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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. VERNON T. JOHNSON et al., Defendants and Appellants.	B209800 (Los Angeles County Super. Ct. No. BA304246)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy-Powell, Judge. Affirmed in part; reversed in part.

Leslie Conrad, under appointment by the Court of Appeal, for Defendant and Appellant Vernon T. Johnson.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant Jonathan Moore.

Feria & Corona and Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Michael Bennett.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Vernon T. Johnson, Jonathan Moore, and Michael Franscula Bennett, appeal from their convictions arising from a gang related shooting. Mr. Johnson was convicted of: first degree murder (Pen. Code[1] § 187, subd. (a)); two counts of attempted murder (§§ 187, subd. (a), 667); two counts of firearm assault (§ 245, subd. (a)(2)); and shooting at an occupied motor vehicle. (§ 246.) Special circumstances allegations were sustained as to Mr. Johnson. (§ 190.2, subd. (a)(21)-(22).) Mr. Moore and Mr. Bennett were convicted of the same offenses except for the homicide and its related special allegations. The jury returned gang and multiple firearm use findings which we will discuss as they are pertinent. (§§ 186.22, subd. (b)(1)(C); 12022.5, subd.(a); 12022.53, subds. (b)-(e)(1).)

Mr. Johnson argues that there was insufficient evidence to support his convictions and the trial court improperly imposed a state court construction fee. Mr. Moore argues there was insufficient evidence to support: his attempted murder convictions; the great bodily injury findings in count 2; the finding that he personally discharged a firearm causing great bodily injury in count 2; and the finding that a principal personally discharged a weapon causing great bodily injury as to count 2. Mr. Moore further argues that the term "great bodily injury" is so "vague and undefined" that it denies due process. Mr. Bennett argues that the trial court improperly imposed sentences under both section 12022.53 and 186.22 as to counts 2 and 3. Mr. Moore and Mr. Bennett argue that the trial court improperly allowed Detective Michael Valento to testify regarding defendants' mental state. All defendants argue that the trial court improperly sentenced them to a section 12022.53, subdivision (d) enhancement as to count 3. All defendants join the arguments of their codefendants that accrue to their benefit. We reverse in part.

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

II. FACTUAL BACKGROUND

Gabriel Njie pled guilty to an attempted murder charge arising from this case. Mr. Njie admitted allegations a principal was armed in the commission of the crime and the offense was committed for the benefit of a criminal street gang. Mr. Njie was sentenced to 16 years in state prison. Mr. Njie also agreed to testify truthfully and completely at defendants' trial.

A few days before December 30, 2005, Mr. Johnson telephoned Mr. Njie. Mr. Johnson said that a friend had been killed. Mr. Johnson said he had a "chrome .357" and he wanted to "put in some work." Mr. Njie understood this to mean that Mr. Johnson intended to kill some enemies. Mr. Johnson called Mr. Njie again on December 30, 2005. Mr. Njie was asked to join Mr. Johnson in order to "put in some work"; i.e., commit gang violence. Both Mr. Njie and Mr. Johnson were members of the local gang.

Mr. Njie borrowed his girlfriend's burgundy Saturn. Mr. Njie and a friend, identified only as "Dameon," drove to a house at 1940 108th Street near Vernon Street. Mr. Njie met Mr. Johnson in the house. The person identified only as Dameon was left at his house. Mr. Njie and Mr. Johnson then drove to Mr. Bennett's house. Mr. Bennett was a fellow gang member. Mr. Bennett's girlfriend, Trinity Metzgen, was at his house. Also present were Mr. Moore and an individual identified as Mike. After playing a video game briefly, all those present left in two cars to go to the liquor store at 108th and Western Streets. Mr. Njie, Mr. Johnson and Mr. Moore rode in the burgundy Saturn. Ms. Metzgen, Mr. Bennett, and the person identified as Mike rode in her Mustang automobile. Mr. Bennett was driving Ms. Metzgen's Mustang. The person identified as Mike was in the back seat of the two-door car. Ms. Metzgen saw a small black gun in the car.

Mr. Njie, Mr. Johnson and Mr. Moore stopped at the 108th street address to pick up some marijuana. Thereafter, they drove to the liquor store. Ms. Metzgen's Mustang was already there. Mr. Njie, Mr. Johnson and Mr. Moore went into the liquor store, made a purchase, then returned to the Saturn. Mr. Njie drove. Mr. Johnson was in the right

passenger seat and Mr. Moore was in the rear right passenger seat. As Mr. Njie pulled out of the parking lot, a green four-door Honda automobile almost collided with the Saturn. Mr. Njie began to follow the Honda. However, he could not catch up to the Honda. Mr. Njie saw the Mustang driven by Mr. Bennett pursue the Honda.

The Honda was driven by Jose Saucedo. Mr. Saucedo, Rene Escalante, Arianna Meneses, Miguel Gutierrez and others identified only as Santiago, Lluvia and Josephine were also in the Honda. The group was going to celebrate Mr. Saucedo's birthday. Mr. Escalante saw a Mustang automobile begin to follow them after they had stopped at a signal. The Mustang drove alongside the Honda, passed them and then stopped in front of them. Mr. Saucedo turned left, eluding the Mustang. When the Honda drove back to Western Avenue, a burgundy colored car began to follow them. Mr. Njie had resumed the chase in the burgundy Saturn when the Honda passed him on Western Street.

Mr. Njie drove up next to the Honda to ask the driver a question. Mr. Njie wanted to know why the two cars almost collided. Mr. Njie lowered his front electric right passenger window. Mr. Johnson pulled out a gun from under the seat and shot into driver's side of the green Honda. The shot shattered the driver's window of the Honda. Mr. Saucedo was fatally shot in the left side of his face. Mr. Escalante saw the right front passenger of the burgundy car reach through the open window. Thereafter, Mr. Escalante heard a gun fire and felt glass shatter on his face. Mr. Gutierrez, who was seated behind Mr. Saucedo on the left side of the Honda, saw the right front passenger of the car pull a gun and fire once. Ms. Meneses, who was seated on Mr. Guiterrez's lap, saw the car pull up next to Mr. Saucedo's Honda. Ms. Meneses saw a gun come out of the right front passenger side of the Honda. Ms. Meneses saw a flash from the gun before she ducked down. After the shooting, Mr. Njie pulled around the corner and parked. Mr. Njie was very nervous. Mr. Johnson asked Mr. Njie to start the Saturn. At first, Mr. Njie refused to restart the car. Mr. Johnson ordered Mr. Njie to start the Saturn or they would fight. Mr. Njie started the Saturn.

The passengers in Mr. Saucedo's Honda were able to steer the car to a curb when he lost consciousness. A nearby neighbor called the police for them. Mr. Saucedo died

as the result of the gunshot wound to his cheek and neck that injured his carotid artery and jugular vein thereby causing a fatal hemorrhage.

Mr. Bennett, who had lost sight of the Honda, asked Ms. Metzgen if she had heard gunshots. Soon thereafter, Mr. Njie saw Ms. Metzgen's Mustang on 108th Street. Mr. Njie drove to a Valero gas station at Western Avenue and Imperial Highway. Mr. Bennett also drove into the gas station. After leaving the gas station, the two groups drove to a nearby bowling alley, where they went inside briefly. Thereafter, they smoked cigarettes outside the bowling alley. Photographs taken by video camera at the bowling alley showed Mr. Njie, Mr. Johnson, Mr. Moore, Mr. Bennett, the person identified as Mike, and Ms. Metzgen. Later, all of those present drove back to Mr. Bennett's house in the Saturn and the Mustang. Mr. Njie, Mr. Johnson, Mr. Moore, Mr. Bennett, Ms. Metzgen and the person identified as Mike went inside Mr. Bennett's house for 20 to 30 minutes.

The group left Mr. Bennett's house. Mr. Bennett was driving the Mustang, Ms. Metzgen sat in the passenger seat and the person identified as Mike was in the rear seat. Mr. Johnson asked if he could drive the Saturn. Mr. Njie said, "Yes." Mr. Johnson indicated he was going to drive through an area known to be the rival gang territory. As Mr. Johnson drove on Crenshaw Boulevard and 104th Street, Mr. Njie saw a white Caprice automobile with two individuals inside. Mr. Njie believed the two men were members of the rival gang because of the color of their clothing. The men in the Caprice drove off. Mr. Johnson was unable to find them. However, as they drove through a residential area, they saw the white Caprice which was now parked.

Mr. Johnson drove in front of the Caprice and parked. Mr. Johnson tried to hand Mr. Njie the gun. Mr. Njie told Mr. Johnson, "I don't want the gun." Mr. Johnson then handed the gun to Mr. Moore. Mr. Moore then leaned his body out the window behind the driver's seat and shot at the Caprice. The gun jammed the first time Mr. Moore tried to fire. However, he then successfully fired the gun. The Caprice drove away quickly. As Mr. Johnson in the Saturn began following the Caprice, Mr. Bennett drove up in the Mustang. Mr. Njie saw Mr. Bennett standing outside the Mustang's sunroof. Mr.

Bennett was chasing the Caprice. Mr. Bennett told Ms. Metzgen to "duck." After Ms. Metzgen put her head down, she heard more than two gunshots from above her. Mr. Bennett's body was lifted off the driver's seat. Mr. Johnson was driving the Saturn directly behind Mr. Bennett. Mr. Njie heard gunshots. The gunshots sounded as though they were coming from the area in front of him. When Ms. Metzgen finally raised her head up, she asked Mr. Bennett what had happened. Mr. Bennett said he knew the people in the car they had followed. The Caprice turned onto another street.

Chaundi Grant and Gerald Kelly, who were brothers, went out at approximately 10:15 p.m. on December 30, 2005, to get some food. Mr. Grant was driving a white Chevrolet. As Mr. Grant was about to parallel park, Mr. Kelly yelled out in a frightened tone, "D, they about to bust." Mr. Grant understood that to mean they would be shot. As Mr. Grant looked over his shoulder, he saw gunfire coming out of what he believed to be a gray Mustang automobile. Mr. Grant was hit in the back of the head by the first shot. Mr. Grant drove away. At the time of trial, Mr. Grant had a scar approximately two and one-half inches behind his right ear and an inch above the bottom of his hairline. The rear windshield of Mr. Grant's car had been shattered. As he drove away, Mr. Grant heard additional shots being fired. The shots stopped for a while. Mr. Grant believed that he might have lost the assailants.

Mr. Grant did not see the Mustang again until he had turned on Van Ness Boulevard, the next street. The Mustang followed Mr. Grant and shots were fired at him. Mr. Grant's car was hit several times resulting in: three flat tires; holes near the rearview mirror; holes in the handle of the driver's door; and holes in the rear passenger door. Eventually, the other car drove off. Mr. Grant stopped at Prairie Avenue and 97th Street, where he passed out. Mr. Kelly flagged down a passing ambulance, which took Mr. Grant to the hospital. Mr. Grant received stitches. Mr. Grant returned to the hospital two weeks later for follow up care. Mr. Grant described "pussing and bleeding" and the inability to lie on the back of his head as a result of the wound.

After the shooting, those in the Mustang and the Saturn then returned to Mr. Bennett's house. Mr. Bennett used a flashlight to try to find shells in Ms. Metzgen's car.

A short time later, Mr. Njie drove up in the Saturn with Mr. Moore and Mr. Johnson. Mr. Bennett, Ms. Metzgen and the person identified as Mike got into the Mustang. After driving around for a while, they went to the 108th Street address to drop off Mr. Johnson. When they arrived at the 108th Street address, they were immediately arrested.

Los Angeles Police Officers Joshua Kniss and Jason Schwab arrived at the 97th Street shooting scene. During the course of their investigation, the officers spoke with the liquor store owner. Officer Schwab reviewed a security video tape. Officer Schwab reviewed the tape from a time period around 9:45 p.m. Officer Schwab saw three individuals on the tape that wore hats with the color of the local gang. While at the liquor store, Officer Kniss spoke with Curtis Potts. They discussed Mr. Pott's affiliation with the local gang. As a result of that investigation, Officers Kniss and Schwab went with other gang investigators to 1940 108th Street. Mr. Potts identified this as his residence. As they approached the 108th Street residence, Officer Schwab saw a burgundy Saturn and a silver Mustang. The engines were running and the lights were on in both cars. The occupants of both automobiles were ordered out of the cars. All those inside the house were also detained. All of those involved except Mr. Johnson were arrested. Officer Kniss later returned to the 108th Street address with another officer at 3 or 4 a.m. At that time, Mr. Johnson was arrested.

Finally, Detective Valento testified concerning defendants' street gang and its relationship to the shootings. Mr. Moore gave an extensive recorded statement to the authorities which was played to the jury. Mr. Moore admitted participating in the events leading up to the shootings. Mr. Moore, who admitted riding with the others in the Saturn, stated that Mr. Johnson had a gun. But Mr. Moore denied actually seeing who shot Mr. Saucedo. This was despite the fact that Mr. Moore was seated in the same car with Mr. Johnson when Mr. Saucedo was fatally shot. But Mr. Moore saw Mr. Johnson dispose of a cartridge in a gutter. Mr. Johnson then reloaded the gun. Mr. Moore admitted being present at the shooting of Mr. Grant. At one point in his contradictory statement, Mr. Moore stated he shot the handgun into the air. But at another point, Mr. Moore said to Mr. Johnson: "Yeah, I think I did it. I think I got him." Mr. Moore was

tried by a different jury from the one that evaluated the charges against Mr. Bennett and Mr. Johnson.

III. DISCUSSION

A. Sufficiency of the Evidence

1. Mr. Moore's intent to kill Mr. Grant and Mr. Kelly

Mr. Moore argues, "The findings that appellant intended to kill Grant and Kelly are . . . unsupported by the evidence." Before addressing the merits of Mr. Moore's argument, we emphasize the precise argument that is before us. The heading in Mr. Moore's opening brief states he is challenging the evidence he intended to kill the two brothers. Until the last sentence of the discussion in the opening brief all that is asserted is that Mr. Moore did not possess the intent to kill. Until that point in the opening brief, no reference is made to the premeditation element of a violation of section 664, subdivision (a). In the last sentence, Mr. Moore argues: "For these reasons the verdicts of guilty of attempted murder and the findings of premeditation in counts two and three must be reversed without leave to retry. (*Burks v. United States* (1978) 437 U.S. 1, 18 [sic].)" The reply brief makes no mention of the premeditation issue. The issue properly before us is the absence of evidence of an intent to kill. The premeditation issue raised in passing in a single sentence in the opening brief without appearing in the heading of the argument, citation to the record, or development of the argument has not been preserved for review. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Roe v. McDonald's Corp.* (2005) 129 Cal.App.4th 1107, 1114.)

In reviewing a challenge of the sufficiency of the evidence, we apply the following standard of review: "[We] consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence

supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer* (1994) 31 F.3d 907, 908-909.) The standard of review is the same in cases where the prosecution relies primarily on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11; *People v. Stanley* (1995) 10 Cal.4th 764, 792; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Bean* (1988) 46 Cal.3d 919, 932.) Our California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin, supra,* 18 Cal.4th at p. 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Our Supreme Court has held: "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]'" (*People v. Smith* (2005) 37 Cal.4th 733, 741, 742; quoting *People v. Lee* (1987) 43 Cal.3d 666, 679, and *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 [where a defendant fired a bullet at two officers, a reasonable jury could infer he intended to kill both]; see also *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225; *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565 [attempted murder convictions affirmed where defendant indiscriminately shot at occupied dwellings].)

Here, there was substantial circumstantial evidence to support the jurors' intent to kill findings. With Mr. Moore's jury present in the courtroom, his tape recorded statement was played for the jurors. Mr. Moore was interviewed by Detective Kevin Huff. In that statement, Mr. Moore told Detective Huff that Mr. Johnson told Mr. Njie to shoot at the white car in Inglewood. But Mr. Njie refused to do so because he was afraid. Mr. Johnson then told Mr. Moore: "Do it. Do it. Do it." Mr. Moore, said, "No." However, Mr. Moore was afraid he would be left in the rival gang neighborhood if he did not shoot. Mr. Moore then shot out the window into the air. Mr. Moore did not believe he shot anyone. However, Mr. Moore bragged to Mr. Johnson: "Yeah, I think I did. I think I got him." The white Caprice containing Mr. Grant and Mr. Kelly turned one way and Mr. Johnson turned another. The Mustang was still behind the white Caprice at that time. Mr. Moore told Detective Huff that Mr. Johnson said to the others, "Yeah, you know, you all need to come on, do something" because a fellow gang member was in the hospital after being shot by a rival gang.

Mr. Moore argues that only a fear of Mr. Johnson caused him to fire shots at the white Caprice. However, there was no substantial evidence that any explicit threat motivated Mr. Moore's conduct. (See *People v. Burney* (2009) 47 Cal.4th 203, 249 ["Although defendant's statement also indicates that defendant's codefendant repeatedly informed him 'you gotta kill him' there is no evidence of any threat, menace, or compulsion accompanying these words."]) Moreover, Mr. Moore did not request a duress instruction. Here, Mr. Moore knew the group's purpose before they left for the rival gang's territory. Mr. Moore had seen Mr. Johnson shoot Mr. Saucedo earlier in the evening. Mr. Moore readily acknowledged to Detective Huff that Mr. Johnson wanted revenge for the shooting of a fellow gang member by a rival gang. Mr. Moore also admitted that Mr. Njie refused to fire the gun provided by Mr. Johnson without consequence. Mr. Moore could have done the same.

Mr. Njie testified that he refused to take the gun. Mr. Moore then took the gun and leaned his body out of the rear window. Mr. Moore then shot at Mr. Grant's car. Initially, the gun jammed. However, Mr. Moore then successfully fired the handgun.

Mr. Moore could easily have discontinued his efforts once the gun jammed. However, Mr. Moore made a deliberate decision to continue to try to shoot Mr. Grant and Mr. Kelly. Mr. Moore struck Mr. Grant in the head with one bullet. The jury could reasonably find Mr. Moore had ample time to reflect on what he was about to do. Mr. Moore bragged, "I think I got him." Therefore, the jury could reasonably find Mr. Moore intended to kill Mr. Grant and Mr. Kelly. (*People v. Smith, supra,* 37 Cal.4th at pp. 741, 742; *People v. Chinchilla, supra,* 52 Cal.App.4th at p. 690.)

2. The great bodily injury finding

Mr. Moore argues that there was insufficient evidence to support the jury's finding he inflicted great bodily injury pursuant to section 12022.53, subdivision (d). Mr. Moore argues that Mr. Grant, who was shot in the head, did not suffer great bodily injury. We disagree. Section 12022.53, subdivision (d) states in part, "[A]ny person who, in the commission of a felony specified in subdivision (a) . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7 . . . to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life." Section 12022.7, subdivision (f) defines great bodily injury as "significant or substantial" physical injury.

The question of whether Mr. Grant suffered a great bodily injury as a result of the gunshot to his head is a question of fact for the jury which we review for substantial evidence. (*People v. Escobar* (1992) 3 Cal.4th 740, 750; see *People v. Cross* (2008) 45 Cal.4th 58, 64; *People v. Chan* (2005) 128 Cal.App.4th 408, 424.) In *People v. Cross, supra,* 45 Cal.4th at page 64, our Supreme Court held: "In [*People v.*] *Escobar*[*, supra,* 3 Cal.4th at page 746], this court described great bodily injury as 'substantial injury *beyond* that inherent in the offense.' [Citations.] But *Escobar* went on to observe that to be significant or substantial the injury need not be so grave as to cause the victim '"permanent," "prolonged," or "protracted"' bodily damage. [Citation.]" In *People v. Le*

(2006) 137 Cal.App.4th 54, 57-58, the victim of shots fired from another car into his was unable to work for a week after the shooting and could not walk without a limp for seven weeks. In *Le,* our colleagues in the Court of Appeal for the Third Appellate District held that under the holding of *People v. Escobar, supra,* 3 Cal.4th at pages 746-747, the victim's injuries constituted great bodily injury. (*People v. Le, supra,* 137 Cal.App.4th at pp. 58-60.)

Here, there was substantial evidence that Mr. Grant suffered great bodily injury. Mr. Grant lost a great deal of blood. He passed out following the shooting. Mr. Grant required stitches to close the wound. In addition, Mr. Grant was required to pursue follow-up care because he was "pussing and bleeding" and unable to lie on the back of his head. The jury could reasonably find that Mr. Grant suffered a significant or substantial physical injury.

3. The section 12022.53, subdivisions (d) and (e)(1) finding as to Mr. Moore

Mr. Moore argues there was insufficient evidence to support the finding he personally discharged a firearm causing great bodily injury. Mr. Moore argues that Mr. Grant's head wound came from a shot fired from the grey Mustang. And, as noted, Mr. Moore admitted he was in the Saturn. However, there was substantial evidence to support the jurors' finding. Mr. Njie testified that while driving in the rival gang territory he spotted two men in a white Caprice that appeared to be rival gang members. The white car drove away. However, Mr. Njie saw the same car parked on a residential street. Mr. Johnson drove in front of the white car and parked. Mr. Njie refused to fire the gun offered by Mr. Johnson. Mr. Moore then took the gun and shot it out of the rear window behind the driver's seat at the white car. The white Caprice then drove away quickly. As Mr. Johnson drove after the white car, Mr. Bennett drove up in the Mustang. Mr. Bennett was standing outside the Mustang's sunroof. Mr. Grant testified he was parking the white Caprice. Mr. Grant's brother, Mr. Kelly, yelled out. As Mr. Grant looked over his shoulder, he saw gunfire coming out of what he believed to be a gray Mustang. Mr.

Grant reported that he was hit by the "first shot" in the back of his head. Mr. Grant immediately drove away. The first shot fired was by Mr. Moore before the white car drove away. When interrogated, Mr. Moore claimed he shot into the air. But Mr. Moore also bragged, "I think I got him." Ms. Metzgen testified that Mr. Bennett and the person identified only as Mike arrived after the Saturn and the white car were driving away. It was only then that Mr. Bennett began shooting from the sunroof. The jurors could reasonably believe that, although there was inconsistent testimony, the shot fired by Mr. Moore was the one that struck Mr. Grant and caused great bodily injury.

4. Section 12022.53, subdivision (b) finding that a principal personally discharged a weapon proximately causing great bodily injury

Mr. Moore further argues that the section 12022.53, subdivision (b) finding that a principal personally discharged a weapon proximately causing great bodily injury must also be reversed. Mr. Moore asserts it is possible the jury decided that he was the principal. Based upon his previous argument that there was insufficient evidence to support the finding that he personally fired the weapon causing great bodily injury, Mr. Moore argues that the principal finding must also fail. However, as noted previously, it was reasonable for the jurors to find Mr. Moore shot Mr. Grant. Thus, Mr. Moore's argument there was insufficient evidence to support the section 12022.53, subdivision (b) finding, is meritless.

5. Corroboration of Mr. Njie's testimony regarding Mr. Johnson's convictions

Mr. Johnson argues that there was insufficient evidence to corroborate the testimony of Mr. Njie, who purportedly was an accomplice as a matter of law. Section 1111 defines an accomplice as, "[O]ne who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (See *People v. Riggs* (2008) 44 Cal.4th 248, 312-313; *People v.*

Brown (2003) 31 Cal.4th 518, 555.) An accomplice's testimony: must be "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"; is insufficient if it merely shows the commission of the offense; and is insufficient if the corroboration only shows the circumstances of the crime. (§ 1111; *People v. Brown, supra,* 31 Cal.4th at p. 555.)

Here, the jury was instructed pursuant to CALJIC No. 3.16 that Mr. Njie was an accomplice as a matter of law and his testimony could be the basis for a conviction only if it was corroborated. The jury was also instructed that an accomplice's testimony should be viewed with caution pursuant to CALJIC No. 3.18. Mr. Njie presented the following testimony. Several days prior to December 30, 2005, Mr. Johnson and Mr. Njie spoke by telephone. Mr. Johnson said a friend had been killed. Mr. Johnson had a "chrome .357" and a desire to "put in some work" in an effort to avenge the friend's death. Mr. Johnson called again on December 30, 2005. This time Mr. Johnson wanted Mr. Njie's assistance and presence while they would "put in some work" which was a reference to avenging the friend's death. Both Mr. Johnson and Mr. Njie were fellow gang members. Later the same day, Mr. Njie was driving with Mr. Johnson in the right passenger seat and Mr. Moore in the rear passenger seat. While exiting a liquor store parking lot, a green Honda cut off the Saturn driven by Mr. Njie. Mr. Njie began to chase the Honda. After losing sight of the Honda, Mr. Njie again caught up and pulled alongside. Mr. Njie testified that he opened the right front passenger window and intended to ask why they had been cut off. However, Mr. Johnson pulled a gun from under the seat, pointed it at the driver of the Honda and fired into the driver's window. Mr. Escalante, Ms. Meneses, and Mr. Gutierrez, all passengers in the Honda and none of whom were accomplices as a matter of law, saw the shot being fired from the right front passenger window of the Saturn. The jury could reasonably find the testimony of Mr. Escalante, Ms. Meneses, and Mr. Gutierrez was substantial corroborating evidence that Mr. Johnson shot Mr. Saucedo.

There was also sufficient corroborating evidence to support Mr. Jackson's attempted murder convictions. Again, Mr. Njie knew that Mr. Johnson intended to seek

revenge for the shooting of a fellow local gang member based upon their prior conversations. Both Mr. Johnson and Mr. Njie were members of the local gang. Detective Huff's interview of Mr. Moore was played at trial. During that interview, Mr. Moore described arriving at Mr. Bennett's home on December 30, 2005. Mr. Johnson said to Mr. Moore and Mr. Bennett: "You got to get up and do something. You can't be just sitting here having fun, chillin', and homey laying in the hospital and them niggers over there having fun." Mr. Moore believed Mr. Johnson intended to "catch up." Mr. Njie and Mr. Moore had been in the Saturn when Mr. Johnson fatally shot Mr. Saucedo earlier in the evening. Mr. Moore admitted knowing Mr. Johnson had a gun in the car as they pursued the green Honda. Mr. Moore saw Mr. Johnson's arm come back into the car after hearing one shot fired. Mr. Moore told the police what happened after they retreated and Mr. Njie parked the car. Mr. Njie said to Mr. Johnson, "Man, you really shot?" Mr. Moore later saw the gun Mr. Johnson had used when they returned to Mr. Bennett's house.

The three went out again in the Saturn to rival gang territory. Mr. Njie pointed out Mr. Grant and Mr. Kelly as possible gang members because of the color of their clothing. The Saturn was driven down an adjacent street and cut off Mr. Grant's car as he parked. Mr. Johnson then pulled alongside Mr. Grant's car. As Mr. Grant attempted to pull away, Mr. Johnson ordered Mr. Njie to shoot. Mr. Moore initially denied any involvement in the shooting involving Mr. Grant and Mr. Kelly. But Mr. Moore eventually admitted to Detective Huff that after Mr. Njie refused to shoot, Mr. Johnson said: "Do it. Do it. Do it." Mr. Moore stated that he fired a shot into the air. Mr. Moore claimed the shot was fired into the air in order to satisfy Mr. Johnson.

Detective Valento testified the shooting at Mr. Grant and Mr. Kelly took place in rival gang territory. Based upon the circumstances of the shooting, Detective Valento believed it occurred in retaliation for the shooting of a local gang member the previous week. The jury could reasonably find the totality of this evidence constituted substantial corroborating evidence to support Mr. Johnson's attempted murder convictions.

B. The Great Bodily Injury Definition

Mr. Moore argues that the statutory definition of the term "great bodily injury" as used in sections 186.22, subdivision (b)(1)(B), 1192.7, subdivision (c)(8), 12022.5, subdivision (d) and 12022.53, subdivision (d) is so vague that it denies due process. Our Supreme Court has held: "'It is established that in order for a criminal statute to satisfy the dictates of due process, two requirements must be met. First the provision must be definite enough to provide a standard of conduct for those whose activities are proscribed. [Citations.] Because we assume that individuals are free to choose between lawful and unlawful conduct, 'we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he [or she] may act accordingly. Vague laws trap the innocent by not providing fair warning.'" (*People v. Heitzman* (1994) 9 Cal.4th 189, 199; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 542-543; *People v. Prevost* (1998) 60 Cal.App.4th 1382, 1394.)

In *People v. Rubalcava* (2000) 23 Cal.4th 322, 332, our Supreme Court held: "A law is void for vagueness only if it 'fails to provide adequate notice to those who must observe its strictures' and "'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" [Citation.]" Moreover, "'[o]nly a reasonable degree of certainty is required and there is a strong presumption in favor of the constitutionality of statutes; thus a statute will not be held void for uncertainty if any reasonable and practical construction can be given to its language.' [Citation.] 'The fact that a term is somewhat imprecise does not itself offend due process. Rather, so long as the language sufficiently warns of the proscribed conduct when measured by common understanding and experience, the statute is not unconstitutionally vague.' [Citation.]" *People v. Sullivan, supra,* 151 Cal.App.4th at p. 543, quoting *People v. Misa* (2006) 140 Cal.App.4th 837, 844, and *People v. Ellison* (1998) 68 Cal.App.4th 203, 207.) In *People v. Maciel* (2003) 113 Cal.App.4th 679, 686, we held: "'The term "great bodily injury"

has been used in the law of California for over a century without further definition and the courts have consistently held that it is not a technical term that requires further elaboration.' (*People v. La Fargue* (1983) 147 Cal.App.3d 878, 886-887.)" (See also *In re Mariah T.* (2008) 159 Cal.App.4th 428, 436-437; *People v. Guest* (1986) 181 Cal.App.3d 809, 812.) Mr. Moore's void for vagueness contention is without merit.

C. Detective Valento's Testimony

1. Overview

Mr. Moore and Mr. Bennett argue that the trial court improperly allowed Detective Valento to offer opinion evidence attributing certain subjective intentions or motives to defendants. Mr. Johnson has joined those arguments that accrue to his benefit. Mr. Bennett argues: "The expert's testimony exceeded the permissible bounds of expert testimony, usurped the function of the jury, lessened the prosecution's burden of proof and violated [his] Fifth, Sixth and Fourteenth Amendment rights to due process of law." Detective Valento testified that, based upon hypothetical scenarios similar to the two shootings, he believed they were committed for the benefit of and at the direction of a criminal street gang.

2. Forfeiture

Preliminarily, defendants have waived this issue on appeal by reason of their failure to object in the trial court. The California Supreme Court has held: "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]"' [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 620, quoting *People v. Seijas* (2005) 36 Cal.4th 291, 301; see *People v. Partida* (2005) 37 Cal.4th 428, 434-435.) No such objection was interposed here.

3. Effectiveness of counsel

Defendants further argue their attorneys provided ineffective assistance when they failed to object to Detective Valento's testimony. Before ineffective assistance of counsel may be found, there must be proof not only that counsel's performance was deficient but also that defendant suffered prejudice as a consequence. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Horton* (1995) 11 Cal.4th 1068, 1122; *In re Fields* (1990) 51 Cal.3d 1063, 1068-1069; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) Furthermore, we engage in a presumption, which it is defendants' burden to overcome, that their attorneys' performances fell within the wide range of reasonable professional assistance and their actions were a matter of sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at pp. 689-690; *People v. Lewis* (1990) 50 Cal.3d 262, 288.) As will be set forth below, Detective Valento's testimony could properly be admitted. Counsel need not pursue futile or meritless objections or argument. (*People v. Prieto* (2003) 30 Cal.4th 226, 261; *People v. Ochoa* (1998) 19 Cal.4th 353, 432; *People v. Lewis, supra,* 50 Cal.3d at p. 289.) As a result, defendants were not denied effective assistance of counsel.

4. The trial court could reasonably allow Detective Valento to testify

Notwithstanding the forfeiture of this issue, Detective Valento's testimony could properly be received. Our Supreme Court has held: "'Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 [citation] and a witness's expert status [citation].' [Citation.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) In *People v. Gardeley* (1996) 14 Cal.4th 605, 617, our

Supreme Court held that the provisions of Evidence Code section 801[2] permit a trial court to admit testimony concerning "[t]he subject matter of the culture and habits" of criminal street gangs. (See also *People v. Gonzalez, supra,* 38 Cal.4th at p. 944; *People v. Champion* (1995) 9 Cal.4th 879, 919-922; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 653; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1370; *People v. Gamez* (1991) 235 Cal.App.3d 957, 965-966 overruled in part in *People v. Gardeley, supra*, 14 Cal.4th at p. 624.)

In *People v. Ward* (2005) 36 Cal.4th 186, 210, our Supreme Court found that the opinions concerning gang culture and habits fell within the rules set forth in *Gardeley*: "The substance of the experts' testimony, as given through their responses to hypothetical questions, related to defendant's motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. [Citations.] This testimony was not tantamount to expressing an opinion as to defendant's guilt." The same was true in this case. The trial court could reasonably admit Detective Valento's testimony so the jurors had a complete understanding of the local gang's past and present operations. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 944-947; *People v. Ward, supra,* 36 Cal.4th at p. 210.) Also, the prosecution alleged all defendants were subject to section 186.22. The prosecution therefore had an obligation to present evidence to support that allegation. (See *People v. Gonzalez, supra,* 38 Cal.4th at pp. 946-947 [gang expert testimony admissible even though it encompasses the ultimate issue]; *People v. Olguin, supra,* 31 Cal.App.4th at p. 1371.)

We disagree with Mr. Bennett's argument that Detective Valento "did not have the expertise necessary to render an expert opinion" concerning membership in the local gang. Detective Valento expressed the opinion Mr. Bennett was a local gang member. This was because Mr. Bennett: had a local gang tattoo; associated with Mr. Johnson;

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[2] Evidence Code section 801 provides in relevant part: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: [¶] (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . ."

frequented the address at 1940 West 108th Street, where local gang members congregated; followed Mr. Johnson in the car chase that ended in the murder of Mr. Saucedo; participated in a second shooting of African Americans in rival gang territory; and wore the rival gang color when he went on the second shooting. Detective Valento testified because Mr. Bennett was in a car on a mission to shoot rival gang members, the shooting would be attributed to the local gang. Likewise, even if Mr. Bennett was not a local gang member, his act of shooting at apparent rival gang members would also be credited to the local gang.

No doubt, a gang investigator is prohibited from offering an opinion of the knowledge or intent of an accused. But such a witness may answer hypothetical questions based on other evidence presented by the prosecution. (*People v. Gonzalez, supra,* 38 Cal.4th at p. 946; *People v. Gardeley, supra,* 14 Cal.4th at p. 618; see also *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551, fn. 4.) Detective Valento's testimony was not tantamount to expressing an opinion as to defendants' guilt. Rather, based upon his knowledge and expertise, Detective Valento believed the hypothetical scenarios suggested the offenses were committed for the benefit of and at the direction of a criminal street gang. (*People v. Gonzalez, supra,* 38 Cal.4th at pp. 944-947; *People v. Ward, supra,* 36 Cal.4th at p. 210.) In addition, the jurors were instructed on how to determine what weight to give to the detective's testimony as well as the hypothetical questions posed to them. It is presumed these instructions were obeyed. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1115 overruled on another point in *People v. Rundle* (2008) 43 Cal.4th 76,151; *People v. Anderson* (1987) 43 Cal.3d 1104, 1120.)

D. Sentencing

1. The section 12022.53, subdivision (d) enhancement as to count 3

All three defendants argue and the Attorney General concedes the trial court improperly imposed a 25-years-to-life enhancement pursuant to section 12022.53,

subdivision (d) as to count 3 because it was neither alleged nor found true. We agree. Count 3 of the amended information alleged only that a principal personally and intentionally discharged (§ 12022.53, subds. (c) and (e)(1)) and used a firearm. (§ 12022.53, subds. (b) and (e)(1).) In addition, there was substantial evidence Mr. Kelly suffered great bodily injury. As a result, the section 12022.53, subdivision (d) enhancement is reversed as to each defendant with respect to count 3. A 20-year section 12022.53, subdivision (c) enhancement is imposed as to each defendant relative to count 3. Further, the section 12022.53, subdivision (b) enhancement is ordered stayed. (*People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130; *People v. McFearson* (2008) 168 Cal.App.4th 388, 391.)

2. Mr. Bennett's sentence as to counts 2 and 3

Mr. Bennett argues that his 15-years-to-life sentences on counts 2 and 3, imposed pursuant to section 186.22, subdivision (b)(5), should be modified to a life term because he was not found to have personally used a firearm. The Attorney General agrees. We too agree the proper count 2 sentence for the willful, deliberate and premeditated attempted murder is life with a seven year a parole eligibility date.

Further, as to count 2, the jury found the section 12022.53, subdivision (d) personal use allegation to be untrue. In fact, all of the allegations Mr. Bennett personally used a firearm were found to be not true. The trial court imposed a 25-years-to-life personal use enhancement as to count 2. Thus, as to count 2, the 25-years-to-life section 12022.53, subdivision (d) personal use enhancement must be reversed. But the jury found that a principal used a firearm pursuant to section 12022.53, subdivisions (b), (c), (d) and (e)(1). And the jury found the section 186.22, subdivision (b)(1)(C) allegation to be true. Thus, pursuant to section 12022.53, subdivisions (d) and (e)(1), Mr. Bennett must be sentenced to an additional 25-years-to-life as to count 2. The section 12022.53, subdivision (b), (c), and (e)(1) enhancements are ordered stayed. (*People v Gonzalez*, *supra*, 43 Cal.4th at p. 1130; *People v. McFearson*, *supra*, 168 Cal.App.4th at p. 391.)

There is no merit to Mr. Bennett's argument the trial court imposed the section 186.22, subdivision (b)(1)(C) enhancement. The trial court merely made reference to the section 186.22, subdivision (b)(1)(C) finding as without it, section 12022.53 would have not have applied as Mr. Bennett did not personally use a firearm.

As to count 3, we agree with the parties that Mr. Bennett's sentence should be a life term with a seven year parole eligibility date. And as we have previously discussed, the additional 20-year term must be imposed on count 3. And, as discussed, the 10-year enhancement must be stayed. (*People v Gonzalez*, *supra*, 43 Cal.4th at p. 1130; *People v. McFearson*, *supra*, 168 Cal.App.4th at p. 391.)

3. Mr. Johnson's sentence

Mr. Johnson contends that his counts 2 and 3 sentences must be modified to be for life with a seven year parole eligibility date. And Mr. Johnson argues the he should only receive a 20-year section 12022.53, subdivision (c) and (e)(1) gun use enhancement on each count. We agree with Mr. Johnson that the sentence for willful, deliberate and premeditated attempted murder must be modified to life with a seven year parole eligibility date as to counts 2 and 3.

As to the count 2 enhancements, the jury found that a principal used a firearm pursuant to section 12022.53, subdivisions (b), (c), (d) and (e)(1). And the jury found the section 186.22, subdivision (b)(1)(C) allegation to be true. Thus, as to count 2, pursuant to section 12022.53, subdivisions (d) and (e)(1), Mr. Johnson was properly sentenced to an additional 25-years-to-life. The section 12022.53, subdivision (b), (c), and (e)(1) enhancements are ordered stayed. (*People v Gonzalez*, *supra*, 43 Cal.4th at p. 1130; *People v. McFearson*, *supra*, 168 Cal.App.4th at p. 391.)

As to count 3 enhancements, the jury returned section 12022.53, subdivision (b), (c) and (e)(1) findings for personal firearm use by a principal. Thus, a section 12022.53, subdivision (c) and (e)(1) 20-year enhancement must be added to count 3. The section 10-year 12022.53, subdivision (b) and (e)(1) enhancement is ordered stayed. (*People v.*

Gonzalez, *supra*, 43 Cal.4th at p. 1130; *People v. McFearson*, *supra*, 168 Cal.App.4th at p. 391.) The count 3 sentence pursuant to section 12022.53, subdivision (d) is reversed as the jury did not find Mr. Johnson personally used a firearm.

Finally, as to the count 1 enhancements, the jury returned section 12022.53, subdivision (b), (c), and (d) findings for personal and intentional use and discharge of a firearm. The trial court imposed a 25-years-to-life enhancement pursuant to section 12022.53, subdivision (d). The abstract of judgment should be modified to reflect that the section 12022.53, subdivisions (b) and (c) enhancements are ordered stayed. (*People v. Gonzalez*, *supra*, 43 Cal.4th at p. 1130; *People v. McFearson*, *supra*, 168 Cal.App.4th at p. 391.) In addition, the jury found the section 186.22, subdivision (b)(1)(C) allegation true. However, the trial court failed to make reference to that finding at the sentencing hearing. The trial court is directed to strike imposition of the 10-year section 186.22, subdivision (b)(1)(C) term related to that finding. (See section 186.22, subdivision (b)(5); *People v. Lopez* (2005) 34 Cal.4th 1002, 1007-1011 [sentence pursuant § 186.22, subd. (b)(1)(C) does not apply to defendants sentenced to life without the possibility of parole].)

4. Mr. Moore's sentence

Mr. Moore argues that his sentence as to counts 4 and 5 must be reversed. The abstract of judgment reflects that Mr. Moore was found to have used a firearm within the meaning of Penal Code section 12022.53, subdivision (d) in counts 4 and 5. However, as to count 4, the jury never returned a section 12022.53 finding. The finding that was returned was that Mr. Moore used a firearm within the meaning of section 12022.5. The trial court's oral pronouncement of judgment indicates the imposition and stay of a 10-year section 12022.5 enhancement as to count 4. The abstract of judgment must therefore be corrected to correctly reflect the sentence imposed by the trial court. As to count 5, no firearm use finding was returned by the jury. However, the trial court imposed and stayed a 10-year section 12022.5 enhancement as to count 5. We therefore reverse the

section 12022.5 enhancement as to count 5. In addition, the crime of firearm assault is not a violent felony within the definition of section 667.5, subdivision (1). As a result, the trial court improperly imposed a section 186.22, subdivision (b)(1)(C) 10-year term. The trial court should have imposed only a 5-year term pursuant to section 186.22, subdivision (b)(1)(B) because assault with a firearm is a serious felony as defined in section 1192.7, subdivision (c)(31). We therefore reverse the section 186.22, subdivision (b)(1)(C) 10-year term and impose a 5-year term pursuant to section 186.22, subdivision (b)(1)(B).

5. State court construction fee

Mr. Johnson argues that the trial court improperly imposed a $5,060 state court construction fee pursuant to Government Code section 70372, subdivision (a). The Attorney General agrees that the trial court imposed too great a Government Code section 70372, subdivision (a) fine, but argues the fine should apply to the section 1465.8, subdivision (a)(1) court security fees in the amount of $36. As amended in 2007, Government Code section 70372, states in pertinent part: "(a)(1) Except as otherwise provided in subdivision (b) of Section 70375 and in this article, there shall be levied a state court construction penalty, in the amount of five dollars ($5) for every ten dollars ($10), or part of ten dollars ($10), upon every fine, penalty, or forfeiture imposed and collected by the courts for all criminal offenses . . . . [¶] . . . [¶] (3) This construction penalty does not apply to the following: [¶] (A) any restitution fine." (See also *People v. Walz* (2008) 160 Cal.App.4th 1364, 1371-1372.)

When Mr. Johnson was sentenced, the trial court imposed: a $10,000 section 1202.4, subdivision (b)(1) restitution fine; a $7,296.05 section 1202.4, subdivision (a) restitution order; six $20 section 1465.8, subdivision (a)(1) court security fees; and the $5,060 Government Code section 70372, subdivision (a)(1) state court construction fee at issue here. By its own terms, Government Code section 70372, subdivision (a)(1) only applies to fines, penalties or forfeitures. The court security fee is not a fine. (See *People*

v. Alford (2007) 42 Cal.4th 749, 757; *People v. Wallace* (2004) 120 Cal.App.4th 867, 876.) And the Legislature has not chosen to refer to the court security fee as a penalty. Thus, the state construction penalty which is only added to a fine, penalty or forfeiture does not apply a restitution fine or section 1465.8, subdivision (a)(1) fees. (*People v. Walz, supra,* 160 Cal.App.4th at p. 1372; *People v. Wallace, supra,* 120 Cal.App.4th at p. 877 [the $20 court security fee is not a traditional punishment].) Therefore, the $5,060 Government Code section 70372, subdivision (a)(1) state court construction penalty imposed as to Mr. Johnson is reversed. No state court construction penalty is to be imposed. The trial court is to personally insure the abstract of judgment is corrected to fully comport with all of the modifications we have ordered. (*People v. Acosta* (2002) 29 Cal.4th 105, 110, fn. 2; *People v. Chan, supra,* 128 Cal.App.4th at pp. 425-426.)

IV. DISPOSITION

Those portions of the judgment as discussed in part III(D)(1)-(5) are reversed and modified as noted. Upon remittitur issuance, the superior court clerk is to prepare corrected abstracts of judgment which accurately reflect the modifications set forth in part III(D)(1)-(5) of this opinion and forward them to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J. KRIEGLER, J.