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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARRYL WILSON et al., Defendants and Appellants.	B183372 (Los Angeles County Super. Ct. No. TA071802)

APPEALS from judgments of the Superior Court of Los Angeles County, Kelvin Filer, Judge. Affirmed as to Wilson. Affirmed in part, vacated in part, and remanded as to Louis. Dismissed as to Anderson.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Darryl Wilson.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Dallan Louis.

Cynthia Thomas, under appointment by the Court of Appeal, for Defendant and Appellant Rudy Mundell Anderson.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Darryl Wilson appeals from the judgment entered following his convictions by jury on two counts (counts 1 & 2) of attempted willful, deliberate, and premeditated murder (Pen. Code, §§ 664, 187),[1] and two counts (counts 3 & 4) of attempted murder (§§ 664, 187), each with a finding that the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)). The court sentenced him to prison on each of counts 1 and 2 to life with the possibility of parole, with service of a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5), and sentenced him to prison for 19 years on each of counts 3 and 4. The court ordered consecutive sentences on counts 1 and 3, and concurrent sentences on counts 2 and 4. Appellant Dallan Louis appeals from the judgment entered following his convictions by jury on three counts (counts 1 – 3) of attempted willful, deliberate, and premeditated murder (§§ 664, 187), each with findings that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)), a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), a principal personally and intentionally discharged a firearm causing great bodily injury (§ 12022.53, subds. (d) & (e)(1)), and the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)), and count 4 - attempted willful, deliberate, and premeditated murder (§§ 664, 187) with findings that a principal personally used a firearm (§ 12022.53, subds. (b) & (e)(1)), and the offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(5)). The court sentenced Louis to prison on each count to a term of life with the possibility of parole, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1), with service of a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The court ordered consecutive sentences on counts 1 and 3, and concurrent sentences on counts 2 and 4.

Appellant Rudy Mundell Anderson appeals from the judgment entered following his plea of no contest to attempted murder (§§ 664, 187) with an admission that he

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[1] Statutory references are to the Penal Code.

suffered a prior felony conviction (§ 667, subd. (d)).[2] The court sentenced him to prison for 10 years.

INTRODUCTION

In this case, we reject the claims of Wilson and Louis that the trial court erroneously denied their three *Wheeler* motions, which were based on the alleged group bias of race. As to the first *Wheeler* motion, which was based on the prosecutor's excusal of three African-American prospective jurors, the trial court concluded a prima facie showing of group bias had been made. However, after hearing the prosecutor's race-neutral explanations for his excusals, the court denied the motion, and the denial was supported by substantial evidence. Moreover, because they failed to raise the issue below, Louis and Wilson waived the issue of whether comparative analysis demonstrated group bias because certain jurors who remained on the panel were allegedly similarly situated to one or more of the three excused jurors. In any event, the record reflects said certain jurors were not similarly situated.

We also reject the claims of Wilson and Louis that the trial court erroneously denied their second and third *Wheeler* motions, each made after the prosecutor excused a single African-American juror. Each such motion presented little more than a showing that the People excused an African-American juror, and the showing was insufficient. There is no need to decide Wilson's argument that, as to the second and third *Wheeler* motions, the trial court erroneously employed a "strong likelihood" instead of "inference" standard of proof of group bias, since even under the lighter "inference" standard, a prima facie showing was not made.

We also reject Wilson's argument that the trial court erred when denying the second and third *Wheeler* motions by failing to consider the excusals of jurors with

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[2] We appointed counsel to represent Anderson on appeal. After examination of the record, counsel for Anderson filed, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, 441, an opening brief in which no issues were raised. On November 28, 2005, we advised Anderson that he had 30 days within which to personally submit any contentions or issues which he wished us to consider. We received no response from Anderson.

respect to whom previous *Wheeler* motions had been denied. Once a *Wheeler* motion is denied, the presumption is reinstated that the prosecutor excused for race-neutral reasons the jurors the excusal of whom resulted in the motion. Wilson was therefore required to make his prima facie showing anew as to the second and third *Wheeler* motions, and the showings were insufficient. We also reject Louis's argument that the trial court erred by denying the second *Wheeler* motion on the ground that a pattern of impermissible excusals had not been shown. The trial court did not state it was denying the motion on that ground, but merely disputed Louis's argument that such a pattern had been shown.

We conclude Wilson's claim (in which Louis purports to join) that the trial court reversibly erred by instructing on transferred intent is without merit. The transferred intent doctrine does not apply to attempted murder and respondent concedes the giving of the instruction was error. However, Wilson and Louis had motive to kill because the drive-by shootings by Louis and the other shooters were committed in a rival gang's territory, and a fellow gang member of Wilson and Louis had been killed two days before. The shooters used high-caliber weapons to shoot multiple shots at victims only a short distance away, and the two victims of each set of shootings were physically close to each other. The car which Wilson and Louis were in, and which Wilson was driving, later collided with another car, and the subsequent flight of Wilson and Louis, and various statements made by Wilson, evidenced consciousness of guilt.

The jury found various firearm and gang enhancements true as to Louis, and a gang enhancement true as to Wilson. The jury rejected felonious assault as a lesser included offense in favor of convicting Wilson and Louis on four counts of, inter alia, attempted murder with its more culpable mental state. Therefore, the jury rejected the notion that the victims were injured merely by "mistake or inadvertence" as required by the given transferred intent instruction, and the jury effectively rejected reliance upon that instruction. In sum, there was overwhelming evidence that Wilson and Louis intended to kill each of the four victims, a jury necessarily would have so concluded, and no reasonable jury could have relied solely on the transferred intent instruction to convict

Wilson and Louis; therefore, the alleged instructional error was harmless under any conceivable standard.

We reject Louis's claim that the court's instructions erroneously permitted convictions without jury findings that he harbored a specific intent to kill each victim. He claims the giving of the accomplice instruction (CALJIC No. 3.01), with CALJIC No. 8.66.1 on "attempted murder--concurrent intent," was prejudicial error because the accomplice instruction, when read with CALJIC No. 8.66.1, permitted him to be convicted, as a nonshooting accomplice, of attempted murder simply because the victim was within the field of fire of a shooter. What Louis is essentially arguing is that the accomplice instruction, read with CALJIC No. 8.66.1, permits de facto application of the transferred intent doctrine to the extent the victim is within the shooter's field of fire.

However, the instructions did not use the term "field of fire" but, read together, merely permitted the jury to infer intent to kill not only a primary target but everyone within a kill zone, as the basis for further inferences that intent to kill everyone existed and the accomplice shared that intent. No instructional error occurred. Moreover, again, there was overwhelming evidence that Wilson and Louis intended to kill each of the four victims, a jury necessarily would have so concluded, and no reasonable jury could have relied solely on the fact that victims were within a "field of fire" to convict Wilson and Louis; therefore, the alleged trial court error was harmless under any conceivable standard.

We conclude Wilson's claims (in which Louis purports to join) that (1) the trial court lessened the People's burden of proof by instructing the jury that they could not harbor a reasonable doubt of guilt based solely on an evidentiary conflict, and (2) the trial court interfered with the jury's deliberative process by instructing them that they were required to resolve such conflicts, are without merit. The trial court merely told the jury that an evidentiary conflict did not *necessarily* create reasonable doubt, and the jury's job was to *attempt* to resolve evidentiary conflicts. Accordingly, no juror reasonably would have understood the court's instructions as Wilson suggests, and no instructional error

occurred. Moreover, given additional comments by the trial court and the overwhelming evidence of guilt, the claimed instructional error was not prejudicial.

We reject Louis's claim (in which Wilson joins) that the trial court erroneously failed to conduct a juror misconduct hearing based on (1) a juror's expression, after retiring for, but before the jury engaged in, deliberations, of his opinion as to guilt, and (2) that same juror's later statements during deliberations insulting a juror who was then carefully examining the evidence. The complaining juror was thoroughly examined concerning the offending juror's statements. That examination failed to demonstrate a strong possibility that prejudicial misconduct occurred, or that there was a material conflict in the evidence of misconduct that could be resolved only at a hearing. Moreover, the trial court, with appellants' acquiescence, subsequently admonished the offending juror with the rest of the jury as to the jury's responsibilities. Accordingly, the trial court did not abuse its discretion by failing to conduct a hearing

We accept respondent's concession that Louis's sentence was unauthorized because, as to count 4 alleged against Louis, the trial court erroneously (1) failed to impose an enhancement pursuant to section 12022.53, subdivisions (b) and (e)(1), where the jury found true such enhancement allegations pertaining to that count and (2) imposed an enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) as to that count where no subdivision (d) allegation was pled or proved as to that count. We will remand the matter for resentencing.

We conclude imposition of upper terms on counts 3 and 4 as part of Wilson's prison sentence did not violate *Blakely v. Washington* (2004) 542 U.S. 296. Finally, we accept respondent's contention that Anderson's appeal must be dismissed. As to certificate issues, the trial court denied a certificate of probable cause, and Anderson listed no noncertificate issues in his notice of appeal; therefore, dismissal is appropriate.

FACTUAL SUMMARY

In this case, as discussed below, appellants, members of a Crips gang clique, drove into territory claimed by a rival Bloods gang clique. Once there, and in retaliation for the killing of a Crips gang member, Louis and Wilson committed drive-by shootings of four

persons, two at 1314 Bullis, then two at 2120 Bullis, in Compton. The record reflects Anderson committed one of the shootings at 1314 Bullis.

1. *The Shootings of Baskin and Turner (Counts 3 & 4) at 1314 Bullis.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on September 18, 2003, persons who affiliated with, or lived in a neighborhood claimed by, the Tree Top Piru clique of the Bloods gang shot and killed Kevin Jones, a member of the rival Grape Street gang, a clique of the Crips gang. The shooting occurred in Watts and in territory claimed by the Grape Street gang.

On September 20, 2003, A.M., who was 12 years old at the time of the trial, witnessed the shooting of her uncle, Douglas Baskin, outside her apartment. Evidence discussed below demonstrated A.M.'s apartment was located at 1314 Bullis[3] in Compton. Photographs admitted in evidence (People's exhibit No. 10) depicted A.M.'s apartment building and the shooting scene. The apartment building was on the east side of Bullis and separated from the sidewalk by a concrete block wall about six feet high. The wall had a single gated pedestrian opening about three feet wide and, in the photographs, the gate was open. A walkway led from the pedestrian opening to inside the apartment complex.

On September 20, 2003, A.M. was in her second floor apartment, looking out the window. She saw Baskin and A.M.'s cousin, Dametric Turner, on the walkway inside the gate. A Ford Contour,[4] occupied by three or four persons, drove up. Baskin ran further inside the apartment complex, and Turner was with Baskin. Shots were fired

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[3] The record contains references to the street as Bullis, and North Bullis. For convenience sake, we refer to the street as Bullis.

[4] A.M. testified the car was the same color as a tan car in People's exhibit No. 1. There is no dispute that the car in People's exhibit No. 1 was a Ford Contour, and that there was ample evidence that that Ford was the car from which shots were fired at 1314 Bullis, and later at 2120 Bullis.

from the car. Baskin, inside the gate and on the walkway, was shot three times in the legs. The car left northbound, away from Rosecrans.

Turner testified as follows. Photographs (People's exhibit No. 10) depicted where Turner lived on Bullis. On September 20, 2003, a car coming from Rosecrans drove up to the location where he lived. The car stopped alongside another car parked in front of the above mentioned pedestrian opening. Turner, looking at a photograph of the concrete block wall and pedestrian opening, testified he was standing between the "two things," apparently referring to the two portions of the concrete wall separated by the pedestrian opening.[5] While Turner was standing there, a lot of shots were fired from the car that had pulled up.

Turner testified that when "they" started shooting, he dodged behind a Blazer parked in front of the pedestrian opening. Turner was shot in the hip. Turner testified that Baskin was "out there" with Turner when Turner was shot.

Turner told the police there was a person in the front seat and a person in the rear seat of the car that drove up. Turner also told police that the person in the rear seat opened the car's right rear door and was shooting out of that door. Turner testified the rear passenger "began to shoot at [Turner] and Baskin" with a gun from inside the car. Turner also suggested he did not see the gun possessed by the rear passenger. The car had a driver but Turner did not see the driver. It appeared that the front passenger was also shooting a weapon from the car. Turner was not a gang member.

About 6:30 p.m. on September 20, 2003, Los Angeles County Sheriff's Deputy Matthew Shackelford, responding to a radio call, went to the scene of a shooting at 1314 Bullis. Shackelford arrived less than a minute after he had received the call. Shackelford found thirteen 9-millimeter casings, three .45-caliber casings, and two expended bullets. The 9-millimeter and .45-caliber casings were on the east side of Bullis at the curb. One of the expended bullets was under a Chevy Blazer parked on the east side of the street

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[5] We note that, because Turner was pointing at a photograph, the record is not clear whether, when pointing, he was referring merely to the opening or to a point visible through the opening.

against the curb, and the other bullet was next to a block wall on the east side of the street.

Shackelford noted there were nine bullet holes throughout the Blazer. A few seconds after the radio call pertaining to the 1314 Bullis shooting, another call was broadcast about a shooting that had occurred just up the street.

2. *The Shootings of Colbert and D.S. (Counts 1 & 2) at 2120 Bullis.*

On September 20, 2003, sixteen year-old D.S. was standing on the inside of a walled apartment complex, later determined to have been at 2120 Bullis. D.S. was standing near a pedestrian opening in the wall. Photographs admitted in evidence (People's exhibit No. 5) depict the pedestrian opening and apartment building. The apartment building was on the east side of Bullis and separated from the sidewalk by a concrete block wall about three to four feet high. A wrought iron fence about three to four feet high was on top of the concrete block wall. The wall had a single pedestrian opening. The opening was about three feet wide due to wrought iron fencing attached to the walls on each side of the opening. There were open areas in the wrought iron fencing. Although D.S. referred to a gate at the location, no gate appears in the photographs.

While D.S. was standing inside the pedestrian opening, she heard shots. D.S. was shot in the right leg near her knee. When shot, D.S. was facing the apartments, not the street. D.S. did not remember what time she was shot, but after she was shot it was "going from light to dark[.]" D.S. did not see whether anyone else in the area was shot when she was shot. D.S. had no gang affiliation.

On the afternoon of September 20, 2003, Rayvonn Colbert was on the sidewalk across the street from a shopping center on Bullis. Colbert's location was later determined to have been 2120 Bullis. Colbert testified he left the sidewalk and entered the street to try to cross it and walk towards the shopping center.

Colbert heard shots, and he and a nearby male tried to escape. Colbert returned to the sidewalk, where he was shot. Deputies showed Colbert a photographic identification folder containing six photographs. Colbert circled one photograph that depicted the

person who shot Colbert, and Colbert wrote on the folder that the person who shot him used a Tec-9. The folder and its photographs were admitted in evidence.

Los Angeles County Sheriff's Deputy Allen Dollens testified as follows. During the late afternoon of September 20, 2003, Dollens and his partner received a call that a shooting had occurred near 1314 Bullis. When Dollens first got the call, he was probably about four miles from the location. He arrived at the location within less than two minutes. It was not yet dusk when he arrived.

Dollens saw deputies at the location, then continued northbound because he had received another call that a traffic collision had occurred on Bullis. En route to the collision site, persons flagged down Dollens and told him there were two additional shooting victims at 2120 Bullis. The location of 2120 Bullis was one-fourth of a mile from 1314 Bullis.

Dollens went to 2120 Bullis and talked to D.S. and then Colbert. When Dollens contacted D.S., she was at the Bullis Apartments at 2120 Bullis. The apartments were gated. D.S. was just inside the west pedestrian gate that faced Bullis. D.S. was lying on the grass inside the gate and had a bullet wound on her right knee.

When Dollens contacted Colbert, he was sitting on an apartment stairway just east of where D.S. was lying. Colbert was being treated by paramedics. Colbert appeared to have a grazing wound to his hip and a bullet wound on his lower left leg.

Dollens testified that Colbert told him the following.[6] Colbert had just walked out the west pedestrian gate of the apartment complex and was walking west across Bullis when he saw a tan four-door vehicle traveling southbound on Bullis and towards him. There were four males in the vehicle. The front passenger was seated in the passenger window so his upper body extended out of the vehicle and was facing across the roof of the vehicle. The front passenger was holding a black Tec-9 firearm in his hands.

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[6] Colbert testified but was afraid to do so because he was in custody on an unrelated charge. His statements to Dollens were admitted in evidence as prior inconsistent statements.

Colbert made eye contact with the front passenger and Colbert knew he was about to be shot. Colbert turned to run back into the apartment complex but felt pain in his left leg and fell. The two rear passengers also "began shooting at him and at the west pedestrian gate" of the apartment complex. They were shooting handguns that could have been 9-millimeter or .45-caliber weapons.

On September 20, 2003, Los Angeles County Sheriff's Deputy Deanie Caffey went to a location between the 2100 and 2200 blocks of Bullis to assist with a shooting investigation. She recovered three 9-millimeter casings and one .45-caliber casing from the southbound lane of Bullis near the curb.

3. *The Traffic Collision and Flight of Appellants.*

On September 20, 2003, Vidalia Aguilera was driving a Chevrolet Silverado pickup truck several blocks from the shooting scenes. A tan Ford Contour (People exhibit No. 1) crashed into her truck. Five males fled from the Ford: a driver, a front passenger, and three backseat passengers. The front passenger was limping. Aguilera identified a photograph of Wilson to police as depicting someone who looked like the driver, and identified a photograph of Louis as depicting the front passenger. At trial, Aguilera identified Wilson and Louis as the Ford's driver and front passenger, respectively. A third person in court looked familiar to Aguilera. Carolyn Byers, Jones's aunt, owned the Ford that collided with Aguilera's vehicle. Byers's son was a Grape Street gang member and had permission to drive the Ford.

Kayla Ortiz lived near the collision site. During the late afternoon of September 20, 2003, Ortiz heard a loud crash and later saw a person, then Anderson, and later Wilson, flee into her backyard. Anderson had a gun. Wilson was limping and appeared to have a broken leg. Wilson told Ortiz there had been a crash, he had been hit by a car, and he was running because he lacked car insurance. Wilson asked Ortiz to hide him and not to call the police. Shortly thereafter, Wilson, and later Anderson, were detained.

Sometime after 6:00 p.m. on September 20, 2003, Los Angeles County Sheriff's Deputy Thomas Peter was driving northbound on Bullis, crossing Rosecrans, when he

heard about 15 to 20 gunshots. Peter testified persons in vehicles flagged him down and told him that a brown Ford was traveling northbound by Bullis and Queensdale, and "they were shooting other people in that area." Exhibits admitted in evidence show that the intersection of Bullis and Queensdale is the first intersection north of 1314 Bullis. Peter continued driving northbound on Bullis towards Queensdale.

When Peter reached Queensdale, he heard about seven shots come from an area north of him, so he continued towards the 2000 block of Bullis. As Peter drove past an apartment complex in the 2000 block, a person flagged down Peter and told him a brown Ford was accelerating towards Lynwood and its occupants were shooting out of the Ford. Peter continued northbound on Bullis toward Burton when he saw a Ford matching the description. The Ford was involved in a traffic collision, and was the Ford later identified by Aguilera.

Peter contacted a person at the scene who was sitting on the curb with a broken leg. Peter detained him and the person later went to the hospital. Peter found a black Tec-9 firearm on the right front floorboard of the Ford. A deputy recovered from the driver's side floorboard of the Ford a cell phone belonging to Wilson. The cell phone had a phone number under the entry of "'K Loc,'" Jones's moniker.

4. *Forensic and Gang Evidence.*

Appellants were tested for gunshot residue. Particles consistent with gunshot residue were found on Anderson, a particle consistent with gunshot residue was found on Wilson, but the test was inconclusive as to Louis. Firearms analysis of the expended shell casings revealed that the above mentioned Tec-9, and a .45-caliber firearm, were used during the shootings at 1314 and 2120 Bullis, and a third weapon was used at only one of those locations.

Los Angeles Police Officer Christian Mrakich, a gang expert, opined at trial that appellants were Grape Street gang members, and that they committed the September 20, 2003 shootings on Bullis in retaliation for the killing of Jones. According to Mrakich, it made little difference that the victims of the Bullis shootings were not rival gang members. What was significant was that appellants drove almost four miles from their

territory to a rival gang's territory, drove into it, and committed the shootings. Wilson and Louis presented no defense evidence.

CONTENTIONS

Wilson and Louis contend the trial court (1) erroneously denied their *Wheeler* motions and (2) erroneously failed to conduct a juror misconduct hearing. Wilson also contends (1) the trial court erroneously instructed the jury on transferred intent, (2) the trial court erroneously instructed the jury that an evidentiary conflict could not support a reasonable doubt and (3) the trial court imposed upper terms on counts 3 and 4 in violation of *Blakely v. Washington*. Louis also contends (1) the court's instructions erroneously permitted convictions without jury findings that he harbored a specific intent to kill each victim and (2) imposition of the section 12022.53, subdivision (d) enhancement pertaining to count 4 was error because the jury did not find true the enhancement allegation. Respondent claims Anderson's appeal must be dismissed because it is untimely and Anderson did not comply with section 1237.5.

DISCUSSION

1. *The Trial Court Properly Denied the Wheeler Motions of Wilson and Louis.*

a. *The First Wheeler Motion.*

(1) *Voir Dire.*

(a) *Juror 3127.*[7]

During voir dire of prospective jurors, the court asked if any juror had a friend or relative who had suffered a criminal conviction. Juror 3127 replied she had a brother who, in 2004, had been convicted and sentenced in Compton court for murder.

(b) *Juror 3015.*

During voir dire, juror 3015 indicated she lived in Compton. The court asked if anyone had had any unfortunate experiences with law enforcement officers. Juror 3015 replied, "I had an impeding traffic ticket, and the cop had followed me and was trying to

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[7] For convenience sake, we use "Juror" instead of "Juror No." throughout the opinion.

flag me down like he wanted my telephone number or whatever, so I wouldn't talk to him. I felt like that's why he gave me the ticket." Juror 3015 indicated this occurred in about 1989, but the event would not stop her from being fair.

The following then occurred: "The Court: Do you remember what agency that was? [¶] [Juror 3015]: Compton. [¶] The Court: Why do you say it like that? [¶] [Juror 3015]: It's Compton. Did I say it wrong? [¶] The Court: All right. We don't want you to have any preconceived biases technically about Compton. There was a favorable article about Compton in the L.A. Times Magazine yesterday. [¶] [Juror 3015]: That's good."

As indicated, the court asked if any juror had a friend or relative who had suffered a criminal conviction. Juror 3015 replied, "I have a cousin, murder, Compton. . . . I have a friend in Orange County, aid and abetting to a murder." Both persons referred to by juror 3015 had been convicted.

The prosecutor later asked if any juror had had direct contact with persons the juror believed were Grape Street gang members. Juror 3015 replied, "My cousins lived in the neighborhood. I don't know anything about them." The prosecutor asked whether, to juror 3015's knowledge, any of juror 3015's cousins "associate, hang out, participate or consider themselves to be" Grape Street gang members. Juror 3015 replied, "Not to my knowledge."

*(*c) *Juror 1205.*

During voir dire, the prosecutor asked juror 1205 what she knew about the Grape Street gang. Juror 1205 replied, "I've just heard of them. My husband used to coach at a school over there and they were like in that same area, Jordan, L.A. Jordan." The prosecutor asked "Over by the Jordan Downs apartment complex?" and juror 1205 replied, "So when we would go to the games, . . . they would be present as well as the police, and I kind of learned about it through that and through the kids that went to the school because we were involved in the school." The prosecutor asked if juror 1205 had had any direct contact with individuals whom juror 1205 believed were Grape Street gang members. Juror 1205, replied, "Not that I know of."

Juror 1205 and other jurors raised their hands when the court asked if any juror would have serious difficulty serving as a juror for about three weeks. During later voir dire, juror 1205 indicated that three weeks' jury service would create financial hardship for her family since her employer would not pay for jury duty. Juror 1205 said she brought a letter from her employer.

During subsequent voir dire by Anderson, juror 1205 indicated she would not mind serving if her employer paid her, but she could not serve three weeks without pay. Anderson's counsel replied, "I understand that's a financial hardship, there's no question."

(2) *Peremptory Challenges and Pertinent Proceedings.*

Later, the People, using peremptory challenges, excused jurors 0059, 3127, and 3015. Louis and Wilson accepted the panel each time. After the People excused juror 1205, Wilson made a *Wheeler*[8] motion and Louis expressly joined in it. There is no dispute that jurors 3127, 3015, and 1205 were, like Louis and Wilson, African-Americans, and that, upon the excusal of juror 1205, there were five African-Americans among twelve remaining jurors. The five remaining African-Americans included one who replaced juror 3015.

After Louis and Wilson made their first *Wheeler* motion, the court indicated it was "a little concerned about the pattern" and asked the prosecutor to provide reasons for the excusals.

(a) *Juror 3127.*

The prosecutor replied as follows. Juror 3127 said she could be fair, but her brother had been convicted of murder. The prosecutor felt that a close family member, "particularly a brother that has been through the system and prosecuted by a deputy district attorney," might not be the best juror since the present charges involved attempted murder.

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[8] *People v. Wheeler* (1978) 22 Cal.3d 258. We treat all *Wheeler* motions discussed herein as motions also under *Batson v. Kentucky* (1986) 476 U.S. 79 [90 L.Ed.2d 69].

(b) *Juror 3015.*

The court replied, "Okay. What about [juror 3015]?" The prosecutor, consulting her notes, replied as follows. Juror 3015 had a cousin and friend who had been convicted of murder, and juror 3015 had said she had cousins who associated with Grape Street gang members. Appellants were Grape Street gang members. Juror 3015 was not really impressed with Compton police officers. Compton police officers were involved in the present case. Juror 3015 commented that a Compton police officer had stopped her to get her phone number, then ticketed her, and the event left a bad impression concerning Compton police. According to the prosecutor, the court had told juror 3015 that she had to keep an open mind concerning that issue.

(c) *Juror 1205.*

As to juror 1205, the prosecutor represented as follows. Juror 1205 "says although she doesn't know, probably she does have or has seen or know the area of Grape Street gang members. [*Sic*.] She said her husband is more familiar with Grape Street gang members." Appellants were Grape Street gang members. Juror 1205 had major concerns that the trial would cause her financial hardship, she repeated her concern that morning, and the prosecutor felt juror 1205 would not be the best juror.

The court stated, "I'm satisfied the People have provided reasons. I forgot about [juror 1205]. She did make reference to the gang members on that, so I'll deny the *Wheeler* motion." We will present additional facts where relevant to the analysis.

(3) *Analysis.*

Louis and Wilson claim the prosecutor unlawfully excused jurors 3127, 3015, and 1205 on the basis of group bias, that is, race.[9] We disagree. Our Supreme Court has observed that "There is a presumption that a prosecutor uses his or her peremptory challenges in a constitutional manner." (*People v. Turner* (1994) 8 Cal.4th 137, 165.) In *People v. Fuentes* (1991) 54 Cal.3d 707, our Supreme Court stated, "This court and the

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[9] Neither Louis nor Wilson expressly claims as to any *Wheeler* motion that a prima facie showing of group bias based on gender was made.

high court have professed confidence in trial judges' ability to determine the sufficiency of the prosecutor's explanations. In *Wheeler*, we said that we will 'rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.' (*Wheeler, supra,* 22 Cal.3d at p. 282.) Similarly, the high court stated in *Batson v. Kentucky* [(1986) 476 U.S. 79], that 'the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility,' and for that reason 'a reviewing court ordinarily should give those findings great deference.'. . ." (*People v. Fuentes, supra,* at p. 714.) If substantial evidence supports the trial court's findings, we may affirm them. (*People v. Williams* (1997) 16 Cal.4th 635, 666.)

(a) *Juror 3127.*

As to juror 3127, the prosecutor explained that the prosecutor excused her because, although juror 3127 indicated she could be fair, her brother had been convicted of murder and had been prosecuted by a deputy district attorney, and the present charges involved attempted murder. The fact that a juror's relative has suffered a prior conviction may support an inference of juror partiality and justify the juror's excusal. (*People v. Allen* (1989) 212 Cal.App.3d 306, 312.) Moreover, here, the nature of the prior conviction was similar to the nature of the present offenses.

(b) *Juror 3015.*

As to juror 3015, the prosecutor excused her because juror 3015 indicated she had a cousin who had been convicted of murder in Compton, plus a friend in Orange County who had been convicted of murder as an accomplice. (§ 31.) Excusal of juror 3015 was justified. (*People v. Allen, supra,* 212 Cal.App.3d at p. 312.)

Moreover, juror 3015 indicated that a police officer stopped her and issued a traffic ticket to her because she did not want to engage in personal conversation with him or provide her telephone number. The colloquy between the court and juror 3015 supports an inference that, in open court, she referred to the officer's police department so derisively that it prompted the court both to caution her against harboring preconceived bias and to make an effort to rehabilitate the department in the minds of

jurors. Wilson concedes "[t]here may have been something in [juror 3015's] tone when she replied 'Compton,' . . ." A juror's negative experience with law enforcement may support excusal. (*People v. Turner, supra,* 8 Cal.4th at p. 171.) We note that numerous Los Angeles County Sheriff's deputies testified at trial, many of whom also testified they were assigned to the Compton station.

Louis, engaging in comparative analysis, claims that the fact that juror 6429 was not excused evidences that the excusal of juror 3015 was based on group bias, since juror 6429 was similarly situated to juror 3015 as indicated below.

During voir dire, juror 6429 indicated as follows. Juror 6429 had a problem with the court system, although that did not mean she had anything bad to say about judges, lawyers, or anyone. Juror 6429 merely felt the court system was designed to win a game, not find the truth. Juror 6429 was referring to a New York child custody case that occurred 25 years before and involved her child. During that case, lies were told and truth was twisted. As a result of that case, juror 6429 believed cases were more about winning than determining truth.

Louis waived the comparative analysis issue by failing to raise it below. (Cf. *People v. Schmeck* (2005) 37 Cal.4th 240, 270.) On the merits, we note juror 6429's complaint about the court system, and not individuals within it, markedly differs from juror 3015's negative experience with law enforcement and an individual officer. Jurors 3015 and 6429 were not similarly situated for purposes of comparative analysis. (Cf. *People v. Huggins* (2006) 38 Cal.4th 175, 234-235.)

(c) *Juror 1205.*

As to juror 1205, the prosecutor asked juror 1205 what she knew about the Grape Street gang. Juror 1205 initially replied, "I've *just* heard of them" (italics added), restricting her knowledge to hearsay. However, she later indicated she had been in the presence of Grape Street gang members. This supported the gist of the prosecutor's concern: that juror 1205 tried to minimize her familiarity with the gang. The court, denying the *Wheeler* motion, indicated that juror 1205's reference to gang members during voir dire was noteworthy.

Juror 1205 did not expressly state that her husband was more familiar with Grape Street gang members. However, she did indicate that her husband coached at a school located in the area of the gang members. (Cf. *People v. Williams, supra,* 16 Cal.4th at pp. 190-191.) That indication, coupled with juror 1205's claim that she had "just" heard of the gang members supported inferences that (1) juror 1205 was trying to minimize her familiarity with the gang members by suggesting her husband was more familiar with them and/or (2) she might be partial due to her husband's familiarity with the gang. Moreover, juror 1205 repeatedly complained that a trial of about three weeks would cause her financial hardship; this supported her excusal. (Cf. *People v. Garceau* (1993) 6 Cal.4th 140, 172; *People v. Barber* (1988) 200 Cal.App.3d 378, 398.)

Louis, engaging in comparative analysis, claims that the fact that juror 6663 was not excused evidences that the excusal of juror 1205 was based on group bias. Louis observes that, during voir dire, juror 6663 indicated she was present in court on the third of five days for which her employer would pay for jury duty. Louis waived the comparative analysis issue by failing to raise it below. (Cf. *People v. Schmeck, supra,* 37 Cal.4th at p. 270.) On the merits, we note that the record indicates, and Louis does not dispute respondent's assertion, that juror 6663 was an African-American. The prosecutor's failure to excuse juror 6663 bolsters, not weakens, the lawfulness of the excusal of juror 1205. Moreover, juror 6663 appears to have been in the gallery, and not one of the 18 jurors in the jury box, when the prosecutor excused juror 1205. Further, the number and manner of juror 1205's complaints about financial hardship were different from those of juror 6663.

Wilson, engaging in comparative analysis, claims that the fact that neither juror 1186 nor juror 7847 were excused evidences that the excusal of juror 1205 was based on group bias. Wilson observes that juror 1186 expressed familiarity with a gang. During voir dire, juror 1186 said, concerning gangs, that juror 1186 had been "living in the hood for seven years and I haven't had any . . . I know they're there." Juror 1186 was then asked if that fact would prevent juror 1186 from listening to the evidence, and juror 1186 replied, "I have never had any conscious contact with them." (RT/708) As to jurors

1186 and 7847, Wilson observes that they raised their hands with juror 1205 when the court asked if any juror would have serious difficulty serving as a juror for about three weeks.

Wilson waived comparative analysis claims by failing to raise them below. (Cf. *People v. Schmeck, supra,* 37 Cal.4th at p. 270.) On the merits, the statements of juror 1186 during voir dire reasonably may be distinguished from those of juror 1205 on the ground that the former do not evidence an effort to minimize familiarity with a gang. Mere isolated and discrete similarities do not make two prospective jurors similarly situated for purposes of comparative analysis. (Cf. *People v. Huggins, supra,* 38 Cal.4th at pp. 234-235.) Moreover, juror 1205 repeatedly complained about financial hardship, bolstering her complaint with a letter from her employer. Wilson does not claim this was true of juror 1186 or juror 7847.

Substantial evidence supported the trial court's findings that the People lawfully excused jurors 3127, 3105, and 1205. (Cf. *People v. Williams* (1997) 16 Cal.4th 635, 666.) The trial court did not err by denying the first *Wheeler* motion of Louis and Wilson.

b. *The Second Wheeler Motion.*

(1) *Voir Dire and Pertinent Proceedings.*

In November 2004, following the trial court's denial of the first *Wheeler* motion and further voir dire proceedings, Wilson and Louis accepted the panel. The People excused juror 0369. Louis's counsel represented, "We need to approach again." At sidebar, Louis's counsel stated, "Same objection. Another Afro-American juror, continues the pattern. I can't understand why this juror was picked. We just went through this before." Wilson did not expressly join in Louis's motion, but indicated, inter alia, that jurors 3127, 3105, and 1205 (previously excused jurors), and 6663, were African-Americans. There is no dispute that, at the time juror 0369 was excused, there were five remaining African-American jurors on the panel.

The following colloquy occurred: "The Court: Well, I think she made a good record last time, indicating it was certainly race neutral. I had a little question mark as to

juror No. 9 [juror 0369] as well. There appears to be some hesitancy on her part when it was inquired about whether she could be fair. Ultimately I think she came around, but I don't think there's been a subsequent pattern based upon this one peremptory. I'm going to deny the request at this point. [¶] [Louis's Defense Counsel]: I want[ed] to say there may not be a subsequent but there certainly is a pattern. I mean how can we randomly say everyone chosen to be knocked off the jury is from the same ethnic background and the same gender background? [¶] The Court: I think the other excuses she was able to certainly correct my notes and lay out a race neutral basis and this one, 9, I don't think that establishes a pattern at this point. Okay. [*Sic*.]"

(2) *Analysis.*

We assume Louis joined the second *Wheeler* motion. However, that motion amounted to little more than a showing that the prosecutor had challenged one African-American juror. No one disputed below the trial court's comments that juror 0369 appeared to have been hesitant when asked whether she could be fair. Because of the trial court's knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we give considerable deference to the determination that, as to juror 0369, Louis and Wilson failed to establish a prima facie case of improper exclusion. (Cf. *People v. Trevino* (1997) 55 Cal.App.4th 396, 402, 410.) The trial court did not err by denying the second *Wheeler* motion of Louis and Wilson. (*People v. Turner, supra,* 8 Cal.4th at pp. 167-168; *People v. Garceau, supra,* 6 Cal.4th at pp. 170-172; *People v. Howard* (1992) 1 Cal.4th 1132, 1153-1157; *People v. Christopher* (1991) 1 Cal.App.4th 666, 671-673.)

Wilson claims the trial court erroneously required that, in order to make a prima facie showing of group bias, he establish that it was "more likely than not" that a juror was excused for an improper reason. Prior to 2004, the year in which the present *Wheeler* motions were made, our Supreme Court had concluded that, under the state and federal Constitutions, a prima facie showing of group bias required proof of a "strong likelihood" or "reasonable inference" of group bias, and that these terms were equivalent. (*People v. Avila* (2006) 38 Cal.4th 491, 554 (*Avila*); *People v. Box* (2000) 23 Cal.4th

1153, 1187-1188, fn. 7.) In *Johnson v. California* (2005) 545 U.S. 162 [162 L.Ed.2d 129] (*Johnson*), the United States Supreme Court held that it was sufficient under the federal standard that the defendant raise an inference, and the defendant did not have to show a strong likelihood, of group bias. (*Johnson, supra,* 545 U.S. at p. ___ [162 L.Ed.2d at p. 135].) Wilson argues that since, in the present case, the trial court denied that he had made a prima facie showing, and the denial preceded *Johnson*, the trial court must be presumed to have used the erroneous "strong likelihood" standard when denying his second *Wheeler* motion.

There is no need to decide the issue. In the present case, the trial court did not expressly state whether it used the "strong likelihood" or "inference" standard. However, the trial court did indicate it had a question about juror 0369. The trial court also indicated, without dispute, that juror 0369 appeared to have been hesitant when asked if she could be fair. We conclude Wilson did not even satisfy the inference standard. (Cf. *Avila*, *supra*, 38 Cal.4th at pp. 553-555.)

Wilson, citing *People v. McGee* (2002) 104 Cal.App.4th 559 (*McGee*), claims the trial court erred when denying his second *Wheeler* motion on the ground that he had not established a prima facie showing of group bias, because the trial court considered only the excusal of juror 0369, and not the alleged pattern of excusals beginning with juror 3127. Louis makes a similar claim, arguing the court should have found that he established a prima facie case "as to the *fourth* African-American juror [juror 0369] and required the prosecutor to justify the challenge." (Italics added.) We reject the claims.

Avila stated, "In *McGee*, the Court of Appeal characterized *Wheeler* motions as challenging 'the selection of a jury, not the rejection of an individual juror; the issue is whether a pattern of systematic exclusion exists.' (*McGee, supra,* 104 Cal.App.4th at p. 570, italics [omitted].) Accordingly, it held that once the trial court has found a prima facie case of group bias in the excusal of one prospective juror, the burden shifts to the prosecutor to provide race-neutral explanations for all challenges to prospective jurors who are members of the same group. (*Ibid*.) [¶] The premise of the Court of Appeal's analysis in *McGee*, however, is incorrect. When a party makes a *Wheeler* motion, the

issue is not whether there is a pattern of systematic exclusion; rather, the issue is whether a particular prospective juror has been challenged because of group bias. (*Wheeler, supra,* 22 Cal.3d at p. 280.)" (*Avila, supra,* 38 Cal.4th at p. 549.)

Avila, citing *People v. Alvarez* (1996) 14 Cal.4th 155, stated, "the presumption that a prosecutor uses his peremptory challenges in a constitutional manner is 'suspended when the defendant makes a prima facie showing of the presence of purposeful discrimination' but 'reinstated . . . when the prosecutor makes a showing of its absence.' ([*People v. Alvarez, supra,* 14 Cal.4th] at p. 199.) Thus, on a later motion, the defendant *must make a prima facie showing anew*. (*Id*. at p. 199; see also *People v. Irvin* (1996) 46 Cal.App.4th 1340, 1351 . . . ['Although *Wheeler* motions may be made seriatim, each *Wheeler* motion is itself separate and discrete and is resolved definitively and independently of each other'].) *McGee*, which fails to acknowledge our decision in *Alvarez*, is inconsistent with the premise that each *Wheeler* objection is a discrete event and should be resolved independently of each such motion." (*Avila, supra,* 38 Cal.4th at p. 552, italics added.) In light of *Avila* (decided after *Johnson*), even if the trial court considered only the excusal of juror 0369 and not prior excusals, we reject claims that the trial court thereby erred. Moreover, we note the trial court's comments indicate the court did not merely consider the excusal of juror 0369.

Louis claims, in connection with the second *Wheeler* motion, that the trial court erred by finding that the excusal of juror 0369 failed to "'establish a pattern.'" The trial court did not deny the second *Wheeler* motion on the ground Louis failed to establish a pattern. The court merely disputed Louis's argument that a pattern had been shown. As mentioned, the trial court did not expressly state the standard of proof it employed when denying the second *Wheeler* motion, and any error resulting from that fact does not warrant reversal of the judgment.

c. *The Third Wheeler Motion.*

(1) *Pertinent Facts.*

Following the trial court's denial of the second *Wheeler* motion, appellants accepted the panel. The People excused juror 6992. Appellants accepted the panel. The

People excused juror 6685 (who had replaced juror 0369 as juror 9). The following then occurred: "[Louis's Defense Counsel]: May we approach again? [¶] The Court: For that same issue? [¶] [Louis's Defense Counsel]: Yes. [¶] The Court: . . . I'll take it under submission and allow you to argue it once the jury has been excused. [¶] [Louis's Defense Counsel]: Okay."

After the jury was sworn, the following occurred: "The Court: We're outside the presence of the jury. There was one other thing I noted, and I had forgotten that counsel wanted to renew a *Wheeler* motion as a result of juror no. 9 being excused, and I anticipated that, so at this time I'll let you put anything on the record. [¶] [Louis's Defense Counsel]: I would submit. [¶] [Wilson's Defense Counsel]: Submitted. [¶] The Court: All Right. So that motion is denied. I think clearly there were sufficient grounds given – race neutral grounds given by the People when they challenged the juror."

(2) *Analysis.*

Wilson's claims as to the third *Wheeler* motion are similar to his claims as to the second *Wheeler* motion. He claims as to the third *Wheeler* motion that (1) the trial court erroneously required that, in order to make a prima facie showing of group bias, he establish that it was more likely than not that a juror was excused for an improper reason and (2) citing *McGee*, the trial court erred when denying his third *Wheeler* motion on the ground that he had not established a prima facie showing of group bias, because the trial court considered only the excusal of juror 6685, and not the alleged pattern of excusals beginning with juror 3127.

Louis makes a claim similar to Wilson's second above enumerated claim, and Louis and Wilson note that juror 6685 was the fifth of seven excusals by the People. We rejected similar claims in connection with the second *Wheeler* motion. The reasoning supporting those rejections applies with equal force here. The trial court did not err by denying any of the *Wheeler* motions of Louis and Wilson.

2. *The Trial Court Did Not Reversibly Err as to Wilson or Louis by Instructing on Transferred Intent.*

a. *Pertinent Facts.*

In the present case, as to counts 1 through 4 (and as to Wilson and Louis), the court, using CALJIC No. 8.66, instructed on the intent to kill element of attempted murder[10] and, using CALJIC No. 8.67, instructed on the meaning of willful, deliberate, and premeditated murder. The court also, using a modified CALJIC No. 8.65, instructed the jury on transferred intent as to those counts, stating: "When one attempts to kill a certain person, but by mistake or inadvertence shoots a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been shot."[11]

During jury argument the prosecutor argued there was circumstantial evidence that Wilson and Louis harbored intent to kill, and also argued the doctrine of transferred intent applied.

b. *Analysis.*

(1) *The Court Erred by Instructing on Transferred Intent.*

The doctrine of transferred intent does not apply to attempted murder. Thus, where a defendant shoots a firearm intending to kill X but the bullet only injures Y, the defendant's intent to kill X does not transfer to Y, and the defendant is not guilty of the attempted murder of Y on a theory of transferred intent. (*People v. Bland* (2002) 28

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[10] As to the intent element, CALJIC No. 8.66, stated that the People had to prove, "The person . . . harbored express malice aforethought, namely, a specific intent to kill unlawfully another human being."

[11] The court, using CALJIC No. 8.66.1, also instructed on "Attempted Murder--Concurrent Intent" (see fn. 14). The court also, using CALJIC Nos. 3.00 and 3.01, instructed on principals, and aiding and abetting, respectively. The court, using CALJIC No. 9.02.1, instructed on assault with a semiautomatic firearm as a lesser offense of attempted murder in counts 1 through 4, and, using CALJIC No. 17.10, instructed that the court could not accept a guilty verdict on the lesser charge unless the defendant had been acquitted of the greater charge.

Cal.4th 313, 326-331.) Therefore, as respondent concedes, the trial court erred by instructing on transferred intent. The error requires reversal of the judgment unless the error was harmless beyond a reasonable doubt. (Cf. *Id*. at p. 333*; People v. Hunter* (1989) 49 Cal.3d 957, 980; *People v. Gomez* (2003) 107 Cal.App.4th 328, 336-337; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1738; *People v. Hayden* (1994) 22 Cal.App.4th 48, 57; *People v. Birch* (1969) 3 Cal.App.3d 167, 177; see *People v. Czahara* (1988) 203 Cal.App.3d 1468, 1475; *People v. Harris* (1994) 9 Cal.4th 407, 424-427.)[12]

(2) *The Error Was Not Prejudicial as to Louis.*

(a) *The Shootings of Baskin and Turner (Counts 3 & 4).*

(i) *The Actual Mental State of Any of the Ford's Occupants.*

As members of the Grape Street clique of the Crips gang, each of the Ford's gang member occupants had a motive to kill persons in territory claimed by the rival Bloods gang. Moreover, members of the Tree Top clique of the Bloods gang had killed Jones, a member of the Grape Street clique, providing the Ford's gang member occupants with additional retaliatory motive to kill. The People provided ample evidence that Wilson, Louis, and others were occupants of the Ford when, at 1314 and 2120 Bullis, numerous shots were fired from the Ford.

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[12] We reject Wilson's reliance on *Martinez v. Garcia* (9th Cir. 2004) 371 F.3d 600 (*Martinez*) for the proposition that error in giving a transferred intent instruction is structural, and reversible per se. Federal appellate court cases are not binding on this court. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.) Moreover, *Martinez* (unlike the present case) was a case in which the erroneous transferred intent instruction, the prosecution's transferred intent arguments, and an ambiguous special verdict form combined to render it impossible to tell whether the jury relied on a valid theory or the erroneous instruction to reach a verdict. (*Martinez*, at p. 605.) Louis, in his reply brief, purports to join in Wilson's transferred intent argument. Louis maintains that respondent's concession that the transferred intent instruction was erroneous "leaves this court only with the question whether that error was harmless." Louis has thus abandoned any argument that the giving of the erroneous instruction was structural error which is reversible per se.

When Officer Peter was at Bullis and Rosecrans, he heard about *15 to 20* gunshots. Citizens told Peter that *people* were in a brown Ford, in what was later determined to be the vicinity of the 1314 Bullis shootings, and that the *people* were shooting other people in that area. A short time later, Peter heard *seven* more shots, and as Peter approached 2120 Bullis, a citizen told him a brown Ford was accelerating towards Lynwood and its *occupants* were shooting out of the Ford. Peter later saw a Ford matching the description, namely, the Ford involved in the traffic collision with Ortiz. After the collision, a Tec-9 was in plain view on the right front floorboard, in front of where Louis had been sitting. Anderson was later seen in possession of a gun and there was gunshot residue on Wilson and Anderson.

A gang expert testified Wilson, Louis, and Anderson were Grape Street gang members retaliating for the killing of Jones. Moreover, it was unimportant that the shooting victims were not gang members, but important that the Ford's occupants traveled almost four miles to rival gang territory, entered it, and committed the shootings.

There was ample evidence that the events occurred during the afternoon when there was still daylight making the victims visible. It appeared the gang members were targeting anyone in or near the front of an apartment complex.

Moreover, the transferred intent instruction did not apply merely to one who attempts to kill a certain person, but shoots a different person. The instruction given in this case, by its terms, applied to one who attempts to kill a certain person, but by "mistake or inadvertence" shoots a different person. The court instructed on assault with a semiautomatic firearm as a lesser included offense of counts 1 through 4. Unlike the nonculpable mental state associated with "mistake or inadvertence," the mental state accompanying felonious assault is, of course, culpable. An assault is an intentional act with actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another. (*People v. Williams* (2001) 26 Cal.4th 779, 790.) The mental state accompanying attempted murder is even more culpable, that is, a specific intent to kill unlawfully another human being.

It follows that the jury, rejecting felonious assault with its culpable mental state in favor of convicting Wilson and Louis of attempted murder with its even more culpable mental state, necessarily rejected any notion that Wilson or Louis shot anyone merely with the nonculpable mental state of "mistake or inadvertence" as required by CALJIC No. 8.65; therefore, CALJIC No. 8.65 was irrelevant to the jury.

(ii) *Louis's Actual Mental State.*

There is no dispute that Louis was an occupant of the Ford. As mentioned, there was ample evidence that Louis was an occupant when, at 1314 and 2120 Bullis, shots were fired from the Ford. Those shootings (separated by only about one-fourth of a mile) and the traffic collision involving Ortiz occurred within a very short time frame. These facts demonstrated that throughout these events and when the collision occurred, Louis was the front passenger. The brief flight of Louis from the Ford after the collision evidenced consciousness of guilt.

Moreover, there is no dispute that as to count 3, the jury found Louis personally and intentionally discharged a firearm, proximately causing great bodily injury to Baskin for purposes of section 12022.53, subdivision (d), and the offense was committed with the specific intent required by the section 186.22, subdivision (b)(1) gang enhancement. Nor is there any dispute that, as to count 4, Louis personally used a firearm, and the offense was committed with the specific intent required by the gang enhancement pertaining to that count.

According to A.M. and Turner, Baskin and Turner were together at the time of the shootings at 1314 Bullis. According to A.M. and the photographic evidence, at the time of those shootings Baskin and Turner were a short distance from the Ford, and inside a walled apartment complex with a relatively narrow pedestrian opening. The nature and dimensions of the wall and opening indicate Louis and the other shooters carefully aimed within the relatively narrow field of the opening to shoot Baskin and Turner.

According to Turner, many shots were fired when he was standing in the pedestrian opening, and he hid behind the Blazer. The bullet holes in the Blazer as described by Shackelford demonstrate Louis and the other shooters were trying to kill

Turner wherever he was behind the Blazer, and the bullets and casings found at the location indicate numerous shots were fired from high-caliber weapons. Turner told police, and testified at trial, that the rear passenger of the suspect vehicle opened its car door and shot at Baskin *and* Turner.

In light of the above, and leaving aside the transferred intent instruction, we conclude there was overwhelming evidence that, as to counts 3 and 4, Louis's actual mental state was that he intended to kill Baskin and Turner, willfully, deliberately, and with premeditation, and a reasonable jury necessarily would have concluded that Louis harbored that actual mental state as to both victims. No reasonable jury could have relied on the transferred intent instruction alone to convict Louis on counts 3 and 4. Therefore, the trial court's error in giving the transferred intent instruction was harmless beyond a reasonable doubt. (Cf. *People v. Bland*, *supra*, 28 Cal.4th at p. 333*; People v. Hunter*, *supra,* 49 Cal.3d at p. 980; *People v. Gomez, supra,* 107 Cal.App.4th at pp. 336-337; see *People v. Czahara*, *supra*, 203 Cal.App.3d at p. 1475.)

(b) *The Shootings of Colbert and D.S. (Counts 1 & 2).*

We incorporate here part 2.b.(2)(a) of our Discussion. Moreover, there is no dispute that as to count 1, Louis personally and intentionally discharged a firearm, proximately causing great bodily injury to Colbert (§ 12022.53, subd. (d)) and the offense was committed with the specific intent required by the gang enhancement. Similarly, there is no dispute that, as to count 2, Louis personally and intentionally discharged a firearm, proximately causing great bodily injury to D.S., with the specific intent required by the gang enhancement.

The evidence demonstrates D.S. was standing inside a walled apartment complex at 2120 Bullis. D.S. was standing near a pedestrian opening in the wall. She heard shots and a bullet struck her in the right leg near the knee. The nature and dimensions of the wall and opening indicate Louis and the other shooters carefully aimed within the relatively narrow field of the opening to shoot towards D.S. and Colbert.

Colbert was on the sidewalk outside 2120 Bullis when he subsequently entered the street, heard shots, returned to the sidewalk, and was shot. Colbert told Dollens that

Colbert had just walked out the west pedestrian gate and was walking west across Bullis when he saw a tan four-door vehicle traveling southbound on Bullis and towards him. The front passenger, outside the vehicle and seated on the passenger door, was holding a Tec-9. Colbert fled, but was shot. The rear passengers in the Ford, who could have been using 9-millimeter or .45-caliber weapons, shot at him *and* the west pedestrian gate.

There was no evidence that D.S. or Colbert traveled any substantial distance after being shot, and there was ample evidence that D.S. and Colbert were shot at 2120 Bullis. Wilson effectively conceded during jury argument that the People were claiming that the D.S. and Colbert shootings occurred at 2120 Bullis.[13] We note that, although the jury requested readbacks of testimony of A.M. and Turner, the jury requested no such readbacks as to the testimony of D.S. and Colbert.

In light of the above, and leaving aside the transferred intent instruction, we conclude there was overwhelming evidence that, as to counts 1 and 2, Louis's actual mental state was that he intended to kill Colbert and D.S., willfully, deliberately, and with premeditation, and a reasonable jury necessarily would have concluded that Louis harbored that actual mental state as to both victims. No reasonable jury could have relied on the transferred intent instruction alone to convict Louis on counts 1 and 2. Therefore, the trial court's error in giving the transferred intent instruction was harmless beyond a reasonable doubt.

(3) *The Error Was Not Prejudicial as to Wilson.*

We incorporate here part 2.b.(2) demonstrating a reasonable jury necessarily would have concluded that, as to each of the four victims of counts 1 through 4, the actual mental state of Louis (and other shooters) was an intent to kill, willfully, deliberately, and with premeditation.

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[13] Wilson's counsel argued, "You have got two locations alleged by the district attorney where this happened," that is, 1314 Bullis as to Baskin and Turner, and 2120 Bullis as to Colbert and D.S.

There was ample evidence that Wilson was a gang member occupant of the Ford when, at 1314 and 2120 Bullis, shots were fired from the Ford. As mentioned, those shootings, separated by only about one-fourth of a mile, and the traffic collision involving Ortiz occurred within a very short time frame. These facts demonstrated that throughout these events, and as was the case when the collision occurred, Wilson was the driver. Wilson's flight from the Ford after the collision evidenced consciousness of guilt, as did his statements to Ortiz and requests that she hide him and not call the police. We note Ortiz did not testify that Wilson acknowledged he had been involved, innocently or otherwise, in shootings. There is no dispute that, as to all counts, Wilson committed the offenses with the specific intent required by the gang enhancement.

In light of the above, and leaving aside the transferred intent instruction, we conclude there was overwhelming evidence that, as to counts 1 and 2, Wilson's actual mental state, as an accomplice, was that he intended to kill each of the victims of those counts willfully, deliberately, and with premeditation, and a reasonable jury necessarily would have concluded that Wilson harbored that actual mental state as to both victims. Similarly, we conclude there was overwhelming evidence that, as to counts 3 and 4, Wilson's actual mental state, as an accomplice, was that he intended to kill each of the victims of those counts, and a reasonable jury necessarily would have concluded Wilson harbored that mental state as to both victims. No reasonable jury could have relied on the transferred intent instruction alone to convict Wilson on counts 1 through 4; therefore, the trial court's error in giving the transferred intent instruction was, as to Wilson, harmless beyond a reasonable doubt.

3. *The Court's Instructions Did Not Permit the Jury to Convict Louis Without Finding He Had Specific Intent to Kill Each Victim.*

a. *Pertinent Facts.*

As mentioned, the information alleged as to each of counts 1 through 4 that, inter alia, Louis committed attempted murder. The trial court instructed on attempted murder, including its intent to kill element, using CALJIC No. 8.66 (see fn. 10), and on

"Attempted Murder--Concurrent Intent" using CALJIC No. 8.66.1.[14] The court, using CALJIC No. 3.01, also instructed on the definition of aiding and abetting.[15] The jury convicted Louis as previously indicated.

b. *Analysis.*

Louis claims the giving of the accomplice instruction (CALJIC No. 3.01) was prejudicial error because that instruction, when read with CALJIC No. 8.66.1, permitted him to be convicted, as a nonshooting accomplice, of attempted murder simply because the victim was within the field of fire of a shooter. What Louis is essentially arguing is that the accomplice instruction, read with CALJIC No. 8.66.1, permits de facto application of the transferred intent doctrine to the extent the victim is within the shooter's field of fire. Apart from whether Louis failed to request amplification of the instructions with the result that he waived the issue he now presents, we reject his claim.

The instructions at issue did not use the phrase "field of fire." CALJIC No. 8.66.1 uses the phrase "'kill zone,'" a zone of risk the existence of which serves as a predicate for an inference of actual intent to kill anyone who is within that zone but not a primary target. Such an intent provides, as correctly reflected in CALJIC No. 8.66, the requisite intent of attempted murder, and the defendant who harbors that intent based on a kill zone theory intends to murder the person within the kill zone. In turn, CALJIC No. 3.01, read

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[14] That instruction stated, in relevant part, "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' zone of risk is an issue to be decided by you."

[15] That instruction stated, in relevant part, "A person aids and abets the commission or attempted commission of a crime when he [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime."

with CALJIC No. 8.66, requires an accomplice not only to have (1) knowledge of the unlawful purpose of the perpetrator, that is, said intent to murder, but (2) the intent or purpose of committing, encouraging, or facilitating the crime, that is, a sharing of the perpetrator's intent to murder. (Cf. *People v. Beeman* (1984) 35 Cal.3d 547, 560.) The trial court did not err by giving the accomplice instruction (CALJIC No. 3.01) or, for that matter, CALJIC No. 8.66, or 8.66.1.

Moreover, as discussed in part 2 above, there was overwhelming evidence that Louis actually intended to kill each of the four victims, and a reasonable jury necessarily would have concluded he had such intent. The claimed instructional error was not prejudicial under any conceivable standard. (*People v. Watson* (1956) 46 Cal.2d 818; *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

4. *The Trial Court Did Not Err as to Louis or Wilson in Its Instruction on Evidentiary Conflicts.*

a. *Pertinent Facts.*

During voir dire of prospective jurors, the court advised jurors that appellants could choose not to present evidence and could instead rely on the People's failure, if any, to prove their case beyond a reasonable doubt. The court indicated that the People's burden of proof in a criminal case was a heavier burden than a plaintiff's burden in a civil case.

The court then stated, "conflict in testimony does not *necessarily* create a reasonable doubt. Simply because there may be some conflict in the testimony of witnesses, that does not create reasonable doubt in and of itself. Your job as a jury is to *attempt* to resolve the conflict, to weigh and consider all the evidence and determine what parts you might choose to believe and what parts you might choose not to believe." (Italics added.) The court then indicated, inter alia, that the People's burden was heavy but not unattainable, and the jury's job was to keep an open mind.

During its final charge to the jury, the court gave CALJIC No. 2.90 on the presumption of innocence and proof beyond a reasonable doubt. The court, pursuant to CALJIC No. 17.00, also told the jury that *if they could not agree* to a verdict as to all

appellants, but could agree as to one or more, the jury was to render a verdict as to the appellant(s) as to whom the jury could agree. The court further told the jury, pursuant to CALJIC No. 17.40, that "Each of you must consider the evidence for the purpose of reaching a verdict *if you can do so*." (Italics added.) The jury convicted Wilson and Louis as previously indicated, and the court declared a mistrial as to Anderson after the jury indicated they were deadlocked as to him. Anderson's guilty plea followed.

b. *Analysis.*

Wilson claims that when the trial court told jurors "simple conflict in testimony does not *necessarily* create a reasonable doubt," (italics added) the court thereby erroneously instructed the jury that they could not harbor a reasonable doubt as to his guilt based on an evidentiary conflict, and could not "retain a reasonable doubt based on such conflicts alone." Wilson argues the error impermissibly lightened the People's burden to prove guilt beyond a reasonable doubt. Wilson also claims the trial court erroneously told jurors that they must resolve evidentiary conflicts, and the court thereby impermissibly interfered with the jury's deliberative process. Louis purports to join in Wilson's claims. We reject them.

"'Defendant's contention is reviewed by asking whether there is a reasonable likelihood that the jury understood the instruction as defendant asserts. [Citation.]' [Citations.] 'We determine how it is reasonably likely the jury understood the instruction, and whether the instruction, so understood, accurately reflects applicable law. [Citations.]' [Citation.]'" (*People v. James* (1998) 62 Cal.App.4th 244, 273.)

As to Wilson's first claim, the court did not state conflict cannot create reasonable doubt, but indicated conflict did not *necessarily* create reasonable doubt. No juror reasonably would have understood the court to have meant what Wilson suggests. As to Wilson's second claim, the court did not state the jury's job was to resolve the conflict, but indicated the jury's job was to *attempt* to resolve conflict. Again, no juror reasonably would have understood the court to have meant what Wilson suggests. No error occurred.

Moreover, during its final charge, the court instructed the jury with CALJIC Nos. 2.90, 17.00, and 17.40. The jury is presumed to have understood and followed these instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Given the trial court's additional comments and the overwhelming evidence of guilt, the claimed error was not prejudicial under any conceivable standard. (Cf. *People v. Watson, supra*, 46 Cal.2d at p. 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

5. *The Trial Court Did Not Err as to Wilson or Louis by Failing to Conduct a Juror Misconduct Hearing.*

a. *Pertinent Facts.*

The record reflects as follows. Before noon on December 14, 2004, the jury began deliberations. After the noon recess, the jury, at 1:30 p.m., resumed deliberations and continued deliberating until court recessed. At 9:00 a.m. on December 15, 2004, the jury resumed deliberations until 11:45 a.m., when the jury was excused for lunch. At 1:30 p.m., the jury resumed deliberations. At 1:55 p.m., the jury requested a readback of testimony. At 2:23 p.m., the readback was completed and, at 3:40 p.m., the jury was excused for the day.

At 9:00 a.m. on December 16, 2004, the jury resumed deliberations. At 9:35 a.m., juror 12 requested in writing to speak with the court. At 9:45 a.m., the jury requested a readback of two witnesses' testimony and, at 10:45 a.m., the readback occurred.

Shortly before 11:25 a.m., the court advised appellants and the prosecutor about juror 12's request and the readback. Appellants were represented by Wilson's counsel. The court asked if the parties had anything to put on the record, and the parties replied no. Juror 12 later entered the courtroom.

Juror 12 indicated as follows. Juror 12 had a concern about juror 9. On December 14, 2004, "Prior to us going into deliberation, when we were leaving [juror 9] made the statement that they're all guilty and I said that's not right." Juror 12 stated, "He made the statement when we were coming out before we even discussed the case that they're all guilty and I said that's wrong. [¶] He said, 'Well, I'm entitled to my opinion.' So I let it go."

Juror 12 also indicated the following. On December 15, 2004, "we were deliberating and I was questioning all the testimony because that's how I am. I'm going to ask questions. So he accuses me, he said, 'Why are you defending them? Do you know them? Is he a relative of yours'?"

The court asked if there had been any problems on the morning of December 16. Juror 12 said she discussed it and juror 9 knew that he had done something that was out of line. Juror 12 told juror 9 that juror 12 was very uncomfortable because they had sworn that they were going to have an open mind upon entering into deliberations, and juror 9's two statements led juror 12 to believe that juror 9 already had made up his mind and would just be going through the motions.

The court reminded juror 12 that both sides were entitled to the individual verdict of each juror. The court asked if juror 12 was able to carry out her duties, stand her ground, and continue to participate, listen, and be fair to both sides. Juror 12 replied yes and that she thought she could do so, but added she felt very uncomfortable with juror 12 expressing his sort of mindset.

The following later occurred: "Now I also want to ask, [were] there any other jurors who overheard or you believe overheard what you heard juror No. 9 say yesterday? [¶] [Juror 12]: They were all there because the foreman said, 'Hey, you're out of line.' He said, 'She's supposed to ask questions. That's what we're here for.'"

The prosecutor asked if juror 12 had said that juror 9 gave juror 12 the impression that juror 9 knew he was out of line. Juror 12 replied, "Yeah, because he saw how angry I was and I told him I didn't appreciate him making that statement to me because I had the right to voice my opinion. We were sworn in to look at the evidence and to see how we wanted to proceed with the case."

The prosecutor asked juror 12 if she thought it would help if the entire jury was reminded as to how they should conduct themselves during deliberations. Juror 12 replied it could help, but based on juror 9's mannerism, what he said to juror 12, and how juror 9 had said it, juror 12 "question[ed] that" and did not think juror 9 would be honest.

The following then occurred: "[Appellants' Counsel]: . . . [Y]ou recall the judge gave you an instruction where he stated that the jurors are not to express an opinion at the outset and refuse to deliberate, and the next part concerns me is another instruction that says that each and every juror must exercise their independent opinion about this case. In other words, you cannot refuse to deliberate with the other jurors. You can't shut down, not want to talk, but ultimately you cannot allow yourself to be pushed around, bullied around, that you must decide the case for yourself after deliberating and don't decide a case simply because the majority of your fellow jurors feel one way or another, which is different than the way you feel. [¶] So my concern is that you can stay strong and listen to the discussion, deliberate with your fellow jurors, but still exercise your own independent judgment on this case, no matter what your fellow jurors say. [¶] [Juror 12]: Yes, I can do that. [¶] The Court: All right. [¶] [Appellants' Counsel]: Thank you."

The court asked juror 12 to return to the jury room, and juror 12 left the courtroom. Appellants' counsel asked that juror 9 be brought into the courtroom and reminded that a juror was not to express an opinion at the outset and refuse to deliberate. The court indicated that such a reminder was appropriate but, to avoid antagonizing juror 9, the court would remind the entire jury. Appellants' counsel replied, "It doesn't matter to me." The prosecutor said, "That's what I was thinking." The court later, in open court, reread CALJIC Nos. 17.40 and 17.41 to the jury.[16] The court then recessed for

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[16] As to CALJIC No. 17.40, the court stated, "The People and the defendant are entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict, if you can do so. [¶] Each of you must decide the case for yourselves, but should do so only after discussing the evidence and instructions with the other jurors. [¶] Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of jurors or any of them favor that decision. [¶] Do not decide any issue in this case by the flip of a coin or by any other chance determination." As to CALJIC No. 17.41, the court stated, "The attitude and conduct of jurors at all times are very important. It is rarely helpful for a juror at the beginning of deliberations to express an emphatic opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, a sense of pride may be aroused and one may hesitate to change a position

lunch. At 1:30 p.m., the jury resumed deliberations and continued deliberating until 3:35 p.m., when court recessed.

At 9:00 a.m. on December 17, 2006, the jury resumed deliberations. The jury later asked questions pertaining to a hung jury and also pertaining to the meaning of language in section 12022.53, subdivision (d). After instruction on the issues, the jury, at 10:50 a.m., indicated that, as to Wilson, the jury was deadlocked as to the premeditation allegation pertaining to counts 3 and 4, and, as to Anderson, the jury was deadlocked as to all counts. The jury asked the meaning of the term "proximately" in section 12022.53, subdivision (d), and the court instructed on the issue. At 11:15 a.m., the jury reached verdicts.

b. *Analysis.*

"'When a trial court is aware of possible juror misconduct, the court "must 'make whatever inquiry is reasonably necessary'" to resolve the matter.' [Citation.] Although courts should promptly investigate allegations of juror misconduct 'to nip the problem in the bud' [citation], they have considerable discretion in determining how to conduct the investigation. 'The court's discretion in deciding whether to discharge a juror encompasses the discretion to decide what specific procedures to employ including whether to conduct a hearing or detailed inquiry.' [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 274.)

Moreover, not every allegation of jury misconduct justifies an evidentiary hearing. (*People v. Yeoman* (2003) 31 Cal.4th 93, 163.) "Instead, such hearings should be conducted only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Moreover, even when the defense has made such a showing, an evidentiary hearing will generally be unnecessary unless the evidence presents a material conflict that can be resolved only at such a hearing. (*People v. Hedgecock* (1990) 51 Cal.3d 395, ...)" (*People v. Yeoman, supra,* at p. 163.)

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even if shown it is wrong. [¶] Remember, you are not partisans or advocates in this matter, you are impartial judges of the facts."

In the present case, juror 9's statement on December 14, 2006, after leaving the courtroom but before deliberations, was not personally insulting to juror 12, and juror 12 confronted juror 9 about his statement. Juror 12 took no further action on the matter. It is not clear juror 9 made his statement in the presence of all jurors.

Juror 9's statement on December 15, 2006, was insulting, but the record demonstrates juror 12 and the foreperson confronted juror 9, who indicated he knew he was out of line. Juror 12 indicated she could remain fair to both sides, and the jury heard the corrective comments of juror 12 and the foreperson. Only juror 12 complained about juror 9.

Neither Louis nor Wilson asked that the court inquire of juror 9, nor did either appellant ask for a hearing. The court and parties took at face value juror 12's statements as to what had occurred. Appellants merely asked that juror 9 be brought out and reminded of his responsibilities as a juror. The court did that when it brought out the entire jury and reread CALJIC No. 17.40 and CALJIC No. 17.41. When the court indicated it would bring out the entire jury, appellants' counsel stated, "It doesn't matter to me." That statement did not suggest that appellants felt there was a strong possibility that prejudicial misconduct had occurred, or that the evidence presented a material conflict that could be resolved only at a hearing. Neither Louis nor Wilson moved for a mistrial.

After the court reread CALJIC Nos. 17.40 and 17.41, no further issue arose about juror 9. The jury resumed deliberations, asking the court various questions in the process. The verdicts reflect that juror 9 ultimately did not conclude appellants were guilty on all charges. The trial court did not abuse its discretion by failing to conduct a hearing based on juror 12's statements to the court. (Cf. *People v. Yeoman, supra,* 31 Cal.4th at pp. 163-164; *People v. Prieto, supra,* 30 Cal.4th at pp. 274-275.) None of the cases cited by Louis or Wilson compels a contrary conclusion.

6. *Respondent Concedes Louis's Sentence Is Unauthorized.*

a. *Pertinent Facts.*

Count 4 of the information alleged as to Louis that a principal personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (e)(1). That count did not allege that a principal personally and intentionally discharged a firearm which proximately caused great bodily injury within the meaning of section 12022.53, subdivisions (d) and (e)(1).

As to said count 4, the jury found true, inter alia, the section 12022.53, subdivisions (b) and (e)(1) allegations. However, as to that count, the jury made no finding as to any section 12022.53, subdivisions (d) and (e)(1) allegations (because there were no subdivision (d) allegations).

The sentence[17] which the court orally pronounced as to Louis as to count 4 did not include an enhancement pursuant to section 12022.53, subdivisions (b) and (e)(1). That sentence did include an enhancement of 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1).

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[17] The trial court sentenced Louis to prison on each of counts 1 and 3 to a consecutive term of life with the possibility of parole, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1), with service of a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The court, pursuant to section 654, stayed punishment on the section 12022.53, subdivision (b) enhancements pertaining to counts 1 and 3.

As to count 2, the court imposed a term of life with the possibility of parole, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1), with service of a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The court stated the sentence was to be served "concurrent, pursuant to . . . section 654, to avoid any claims of double jeopardy." (*Sic*.) The court, pursuant to section 654, stayed punishment on the section 12022.53, subdivision (b) enhancement pertaining to count 2. As to count 4, the court imposed a concurrent term of life with the possibility of parole, plus 25 years to life pursuant to section 12022.53, subdivisions (d) and (e)(1), with service of a 15-year minimum parole eligibility term pursuant to section 186.22, subdivision (b)(5). The court, pursuant to section 654, stayed punishment on the section 12022.53, subdivision (b) enhancement pertaining to count 4.

b. *Analysis.*

Respondent concedes Louis's sentence was unauthorized because, as to count 4, the trial court erroneously (1) failed to impose an enhancement pursuant to section 12022.53, subdivisions (b) and (e)(1), where the jury found true such enhancement allegations pertaining to that count and (2) imposed an enhancement pursuant to section 12022.53, subdivisions (d) and (e)(1) as to count 4 where no subdivision (d) allegation was pled or proved as to that count (§ 1170.1, subd. (e)). Since sentencing discretion appears to remain (the court did not impose consecutive sentences on counts 2 and 4 (see fn. 17)), we will vacate Louis's sentence and remand his case for resentencing. (Cf. *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295; *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1455-1458; *People v. Savala* (1983) 147 Cal.App.3d 63, 66-70.) We express no opinion concerning the manner in which the court should exercise its sentencing discretion, or concerning what Louis's sentence should be.

7. *Imposition of Upper Terms on Counts 3 and 4 Did Not Violate Wilson's Right to a Jury Trial or to Proof Beyond a Reasonable Doubt.*

Wilson's sentence included a nine-year upper term on each of counts 3 and 4. He claims imposition of each upper term violated his right to a jury trial and to proof beyond a reasonable doubt. We disagree. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1261; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

8. *Anderson's Appeal Must Be Dismissed.*

a. *Pertinent Facts.*

As mentioned, the trial court declared a mistrial as to Anderson following a hung jury as to him on all counts. Later, on April 5, 2005, Anderson entered a negotiated plea of no contest to count 1, and the court sentenced him to prison.

On June 6, 2005, Anderson, in propria persona, filed a "notice of appeal . . . challenge to validity of plea itself" and a "declaration in support of application for certificate of probable cause." (Capitalization omitted.) The declaration listed only certificate issues, that is, those pertaining to the legality of the proceedings. On June 10, 2005, the trial court denied a certificate of probable cause. This court later appointed

appellate counsel for Anderson (see fn. 2) who, through counsel, subsequently filed a *Wende* brief.

b. *Analysis.*

Respondent claims Anderson's appeal must be dismissed because he failed to file his notice of appeal within 60 days (Cal. Rules of Court, rule 30.1). Respondent also claims dismissal is required because (1) as to certificate issues, the trial court denied a certificate of probable cause and (2) Anderson listed no noncertificate issues in his notice of appeal.

Sixty days after rendition of judgment fell on a Sunday, that is, June 5, 2005. Therefore, Anderson's June 6, 2005 filing of the notice of appeal was timely. (Code Civ. Proc., § 12a; Gov. Code, § 6700, subd. (a).) However, we agree with respondent's second claim. (Cf. *People v. Mendez* (1999) 19 Cal.4th 1084, 1088.)

DISPOSITION

The judgments as to Louis and Wilson are affirmed except that, as to Louis, his sentence is vacated and the matter is remanded for resentencing consistent with this opinion. Anderson's appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.