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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>TERRENCE DUNSON et al.,<br><br>Defendants and Appellants. | B185018<br><br>(Los Angeles County<br>Super. Ct. No. MA027330) |

APPEAL from judgments of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant Terrence Dunson.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant Marshawn D. Jackson.

Emry J. Allen, under appointment by the Court of Appeal, for Defendant and Appellant Brian Jermain McDonald.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters, Lawrence M. Daniels and Richard T. Breen, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Defendants and appellants Terrence Dunson, Marshawn Jackson, and Brian McDonald robbed a bar and shot at all four people in the bar, wounding three of them. The entire incident was captured by surveillance cameras. A jury convicted defendants of multiple counts of attempted murder, kidnapping for robbery, and robbery. On appeal, defendants, individually or jointly,[1] make the following contentions. First, the evidence was insufficient to support their convictions for kidnapping for robbery. Second, the evidence was insufficient to establish that defendants committed the attempted murders with premeditation and deliberation and with intent to kill. Third, there was insufficient evidence to corroborate Dunson's and McDonald's accomplice testimony that Jackson was the shooter. Fourth, the trial court erred in admitting Jackson's statement made during gunshot residue testing. Fifth, admission of gang evidence was prejudicial error. Sixth, the trial court erred in giving and in not giving certain accomplice instructions. Seventh, the trial court erred in failing to instruct the jury with CALJIC No. 2.02 on the sufficiency of circumstantial evidence to prove specific intent. Eighth, the trial court erred by imposing consecutive sentences. Ninth, the trial court erred in instructing the jury with CALJIC No. 8.66 on attempted murder. And finally, the trial court should have struck the lesser enhancements rather than imposing and staying them.

As we explain, there was either no error, or assuming error, it was not prejudicial. We therefore affirm the judgments.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. <u>Factual background</u>.

A. *The robberies and attempted murders.*

On September 13, 2003, John Tarry was working at Snooky's, a bar he owned in Antelope Valley. Also present at Snooky's that day were Jeff Collier, a customer and Tarry's friend; John Long, the doorman; and April Tapia, the bartender. At the time of

[1] Each defendant joins in the others' contentions and arguments to the extent they are applicable.

the robbery, Snooky's had a front public area with pool tables and a bar. It also had a private, windowless, back office where Tarry kept a safe.

Soon after Snooky's opened after 12:00 p.m., Terrence Dunson, Marshawn Jackson, and Brian McDonald entered the bar. Dunson was taller than the other two men, and he was wearing a light-colored floppy hat. McDonald and Jackson were wearing black skull caps. They bought beers and played pool. At some point, Tarry asked Dunson to give back his beer because he did not have identification. Dunson did so, and Tarry gave back Dunson's money. Dunson, Jackson, and McDonald left Snooky's.

Immediately after leaving, Dunson, Jackson, and McDonald reentered Snooky's. Dunson hit Tarry in the head with a bar stool. Tapia began to run to the back door. As she ran, she heard a gunshot, which she later learned was Long being shot in his left hip. The shooter was left-handed, and he wore a red shirt. One of the men stopped Tapia as she was running and asked if she wanted to die right there. She was made to lie on the floor near the back kitchen area, which is about halfway to the office.[2]

Dunson made Tarry get up and go into the back office (about 10 to 12 feet), where a safe was located. En route to the office, one of the other men hit Tarry twice, knocking out some of his teeth. Dunson told Tarry to open the safe. When Tarry was unable to open the safe, Dunson called for his friend to come and "kill this motherfucker." Jackson pointed the gun at Tarry's head. Dunson kicked Tarry's foot, fracturing it. Long, whose hands were bound, Collier, and Tapia were also moved into the office. Dunson told Tarry something to the effect of, "open the safe old man. If you don't open the safe,

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[2] Tapia testified that at some point while she was lying on the floor one of the defendants told her to "go back there, so I walked to the back door, and another one came and said, 'What the hell are you doing over there, I told you to lay over there,' and then they put me in the back office with everybody else." Although it is not clear, it appears that after Tapia was ordered to lie down, she was told to get up and to walk to the back door, which she said was about 10 to 15 steps from the bar or public area, and then one of the defendants made her go back to where she had been lying on the floor, about 7 steps back.

we're going to kill these people." Tarry opened the safe, and the men took about $4,000 from the safe and $400 from Tarry. They put the money in a blue plastic bag.

After defendants had emptied the safe and Dunson left the office, Tapia heard one of them say " 'just go back and kill them motherfuckers' or something like that."[3] While in a fetal position on the floor, she was shot in her hip, and the bullet exited and grazed her breast. Collier was shot in his left arm.[4] According to Tarry, a gunshot directed at him missed and hit the computer instead. Long, who had been immediately shot upon defendants' reentrance into Snooky's, had to be airlifted to a hospital because of the seriousness of his condition.

After Dunson, Jackson, and McDonald left Snooky's, they went to a Black Honda Civic that Amber Dunson, Terrence Dunson's sister, was driving. Two employees of a nearby plant nursery saw the three men, one of whom was carrying a blue trash bag and another who was carrying bottles. Suspicious, because Amber Dunson had kept the car running the entire time the men were gone, the employees called the police and gave them a description of the car.

While on patrol, Officer Michelle Cross saw a car matching the description. She followed it, and other units joined her. While following the Honda, it appeared to Officer Cross that the people in the car were changing their clothes. When Officer Cross turned on her lights to indicate that the car should pull over, it did not.

After a pursuit, the car eventually stopped in an alley, and Amber Dunson was in the driver's seat. Dunson, Jackson, and McDonald fled on foot. Lieutenant Mark Odle, who had also been pursuing the Honda, captured McDonald, who had a large wad of money in his pocket. Jackson jumped a fence, but was apprehended. He had a bundle of $1 bills in his shoes. Dunson was found in the backyard of a home. Officers found money, coins in rolls, two credit cards in Long's name, and a floppy hat. Several bottles

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[3] Tapia said that those might "not be the exact words but something of that nature."

[4] Collier did not testify at trial, but the parties entered into a stipulation concerning his testimony. Long did not testify at trial.

of liquor, a red-hooded sweatshirt, a long-sleeved red t-shirt, a long-sleeved white t-shirt, black gloves, a roll of quarters, a blue pouch inside of a blue plastic trash bag, banded money inside the pouch, a wallet with items bearing Long's name, a .357 magnum with four expended rounds and two live rounds, three black skull caps, a pair of pants with Jackson's social security card, and a hand drawn map of Snooky's and the surrounding streets were found in the Honda.

Rakeina Rubin, the mother of Dunson's child, drew the map. She had worked at Snooky's, and within a week before the incident, she was in the back room with Tarry, who was getting money from the safe to pay her. Dunson's fingerprints were found on a money band and in the car.

A single particle of gunshot reside was found on Jackson's left hand. Surveillance cameras captured the incident, and a videotape and a DVD were played for the jury.[5] At trial, Tarry identified Dunson as the man who hit him with a bar stool and stayed in the back office with him.

B. *Defendants' testimony at trial.*

Dunson and McDonald testified at trial. They admitted they were present at Snooky's. Dunson testified he was drinking in his hotel room with McDonald and Jackson on the morning of the robbery. They all went to Snooky's together. He could not identify the shooter. He said he did not know either that someone had a gun or who had the gun.

McDonald testified that he did not have a gun. And at one point during Dunson's testimony, McDonald spoke out of turn and identified himself as the person in the white shirt in the surveillance footage.

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[5] We have independently reviewed the videotape (People's exhibit 88) and DVD (People's exhibit 89).

## II. **Procedural background.**

Trial was by jury. Before trial, the court dismissed as to all defendants count 8 for kidnapping for the purposes of robbery of Tarry. The jury found the defendants guilty of the remaining counts on June 23, 2005, and the trial court sentenced them as follows.

### A. *Dunson*'s *verdict and sentence.*

The jury found Dunson guilty of counts 1, 2, 3, and 4 for the attempted murders of Long, Collier, Tapia, and Tarry, respectively. (Pen. Code,[6] §§ 664, 187.) The jury found as to all four counts that the attempted murders were committed willfully, deliberately, and with premeditation. As to counts 1, 2, and 3, the jury found true principal gun use allegations under section 12022.53, subdivisions (b), (c), (d), and (e), but found true principal gun use allegations as to count 4 concerning Tarry only under section 12022.53, subdivisions (b), (c), and (e), because Tarry was not hit by gun shots. Also as to count 4, the jury found true allegations that Dunson personally inflicted great bodily injury on Tarry (§ 12022.7, subd. (a)), and personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)).

The jury also found Dunson guilty of counts 5, 6, and 7 for kidnapping to commit robbery (§ 209, subd. (b)(1)) of Long, Collier, and Tapia, respectively, and guilty of counts 9, 10, 11, and 12 for robbery (§ 211) of Long, Collier, Tapia, and Tarry respectively. The jury found true principal gun use allegations (§ 12022.53, subds. (b), (c), (d), (e)) as to each of those counts, except count 12. As to count 12, the jury found true principal gun use allegations only under subdivisions (b), (c), and (e) of section 12022.53; that Dunson personally inflicted great bodily injury on Tarry (§ 12022.7, subd. (a)); and that Dunson personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)).

As to each count, the jury found not true gang allegations under section 186.22, subdivision (b)(1).

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

On July 25, 2005, the trial court found a prior strike conviction allegation to be true. It therefore sentenced Dunson to consecutive life terms on counts 1, 2, 3, 4, 5, 6, and 7, and those sentences were doubled under the Three Strikes law. The court sentenced defendant to a consecutive 6 years on count 12 (the midterm of 3 years doubled under the Three Strikes law). The court imposed an additional 5 years on count 1 under section 667, subdivision (a), 1 year on count 4 under section 12022, subdivision (b)(1), and 3 years under section 12022.7. The court stayed the sentences on counts 9, 10, and 11 and stayed the enhancements on count 12.

B. *Jackson*'s *verdict and sentence.*

The jury found Jackson guilty of counts 1, 2, 3, and 4 for the attempted murders of Long, Collier, Tapia, and Tarry, respectively. (§§ 664, 187.) The jury found as to all four counts that the attempted murders were committed willfully, deliberately, and with premeditation. The jury found true personal and principal gun use allegations (§ 12022.53, subds. (b), (c), (d), (e)).

The jury also found Jackson guilty of counts 5, 6, and 7 for the kidnappings to commit robbery (§ 209, subd. (b)(1)) of Long, Collier, and Tapia, respectively, and guilty of counts 9, 10, 11, and 12 for robbery (§ 211) of Long, Collier, Tapia, and Tarry respectively. The jury found true personal and principal gun use allegations (§ 12022.53, subds. (b), (c), (d), (e)) as to each of those counts, except count 12. As to count 12, the jury found true personal and principal gun use allegations only under subdivisions (b), (c), and (e) of section 12022.53.

As to each count, the jury found not true gang allegations under section 186.22, subdivision (b)(1).

On July 21, 2005, the trial court sentenced Jackson to consecutive life terms on counts 1, 2, and 3 plus 25 years to life under section 12022.53, subdivision (d), for each of those counts; to life plus 20 years under section 12022.53, subdivision (c), on count 4; to life on counts 5, 6, and 7; and to 3 years on count 12. The court stayed the sentences on counts 9, 10, and 11; stayed the enhancements under section 12022.53, subdivisions

(b) and (c) on counts 1, 2, and 3; stayed the 12022.53, subdivision (b) enhancement on count 4; and stayed all enhancements on counts 5, 6, 7, and 12.[7]

C. *McDonald's verdict and sentence.*

The jury found McDonald guilty of counts 1, 2, 3, and 4 for the attempted murders of Long, Collier, Tapia, and Tarry, respectively. (§§ 664, 187.) The jury found as to all four counts that the attempted murders were committed willfully, deliberately, and with premeditation. As to counts 1, 2, and 3, the jury found true principal gun use allegations under section 12022.53, subdivisions (b), (c), (d), and (e), but found true principal gun use allegations as to count 4 concerning Tarry under only section 12022.53, subdivisions (b), (c), and (e), because Tarry was not hit by gun shots.

The jury also found McDonald guilty of counts 5, 6, and 7 for kidnapping to commit robbery (§ 209, subd. (b)(1)) of Long, Collier, and Tapia, respectively, and guilty of counts 9, 10, 11, and 12 for robbery (§ 211) of Long, Collier, Tapia, and Tarry respectively. The jury found true principal gun use allegations (§ 12022.53, subds. (b), (c), (d), (e)) true as to each of those counts, except count 12. As to count 12, the jury found true principal gun use allegations only under subdivisions (b), (c), and (e) of section 12022.53.[8]

After McDonald waived his right to a jury trial on a prior prison term allegation, the trial court, on July 25, 2006, found that allegation to be true. The court sentenced McDonald to life terms on counts 1 through 7 and to the midterm of 3 years on count 12.

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[7] The abstract of judgment incorrectly states that the sentences on counts 5, 6, 7, and 12 were stayed. As we set forth in the disposition, the abstract must be corrected.

[8] The jury also found Amber Dunson guilty of four counts of robbery and one count of evading an officer, willful disregard (Veh. Code, § 2800.2, subd. (a)). The jury found true principal gun use allegations as to the robbery counts (§ 12022.53, subds. (b), (c), (d), & (e)). The jury acquitted her of attempted murder, kidnapping to commit robbery charges, and of gang allegations. She was sentenced to four years, eight months in prison. She filed an appeal, but abandoned it.

The court imposed an additional 1 year under section 667.5, subdivision (b). The court stayed the sentences on counts 9, 10, and 11.

Dunson, Jackson, and McDonald all filed appeals.

## DISCUSSION

### I. **There was sufficient evidence to support defendants' convictions for kidnapping for robbery.**

Dunson, Jackson, and McDonald separately contend that the evidence is insufficient to support their convictions for three counts of kidnapping for the purposes of robbery of Long, Collier, and Tapia (counts 5, 6, and 7, respectively) in violation of section 209.[9] We reject defendants' contention.

Under the substantial evidence standard of review, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] ' "[I]f the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' [Citation.] 'The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt." ' [Citation.]" (*People v. Snow* (2003) 30 Cal.4th 43, 66.)

Section 209 provides, "Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away another person by any means

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[9] At the close of the prosecution's case, defendants moved for dismissal of the counts, but the trial court denied the motion. The trial court, however, had previously dismissed count 8 for kidnapping to commit robbery of Tarry.

whatsoever with intent to hold or detain, or who holds or detains, that person for ransom, reward or to commit extortion or to exact from another person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony, . . ." (§ 209, subd. (a).) But section 209 only applies "if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (§ 209, subd. (b)(2).)

Section 209 thus consists of two prongs. First, to determine whether a victim's movement is merely incidental to the underlying crime we consider the scope and nature of the movement, including the actual distance the victim is moved. (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) There is, however, no minimum number of feet a victim must be moved to satisfy the first prong. (*Ibid.*) The second prong of the test requires consideration of whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery. (*Id.* at p. 13.) "This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes." (*Ibid.*)

Under this two-prong test, "when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence . . . or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209." (*People v. Daniels* (1969) 71 Cal.2d 1119, 1140; see also *People v. Washington* (2005) 127 Cal.App.4th 290 (*Washington*).) For example, in *Washington*, the defendant entered the bank manager's office and ordered her to give him money from the vault. When the manager said she needed a second set of keys to open the vault, she went to the door of her office and asked a teller to help her. The teller left the teller's area and went with the manager and the defendant to the vault room. The manager traveled about 9 feet from her office to the vault room door plus an additional 5 or 6 feet into the vault room. The teller twice

moved about 15 feet from the teller area to the vault room (she had to return to the teller area to retrieve her keys).

We held that the evidence of movement was insufficient to support a conviction for aggravated kidnapping. We said that "there was no excess or gratuitous movement of the victims over and above that necessary to obtain the money in the vault," and we noted that the manager's and teller's cooperation was required to open the vault and to complete the robbery. (*Washington, supra*, 127 Cal.App.4th at p. 299; see also *People v. Hoard* (2002) 103 Cal.App.4th 599, 607 [where jewelry store employees were moved about 50 feet to the back of the store so that defendant could have free access to the jewelry and direct customers away from the store, the movement of the victims "served only to facilitate the crime with no other apparent purpose"].) We also rejected the notion that movement of the victims from an area open to public view to the more isolated vault room changed their environment and increased the risk of harm over and above that inherent in robbery, decreased the likelihood of detection, and enhanced the opportunity for defendants to commit additional crimes. (*Washington, supra,* at p. 300.) Instead, we noted that "*any* movement of a robbery victim increases the risk of harm to the victim over and above that present in a standstill robbery." (*Id.* at p. 301; accord, *Hoard, supra,* at p. 607 [removal of victims from public view does not, in itself, substantially increase the risk of harm].)

Relying heavily on our decision in *Washington*, defendants argue that moving Collier, Long,[10] and Tapia from the bar area to the back office was similarly incidental to robbery. We agree that the actual distance the victims were moved (a matter of feet all within Snooky's) is insignificant, but we disagree that the overall nature of the movement shows that the movement was merely incidental to the robbery. Rather, there is crucial evidence that distinguishes this case from *Washington*. Specifically, Dunson first moved

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**10** There is a discrepancy in the briefs about whether Long was moved to the back office. Dunson states in his opening brief that Long was not moved to the back office. But the evidence at trial, including the surveillance tape of the crime, shows that he was moved to just outside the back office.

Tarry into the back office. When Tarry had problems opening the safe, Tapia, Collier, and Long were moved into the office. Dunson then told Tarry that he had better open the safe or they were "going to kill these people."[11]

Although defendants characterize the movement as incidental because it merely "grease[d] the wheels of the robbery," we do not think that characterization is apt. Moving Collier, Long, and Tapia into the room to force Tarry to open the safe is not the same as forcing the teller in *Washington* to bring a key to the vault room. The teller's presence was necessary to open the vault. Collier's, Long's, and Tapia's presence was not necessary to open the safe. Instead, their lives were used as bargaining chips; Tarry either had to open the safe or, if he did not, the victims would be killed. Indeed, unlike in *Washington*, where the robbers left the premises after taking the money immediately and without incident, Tapia and Collier were shot *after* defendants had the money. Dunson left the office with the money, and Jackson then shot Collier and Tapia and shot at, but missed, Tarry. From this evidence, the jury could have believed that the victims were brought to the back office for a reason having absolutely nothing to do with the robbery, that reason being to kill them. Thus, moving the victims into the back office substantially increased the risk of harm above and beyond that inherent in the robbery.

## II. **There was sufficient evidence to support the jury's findings that defendants committed the attempted murders with premeditation and deliberation and with intent to kill.**

Dunson, Jackson, and McDonald each make the following related contentions: First, the evidence was insufficient to support the jury's finding that the attempted murders were committed with premeditation and deliberation. Second, there was insufficient evidence to support the jury's finding that defendants had intent to kill Collier, Long, Tapia, and Tarry. Both contentions are meritless.

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[11] Dunson testified that he had Long, Collier, and Tapia brought into the back office because he thought they might know the combination to the safe. Interestingly, Tapia did not testify that she was ever asked if she knew the combination.

A. *Premeditation and deliberation.*

The jury found true that defendants committed the attempted murders with premeditation and deliberation. Defendants, however, contend that the evidence was insufficient to establish premeditation and deliberation as to counts 1 through 4 for the attempted murders of Collier, Long, Tapia, and Tarry. We disagree.

"Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder involves consideration of the evidence presented and all logical inferences from that evidence in light of the legal definition of premeditation and deliberation . . . . Settled principles of appellate review require us to review the entire record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a reasonable trier of fact could find that the defendant premeditated and deliberated beyond a reasonable doubt. [Citations.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

Attempted murder requires express malice, and, on appeal, we do not distinguish between attempted murder and completed first degree murder to determine whether there is sufficient evidence to support the finding of premeditation and deliberation. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.) Malice is express when "there is manifested a deliberate intention unlawfully" to kill a person. (§ 188.) Murder perpetrated by a willful, deliberate, and premeditated killing is murder in the first degree. (§ 189; *People v. Cole* (2004) 33 Cal.4th 1158, 1224.) " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' [Citation.]" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) There are three basic, but not exhaustive, categories of evidence that will sustain a finding of premeditation and deliberation: (1) planning activity; (2) motive; and (3) manner of the killing. (*People v.*

*Anderson* (1968) 70 Cal.2d 15, 26-27; see also *People v. Perez, supra,* 2 Cal.4th at p. 1125.) All of these factors need not be present to sustain a finding of premeditation and deliberation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

Here, defendants' planning activity and the manner in which the victims were shot provide sufficient evidence of premeditation and deliberation. Dunson's girlfriend drew a layout of Snooky's that was found in the car defendants had waiting for them outside the bar to flee the scene. Although defendants had a layout of the bar, they did not commence committing the crimes the first time they entered the bar. Instead, they went into Snooky's, had a drink, and played pool. They left, but immediately returned. Jackson reentered the bar armed with a gun, which he immediately used to shoot Long at close range. Almost immediately upon reentering the bar, Dunson struck Tarry with a bar stool. One of the men asked Tapia if she wanted to "die" after she tried to escape.

Then, after rendering the victims helpless and in their control, Dunson dragged Tarry into the back office. Collier, Long, and Tapia were later herded into the office. Dunson then verbally threatened the victims with death *three* times. Dunson first threatened to kill Tarry when Tarry did not open the safe; Dunson called to his codefendant to come and "kill this motherfucker." Jackson pointed his gun at Tarry's head. Dunson's second threat was he would kill Collier, Long, and Tapia if Tarry did not open the safe. The third threat was made after defendants had the money and Dunson had left the back office. One of the defendants—apparently Dunson—told Jackson to kill them. To that end, Jackson shot Tapia and Collier at close range, and shot at Tarry but missed him (Long had already been shot).

This evidence contradicts defendants' argument that the shootings were "gratuitous," "unnecessary," and were done on a "spur of the moment" impulse. (McDonald Opening Brief, at pp. 22, 24.) The shootings certainly were gratuitous and unnecessary, but they were not, as the evidence demonstrates, done on a spur of the moment impulse. Rather, from this evidence the jury could have believed that the first time defendants entered Snooky's they did so to further case the bar and to determine, for example, how many people were in the bar and where they were situated. Having made

that determination, defendants reentered the bar. Upon reentering the bar, Jackson *immediately* shot Long at close range and Dunson *immediately* hit Tarry with a bar stool, which indicates that they planned to quickly render the bar's occupants helpless. At the time Tapia and Collier were shot and Tarry was shot at, the victims were not a threat to the defendants. The jury thus could have properly believed that the only reason for shooting them was to kill them. Even if the jury believed that the decision to kill the victims was arrived at only when Jackson was told to "kill" Collier, Tapia, and Tarry, that was sufficient time in which to arrive at a cold and calculated decision to kill. (*People v. Koontz*, *supra,* 27 Cal.4th at p. 1080.)

Defendants nonetheless argue that their lack of premeditation and deliberation is supported by the surveillance footage and by the nonmortal wounds the victims sustained. Based on the surveillance footage, Jackson suggests that he did "not appear to have carefully aimed with the planned intention of killing the victims." (Jackson's Opening Brief, at p. 47.) McDonald, however, suggests that "Jackson's aim was perfect—he intentionally inflicted nonlethal wounds for purposes of intimidation and to disable the victims." Whether Jackson was a poor shot or an excellent one, defendants' premeditation and deliberation simply does not hinge on Jackson's marksmanship where, as here, planning activity, motive, and the manner of killing all support the jury's finding.

Nor does the fact Collier, Long, and Tapia were shot in "nonvital" areas demonstrate that defendants lacked premeditation and deliberation. There was no evidence introduced that the areas in which the victims were shot were "nonvital." To the contrary, Long, who was shot in the hip, was so critically injured that he had to be airlifted to a medical facility. Tapia was also shot in the hip, but, fortunately, escaped critical injury, as did Collier, who was shot in the arm. Where the overwhelming evidence shows that defendants premeditated and deliberated, they do not get a reward because the victims miraculously escaped mortal injury.

B. *Intent to kill.*

On a similar note, all three defendants contend that the evidence was insufficient to show they intended to kill Collier, Long, Tapia, and Tarry.[12] For reasons similar to the ones set forth above, we disagree.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) To be guilty of attempted murder, a defendant must harbor express malice toward the victim or victims. (*People v. Smith* (2005) 37 Cal.4th 733, 739 (*Smith*).) " '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.]' [Citations.] ' "The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*Id.* at p. 741.)

Defendants acknowledge this authority, but they argue it is distinguishable because not one but *three* victims sustained wounds to nonvital areas; had they intended to kill the victims, one would think Jackson would have been able to strike a vital region. There are multiple responses to this argument. First, the wound inflicted on Long *did* cause him critical injury. Second, the rule that *Smith* articulated does not depend on how many victims escaped death or serious injury. The rule *Smith* articulated is a jury may infer intent to kill where, as here, a defendant fires toward victims at close range but either does not inflict mortal wounds (as in Collier's, Long's, and Tapia's case) or misses

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[12] Jackson limits his argument only to Long and Tarry.

the victim altogether (as in Tarry's case).[13] The jury certainly could have believed that Jackson was an excellent shot and intended merely to disable the victims. But the jury was also entitled to believe, as it clearly did, that Jackson, regardless of his marksmanship, and the other defendants intended to kill the victims based on the manner in which they were shot. Third, before Jackson shot Collier and Tapia and shot at but missed Tarry, Dunson had threatened to kill all of them. Dunson's threats to kill the victims also belie his testimony he did not know there was a gun. Finally, McDonald was present throughout these events and the surveillance footage reveals him to have been an active participant. This overwhelming evidence renders defendants' contention they lacked intent to kill each of the four victims meritless.

## III. There was sufficient evidence to corroborate Dunson's and McDonald's accomplice testimony that Jackson was the shooter.

McDonald and Dunson both denied they were the shooter, and their testimony therefore implied that Jackson was the shooter. Jackson contends, however, that there was insufficient evidence to corroborate that he was the shooter, and therefore, the true finding on the firearm enhancement must be reversed. Not so.

A conviction cannot be based on an accomplice's testimony unless that testimony is corroborated. (§ 1111.) The law, however, requires only slight corroboration, and the evidence need not corroborate the testimony in every particular. (*People v. Williams* (1997) 16 Cal.4th 635, 680-681.) "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see also *People v.*

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[13] McDonald argues that Jackson did not point the gun at Tarry, and instead aimed at the wall behind Tarry or at the computer. The jury, however, was entitled to believe—as it clearly did—that Jackson was aiming at Tarry based on, among other things, Tarry's testimony that Jackson aimed at him and the surveillance footage.

*Rodrigues* (1994) 8 Cal.4th 1060, 1128; *People v. Zapien* (1993) 4 Cal.4th 929, 982, superseded by statute on other grounds.)

In our search for sufficient corroborating evidence, we need look no further than the surveillance footage of the crimes. Two exhibits were shown to the jury: A videotape and a DVD. The videotape is grainy and of poor quality. But the DVD shows the entire incident from several angles, including from the perspective of the front public area and the back office area. The footage clearly shows that a left-handed man wearing a red shirt was the shooter. Moreover, the shooter's face is visible at multiple times during the videotape, especially in the back office. We cannot say that the footage is of such poor quality that, as a matter of law, the jury could not have been able to independently identify Jackson as the shooter. Rather, from this evidence, the jury could have determined which, if any, of the three men was Jackson.

This case is therefore unlike *People v. Robinson* (1964) 61 Cal.2d 373 (*Robinson*), in which the court found that there was insufficient evidence to corroborate an accomplice's testimony. In *Robinson*, the defendant's fingerprints were found in a car owned by his cousin, who was also charged with the crime. The car was found at the crime scene. There was additional evidence that defendant, on the night of the incident, was in the car with his cousin solely to go out to dinner and to see a friend, and that they thereafter parted ways. (*Id.* at pp. 398-399.) The prosecution argued that the presence of defendant's fingerprints in the car corroborated an accomplice's testimony that defendant participated in the crime. (*Id.* at p. 398.) The Supreme Court found that the fingerprints "merely placed [defendant] in the car at some time prior to the time the car was discovered" and were insufficient to connect defendant to the crime. (*Id.* at pp. 399-400.)

This case might be closer to *Robinson* if the *only* corroborating evidence was the fact a single particle of gunshot residue was found on Jackson's left hand. That evidence established that Jackson was "in an environment of gunshot primer residue," meaning he could have fired the gun or he could have been standing next to somebody who fired a gun. The gunshot residue (GSR) test by itself, therefore, might be insufficient to corroborate Dunson's and McDonald's testimony that Jackson was the shooter. But we

need not rely just on the GSR test. The surveillance footage did more than just place Jackson in Snooky's. It identified him as the shooter. Therefore, there was sufficient evidence to corroborate the inference, which arose from Dunson's and McDonald's accomplice testimony, that Jackson was the shooter.

## IV. **Jackson's statement made during GSR testing was admissible, and, in any event, its admission was not prejudicial.**

Before Jackson was given *Miranda*[14] warnings, he had GSR testing. During that testing, Officer David Patterson, as part of a series of form questions, asked Jackson if he was right or left-handed. Jackson replied he was left-handed.[15] The testing revealed a single particle of gunshot residue on Jackson's left hand. Jackson moved to exclude his statement.[16] The trial court held that asking whether someone is left or right-handed during a GSR test is "not the kind of questioning which would reasonably be too incriminatory [sic] evidence [and] [i]t's purely part of the test administration and has only to do with the test." It therefore admitted the statement. Admitting that statement, Jackson contends, violated his Fifth Amendment right against self-incrimination, because he had neither been given nor had he waived his *Miranda* rights at the time he made the statement.

To determine whether a statement is inadmissible because it was obtained in violation of a defendant's *Miranda* rights, we " 'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.] We apply federal standards in reviewing defendant's

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**14** *Miranda v. Arizona* (1966) 384 U.S. 436.

**15** McDonald is right-handed.

**16** McDonald joined in the motion.

claim that the challenged statements were elicited from him in violation of *Miranda*. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

In *Miranda*, the United States Supreme Court held that a custodial interrogation[17] must be preceded by advice to suspects that they have a right to remain silent and to have an attorney. (*Edwards v. Arizona* (1981) 451 U.S. 477, 481-482.) " '[I]nterrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301-302, fns. omitted.)

Exempted from *Miranda*'s coverage are routine booking questions, that is, questions "to secure the ' "biographical data necessary to complete booking or pretrial services." ' " (*Pennsylvania v. Muniz* (1990) 496 U.S. 582, 601 (plur. opn. of Brennan, J.).)[18] But " '[r]ecognizing a "booking exception" to *Miranda* does not mean,

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**17** There is no dispute that at the time Jackson made the statement at issue he was in custody.

**18** Before the United States Supreme Court decided *Muniz*, our California Supreme Court, in *People v. Rucker* (1980) 26 Cal.3d 368, had already found that *Miranda* warnings "need not be given prior to a booking interrogation intended to elicit 'from an arrestee the basic, neutral information that is necessary for proper jail administration, but

of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.' " (*Id.* at p. 602, fn. 14 (plur. opn. of Brennan, J.).)

Although it predates *Muniz*, the Court of Appeal in *Morris, supra,* (1987) 192 Cal.App.3d 380, relying on *Rhode Island v. Innis*, stated, "The focus of our analysis is *not* what the police may lawfully ask a criminal suspect to ensure jail security. The police may ask whatever the needs of jail security dictate. However, when the police know or should know that such an inquiry is reasonably likely to elicit an incriminating response from the suspect, the suspect's responses are not admissible against him in a subsequent criminal proceeding unless the initial inquiry has been preceded by *Miranda* admonishments." (*Morris, supra,* at pp. 389-390.)

On the specific facts before us, we believe that the "routine booking exception" applies here. The question asked of Jackson was just one of a series of questions on a standardized, preprinted form. The questions on that form concern, for example, the subject's occupation, hobbies, the last time the subject washed his or her hands, and whether there was any debris or blood on the subject's hands. The form questions are asked of *all* persons having GSR testing. Indeed, McDonald was asked the identical questions during his GSR test. That Jackson was asked questions from a standardized form lessens the likelihood that he felt coerced into making a statement. There is also no evidence that Officer Patterson knew or reasonably should have known that the questions were likely to elicit an incriminating response. There is no evidence that, at the time Officer Patterson administered the GSR test, he knew either that the shooter was left-handed or that this might be a crucial fact in determining who was the shooter.

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[the state is forbidden] from using the arrestee's responses in any manner in a subsequent criminal proceeding. . . .' " (*People v. Morris* (1987) 192 Cal.App.3d 380, 386 (*Morris*).) But *Rucker* was superseded by statute. (*Id.* at p. 387.)

These facts distinguish this case from the cases Jackson cites. For example, the officer in *Morris, supra,* 192 Cal.App.3d 380, after completing the booking process, realized he did not put an identification bracelet on the defendant. The officer got the defendant, who was visibly upset, out of his holding cell and asked if he " 'should anticipate any type of problem with his being there in jail.' " (*Id.* at p. 388.) When defendant said he did not think so, the officer asked defendant who he was accused of killing. Defendant replied he had killed his sister-in-law. The court held that the questions went "well beyond the type of neutral questioning permissible in a booking interview." (*Id.* at p. 389.) The court also noted that when the officer received an equivocal answer to his first question, the officer pursued the matter, thereby engaging in conduct he should reasonably have known would be likely to elicit an incriminating response. (*Ibid*.)

This case is also distinguishable from cases Jackson cites in which the interrogating officer knew that the question at issue was likely to elicit an incriminating response. (See, e.g., *United States v. Henley* (9th Cir. 1993) 984 F.2d 1040, 1042-1043 [although he knew there was some doubt about the ownership of a car involved in a robbery, officer asked defendant if he owned the car]; *United States v. Gonzales-Sandoval* (9th Cir. 1990) 894 F.2d 1043, 1046-1047 [officer who suspected defendant of illegal entry asked defendant about his immigration status, and the questioning did not occur during routine booking process]; *United States v. Disla* (9th Cir. 1986) 805 F.2d 1340, 1347 [interrogating officer knew drugs had been found in a residence and that the resident had not been identified, but asked defendant about his residence]; *United States v. Mata-Abundiz* (1983) 717 F.2d 1277, 1278-1279 [background questions, which were not asked during routine booking procedure, were directly related to an element of crime the interrogating officer suspected of defendant].)

Nor does the fact that the question at issue was asked during GSR testing rather than during booking render *Muniz* inapplicable. We do not read *Muniz* so narrowly as to apply only to questions asked during booking. Instead, the court in *Muniz* said that questions "to secure the ' "biographical data necessary to complete booking *or pretrial*

*services*" ' " are exempt from *Miranda*'s coverage. (*Pennsylvania v. Muniz, supra,* 496 U.S. at p. 601 (plur. opn. of Brennan, J.) (italics added).) GSR testing is a pretrial service conducted generally in any case involving discharge of a firearm.

But even if we assume that the trial court erred in admitting Jackson's statement that he is left-handed, it was harmless error beyond a reasonable doubt under *Chapman et al. v. California* (1967) 386 U.S. 18. There is no real dispute that Jackson was present at Snooky's: He was with McDonald and Dunson the morning of the incident, he was apprehended after he ran from the car used to flee the scene, and he was found with $1 bills in his shoes. The only real question was whether he was the shooter, who was left-handed. That question can be answered by reviewing the surveillance footage. Even if we ignore Dunson's and McDonald's testimony identifying themselves on the footage, Tarry identified Dunson as the man who hit him with a bar stool and who remained with him most of the time in the back office. Tarry's testimony therefore eliminated Dunson as the shooter. Dunson was also independently identifiable on the tape because he was taller and lankier than McDonald and Jackson. The jury could then have figured out which of the two other men on the tape was McDonald and which was Jackson. There are several parts of that tape, particularly portions in the back office, where McDonald's and Jackson's faces are shown clearly enough so that a jury could determine that the shooter was Jackson.

**V. Admission of gang evidence was not prejudicial error.**

Although gang allegations under section 186.22, subdivision (b)(1), were found not true as to all defendants and as to all counts, Dunson nonetheless contends that the trial court prejudicially erred in admitting gang evidence under *Bruton v. United States* (1968) 391 U.S. 123, *Crawford v. Washington* (2004) 541 U.S. 36, and *People v. Aranda* (1965) 63 Cal.2d 518.[19] We need not reach the substantive arguments that Dunson raises as to the admissibility of the evidence. Rather, we hold that even if the evidence was improperly admitted, its admission was not prejudicial.

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[19] This contention is also applicable to Jackson and McDonald.

The evidence that Dunson contends was improperly admitted, in brief, is the following: (1) Deputy Amy Hanson's testimony that she had a jailhouse interview with Jackson during which he told her he was a member of the 190th Street East Coast Crips;[20] (2) Deputy Dion Ingram's testimony he filled out a field identification card listing Jackson as a suspected 190th Street East Coast Crips member; (3) Sergeant Fred Reynold's testimony about predicate crimes committed by other members of 190th Street East Coast Crips gang members; (4) Sergeant Reynold's opinion testimony that Dunson is a gang member based on Dunson's tattoos, prior associations, field investigation cards, Dunson's admissions of gang memberships to people other than Reynolds, and information in CALGANGS database; and (5) Detective Michael Steward's testimony about Dunson's prior crimes and his opinion that he is a gang member based on an interview Steward had with him, Dunson's self-admissions to other offices, and field investigation cards about Dunson and McDonald.

Even if we assume that admission of the above evidence was error, it was harmless beyond a reasonable doubt under *Chapman et al. v. California, supra,* 386 U.S. 18. We so hold first and foremost because the jury found the gang allegations *not true* as to *all* defendants and as to *all* counts. Second, any negative inferences the gang evidence might have cast on defendants' criminal dispositions were completely overshadowed by other evidence. The crimes were planned, as the defendants had a map of Snooky's drawn by Dunson's girlfriend. Defendants had a gun. There were four victims. One victim, Long, was shot at close range immediately when defendants reentered Snooky's. Dunson admitted he repeatedly attacked Tarry and threatened to kill him and the others. McDonald admitted he was at Snooky's. Collier and Tapia were shot at close range, even though the defendants already had the money from the safe and the victims were not a threat. All of this savagery was captured by surveillance cameras

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**20** Dunson also objected to this testimony under *People v. Aranda, supra,* 63 Cal.2d 518, *Bruton v. United States, supra,* 391 U.S. 123, and *Crawford v. Washington, supra,* 541 U.S. 36, but the trial court overruled the objection.

and played for the jury. Based on this evidence and on the jury verdicts finding the gang enhancement allegations not true, any error in admitting the gang evidence was not prejudicial.

**VI. <u>The accomplice instructions</u>.**

There are two contentions of error with respect to the instructions given or not given on accomplices. First, Jackson contends that the trial court's failure to instruct that McDonald and Dunson were accomplices as a matter of law under CALJIC No. 3.16 (Witness Accomplice as a Matter of Law) was prejudicial error. Second, Dunson contends that the trial court prejudicially erred in instructing the jury with CALJIC Nos. 3.10 (Accomplice-Defined) and 3.18 (Testimony of Accomplice to be Viewed with Care and Caution). No prejudicial error occurred.

A. *CALJIC No. 3.16*.

Jackson first contends that the trial court should have sua sponte instructed the jury with CALJIC No. 3.16 because Dunson and McDonald admitted their participation in the robberies and the surveillance footage confirmed that they participated in the crimes.[21]

CALJIC No. 3.16 provides: "If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration." CALJIC No. 3.16 must be given where the testimony establishes that the witness was an accomplice as a matter of law. (*People v. Robinson, supra,* 61 Cal.2d at p. 394; *People v. Zapien, supra,* 4 Cal.4th at p. 982.) But where there is sufficient evidence in the record to corroborate accomplice testimony, any failure to give CALJIC No. 3.16 is harmless error. (*Zapien,* at p. 982.)

Here, even if we assume the trial court should have instructed the jury that Dunson and McDonald were accomplices as a matter of law, the failure to instruct the jury with CALJIC No. 3.16 was harmless. As we discussed in Section III, there was ample

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[21] The trial court did, however, instruct the jury with CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.14, and 3.18.

evidence to corroborate Dunson's and McDonald's testimony. Namely, the entire crime was captured on video and played for the jury. That video clearly shows that a left-handed man wearing a red shirt was the shooter. More importantly, the video is of sufficient quality such that the jury could have determined that Jackson was the shooter.

B. *CALJIC Nos. 3.10 and 3.18.*

Dunson makes two claims of error with respect to the accomplice instructions. His first argument concerns CALJIC No. 3.10, which was given to the jury as follows: "An accomplice is a person who is subject to prosecution for the identical offense charged against the defendants on trial, by reason of aiding and abetting." Dunson argues that his testimony showed he was potentially "culpable for fewer crimes than his co-defendants," but that CALJIC No. 3.10 identified him "as an accomplice in all of the offenses" and "lessened the prosecution's burden of proving" his guilt beyond a reasonable doubt on the remaining charges.

It is unclear precisely how CALJIC No. 3.10 lightened the prosecutor's burden of proving beyond a reasonable doubt Dunson's culpability on each charge. Nonetheless, this argument appears to be the same one as made by the defendant and rejected by the court in *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 (*Coffman*). There, both defendants testified, and the jury was instructed with CALJIC No. 3.10. Defendant Coffman argued that, under CALJIC No. 3.10, if the jury believed that her codefendant Marlow was the actual perpetrator, and not an aider and abettor, the jury could convict her without requiring sufficient corroboration of Marlow's testimony. (*Coffman, supra,* at p. 104.) The court rejected, as do we, that contention and found that "it was obvious to the jury that defendants stood accused of being accomplices to each other and that its task was to determine whether one had acted as an aider and abettor to the other or whether the two had acted in concert." (*Ibid.*) The court therefore approved giving CALJIC No. 3.10.

Dunson next contends that the trial court erred in instructing the jury with CALJIC No. 3.18, which was given to the jury as follows: "To the extent [that] an accomplice gives testimony that tends to incriminate another defendant, it should be

viewed with caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves, after examining it with the care and caution and in light of all the evidence in this case." Defendant argues it was error to instruct the jury with CALJIC No. 3.18 because the instruction required the jury to view his testimony, including the exculpatory portions, with caution, thereby depriving him of his Fifth and Sixth Amendment rights to present a defense and of his Fourteenth Amendment right to due process.[22]

Dunson relies on *People v. Fowler* (1987) 196 Cal.App.3d 79 (*Fowler*). In *Fowler*, both defendants testified on their own behalf. Fowler's testimony was self-exculpatory and incriminated his codefendant. The trial court instructed the jury that the testimony of an accomplice which tends to incriminate the other in the offense for which they are on trial should be viewed with distrust. (*Id.* at p. 85.) The Court of Appeal concluded that where "a codefendant accomplice takes the stand, confesses his guilt, and incriminates his codefendant, then the cautionary instruction must be given. [Citation.] But, where a codefendant testifies in his own behalf, even though that testimony incriminates the other defendant, it is highly prejudicial to the testifying codefendant to give a cautionary instruction, for the jury is then being instructed that the law requires his defensive testimony, and his defense, to be viewed with distrust." (*Id.* at p. 87.)

*Fowler* is distinguishable from this case. Fowler's testimony was self-exculpatory. In contrast, Dunson's testimony cannot be described as wholly self-exculpatory. To the contrary, he confessed, at the very minimum, to robbing Tarry. The only real "self-exculpatory" portion of his testimony was his attempt to distance himself from the gun by saying he did not know either who had the gun or that there was

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[22] Although Dunson does not clearly state his argument, the essence of it must be that although he confessed to being present, he denied being the shooter. He said he did not know there was a gun, and he did not know who shot the gun. McDonald also admitted he was present during the crimes and denied being the shooter. Thus, Dunson's and McDonald's denials were both a defense *and* incriminating because their testimony implied that someone other than the testifying defendant was the shooter.

one used during the crimes—incredible assertions in light of the surveillance footage. Therefore, because his testimony included a confession and incriminated his codefendants, his testimony had to be viewed with caution. Indeed, *Fowler* cited with approval a line of cases holding that the cautionary instruction must be given where, as here, one of several defendants takes the stand, confesses his guilt, and incriminates his codefendant. (*Fowler, supra,* 196 Cal.App.3d at pp. 85-86.)

The California Supreme Court has also held that it is proper to give CALJIC No. 3.18 even where both defendants deny their guilt and incriminate the other. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217-218.) The court said, "Defendant does complain of the instruction, however, insofar as it *burdens* him as the *incriminating* accomplice-defendant. But without sufficient basis. If an accomplice who testifies against a defendant deserves 'close scrutiny'—and he does—he deserves such scrutiny even if he is himself a defendant. Like any other accomplice, an accomplice-defendant has the motive, opportunity, and means to try to help himself at the other's expense. [¶] It is true that the testimony of a defendant ought not to be viewed with distrust simply because it is given by a defendant. Indeed, to such effect was the superior court's instruction on pity and prejudice. [Citation.] [¶] It is also true, however, that the testimony of a defendant ought not to be viewed *without distrust* simply because it is given by a defendant. Under the law, a defendant is surely equal to all other witnesses. But, under that same law, he is superior to none." (*Id.* at pp. 218-219; accord *Coffman, supra,* 34 Cal.4th at pp. 104-105.)[23]

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[23] The court in *Coffman* gave a modified version of CALJIC No. 3.18: " 'You are to apply the general rules of credibility when weighing Cynthia Coffman's testimony in her own defense. [¶] But if you find her to be an accomplice, then in weighing her testimony against James Gregory Marlow you ought to view it with distrust. [¶] This does not mean that you may arbitrarily disregard such testimony. [¶] But give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case. [¶] You are to apply the general rules of credibility when weighing James Gregory Marlow's testimony in his own defense. [¶] But if you find him to be an accomplice then in weighing his testimony against Cynthia Coffman you ought to view it with distrust. [¶] This does not mean that you may arbitrarily disregard

The court in *Coffman* similarly noted that CALJIC No. 3.18 correctly informs "the jury that, insofar as it assigned one accomplice-defendant's testimony any weight in determining the codefendant's guilt, it must view such testimony with distrust and find sufficient corroboration, as elsewhere defined for the jury. We see no reason to believe this relatively straightforward task was beyond the jury's capabilities. Contrary to Marlow's argument, the instruction did not undermine the presumption of innocence or deprive defendants of due process." (*Coffman, supra,* 34 Cal.4th at p. 105.) The court therefore rejected, as do we, the notion that CALJIC No. 3.18 forces the jury to perform the " 'impossible mental gymnastic' " of simultaneously distrusting a testifying defendant's testimony when offered against a codefendant and not distrusting a testifying defendant's testimony when offered on his own behalf. (*Id.* at p. 103.)

In any event, any error in instructing the jury with CALJIC No. 3.18 was not prejudicial, whether the error is reviewed under the *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of prejudice (whether it is reasonably probable appellants would have obtained a more favorable result absent the error) or under the *Chapman et al. v. California, supra,* 386 U.S. 18, standard of prejudice (whether beyond a reasonable doubt the error contributed to the verdict). Both McDonald and Dunson testified that they were present during the incident, although they denied having the gun. Dunson further denied knowing that there was a gun. But the videotape of the incident shows, among other things, that Jackson immediately shot Long in Dunson's and McDonald's presence, which did not deter either McDonald or Dunson from further participating in the crimes. Jackson openly wielded the gun throughout the incident. Also, Dunson threatened to kill Tapia and the others if Tarry did not open the safe. These threats undermine Dunson's testimony he did not know Jackson had a gun. One of the defendants told Jackson to kill the victims. Therefore, although the main point of McDonald's and Dunson's testimony

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such testimony. [¶] But give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case.' " (*People v. Coffman*, *supra,* 34 Cal.4th at p. 104.)

was to distance themselves from the gun, the overwhelming evidence was that they were knowledgeable and willing participants in every aspect of the crimes.

**VII. The trial court did not prejudicially err in failing to sua sponte instruct the jury with CALJIC No. 2.02.**

Based on the premise that the only element of the crime or crimes to be proved by circumstantial evidence was his specific intent or mental state, McDonald contends that the trial erred in instructing the jury with CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence-Generally) instead of sua sponte instructing the jury with CALJIC No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent or Mental Intent).

The jury was instructed with CALJIC No. 2.01 as follows: "However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only, one, consistent with the theory that the defendant is guilty of the crime, and, (2), cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendants' guilt must be proved beyond a reasonable doubt. [¶] In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. [¶] Also, if the circumstantial evidence as to any count permits two reasonable interpretations, one of which points to the defendant's guilt and the other to his or her innocence, you must adopt the interpretation that point[s to] the defendant's innocence and reject that interpretation that points to his or her guilt. [¶] On the other hand, if one interpretation of the evidence appears to you to be reasonable, and the other interpretation appears to be unreasonable, then you must accept the reasonable interpretation and reject the unreasonable."[24]

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[24] The trial court also instructed the jury with CALJIC No. 2.00: "Evidence consists of the testimony of witnesses, writings, objects, or anything presented to your senses and offered to prove the existence or nonexistence of a fact. [¶] Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves a fact. It is evidence

The jury was not instructed with CALJIC No. 2.02, which provides: The [specific intent] [or] [and] [mental state] with which an act is done may be shown by the circumstances surrounding the commission of the act. However, you may not [find the defendant guilty of the crime charged [in Count [s] 1 thru 4 . . . unless the proved circumstances are not only (1) consistent with the theory that the defendant had the required [specific intent] [or] [and] [mental state] but (2) cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to [any] [specific intent] [or] [mental state] permits two reasonable interpretations, one of which points to the existence of the [specific intent] [or] [mental state] and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the [specific intent] [or] [mental state] appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CALJIC No. 2.02.)

CALJIC No. 2.01 is the more inclusive instruction. (*People v. Marshall* (1996) 13 Cal.4th 799, 849.) It generally addresses the sufficiency of circumstantial evidence. In contrast, CALJIC No. 2.02 is limited to specific intent. The use notes to CALJIC Nos. 2.01 and 2.02 state that they should never be given together "because CALJIC 2.01 is inclusive of all issues, including mental state and/or specific intent, whereas CALJIC 2.02 is limited to just mental state and/or specific intent. Therefore, they are alternative instructions." Thus, CALJIC No. 2.02, rather than 2.01, should be given if the only element of the offense that rests substantially or entirely on circumstantial evidence is that of specific intent or mental state. (*Marshall*, at p. 849.)

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which by itself, if found to be true, establishes the fact. [¶] Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. [¶] It's not necessary that facts be proved by direct evidence. They also may be proved by circumstantial evidence or by a combination of direct and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof, and neither is entitled to any greater weight than the other."

Even if we assume that the trial court should have instructed the jury with CALJIC No. 2.02 rather than 2.01, defendant cites no case in which a failure to give CALJIC No. 2.02 where, as here, CALJIC No. 2.01 was given constituted reversible error. To the contrary, courts have repeatedly found that the failure to give CALJIC No. 2.02 is harmless error when the jury was instructed with CALJIC No. 2.01. (See, e.g., *People v. Rodrigues, supra,* 8 Cal.4th at p. 1142; *People v. Bloyd* (1987) 43 Cal.3d 333, 352; *People v. Lee* (1990) 220 Cal.App.3d 320, 328.) We therefore hold that any error in failing to give CALJIC No. 2.02 was harmless under *People v. Watson, supra,* 46 Cal.2d at pages 836-837, since the court instructed the jury with CALJIC No. 2.01, which generally tells the jury how to consider circumstantial evidence, and which fully instructed the jury on the elements of the offense, including the specific intent element. There is no reasonable probability the jury failed to properly apply the rules regarding circumstantial evidence to the intent element of the offenses.

We also reject defendant's contention that a failure to give CALJIC No. 2.02 is federal constitutional error because it lightened the prosecution's burden of proof, resulting in defendant having been convicted without the jury finding him guilty beyond a reasonable doubt. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282.) The error, if any, was instructing on the sufficiency of circumstantial evidence, not in instructing on reasonable doubt.

**VIII. The trial court did not err in imposing consecutive sentences.**

All three defendants contend that the imposition of consecutive sentences violates their right to a trial by jury. McDonald makes the additional contention that the trial court should have stayed the sentence on count 12 under section 654 instead of imposing a consecutive sentence on that count. No error occurred.

A. *Blakely*.

All three defendants contend that the imposition of consecutive sentences violates *Blakely v. Washington* (2004) 542 U.S. 296. The California Supreme Court rejected this contention in *People v. Black* (2005) 35 Cal.4th 1238. *Black* concluded that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term

sentence or consecutive terms under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Id.* at p. 1244.) The court in *Black* explained that "*Blakely*'s underlying rationale is inapplicable to a trial court's decision whether to require that sentences on two or more offenses be served consecutively or concurrently," (*id.* at p. 1262), because "[t]he jury's verdict finding the defendant guilty of two or more crimes authorizes the statutory maximum sentence for each offense" (*id.* at p. 1263). We are bound by *Black.* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, defendants' *Blakely* claims lack merit.[25]

B. *Count 12.*

In addition to his claim that his consecutive sentence was improper under *Blakely,* McDonald contends that if the evidence was sufficient to sustain the finding of premeditation and deliberation on the attempted murder counts, then the trial court erred in ordering a consecutive sentence as to count 12, robbery of Tarry, under section 654, because the attempted murders were inextricably intertwined with the robbery. We disagree.[26]

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 thus bars the imposition of multiple punishments when one act or a single course of conduct violates more than one statute. (*People v. Perez* (1979) 23 Cal.3d 545, 551.) The purpose of section 654 is to ensure that a defendant's punishment is commensurate with his or her culpability. (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

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**25** The United States Supreme Court is reviewing California's determinate sentencing scheme. (*People v. Cunningham,* (Apr. 18, 2005, A103501 [nonpub. opn.], cert. granted *sub nom. Cunningham v. California* (Feb. 21, 2006) __ U.S. __ [126 S.Ct. 1329].)

**26** The trial court imposed a consecutive determinate term of three years on count 12.

Whether a course of conduct is indivisible for purposes of section 654 depends on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) When crimes are divisible in time, separate punishments are proper even if the defendant had a single intent or objective and even if one crime is committed to facilitate the other crime. (*People v. Beamon* (1973) 8 Cal.3d 625, 639 & fn. 11 ["It seems clear that a course of conduct divisible in time, although directed to one objective, may give rise to multiple violations and punishment"]; *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1253.) A significant factor in determining section 654's applicability is whether the defendant had the opportunity to reflect on his criminal conduct between the offenses. (*Kwok, supra,* at p. 1255.) A trial court's ruling under 654 is a factual matter that will not be reversed on appeal if it is supported by substantial evidence. (*People v. Saffle, supra,* 4 Cal.App.4th at p. 438.)

The trial court's ruling that McDonald's sentence on count 12 for the robbery of John Tarry should run consecutively is supported by substantial evidence. Before Jackson shot at Tarry, Tarry had already been savagely and severely beaten: Dunson had hit him with a bar stool, kicked Tarry's foot and fractured it, and Tarry had been punched in the face several times. After beating Tarry and dragging the other victims into the back office, Dunson got the money out of the safe and left the back office. It was only then—when the victims were not a threat or a hindrance to the robbery—that one of the defendants told Jackson to "kill" them. Jackson did as he was told, shooting at Tarry, as well as Tapia and Collier. This evidence alone is sufficient evidence to support the court's conclusion that defendants' robbery of Tarry was divisible from their attempted murders of the victims.[27]

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[27] In response to the People's argument that section 654 does not apply because Jackson's act of shooting at Tarry involved force beyond that reasonably necessary to accomplish the robbery, McDonald argues that a robber in similar circumstances could reasonably be expected to take additional steps to ensure his escape. To justify shooting Tarry as part of the robbery, McDonald further states that there is no indication Tarry "was unconscious or close to it, or that he was in retreat, or was incapable of resisting Jackson." (McDonald Reply at p. 19.) We take issue with that statement. Tarry had

**IX. <u>The trial court did not err in instructing the jury with CALJIC No. 8.66 on attempted murder</u>.**

Jackson contends that the trial court prejudicially erred in failing to modify CALJIC No. 8.66 (Attempted Murder).[28] We disagree.

The trial court instructed the jury with CALJIC No. 8.66 as follows: "Defendants all are accused in Counts 1 through 4 of having committed the crime of attempted murder, in violation of Penal Code Section 664-187(a). [¶] Every person who attempts to murder another human being is guilty of a violation of Section 664-187. [¶] Murder is the unlawful killing of a human being with malice aforethought. In order to prove attempted murder, each of the following two elements must be proved: [¶] 1. A direct but ineffectual act was done by one person towards killing another human being; [¶] 2. The person committing the act harbored express malice aforethought; namely, *a specific intent to kill unlawfully another human being*. [¶] In deciding whether or not such an act was done, it is necessary to distinguish between mere preparation, on the one hand, and the actual commencement of the doing of the criminal deed on the other. [¶] Mere preparation, which may consist of planning the killing or of devising, obtaining or arranging the means for [its] commission, is not sufficient to constitute [an] attempt. However, acts of a person who intends to kill another person, will constitute an attempt where those acts clearly indicate a certain unambiguous intent to kill. [¶] The acts must be an immediate step in the present execution of the killing, the progress of which would be completed unless interrupted by some circumstances not intended in the original design." (Italics added.)

Focusing on the italicized portion of the instruction stating that an element of the crime is "a specific intent to kill unlawfully another human being," Jackson argues that

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been savagely beaten, and Jackson shot at Tarry only *after* defendants had the money. Moreover, we think a victim can be considered "incapable of resisting" when a gun has been or is being pointed at him.

**28** This contention applies to all defendants.

the jury could have convicted him on all four counts of attempted murder if it found he intended to kill only one of the four victims. There is no reasonable likelihood the jury construed or applied CALJIC No. 8.66 in this manner. (*People v. Osband* (1996) 13 Cal.4th 622, 679.) The jurors were given separate special verdict forms for each of the four victims. The jury was also instructed, under CALJIC No. 17.02 that it had to "decide each count separately." Therefore, viewing the instructions as a whole, as we must do (*People v. Davis* (1995) 10 Cal.4th 463, 521), and presuming that the jury understood and followed those instructions (*People v. Holt* (1997) 15 Cal.4th 619, 662), no error occurred.[29]

**X. <u>The trial court properly imposed and stayed the enhancements under section 12022.53, subdivisions (b) and (c)</u>.**

As to counts 1, 2, and 3 for attempted murder, the jury found true allegations that Jackson had personally and intentionally used and discharged a firearm, causing great bodily injury. (§ 12022.53, subds. (b), (c), (d).) The jury also found true as to count 4 the firearm enhancement allegations, but only under subdivisions (b) and (c) of section 12022.53. On counts 1, 2, and 3, the trial court imposed 25-years-to-life terms for the section 12022.53, subdivision (d) enhancements. It imposed and stayed, under section 654, 10- and 20-year terms on the subdivision (b) and (c) enhancements, respectively. On count 4, the trial court imposed 20 years for the section 12022.53, subdivision (c), enhancement. It imposed and stayed, under section 654, the 10-year term under subdivision (b). Jackson contends the subdivisions (b) and (c) enhancements must be stricken instead of imposed and stayed. We disagree.

Section 12022.53 provides a range of enhancements to punish firearm use during specified crimes. (§ 12022.53, subd. (b) [10-year enhancement for personal use of firearm], subd. (c) [20-year enhancement for personally and intentionally discharging firearm], subd. (d) [25-years-to-life enhancement for personally and intentionally

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[29] Because we reach the merits of the issue, we need not decide whether, as the People assert, the issue was waived because Jackson's counsel failed to object below.

discharging firearm, proximately causing great bodily injury or death to any person other than an accomplice].) Section 12022.53, subdivision (f), provides: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment." But section 12022.53, subdivision (h), provides, "Notwithstanding Section 1385 or any other provision of law, the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Recognizing the apparent conflict between section 12022.53, subdivisions (f) and (h), *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 713 (*Bracamonte*), harmonized the two subsections. *Bracamonte* reasoned: "If viewed in isolation, the language of section 12022.53, subdivision (f) would dictate that the trial court in this case could only impose the 25-year-to-life enhancement . . . and must strike the findings underlying the 10-year . . . and 20-year . . . enhancements. Such construction of section 12022.53, however, would conflict with subdivision (h) of that section. . . . [¶] To harmonize these seemingly conflicting provisions, we conclude that section 12022.53 operates to require the trial court to add the applicable enhancement for each firearm discharge and use allegation under that section found true and then to stay the execution of all such enhancements except for the one which provides the longest imprisonment term. [Citation.]" (*Bracamonte,* at p. 713; accord, *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1061-1062.)

Jackson urges that *Bracamonte* was wrongly decided. He argues that the statutory language and legislative history require that only one firearm enhancement be imposed per count. We are unpersuaded. In our view, *Bracamonte* was correctly reasoned. Indeed, *People v. Oates* (2004) 32 Cal.4th 1048, supports *Bracamonte*'s conclusion. In *Oates,* albeit in a somewhat different context, the court concluded that failing to impose a section 12022.53, subdivision (d), enhancement where the requirements for the enhancement were met "would, contrary to the command of section 12022.53,

subdivision (h), effectively strike the subdivision (d) enhancement allegations and findings . . . ." (*Oates,* at p. 1057.)

Likewise, here, *not* imposing enhancements under section 12022.53, subdivisions (b) and (c), would be the equivalent of striking the allegations in violation of subdivision (h). If section 12022.53, subdivision (f), was interpreted to mean that only the longest section 12022.53 enhancement could be imposed, the trial court would be required to strike the remaining section 12022.53 enhancements, in contravention of section 12022.53, subdivision (h)'s prohibition on striking enhancements.

The legislative materials Jackson cites certainly suggest the Legislature did not intend for a defendant to *serve* more than one section 12022.53 enhancement for the same crime. That goal, however, is met by imposing and staying the sentence on the subdivision (b) and (c) terms. When execution of a sentence enhancement is stayed, the enhancement becomes part of the sentence, but it is not served. (*People v. Meloney* (2003) 30 Cal.4th 1145, 1156.) Therefore, imposing but staying execution of the enhancement advances the legislative goal of precluding service of multiple terms on enhancements.

**DISPOSITION**

Defendant and appellant Marshawn Jackson's abstract of judgment shall be corrected to reflect that the sentences on counts 5, 6, 7, and 12 were not stayed. The clerk of the superior court is directed to correct the abstract of judgment and to forward a corrected abstract to the Department of Corrections. The judgments are affirmed.

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.