Jaguar. They purchased food and returned home by 8:15 p.m. They remained at home until 11:00 p.m. when Glenn was arrested.

Glenn denied any involvement in the shootings. He testified he was a member of the Ten Line Gangster Crips and that the Project Crips was a rival gang. He acknowledged he often used his stepfather's Jaguar. On the night of May 5, 2014, he drove to McDonald's with Cervantes; Jones followed them in his car. They bought food and returned home around 8:00 p.m. Glenn remained at home the rest of the evening until his arrest.

Johnny Heudley testified he was related to both Glenn and Johnson. He had attended a Thanksgiving dinner with Johnson six months after the shooting at which she had admitted she mistakenly identified Glenn as the shooter. Heudley claimed he was not a gang member. On cross-examination, he denied ever having been stopped by the police or using the name "Hendley."

The People presented evidence that Heudley had previously admitted to being a member of the Ten Line Gangster Crips, had been known under the name "Hendley," and had been arrested for illegal possession of a firearm. Heudley received use immunity and then admitted he had lied in his prior testimony: he was also known as "Hendley," had a criminal record, and had previously been a member of the Ten Line gang.

5. *Threats to Johnson*

Johnson testified that two men had threatened her at an earlier court appearance—they said, "Don't go to court on my family." She felt scared and did not come back to court for the next hearing despite having been ordered to do so. On another

occasion, other individuals in court were staring at her in a threatening manner which made her feel uncomfortable.

Detective Marsico also testified that, at an earlier hearing in this case, Johnson had told him that certain individuals were "mad-dogging her."[2] She had pointed to three men in the courtroom. Detective Marsico recognized Heudley as one of those individuals. When Detective Marsico asked the men for their names, they refused to talk to him and left the courtroom. After the hearing, Detective Marsico escorted Johnson outside. She appeared scared and "kept repeating over and over, 'My grandkids could have been shot that day.' "

6. *The Verdict*

The jury acquitted Glenn of attempted murder with respect to Smith and Lamont. The jury found Glenn guilty of attempted murder with respect to Johnson and John Doe (Knock-Knock), and found true the firearm and gang allegations. Glenn was sentenced to state prison for an aggregate term of 70 years to life, consisting of consecutive terms of seven years to life with 15 years minimum parole eligibility (§ 186.22, subd. (b)(5)) plus 20 years for the firearm-use enhancement (§ 12022.53, subd. (c)). Glenn filed a timely notice of appeal.

DISCUSSION

1. *The Verdict Is Supported by Substantial Evidence*

Glenn contends his convictions are not supported by substantial evidence because there was insufficient evidence Glenn intended to kill Johnson or Knock-Knock, or that either victim was in a "particular zone of harm." Rather, he argues the

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[2] "Mad-dogging" is "a slang term referring to the practice of staring down" another individual. (*People v. Monterroso* (2004) 34 Cal.4th 743, 772.)

evidence established "the shooter was not shooting at anyone on the porch, but at people and cars in the street, at least 15 feet away." We disagree.

"[I]n reviewing a challenge to the sufficiency of the evidence, the relevant inquiry is whether, on review of the entire record in the light most favorable to the judgment, any rational trier of fact could have found the elements of the offense beyond a reasonable doubt. [Citations.] . . . In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623–624.) "[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [is] termed the 'kill zone.' " (*People v. Bland* (2002) 28 Cal.4th 313, 329.) Thus, a concurrent intent to kill nontargeted victims may be inferred when the defendant uses lethal force calculated to kill everyone surrounding the target as a means of ensuring the target's death. (*Ibid.*) Under such circumstances, "a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

The day after the Johnson shooting, Johnson told Detective Giles that Glenn had fired shots in her direction. The detective asked Johnson if Glenn had been shooting at another person on the street or at "you guys." Johnson replied, "He was shooting at us."

Glenn argues there was no substantial evidence Glenn was shooting at Johnson or Knock-Knock because Johnson testified at trial that Glenn was *not* shooting at her and that "[n]o shots ever came in the yard" or "on the porch." This argument does not consider the evidence in the light most favorable to the judgment as required under the substantial evidence appellate standard. Johnson's statements to Detective Giles were inconsistent with her testimony at trial—it was within the province of the jury to resolve those inconsistencies. The jury chose to believe that Johnson's statements made right after the shooting were more credible. We may not reweigh the jury's resolution of Johnson's inconsistent statements. Her statements to Detective Giles—that Glenn purposefully discharged a firearm at her and her cousin—were sufficient to support the convictions under a "kill zone" or direct intent theory.

Glenn in passing argues it was inconsistent for the jury to acquit Glenn of the Smith shooting charges while convicting him of the Johnson shooting charges. He argues that both Johnson and Smith offered "testimony that fully exculpates" him, therefore, absent ineffective assistance of counsel, the jury would have fully acquitted Glenn. We disagree. The jury was entitled to find Johnson credible while discounting the evidence supporting the Smith charges. (*People v. Cardenas* (1994) 21 Cal.App.4th 927, 938.)

2. *The Court Was Not Required to Give an Unanimity or Uncharged Bad Acts Instruction*

Glenn argues the trial court erred in failing to instruct sua sponte about unanimity because some jurors may have voted for guilt based on a belief that Glenn attempted to kill Knock-Knock, while others did so based on the belief that Glenn attempted to kill Johnson. We disagree.

"[T]he unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo* (2001) 25 Cal.4th 1124, 1132, 1135.)

Here, the attempted murders of Johnson and Knock-Knock were accomplished by the firing of gunshots in a single criminal act. This is distinguishable from a case where "the evidence establishes *several* acts, any one of which could constitute the crime charged . . . ." (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (italics added).) In the latter situation, "either the state must select the particular act upon which it relied for the allegation of the information, or the jury must be instructed that it must agree unanimously upon which act to base a verdict of guilty." (*Ibid.*) Here, by contrast, the gunshots fired by Glenn were acts " 'so closely connected in time as to form part of one transaction,' "

thus, no unanimity instruction was required. (*Ibid.*; *People v. Hajek & Vo* (2014) 58 Cal.4th 1144, 1221, overruled on other grounds in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216 ["no unanimity instruction is required if the case falls within the continuous-course-of-conduct exception"].)

Glenn also briefly argues the trial court erred in failing to instruct on the limited purpose for which evidence of uncharged other offenses should be received by the jury (CALJIC No. 2.50). He contends that the uncharged offense—his rumored participation in a 2013 shooting which we address below—could have been used by the jury "as a bad act in support of [the] conviction in the Johnson shooting."

"[I]n general, the trial court is under no duty to instruct *sua sponte* on the limited admissibility of evidence of past criminal conduct." (*People v. Collie* (1981) 30 Cal.3d 43, 64.) Glenn has not shown this is the "extraordinary case" in which sua sponte instruction was required. Given that the uncontested evidence was that Glenn did not participate in the 2013 shooting and to the contrary his counsel affirmatively used the evidence of the 2013 shooting as part of a strategy to undermine the prosecution's case, we find no error. (*Ibid.*)

3. *The Evidence Was Sufficient to Prove a Pattern of Criminal Gang Activity*

Glenn argues the gang expert's testimony did not supply substantial evidence of "a pattern of criminal gang activity" as required under section 186.22, subdivision (e). We disagree.

A gang enhancement under section 186.22 requires the prosecution to prove that the gang "includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' . . . ." (*People v. Gardeley* (1996) 14 Cal.4th 605,

617.) A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. (§ 186.22, subd. (e).) The predicate offenses must have been committed " 'on separate occasions, *or* by two or more persons.' " (*People v. Loeun* (1997) 17 Cal.4th 1, 9.)

Here, the gang expert, Office William Niemeyer, testified about two predicate acts as required under section 186.22. He had personally arrested Robert Young, a member of the Ten Line Gangster Crips, for being a felon in possession of a firearm. A certified minute order confirmed the conviction. Another certified minute order was submitted into evidence documenting the conviction of Percy Hendley (the stepbrother of witness Johnny Heudley) for robbery. Officer Niemeyer testified he had spoken with the officer who had arrested Hendley, and that "Percy Hendley, along with two other Ten Line Gangster Crips, [had been] placed under arrest for robbery."

Glenn argues that Officer Niemeyer's testimony did not establish the requisite two predicate offenses because the expert did not specifically testify that Percy Hendley was a member of the Ten Line gang but only implied it. First of all, this arguments asks us to ignore the plain meaning of the testimony. The use of the word "other" before "Ten Line" indicates that Hendley like the two "others" was a Ten Line member. Glenn was free to engage in wordsmithing with the witness (or the jury) but he may not ask us to find the witness did not mean what he said.

Even if the expert's testimony about Percy Hendley's gang membership was insufficient, the prosecution was entitled to rely on Glenn's own convictions in this case to establish one of the requisite predicate offenses. "[W]hen the prosecution chooses to establish the requisite 'pattern' by evidence of 'two or more' predicate offenses committed on a single occasion by 'two or more persons,' it can . . . rely on evidence of the defendant's commission of the charged offense . . . ." (*People v. Loeun*, *supra*, 17 Cal.4th at p. 10.) There was also independent evidence sufficient to establish Hendley's gang membership: Heudley testified that Percy Hendley, his stepbrother, was a Ten Line Gangster Crips member. Accordingly, substantial evidence supports the jury's finding of a pattern of criminal gang activity.[3]

4. *Ineffective Assistance of Counsel*

Glenn contends that defense counsel rendered ineffective assistance in several regards: (a) by allowing his stepfather, Ronald Jones, to testify that he had accompanied Glenn to McDonald's when Jones's recorded interview with the police

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[3] Because we find that Officer Niemeyer's testimony regarding Percy Hendley's conviction was unnecessary to show a "pattern of criminal activity," we need not reach Glenn's argument that the testimony was based on case-specific out-of-court statements and, thus, was inadmissible under by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). However, as we recently held, "[u]nder *Sanchez*, facts are only case specific when they relate '*to the particular events and participants* alleged to have been involved in the case being tried' . . . . [Citation.]" (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1174–1175, review granted March 22, 2017, S239442, on other grounds, but ordered the Court of Appeal opinion remain precedential (Cal. Rules of Court, rule 8.1115(e)(3)).)

contradicted this claim; (b) by allowing his cousin, John Heudley, to falsely testify as to his last name, gang membership, and criminal record; (c) by not moving to exclude Christy Johnson's reference to a rumor that Glenn "did it before on last year, 2013"; (d) by failing to object to the prosecutor's questioning of Glenn regarding his possession of a firearm; (e) by failing to adequately challenge expert testimony on gunshot residue and ballistics evidence; and (f) by failing to adequately represent Glenn at the sentencing hearing.

Applying the legal standard first announced in *Strickland v. Washington* (1984) 466 U.S. 668 *(Strickland)*, our Supreme Court has stated, "In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745–746.) In evaluating trial counsel's actions, "[a] court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance." (*People v. Dennis* (1998) 17 Cal.4th 468, 541.) To satisfy the second prong of *Strickland's* test, the defendant must also show prejudice, namely that there is a reasonable probability the result of trial would have been more favorable for him but for counsel's deficient representation. (*Id.* at p. 540.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of

ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

a. *Ronald Jones's Testimony*

Glenn argues that his counsel was ineffective because he put Jones on to testify to facts that were inconsistent with a recorded statement Jones had made to the police. Specifically, Jones testified that he had accompanied Glenn to McDonald's on the evening of May 5, 2014, but in his interview with the police said that Glenn's cousin had "told" him that Glenn had gone to McDonald's. When confronted with his prior interview statements, Jones could not explain the discrepancy but only asserted that his more recent version of the events was true.

Arguably, competent counsel would not have allowed Jones to testify to statements that were inconsistent with statements he had made to the police in a recorded interview. It may be that trial counsel made a tactical choice to bolster Glenn's alibi with testimony from his stepfather rather than merely relying on Cervantes, Glenn's former girlfriend. However, counsel could have simply examined Jones about Glenn's whereabouts at the time of the shooting—9:00 p.m.—rather than eliciting inconsistent testimony about events earlier in the evening.

In any case, Glenn has not shown prejudice. To establish prejudice, the defendant " 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Ledesma* (1987) 43 Cal.3d 171, 217–218.) Although Jones's prior statements to the police contradicted his account of events prior to 8:30 p.m. on May 5,

2014, Jones's testimony that Glenn was at home at 9:00 p.m.—when the shooting occurred—was not impeached with any prior inconsistent statements by Jones.

Finally, the substantial evidence of Glenn's guilt demonstrates there is no reasonable probability of a more favorable outcome had defense counsel not called Jones to testify. (See *People v. Doolin* (2009) 45 Cal.4th 390, 432 [extensive evidence of the defendant's guilt demonstrated no reasonable probability of a more favorable outcome].) Johnson identified Glenn as the shooter, and his stepfather's car, a silver Jaguar, as the car used in the shooting. She was standing on her porch with a member of the rival Imperial Courts or Project Crips gang when the shooting occurred. Glenn admitted he had driven the Jaguar the day of the shooting. Glenn was not a stranger to Johnson as she knew him from the neighborhood and had even seen him pass by her house earlier that day. Her identification was particularly credible as she had no apparent motive to identify him. On the contrary, she was fearful of testifying due to gang threats. Finally, gunshot residue was found on Glenn's hands within hours of the shooting. As Glenn has not established prejudice, this ineffective assistance claim lacks merit.

b. *John Heudley's Testimony*

Glenn argues his counsel was ineffective by leaving Heudley "open to attack and impeachment" based on Heudley's false testimony about not being a gang member, having a criminal record, or using the name "Hendley." There is no evidence trial counsel knew Heudley intended to lie on the stand. Although Heudley testified that he had informed counsel of his criminal record, this does not lead to an inference that trial counsel knew Heudley intended to deny his criminal record on

the stand when cross-examined about it. There is also no evidence counsel knew Heudley had been a gang member and had been known as "Hendley," or that counsel knew Heudley intended to lie about these facts.[4]

Accordingly, we cannot say on appeal there is "no satisfactory explanation" for trial counsel's decision to put Heudley on the stand. (*People v. Anderson*, *supra*, 25 Cal.4th at p. 569.) Heudley testified as to Johnson's alleged admission that she had lied about the shooting; thus, his testimony was important to the defense's attempt to discredit Johnson. On this record, calling Heudley to testify appears to be a reasonable tactical choice presuming, as we must in the absence of anything to the contrary, that counsel did not know Heudley intended to lie on the stand.

c. *Rumor About the 2013 Shooting*

Glenn argues that his counsel was ineffective in allowing the admission of Johnson's statement in a recorded police interview that Glenn "did it before on last year, 2013." We conclude counsel made a reasonable tactical decision to use this evidence to argue that the prosecution's case was based on speculation.

Prior to trial, defense counsel initially moved to exclude any reference to a third shooting. However, counsel later withdrew that motion. At trial, a recorded interview between

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[4] In the opening brief, Glenn argues that Heudley brought "documents with the name 'Hendley' on them" to mislead the jury. The record shows that Heudley brought in his driver's license, social security card, and his birth certificate with the name *Heudley*, not Hendley. Even if Heudley intended to mislead the jury into believing he was not known as "Hendley," there is no evidence counsel knew this was Heudley's intention.

Detective Giles and Johnson was played for the jury. In the interview, Johnson described the shooter's actions and said, "he the same guy that, um, you know, you hear the rumors that he did it before on last year, 2013." Defense counsel objected, stating the statement about "rumors" was highly prejudicial, and he "thought this had been cleaned up."

The court asked counsel if he wanted to strike or limit the evidence. Defense counsel volunteered that Glenn was "locked up" in 2013. The court replied, "If this is the same incident and . . . he was in custody during that incident, then this is not prejudicial to you by any stretch, at least tactically because this establishes what you've already—what you want to establish that he couldn't have done that shooting . . . ." Defense counsel replied, "Let's let it go."

The prosecution's expert criminalist later testified about a 2013 shooting that was connected to the Smith shooting. Based on his testing of cartridges recovered from the Smith shooting, he concluded that two firearms had been used and both firearms were connected to other shootings: one firearm had been used in the Johnson shooting, and the other had been used in a 2013 shooting. On cross-examination, the criminalist confirmed that the referenced 2013 shooting had occurred on June 3. Glenn then testified he was in custody from January to September 2013. A counselor from Los Padrinos Juvenile Hall, also testified that Glenn was detained at a "camp school" on June 3, 2013.

In closing, defense counsel argued, "There's been several examples in this case where the prosecution wants you to speculate about stuff . . . . [¶] They want you to believe that because there was another shooting on June 3rd, that it involved one of the same gun[s]. June 3, 2013, they want you to believe he

was involved in that. . . . We know he was in juvenile hall on June 3, 2013. [¶] Likewise . . . Miss Johnson told you, 'Well, I heard rumors that he was involved in another shooting sometime in 2013.' But we know from the records and from the testimony that he was in juvenile hall . . . from January to . . . September." The prosecutor, in closing, said the People "have never alleged that the defendant was responsible for the shooting in 2013."

Glenn now argues that trial counsel was ineffective in failing to move to exclude references to the 2013 shooting. Counsel waffled on whether to exclude such evidence or use it strategically to argue that the prosecution's case was based on speculation and innuendo. He ultimately pursued the latter tactic. When Johnson's statement regarding the 2013 shooting "rumor" was played, counsel made a conscious decision not to move to strike or limit the evidence even after a candid discussion at sidebar. Instead, he chose to leverage the evidence to cast doubt on the prosecution's tactics and evidence. Counsel then elicited testimony that the 2013 shooting referenced by the prosecution's expert witness occurred on June 3, and presented evidence Glenn was in custody at that time. These were reasonable tactical decisions.

d. *Prior Arrest for Possession of a Firearm*

Glenn contends his counsel was ineffective in failing to object to the prosecutor's questions to him about whether he had previously possessed a firearm. We conclude counsel's decision not to object was reasonable.

On cross-examination, the prosecutor's exchange with Glenn went as follows:

"Q. Now, did you also, when speaking to detectives, tell them you never had a gun?

A. Yes.

Q. I mean ever?

A. Yes.

Q. You're lying then, right?

A. I'm not lying. I got arrested for a gun, yes."

No further questions were asked about the arrest, but the prosecutor asked Glenn, "Did you, on May 5th, 2014 [the date of the shooting], handle a gun?" to which Glenn responded, "No."

The prosecutor's questions to Glenn on this topic were not a clear attempt to impeach him with evidence of a prior arrest. Rather, the prosecution asked Glenn whether his prior statements to the police were true. Glenn had previously denied ever possessing a gun when he was interviewed in relation to this case, thus, defense counsel could have reasonably inferred that Glenn would have continued to affirm that denial. Accordingly, defense counsel's choice to allow such testimony without asserting an objection was a reasonable tactical decision to give Glenn the opportunity to affirm his prior denial of firearm possession.

e. *Expert Opinion on Gunshot Residue and Ballistics*

Glenn contends that his counsel was ineffective in failing to adequately challenge the expert's testimony on gunshot residue. We conclude defense counsel's efforts to challenge the expert's testimony on this subject fell within "the wide range of reasonable professional assistance." (*People v. Dennis*, *supra*, 17 Cal.4th at p. 541.)

The prosecution's expert from the crime lab testified that one particle of gunshot residue was detected based on the sample taken from Glenn's hands. He further testified that the reasons a person may test positive for gunshot residue include they fired a

gun, they held a gun, they stood close to someone firing a gun, or they touched a surface with gunshot residue on it.

On cross-examination, defense counsel challenged the expert about his testimony on several points: he asked whether Glenn's clothes or the Jaguar had been tested for gunshot residue to confirm the positive result (no), whether the police had "bagged" Glenn's hands upon arrest in order to prevent contamination through contact with other surfaces (no), and whether it was easy to "pick up" gunshot residue from touching other surfaces with gunshot residue (yes). That defense counsel did not, in addition, challenge other parts of the expert's testimony does not establish that his representation fell below an objective standard of reasonableness.

Glenn makes the same argument as to the ballistics expert: he contends counsel was ineffective in not cross-examining the expert on the scientific underpinnings of his opinion. We conclude that defense counsel's decision to only challenge other aspects of this expert's testimony constituted reasonable assistance.

After the ballistics expert testified to the link between the Smith and Johnson shootings, defense counsel cross-examined him on multiple points: he asked whether the expert had been able to test the firearm used in the crimes (no), and whether the expert was concerned that the police had recorded that only eight cartridges were recovered from the Johnson shooting when, in fact, ten were presented to the expert for testing (yes).

Although Glenn contends that defense counsel could have, in addition, challenged the expert on the accuracy of his scientific method for matching the cartridge cases to a particular firearm, we do not conclude there could be no satisfactory explanation for

counsel's failure to do so. Counsel may have decided that an attempt to cross-examine the expert on the validity of the scientific process would have unduly extended and, thus, drawn emphasis to this witness's testimony. Glenn has not shown he received ineffective assistance of counsel.

f. *Ineffective Assistance of Counsel at Sentencing*

Glenn argues that his lawyer was legally ineffective at his sentencing hearing in two respects: (1) counsel failed to consult with Glenn about his allocution,[5] and (2) counsel failed to present any mitigating factors under *Miller v. Alabama* (2012) 567 U.S. 460, 132 S.Ct. 2455 (*Miller*). For reasons that we explain below, we conclude the current record does not permit us to determine whether counsel was legally ineffective under *Strickland*'s two-part test.

Just prior to sentencing, the court asked Glenn if he wanted to make a statement. Glenn replied, "I just wanted to say that [I] feel I was wrongly convicted and I'm prayin' to God that everything work out on my appeal." The trial court stated that he believed Glenn had lied at trial and was "now continuing that lie." "What you just shared with me really wasn't helpful at all. In fact, it made me believe that sentencing you to both counts

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[5] "In legal parlance, the term 'allocution' has traditionally meant the *trial court's inquiry of a defendant* as to whether there is any reason why judgment should not be pronounced. [Citations.] In recent years, however, the word 'allocution' has often been used for *a mitigating statement made by a defendant in response to the court's inquiry*. [Citation.]" (*People v. Evans* (2008) 44 Cal.4th 590, 592, fn. 2, italics in original.) Here, we use the term's modern meaning.

consecutively is the appropriate sentence because its shows to me how little insight you have into what you did." Although the court agreed with defense counsel that there was "no evidence" Glenn was involved in misconduct by his relatives who were witnesses at trial, the court concluded, "What I do know is he tried to kill two people, and I do know he did it with premeditation and deliberation."

Glenn argues on appeal that his counsel should have consulted with him about his allocution, and he was prejudiced because the court expressly based its decision to impose consecutive sentences at least in part on Glenn's response.

Glenn has not established ineffective assistance on this record. At this stage, we do not know whether trial counsel consulted with Glenn about a potential statement to the court or whether Glenn followed any advice the lawyer may have given him. On this record, we can only assume that counsel advised Glenn in a competent manner, and, therefore, that Glenn has not satisfied the first test for ineffective assistance of counsel.

Glenn also argues his counsel was ineffective in not presenting at the sentencing hearing any evidence on the factors identified in *Miller*. (See, e.g., *Miller*, *supra*, 132 S.Ct. at p. 2464 [" 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds' [citation]"].) As a result, defense counsel left the trial court with no plausible theory on which to sentence Glenn to concurrent rather than consecutive sentences. (See, e.g., Cal. Rules of Court, rule 4.425 [the court may consider circumstances in aggravation or mitigation in deciding whether to impose consecutive rather than concurrent sentences].) This issue is related but distinct from the issue we discuss, *post,* that Glenn should now be

afforded a hearing under *Franklin, supra,* 63 Cal.4th 261 to develop the record for future parole consideration.

We can see no tactical reason why counsel would not present argument and evidence as to youth mitigation factors particularly when counsel was aware the trial court had discretion to impose consecutive sentences. A 35-years-to-life sentence for a seventeen year old is fundamentally different than a 70-years-to-life sentence.[6] However, Glenn appears to argue only he was prejudiced because he was deprived of the opportunity "to produce mitigating evidence . . . for future consideration by the parole board."

To the extent Glenn is also arguing that he received ineffective assistance of counsel because his lawyer's failure to address the *Miller* factors resulted in the trial court's imposing consecutive rather than concurrent sentences, we are unable to adjudicate that claim on the current record. It is true, that, as recently highlighted in *Weeden v. Johnson* (9th Cir. 2017) 854 F.3d 1063, the "Supreme Court has repeatedly made plain that counsel has the 'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.' [Citation.]" (*Id.* at p. 1069.) The *Weeden* court found that trial counsel had unreasonably failed to investigate the juvenile defendant's mental condition. (*Ibid.*) The court's finding was based, in part, on the *Miller* line of cases in which the United States Supreme Court has observed that a juvenile's

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[6] We are aware that under *Franklin*, Glenn would be entitled to a parole hearing after 25 years whether or not his sentences were concurrent or consecutive. We cannot say as a matter of law that the parole board would view the appropriateness of parole for a 35-year minimum sentence the same as it would for a 70-year minimum.

brain "is markedly less developed than that of an adult." (*Ibid.*) The defendant showed prejudice in *Weeden* through the presentation of expert testimony based on a postconviction psychological examination. (*Id.* at p. 1072.)

Although *Weeden* involved a failure to reasonably investigate a juvenile defendant's mental state as it might affect a finding of guilt, we see reason why the duty would not equally apply at sentencing. Indeed, in light of *Miller's* strong admonition, an investigation into a juvenile's mental state (and background generally) may be most useful at sentencing because it provides the opportunity for the defense to provide information to the court that would have been inadmissible at trial. It follows that an attorney in preparing for a sentencing hearing has a duty to investigate the *Miller* factors and that the failure to do so is ineffective assistance of counsel under the first *Strickland* prong. Here the record *suggests* that counsel failed to investigate *Miller* mitigation factors—he certainly did not present any to the trial court—but this suggestion is only that and it does not reveal whether there were in fact any mitigation factors that could have been placed before the trial court. Even though it is hard to imagine that there was nothing in Glenn's background that might have influenced the court favorably in its sentencing decision, we choose not to tread into these waters on the present record. Instead, we believe this point is more appropriate for resolution by a habeas corpus petition, filed first in the trial court.[7]

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[7] In a petition for habeas corpus, the defendant may present his prior counsel's declaration attesting to the actions he took while representing the defendant. (See *In re Robbins* (1998) 18 Cal.4th 770, 780.)

5. *Remand in Accordance with* Franklin, supra, *63 Cal.4th 261*[8]

Glenn contends we should remand his case for further proceedings pursuant to the Supreme Court's recent decision in *Franklin, supra,* 63 Cal.4th 261. He argues we should direct the trial court to make a record under sections 3051 and 4801 regarding any factors related to his youth that may become relevant in a future Parole Board hearing. We agree.

Sections 3051 and 4801 were "recently enacted by the Legislature to bring juvenile sentencing in conformity with" *Miller, supra,* 132 S.Ct. 2455 and other authority addressing the constitutionality of life without parole sentences and their functional equivalent for juvenile offenders. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) Section 3051, subdivision (b)(3), states that, when a defendant is convicted for an offense that he or she committed before age 23, and is sentenced to a life term of 25 years to life, the defendant "shall be eligible for release on parole at a youth offender parole hearing by the [Parole Board] during his or her 25th year of incarceration . . . ." Section 4801 requires the Board of Parole Hearings to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity." (§ 4801, subd. (c).)

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[8] Glenn originally argued that his sentence of 70 years to life in prison for his crimes, committed while he was a juvenile, amounted to a violation of the Eighth Amendment's prohibition of cruel and unusual punishment. In his reply brief, he acknowledges this argument was mooted by *Franklin, supra,* 63 Cal.4th 261.

In *Franklin*, the court held that sections 3051 and 4801 mooted the defendant's constitutional challenge to a 50-year-to-life sentence by requiring a parole hearing during the 25th year of incarceration. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) At the same time, the Supreme Court observed: "It is not clear whether [the defendant] had sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a [future] youth offender parole hearing. . . . The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board [of Parole Hearings], years later, may properly discharge its obligation" in reviewing the decision to grant or deny parole under sections 3051 and 4801. (*Id.* at p. 284.) Accordingly, the court remanded the matter "for the limited purposes of determining whether Franklin was afforded an adequate opportunity to make a record of information that will be relevant to the Board as it fulfills its statutory obligations under sections 3051 and 4801." (*Id.* at pp. 286–287.)

Here, Glenn was sentenced in September 2015. Although sections 3051 and 4801 had become effective by that time, *Franklin* had not yet been decided. Perhaps the manner in which the law in this area has developed caused counsel not to understand the importance of introducing *Miller* evidence for future parole consideration. The trial court and district attorney, on the other hand, went to great lengths to address the *Miller* factors even without input from the defense. The Attorney General suggests the hearing presciently complied with *Franklin* but in our view the Supreme Court has made it "clear that the sentencing hearing has newfound import in providing the

juvenile with an opportunity to place on the record the kinds of information" relevant to the parole board under sections 3051 and 4801. (*People v. Jones* (2017) 7 Cal.App.5th 787, 819, italics added)

Prior to *Franklin*, there was no indication that a juvenile's sentencing hearing would be a primary (and contemporaneous) mechanism for providing the Board of Parole Hearings with evidence it would need to evaluate a defendant 25 years in the future. Here, defense counsel presented no evidence: he did not file a sentencing memorandum and did not present any evidence at the hearing. Accordingly, we remand the matter to allow the parties to "make a record of information that will be relevant to the Board as it fulfills its statutory obligations under section 3051 and 4801." (*Franklin*, 63 Cal.4th at pp. 286–287.)

6. *Calculation of Presentence Credits*

Glenn contends, the Attorney General concedes, and we agree that the trial court incorrectly calculated his presentence credits.

Credits for presentence custody are calculated from the date of booking confinement through sentencing. (*People v. Macklem* (2007) 149 Cal.App.4th 674, 702.) Glenn was taken into custody on May 6, 2014 and was sentenced on September 18, 2015, 500 days later. The court awarded Glenn 372 days of actual custody credit and 50 days of conduct credit calculated under section 2933.1.[9] In fact, he spent 500 days in custody before he was sentenced and is entitled to 75 days of conduct

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[9] Because Glenn was convicted of attempted murder, he was subject to a 15 percent limitation on conduct credit. (§ 2933.1, subd. (a).)

credit (500 x 15 percent). His total presentence credits are 575 days (500 plus 75).

DISPOSITION

The matter is remanded for the limited purpose of providing the parties the opportunity to make a record of Glenn's characteristics and circumstances at the time of the offenses as set forth in *Franklin*, *supra*, 63 Cal.4th 261. The judgment is modified to award Glenn 500 days of actual custody and 75 days of conduct credit for a total of 575 days of presentence credit. The trial court is ordered to amend the abstract of judgment to reflect 575 days of presentence credit and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.