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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH HARRISON et al.,

Defendants and Appellants.

A129229

(Alameda County

Super. Ct. Nos.

162373A, 162373B, & 162373C)

The three defendants before us in this appeal, Joseph Harrison, Marcus Moore and Lonnel Moore, along with Freeman Griffin,<sup>1</sup> were jointly tried and convicted by a jury of the following offenses: Harrison, of premeditated attempted murder of Gerrick White (Pen. Code, §§ 187, 664), assault on a peace officer with a semiautomatic weapon (Pen. Code, § 245, subd. (d)(2)), with an enhancement for personal discharge and intentional use of a firearm (Pen. Code, § 12022.53, subd. (c)), and possession of cocaine base for sale (Health & Saf. Code, § 11351.5); Marcus, of premeditated attempted murder (Pen. Code, §§ 187, 664), with an enhancement for intentional discharge of a firearm (Pen. Code, § 12022.53, subd. (c)), and possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)); and Lonnel, of possession of a firearm by a convicted felon (Pen. Code, § 12021, subd. (a)(1)).<sup>2</sup>

<sup>1</sup> Griffin was acquitted of the charges against him and is not a party to this appeal. We will refer to Harrison by his last name; to avoid confusion we will refer to Marcus and Lonnel Moore by their first names.

<sup>2</sup> The court found that Lonnel and Marcus suffered prior strike convictions and served prior prison terms.

On appeal, defendants argue that evidence of recorded statements made during jailhouse telephone calls and prior uncharged offenses was erroneously admitted, a conspiracy instruction was improperly given, the prosecutor committed misconduct, and the evidence does not support their convictions. We conclude that no error in the admission of evidence or prosecutorial misconduct occurred, and the conspiracy instruction was proper. We also find in the record substantial evidence to support the convictions. We therefore affirm all of the judgments.

### **STATEMENT OF FACTS**

The convictions are based on two separate but related shootings that occurred in the same neighborhood in Oakland, the 2000 block of 23rd Avenue, barely more than 24 hours apart. Shots were fired at Oakland Police Officer Marcell Patterson on the night of August 27, 2009. Gerrick White, a witness to the shooting, was shot very early on the morning August 29, 2009.

#### ***The Shooting at Officer Patterson.***

At about 10:50 p.m. on August 27, 2009, officer Patterson responded to a report of gambling at 2015 23rd Avenue. As he approached the 2000 block of 23rd Avenue the officer observed a group of around five males and females “in their 20’s,” “all Black,” standing and drinking alcohol on the west side of the street. From inside his marked patrol vehicle he shined his spotlight on the group, and they “started walking away.”

As officer Patterson began to drive away he heard a male voice shout, “Fuck the police, get the fuck out of here. I’ll kill you, mother fucker. You bitch, fucking bitch.” He could not identify the person who was yelling, so he drove slowly southbound on 23rd Avenue, shining his spotlight. Officer Patterson then made a U-turn to “look again on the east side of the street” for the “person who was shouting the threats” and issue a parking citation to an unoccupied vehicle parked on the sidewalk. After he wrote the citation, placed it on the windshield of the parked car, and returned to his vehicle, the officer heard the same male voice yell from the east side of the street, “I told you to get the fuck out of here, bitch. I’ll kill you bitch.” He “couldn’t see anybody,” so he drove away “really slow.”

As officer Patterson reached the front of Tony's Liquor store, he heard a volley of "about eight gunshots" fired in rapid succession from the east side of 23rd Avenue. He thought the weapon "was probably a semiautomatic" firearm. He drove southbound, made a U-turn to face northbound, reported a "code 33, shots were being fired," and requested assistance.

Additional officers quickly arrived at the scene. Officer Patterson proceeded northbound to a parked gold Jaguar. A female named Adrienne and defendant Marcus Moore were "approaching the car" from the east side of the street. Marcus was detained and placed in handcuffs.

Officer Patterson then looked in the direction of the driveway at 2016 23rd Avenue, where he saw "two Black males." One of them was subsequently identified as defendant Lonnel Moore, the other was Gerrick White. Lonnel "side stepped" to a milk crate next to the house and placed a silver pistol "on top of the milk crate." Officer Patterson advanced on Lonnel and White with his gun drawn and ordered them to show their hands. They both complied, and were handcuffed, "detained and escorted to police cars." As officer Patterson then walked up the driveway "to recover the gun," a .45-caliber semiautomatic weapon, he noticed a "male Black" named Charles Robinson hiding behind a chair, and detained him as well. A search of the area did not result in discovery of any .45-caliber shell casings, although .40-caliber casings were found in the front yard of an abandoned duplex at 2036 23rd Avenue.

White, Lonnel and Robinson were arrested and transported to the Oakland Police Department downtown criminal investigation division. In the patrol vehicle White stated that he "just got out of doing six years in prison," and "wasn't involved" in the shooting. White implied that he "knew who did the shooting," but "was in fear of retaliation and didn't want to talk right there." He "wanted to cut a deal" to avoid arrest if he "said who did what."

White, Lonnel and Robinson were placed in separate interrogation rooms. Beginning around 2:30 a.m., White was interviewed by officers Richard Vass and Leronne Armstrong. White requested "a deal" before he provided information to the

officers. He identified defendant Joseph Harrison, known to him as “Heron,” as the man he believed fired the shots at officer Patterson. White also told the officers Harrison parked his brown Honda, “wrecked in the front,” on the sidewalk on 23rd Avenue just before the shooting. Officer Vass subsequently verified that the Honda was still parked on 23rd Avenue, and was registered to Harrison. Officer Vass showed a photo of Harrison to White, whereupon White said, “That’s Heron.”

Officer Vass released White at 6:55 a.m. While White was outside the interview room putting on his belt and shoelaces, Lonnel was inadvertently and inopportunistly escorted out of another interview room.<sup>3</sup> White and Lonnel saw each other; White “had a petrified look on his face, and he stopped talking.” Officer Vass advised White not to “go back to 23rd Avenue,” to the “very location that Lonnel Moore and his associates hang out at.”

White testified at trial that on August 27, 2009, he “sold dope” during the day, and again in the evening on the 2000 block of 23rd Avenue. Defendant Harrison was present, along with Lonnel, Marcus, and others, perhaps 15 in total. Everyone was “just hanging out” and drinking. Harrison was “playing” with a “black automatic handgun” with an extended clip in his “hoodie.” Lonnel was in possession of a chrome .45-caliber semiautomatic handgun.

When officer Patterson’s patrol vehicle arrived, Harrison was seated in his car. The officer flashed his lights and the group dispersed in different directions. White walked past the police car and stopped to watch, then turned around and walked back toward the liquor store. The police vehicle then made a U-turn, slowly came back down 23rd Avenue and parked at the corner. Harrison was standing behind a wrought iron gate. White heard Harrison proclaim, “I’m fixing to bust,” which to White meant he was “gonna start shooting.” White responded, “Hell, no,” meaning “don’t shoot.” White took five or six steps away from Harrison, then heard four or five shots fired. He “got low to

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<sup>3</sup> Officer Vass explained that he did not authorize Lonnel’s appearance while White was being “released” for fear of “retaliation” against the witness for “talking to [the] police.”

the ground and ducked off in the driveway,” behind a car. Lonnel and a “youngster” also ran into the driveway. Lonnel was holding his chrome handgun.

From the driveway, White observed the police apprehending a male and female who were next to a Jaguar. The officers then “pulled their guns out” and ordered them to put their “hands up.” White heard Lonnel complain that he had a gun, which he was trying to hide “somewhere by the car.” White and Lonnel both stood up and raised their hands, after which they were arrested.

While he was traveling to the police station White told the officers he “knew who shot the gun.” He was willing to provide information because he “didn’t want to be charged” for the shooting.

White testified that he was interviewed separately by officer Vass and another officer. White disclosed that Harrison was the shooter, and identified his photograph at the conclusion of the interview. He also mentioned where Harrison was standing when he yelled, “I’m fixing to bust,” and described Harrison’s car to the officers.

White was released early in the morning on August 28th.<sup>4</sup> As he left the interview room he encountered Lonnel, escorted by two officers. According to White, he and Lonnel looked at each other but did not speak.

At 10:30 that morning, Lonnel was transferred to a holding cell in the North County Jail facility. During the course of the day he placed numerous recorded telephone calls to Harrison, Alonzo Johnson, and other relatives or friends. In the telephone conversations Lonnel discussed his observation of White’s release. He also expressed suspicion, concern and anger that White was cooperating with the police in the investigation of the shooting. In one recorded telephone call by Lonnel at just after noon, Lonnel indicated he knew White was “out of pocket” – that is, was “doing something” he shouldn’t have done – if he was already back “on the street.”

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<sup>4</sup> Robinson was also released from custody that morning.

Harrison was arrested for the shooting at around 12:30 p.m. that day as he walked northbound on 23rd Avenue. He was found in possession of baggies of cocaine base, which he attempted to conceal under the rear seat cushion of the patrol vehicle.

By 6:30 p.m., Harrison was transported to the North County Jail facility, and placed in a holding cell, where he too made numerous telephone calls to family and friends that night, including Marcus, Travon Moore, Alonzo Johnson, and Angelo Pierre Carter.<sup>5</sup> In the calls, Harrison conveyed his belief that White's release was not "cool," and suggested either he or Robinson may have talked to the police about the shooting. Marcus stated in one conversation with Harrison that the police "don't got nothing on you." Marcus added that White would "get the message," and "ain't going to come to court." Harrison repeatedly pointed out the "zero tolerance" policy on talking to the police.

### ***The Shooting of Gerrick White.***

On the evening of August 28, 2009, Gerrick White encountered his friend Alonzo Johnson at 25th and Foothill. From jail, Lonnel called Johnson while he was in the company of White. Lonnel spoke with White on the phone, and asked how he got out of jail. White told Lonnel that he had been charged with loitering and trespassing, and released to his parole officer. White did not want to tell Lonnel the truth about his release because "it was considered snitching."

Later that night White walked to 23rd Avenue and East 20th Street to visit his brother-in-law. He happened upon Marcus, who was in the front passenger seat of a Buick with a "female driver." Marcus asked, "What happened last night?" White replied that Harrison "started shooting."

White then accompanied Marcus and the woman in the car to a house on Prentiss Street, where they met Freeman Griffin, known as "Freeway." White repeated to Griffin his story of the events of the previous night. White, Marcus and Griffin made plans to go a club later, whereupon Griffin separated from them temporarily. The "female" drove

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<sup>5</sup> The calls by Lonnel and Harrison were recorded and played for the jury.

Marcus and White back to 23rd Avenue, where they left the car and walked to an abandoned house on East 21st – the same house where Harrison was standing the night before when he shot at officer Patterson. The woman stayed in the car. White planned to sell some crack cocaine at the house. Marcus left White and “went behind the house,” down the driveway to a shed.

Harrison was placing calls to Marcus and Johnson at around 1:00 a.m. and thereafter. In response to Harrison’s complaint that he was going to be charged for shooting at officer Patterson, Marcus said: “We about to grab a few good men and go do that thing,” and “go hit” someone. Marcus told Harrison that he was “on this one little mission,” and “Freeway” was on his way to join him. Harrison directed Marcus to the location of the extended-round magazine for the gun he used the night before, which he left on top of a shed in the back yard. Marcus retrieved the magazine, and Harrison told him to call Pierre to get the “other piece” of the gun. The call from Harrison to Marcus terminated at 1:41 a.m.

White testified that Marcus returned a few minutes after he left. Marcus departed again through the gate, joined the woman in the car, and they drove away. Around 15 minutes later Marcus returned to the abandoned house. He was dressed in a “black hoodie” instead of the white T-shirt he had been wearing, which “didn’t seem right” to White. Marcus directed the “female girl to pull up further” to where they were standing. Freeman arrived about 10 minutes later in a black SUV.

Freeman and Marcus engaged in a conversation away from White, then joined him behind the gate. In response to White’s query “about something to drink,” Marcus said “he was going to get some” liquor, and asked to use White’s phone. White “gave him the phone,” and “walked off” toward the driveway. Freeman and Marcus spoke briefly, then approached White. Marcus said, “Here go the drink right here,” and “started shooting” at White four or five times. Freeman was “shooting at the same time” with a black handgun. White was hit in both legs and fell to the ground.

While on his back, White heard a “ ‘click’ sound” as their guns jammed. Marcus attempted unsuccessfully to “fix” his gun before he walked out of the gate toward East

20th Street. Freeman “fixed his gun,” cocked it, and pointed it directly at White’s face. White put his hands in front of his face, and the bullet struck his finger. Freeman then also walked out of the gate and left.

At 2:05 a.m., the shooting was reported by neighbors. Paramedics and police officers arrived shortly thereafter, whereupon White was transported to the hospital for treatment of bullet wounds to his legs and finger. The next day, he was interviewed by officer Vass. He falsely told the officer that two men with “masks over their face[s]” robbed and shot him. White testified that he lied because he wanted to “get revenge” personally for the shooting.

On October 20, 2009, White was arrested for possession of rocks of cocaine discovered in his clothing when he was shot. In subsequent interviews White identified Marcus and Freeman as the ones who shot him. White acknowledged that he was concerned with the potential lengthy sentence in the cocaine possession case, and was hoping to be released if he gave the police the names of the people who shot him. The prosecutor promised White that if he testified “truthfully” in the present case, the cocaine possession charge against him would be resolved with five years’ felony probation and release from custody with credit for time served.

The prosecution also offered expert opinion testimony from Oakland Police Department criminalist Mark Bennett, who examined the expended cartridge casings fired during the shooting at officer Patterson and the .45-caliber semiautomatic weapon placed on the milk crate by Lonnel Moore. The .40-caliber cartridge cases were not fired from the .45-caliber firearm. Bennett also compared the two .40-caliber casings and the nine-millimeter casing found at the scene of the shooting of White, with the six casings recovered after the officer Patterson shooting. He concluded that while the nine-millimeter cartridge was “a totally different caliber,” the “same [weapon] that fired the six cartridge cases, also fired the two .40-caliber cartridge cases.”

## DISCUSSION

### ***I. The Admission of Evidence of the Recorded Jail Telephone Conversations. (All Defendants.)***

Defendant Harrison, joined by the other defendants, argues that the trial court erred by admitting evidence of the recorded statements made during telephone calls placed from jail by Harrison and Lonnel following their respective arrests. Defendants claim that the evidence was hearsay, and did not meet the “foundational requirements of the co-conspirator exception” to the hearsay rule. They also assert that the admission of the statements violated their “right to confrontation as interpreted by the United States Supreme Court in *Crawford v. Washington* (2004) 541 U.S. 36 [*Crawford*].”

#### ***A. The Admissibility of the Evidence as Statements of Coconspirators.***

Under Evidence Code section 1223, “ ‘Hearsay statements by coconspirators may . . . be . . . admitted against a party if, at the threshold, the offering party presents “independent evidence to establish prima facie the existence of . . . [a] conspiracy.” . . . Once independent proof of a conspiracy has been shown, three preliminary facts must be established: “(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy.” ’ [Citations.]” (*People v. Sanders* (1995) 11 Cal.4th 475, 516.)<sup>6</sup>

The case law distinguishes between the legal standard a trial court employs in admitting coconspirator statements under Evidence Code section 1223, and the standard a jury uses to determine whether the government has established the necessary preliminary fact a conspiracy has been proved before considering coconspirator statements. For the

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<sup>6</sup> Section 1223 provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; [¶] (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and [¶] (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.”

trial judge, the standard appears to be a prima facie showing. (*People v. Hinton* (2006) 37 Cal.4th 839, 895; *People v. Hardy* (1992) 2 Cal.4th 86, 139; *People v. Gann* (2011) 193 Cal.App.4th 994, 1005–1006.) However, the jury must find the preliminary fact that a conspiracy exists by a preponderance of the evidence before they consider statements under section 1223. (CALCRIM Nos. 416 and 418; *People v. Herrera* (2000) 83 Cal.App.4th 46, 61–62.)

We first assess the evidence that a conspiracy existed. “A conspiracy is shown by ‘evidence of an agreement between two or more persons with the specific intent to agree to commit a public offense and with the further specific intent to commit such offense, which agreement is followed by an overt act committed by one or more of the parties for the purpose of furthering the object of the agreement.’ [Citation.]” (*People v. Longines* (1995) 34 Cal.App.4th 621, 625–626.) “ ‘Only prima facie evidence of a conspiracy is required to permit the trial court to admit evidence under the coconspirator’s exception. This fact need not be established beyond a reasonable doubt, or even by a preponderance of the evidence. . . . The conspiracy may be shown by circumstantial evidence and “the agreement may be inferred from the conduct of the defendants mutually carrying out a common purpose in violation of a penal statute.” ’ [Citations.]” (*People v. Jeffery* (1995) 37 Cal.App.4th 209, 215.) “ ‘The court should exclude the proffered evidence only if the “showing of preliminary facts is too weak to support a favorable determination by the jury”.’ [Citations.] ‘The decision whether the foundational evidence is sufficiently substantial is a matter within the court’s discretion.’ [Citations.]” (*People v. Herrera, supra*, 83 Cal.App.4th 46, 62.)

The independent evidence of the conspiracy, while perhaps not overwhelming, easily meets the foundational threshold. Facts that establish a conspiracy may “ ‘be inferred from the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy. [Citations.]’ ” [Citations.]” (*People v. Herrera, supra*, 83 Cal.App.4th 46, 64.) Here, White was shot less than 24 hours after his arrest and release for the shooting at officer Patterson. During White’s brief incarceration, he identified Harrison as the shooter. His suspiciously prompt release was

personally observed by Lonnel, who was arrested with White and is closely related to both Harrison and Marcus. White was aware, as was officer Vass, that as a witness he was in grave danger at the hands of Harrison's relatives and friends if they realized he provided information to the police. Testimony was presented that street culture deals with snitches severely and violently. Harrison in particular, but also Lonnel and Marcus as his relatives, had a practical reason as well to consider White a threat as a witness to the officer Patterson shooting. Harrison was arrested only hours after White's release, which gave them reason to suspect White was the source of information that resulted in the arrest. The numerous telephone calls made by Lonnel and Harrison from jail suggest that they may have discussed the topic of White's release and its implications with Marcus and Freeman. Also, Lonnel, Marcus, Freeman and Johnson all asked White how he managed to obtain his release, which illustrated and reinforced their distrust of him as an informant. Many of the telephone calls between the defendants occurred within a few hours of the shooting of White, and while White was in the presence of Marcus and Freeman. Finally, White identified Freeman and Marcus, who had received some of the telephone calls, as the ones who shot him very soon after the last few calls were placed. When considered in totality, the evidence provides prima facie proof that the defendants entered into an agreement with the specific intent to facilitate the shooting of White. (*In re David B.* (1978) 81 Cal.App.3d 806, 810.)

We next evaluate the three additional showings necessary for the content of the coconspirator's statement to be considered by the trier of fact: (1) that the declarant participated in a conspiracy at the time of the declaration; (2) that the declaration was made in furtherance of the objective of the conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating, or would later participate, in the conspiracy. (*People v. Sanders, supra*, 11 Cal.4th 475, 516; *People v. Hardy, supra*, 2 Cal.4th 86, 139.) We conclude that all three elements were established, and a jury being instructed pursuant to CALCRIM Nos. 416 and 418 found these elements proven by the evidence. All the conversations dealt in some manner with the topic of who identified Harrison, and what was to be done about it. The

conversations evolved from a discussion of White's apparent role in providing information to the police, to the emergent and finally executed plan to respond to his perceived transgression. The statements were made in furtherance of the conspiracy by parties who participated in it. (*People v. Jeffery, supra*, 37 Cal.App.4th 209, 216.)

Marcus offers the additional argument that the calls prior to numbers 10 and 13 were made before he "was a member of any conspiracy," and thus were "wholly inadmissible" against him. Even if Marcus may not have personally and actively joined the conspiracy until later calls, the earlier statements made by other conspirators were admissible against him. "[I]t is irrelevant that some of the coconspirator statements allegedly preceded defendant's involvement in the conspiracy. Once independent evidence to establish the prima facie existence of the conspiracy has been shown, all that is needed is a showing ' "that the *declarant* was participating in a conspiracy at the time of the declaration," ' "that the declaration was in furtherance of the objective of that conspiracy," ' and ' "that at the time of the declaration the party against whom the evidence is offered was participating *or would later participate* in the conspiracy." ' [Citations.]" (*People v. Hinton, supra*, 37 Cal.4th 839, 895.) Harrison and Lonnel were participants in the conspiracy at the time the challenged statements were made, and the evidence demonstrates Marcus joined the conspiracy thereafter. The challenged telephone conversations were admissible under the coconspirator exception to the hearsay rule. (*In re Hardy* (2007) 41 Cal.4th 977, 998–999; *People v. Sanders, supra*, 11 Cal.4th 475, 516; *People v. Hinton, supra*, at p. 895.)

***B. Defendants' Right to Confrontation.***

We proceed to the related argument that admission of the statements made by defendants during their telephone conversations violated their right to confrontation under the Sixth and Fourteenth Amendments to the Constitution. "The Sixth Amendment to the United States Constitution guarantees the accused in criminal prosecutions the right 'to be confronted with the witnesses against him.' In *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177, 124 S.Ct. 1354], the high court held that this provision prohibits the admission of out-of-court *testimonial* statements offered for their truth,

unless the declarant testified at trial or was unavailable at trial and the defendant had had a prior opportunity for cross-examination. [Citations.]” (*People v. Livingston* (2012) 53 Cal.4th 1145, 1158; see also *People v. Osorio* (2008) 165 Cal.App.4th 603, 610–611; *People v. Parrish* (2007) 152 Cal.App.4th 263, 271–272.)

While the *Crawford* opinion failed to provide a definition of testimonial statements, “in *Davis v. Washington* (2006) 547 U.S. 813 [165 L.Ed.2d 224, 126 S.Ct. 2266], the high court gave this explanation: ‘Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.’ [Citation.]” (*People v. Romero* (2008) 44 Cal.4th 386, 421–422.) The California Supreme Court has added that “statements are not testimonial simply because they might reasonably be used in a later criminal trial. Rather, a critical consideration is the primary purpose of the police in eliciting the statements. Statements are testimonial if the primary purpose was to produce evidence for possible use at a criminal trial; they are nontestimonial if the primary purpose is to deal with a contemporaneous emergency such as assessing the situation, dealing with threats, or apprehending a perpetrator.” (*Id.* at p. 422, citing *People v. Cage* (2007) 40 Cal.4th 965, 991, 994.)

The “basic principles” derived from *Davis* to determine whether a statement is testimonial were enumerated in *People v. Cage, supra*, 40 Cal.4th 965, 984: “First, as noted above, the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for

which a statement was given and taken is to be determined ‘objectively,’ considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial.” (Fns. omitted.)

Upon examination of the totality of circumstances surrounding the statements we find them nontestimonial within the meaning of *Crawford*. The statements were made in furtherance of the conspiracy, not in the course of any interrogation or to prove past events potentially relevant to later criminal prosecution. As examples of nontestimonial hearsay, governed by the rules of evidence but not excluded under the Sixth Amendment, *Crawford* specifically listed “business records or *statements in furtherance of a conspiracy*.” (*Crawford, supra*, 541 U.S. 36, 56, italics added; see also *People v. D’Arcy* (2010) 48 Cal.4th 257, 291; *People v. Geier* (2007) 41 Cal.4th 555, 597; *People v. Taulton* (2005) 129 Cal.App.4th 1218, 1223.) Statements made by coconspirators in the furtherance of the conspiracy do not implicate the confrontation clause because they are, as stated in *Crawford*, “by their nature . . . not testimonial.” (See *Crawford, supra*, at p. 56; accord, *United States v. Crozier* (9th Cir. 2008) 268 Fed.Appx. 604, 606; *United States v. Allen* (9th Cir. 2005) 425 F.3d 1231, 1235; *United States v. Holmes* (5th Cir. 2005) 406 F.3d 337, 348 & fn. 16; *United States v. Reyes* (8th Cir. 2004) 362 F.3d 536, 540–541 & fn. 4.) The trial court did not err by admitting the recorded telephone conversations.

## ***II. The Admission of Evidence of Harrison’s Prior Uncharged Offenses. (Defendant Harrison.)***

Harrison argues that the trial court erred by admitting evidence of his conduct that resulted in an arrest on August 31, 2008, and subsequent conviction, for resisting arrest and assault of officer Valle. Officer Valle testified that while he was on patrol on the

2000 block of 23rd Avenue in Oakland, with his partner officer Enrique Lara, he detained a vehicle driven by Harrison, and issued a citation for an unsafe lane change, driving without possession of a license, and possession of an open alcohol container in the vehicle. Harrison and the occupants of the vehicle became hostile. Harrison reacted by cursing and threatening the officer by calling him a “bitch” and yelling, “Fuck you.” He then rushed at officer Valle, lowered his head and attempted to tackle the officer “into the patrol vehicle” as he also grabbed for the officer’s gun belt. A struggle ensued until officer Valle managed to pin Harrison against the patrol vehicle, and ultimately handcuffed him. Although handcuffed, Harrison continued to resist by pulling away from officer Valle and trying to tackle him. Harrison was transported to the hospital, where he repeated threats to officer Valle to, “see you on the street,” and “knock you the fuck out.” Subsequently at North County Jail Harrison warned officer Valle, “when I see you on the block or if I see you on the street, I’m going to knock you out. And if I have a gun I’m going to shoot you.” Officer Lara also testified that at the hospital Harrison warned officer Valle, “I’m going to beat your ass. I’m going to fuck you up.” During the ride from the hospital to North County Jail Harrison stated: “Don’t let me catch you on the streets, cause I’ll beat your ass, and don’t give me the chance or I’ll shoot you.”

Harrison complains that the prior incident did not have the requisite “similarity” to qualify for admission under Evidence Code section 1101, subdivision (b), to prove his intent to assault or kill officer Patterson as charged in the present case. He also claims the “minimal relevance” of the “prior offense evidence” was “outweighed by its potentially unduly prejudicial effect,” and thus was subject to exclusion under Evidence Code section 352.

Under section 1101, subdivision (b), evidence of other crimes is admissible if it tends logically, naturally, and by reasonable inference to establish any fact material to the prosecution other than general criminal disposition or to overcome any matter sought to be proved by the defense.<sup>7</sup> (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v.*

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<sup>7</sup> Section 1101 provides in pertinent part: “(a) [E]vidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of

*Hamilton* (1985) 41 Cal.3d 408, 425.) “Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.” (*People v. Kipp* (1998) 18 Cal.4th 349, 369.)

“If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant’s intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence ‘is “substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” [Citation.]’ [Citation.] ‘Rulings made under [Evidence Code sections 1101 and 352] are reviewed for an abuse of discretion. [Citation.]’ [Citation.] ‘Under the abuse of discretion standard, “a trial court’s ruling will not be disturbed, and reversal . . . is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]’ [Citation.]” (*People v. Foster* (2010) 50 Cal.4th 1301, 1328–1329.)

#### ***A. The Similarity of the Uncharged Offenses.***

We first consider defendant’s complaint that the prior uncharged vehicle theft is not sufficiently similar to prove his identity of the charged crime. “When evidence is offered under Evidence Code section 1101, subdivision (b), the degree of similarity required for cross-admissibility ranges along a continuum, depending on the purpose for

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specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . . ) other than his or her disposition to commit such an act.”

which the evidence is received.” (*People v. Scott* (2011) 52 Cal.4th 452, 470.) “ “ “ “ ‘In cases in which [a party] seeks to prove the defendant’s identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility “depends upon proof that the charged and uncharged offenses *share distinctive common marks sufficient to raise an inference of identity.*” ’ [Citation.] ‘A somewhat lesser degree of similarity is required to show a common plan or scheme and still less similarity is required to show intent. [Citation.] . . . ’ ” ’ [Citation.]” (*People v. Hovarter* (2008) 44 Cal.4th 983, 1002–1003.)

“ ‘The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] “[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .” [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant “ ‘probably harbor[ed] the same intent in each instance.’ ” ’ [Citation.]” (*People v. Cortes* (2011) 192 Cal.App.4th 873, 916.) Moreover, “ ‘[e]vidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. “In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.” [Citation.]’ [Citation.]” (*People v. King* (2010) 183 Cal.App.4th 1281, 1301, quoting *People v. Ewoldt, supra*, 7 Cal.4th 380, 394, fn. 2.)

The prior incident, although far from identical to the charged offense, has probative value to prove that the shooting at officer Patterson was accompanied by intent to assault or kill him. The incidents took place in essentially the same location in Oakland. As the trial court pointed out, on both occasions Harrison used similar threatening and profane language in response to issuance of citations. The prior incident illustrated that during any form of confrontation, even a trivial one, Harrison was both inclined and willing to use force directed at Oakland police officers. He also manifested

an intense hatred of the officers, and expressed an accompanying intent to shoot them on sight. We find that the August 31, 2008 incident has sufficiently similar characteristics to prove intent in the present case.

***B. Consideration of the Probative Value and Prejudicial Impact of the Uncharged Offenses.***

We turn the focus of our inquiry to whether the uncharged misconduct evidence was nevertheless subject to exclusion under section 352, as Harrison claims. “The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citations.] When reviewing the admission of evidence of other offenses, a court must consider: (1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. [Citation.] Because this type of evidence can be so damaging, ‘[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.’ [Citation.]” (*People v. Daniels* (1991) 52 Cal.3d 815, 856; see also *People v. Hawkins* (1995) 10 Cal.4th 920, 951; *People v. Johnson* (1991) 233 Cal.App.3d 425, 443.)

Looking first at the probative value of the evidence, as with other forms of circumstantial evidence admissibility of testimony recounting prior uncharged criminal acts depends upon “ ‘the *materiality* of the fact sought to be proved or disproved’ ” and “ ‘the *tendency* of the uncharged crime to prove or disprove the material fact . . . .’ ” (*People v. Robbins* (1988) 45 Cal.3d 867, 879, quoting *People v. Thompson* (1980) 27 Cal.3d 303, 315.) To be admissible, an uncharged offense must tend logically, naturally and by reasonable inference to establish any fact material to the People’s case, or to overcome any matter sought to be proved by the defense. (*Robbins, supra*, at p. 879.) “In order to satisfy the requirement of *materiality*, the fact sought to be proved may be either an ultimate fact in the proceeding or an intermediate fact ‘from which such ultimate fact[] may be presumed or inferred.’ [Citation.]” (*People v. Thompson, supra*, at p. 315, fns. deleted; see also *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414,

430.) Although distinguishable in some respects, the prior uncharged incident has great probative value to demonstrate that Harrison intentionally shot at officer Patterson.

Against the probative value of the evidence we balance its prejudicial effect on the defense. “In general, ‘the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.’

[Citation.]” (*People v. Daniels* (2009) 176 Cal.App.4th 304, 316.)

The evidence of defendant’s commission of another assault offense against a police officer was of course damaging to his defense that he did not commit the shooting, or did so without the charged intent, but was not prejudicial in the sense contemplated by section 352. “‘In applying section 352, “prejudicial” is not synonymous with “damaging.”’ [Citations.]” (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.)

“‘Undue prejudice’ refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an improper basis: ‘The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. “[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant’s case. The stronger the evidence, the more it is ‘prejudicial.’ ”’ [Citations.]” (*People v. Walker* (2006) 139 Cal.App.4th 782, 806; see also *People v. Garceau* (1993) 6 Cal.4th 140, 178; *People v. Killebrew* (2002) 103 Cal.App.4th 644, 650–651.) Here, the prior offense evidence did not carry with it the *undue* prejudice section 352 seeks to avoid. “A trial court should not exclude highly probative evidence unless the undue prejudice is unusually great.” (*People v. Walker, supra*, at p. 806.) The risks inherent in the jury’s consideration of the uncharged vehicle theft did not preclude the admission of the evidence. (*People v. Foster, supra*, 50 Cal.4th 1301, 1331.)

The uncharged offense evidence was also less inflammatory than the charged attempted murder and assault on a peace officer offenses. The evidence carried no

potential for confusion of the jury. An instruction was given to the jury to consider the prior offenses for the limited purpose of proving intent to kill officer Patterson. We must presume the jury followed the court's admonition, and did not draw any other improper inferences from the evidence. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1023.) The source of the evidence was also unrelated to the charged offenses, the two offenses were committed within the relatively short time span of one year, and the prior misconduct resulted in a criminal conviction, all factors that favor admission of the evidence. (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1211.) We find no abuse of discretion in the trial court's decision to admit the uncharged offense evidence. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1288; *People v. Prince* (2007) 40 Cal.4th 1179, 1271–1272; *People v. Roldan* (2005) 35 Cal.4th 646, 707; *Hollie, supra*, at pp. 1276–1277.)

### ***III. The Conspiracy Instruction. (Defendant Marcus Moore.)***

Marcus challenges the instruction given by the trial court, pursuant to CALCRIM No. 416, that, “The People have presented evidence of a conspiracy. A member of a conspiracy is criminally responsible for the acts or statements of any other member of the conspiracy done to help accomplish the goal of the conspiracy.” Marcus presents two objections to the instruction. First, he argues that the prosecution did not charge him with conspiracy to commit murder, and in fact “promised that she was not seeking to convict” him of murder on a conspiracy theory. Therefore, the trial court improperly “instructed on conspiracy to commit *murder* on his own.” Second, he insists that “an uncharged conspiracy cannot provide a basis for conviction of a crime,” and an “aider and abettor can only be guilty of those crimes he intends be committed,” so he cannot be guilty of the attempted murder specifically intended and committed only by Freeman.

Marcus is correct that conspiracy was not charged, although evidence of a conspiracy was presented at trial, and conspiracy was argued as a theory of liability by the prosecutor. During a discussion of jury instructions, the trial court proposed to give CALCRIM No. 418 on independent evidence of a conspiracy as a prerequisite to consideration of the “statements by co-conspirators,” along with the standard CALCRIM

No. 416 instruction that enumerated the elements of the offense of conspiracy. To encompass the admission of “all those statements” made in the recorded telephone conversations, the prosecutor suggested a CALCRIM No. 416 instruction that included persons other than the charged defendants – identified as Travaughn Moore, Angelo Pierre Carter, Alonzo Johnson, and Vaneisha Carroll – and defined the target crime as not “*just* committing murder,” but rather as an attempt to “dissuade and prevent Gerrick White from testifying” in violation of section 136.1. (Italics added.) The prosecutor noted that the purpose of the CALCRIM No. 418 instruction was not to outline “conspiracy as a liability theory,” but to “explain the existence” of “a requirement” of admissibility of “these jail calls.”

During closing argument, the prosecutor expressed that a “conspiracy existed to commit a crime,” and identified the target crime specified in the CALCRIM No. 416 instruction as “conspiracy . . . to commit murder” to “silence Gerrick White.” The prosecutor then proceeded to outline the elements of conspiracy as stated in CALCRIM No. 416, and the evidence that comprised the conspiracy “through the jail calls.” The prosecutor argued that Lonnel and Harrison directed the plan, and Marcus and Freeman executed it. The other participants in the phone conversations were subsequently mentioned by the prosecutor, to explain the admissibility of “those jail calls,” not to prove “what’s been charged in this case.”

The lack of any charge of conspiracy to commit murder did not preclude either the admission of evidence of a conspiracy or a conspiracy instruction. “It is firmly established law that conspiracy need not be pleaded as a basis for the reception of evidence which shows the existence of one.” (*People v. Ward* (1968) 266 Cal.App.2d 241, 250.) In *People v. Williams* (2008) 161 Cal.App.4th 705, 709, before trial the prosecution requested aiding and abetting instructions but did not request uncharged conspiracy instructions. Evidence of a sale of narcotics conspiracy was presented at trial, and “before final argument, the prosecutor indicated that the ‘conspiracy-related instructions [were] actually more on point than the aiding and abetting instructions’ because ‘based on the facts in . . . this case . . . there isn’t one person who committed the

crime.’ ” (*Ibid.*) Defense objected to the uncharged conspiracy instructions given by the trial court, but on appeal the court concluded: “Where the prosecutor did not charge conspiracy as an offense, but introduced evidence of a conspiracy to prove liability, the court had a sua sponte duty to give uncharged conspiracy instructions. (Bench Notes to CALCRIM No. 416, p. 200, citing *People v. Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656]; *People v. Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714].)” (*Ibid.*) Thus, despite the absence of any charge of conspiracy against Marcus, the CALCRIM No. 416 conspiracy to commit murder instruction was not error. The conspiracy theory was properly presented to the jury. (*People v. Bandy* (1963) 216 Cal.App.2d 458, 464–465.)

#### ***IV. The Prosecutor’s Closing Argument. (Defendant Lonnel Moore Joined by Other Defendants.)***

Defendants claim the prosecutor committed misconduct during rebuttal to closing argument. The prosecutor announced to the jury that she did not “want to see” the defendants “walk out [of] these doors,” and explained, “Why? Because I know they’re guilty.” Defendants maintain that a prosecutor’s expression of “a personal opinion or belief in the guilt of the accused” constitutes misconduct where the statement “did not allude to supportive evidence presented at trial.” Defendants add that the misconduct was “compounded” by the prosecutor’s reference to her role as a representative of the People, entrusted with the task of getting “a guilty verdict, not an acquittal.”

“ ‘The applicable federal and state standards regarding prosecutorial misconduct are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” [Citation.]’ [Citation.] ‘[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or

applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960; see also *People v. Prieto* (2003) 30 Cal.4th 226, 260.)

The propriety of an assertion of personal belief in the defendant’s guilt by the prosecutor depends on the context and perspective of the comment. “A prosecutor may not give a personal opinion or belief as to the defendant’s guilt if it will suggest to the jury the prosecutor has information bearing on guilt that has not been disclosed at trial.” (*People v. Frye* (1998) 18 Cal.4th 894, 975; see also *People v. Riggs* (2008) 44 Cal.4th 248, 302.) Misconduct is found “ ‘when there is a substantial danger that the jury will view the comments as based on information other than evidence adduced at trial.’ [Citations.] The danger that the jury will view the prosecutor’s expressed belief in the defendant’s guilt as being based on outside sources ‘is acute when the prosecutor offers his opinion and does not explicitly state that it is based solely on inferences from the evidence at trial.’ [Citation.] Nevertheless, not all such comments are improper. Rather, ‘[t]he prosecutor’s comments must . . . be evaluated in the context in which they were made, to ascertain if there was a substantial risk that the jury would consider the remarks to be based on information extraneous to the evidence presented at trial.’ [Citations.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 971.)

Our examination of the record persuades us that the prosecutor’s comment on defendants’ guilt was not misconduct in the present case. Nothing in the prosecutor’s articulation of belief in defendants’ guilt suggested a source of undisclosed evidence known to her. No implication was made that the prosecutor based her expression of confidence in defendants’ guilt on evidence not presented at trial. To the contrary, immediately following the trial court’s admonishment to the jury to “disregard the district attorney’s personal opinion,” the prosecutor agreed by commenting: “And that is absolutely the case. And I’m not telling you that that’s what you should do. I am telling you to vote guilty, because of what the facts are in this case, and what all the evidence has proved in this case.” The prosecutor then proceeded to expound on the evidence that proved defendants’ guilt. A reasonable juror would not have construed any of the

remarks to intimate that the prosecutor was aware of incriminating information extraneous to the evidence presented at trial. (*People v. Lopez, supra*, 42 Cal.4th 960, 971.) No misconduct was committed.

***V. The Evidence to Support the Conviction of Defendant Marcus Moore for Attempted Murder. (Defendant Marcus Moore.)***

Marcus argues that the evidence fails to support his conviction for attempted murder. He specifically challenges the evidence of the element of “specific intent to kill.” He points out that the shots were fired from close range at the victim’s “buttocks or legs” – other than the shot fired by *Freeman* at White’s face – which is “only consistent with an intent to injure, and not an intent to kill.” Marcus also claims that the recorded telephone conversations do not prove intent to kill, rather only an intent to take action “to compel White not to testify.” Finally, Marcus adds that he cannot be found guilty of attempted murder on an aiding and abetting theory for *Freeman*’s act of firing at the victim’s face, since, according to White’s testimony, he “had already left when this shot was fired.”

Our review of the evidence is quite constrained. We undertake a very “limited” assessment of sufficiency of the evidence to support the judgment. (*People v. Lewis* (2001) 25 Cal.4th 610, 643; see also *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1061.) “[W]e ask not whether there is evidence from which the trier of fact could have reached some other conclusion, but whether, viewing the evidence in the light most favorable to respondent, and presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence, there is substantial evidence of appellant’s guilt, i.e., evidence that is credible and of solid value, from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. Thus, our sole function as a reviewing court in determining the sufficiency of the evidence is to determine if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*In re Michael M.* (2001) 86 Cal.App.4th 718, 726, fn. omitted; see also *In re Babak S.* (1993) 18 Cal.App.4th 1077, 1088–1089.)

“In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact.” (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) “We may not reverse a conviction for insufficiency of the evidence unless it appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction.” (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955; see also *People v. Wader* (1993) 5 Cal.4th 610, 640.)

“Attempted murder requires proof of a direct but ineffectual act done towards killing another human being and the specific intent to unlawfully kill another human being.” (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1242.) “ ‘ ‘The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]’ [Citation.] In contrast, “[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” [Citations.]’ [Citation.]” (*People v. Perez* (2010) 50 Cal.4th 222, 229–230.) The evidence must establish “that the defendant harbored express malice toward the victim, i.e., the defendant either desired the victim’s death or knew to a ‘substantial certainty’ that the victim’s death would occur. [Citation.]” (*People v. Anzalone* (2006) 141 Cal.App.4th 380, 389.)

Strong evidence that Marcus had a motive to kill White was presented. His telephone discussions with Harrison reveal that they both wanted to retaliate against White, not only to respond to his actions as an informant, but to prevent him from further incriminating Harrison. Just before the shooting, Marcus told Harrison he was on a “mission,” and was going to “hit” someone.

The primary evidence of intent to kill, however, is revealed in the nature of the shooting itself: just before the shooting, Marcus obtained the magazine for the .40-caliber semiautomatic weapon from the roof of a shed as described to him by Harrison; Marcus and Freeman engaged in conversation with White, left him briefly to speak to each other, then returned to immediately shoot the victim multiple times, although not from close

range, before their guns jammed. A reasonable inference drawn from the evidence is that the shooting was planned and executed to eliminate White. That the bullets fired by Marcus and Freeman managed to strike the victim in the lower extremities may be more indicative of their lack of proficiency with firearms than their lack of intent to kill, particularly given Freeman's shot directed at White's head after their guns jammed. White's testimony suggests that Marcus repeatedly fired his weapon until it malfunctioned, and even then continued to attempt to fire it further. The evidence of motive to eliminate White as a witness, Marcus's participation in the planning of the shooting in conjunction with Harrison, and his act of shooting the victim multiple times in a manner that could have inflicted a mortal wound had the bullets been on target, is sufficient to support an inference of intent to kill. (See *People v. Smith* (2005) 37 Cal.4th 733, 741; *People v. Jenkins* (2000) 22 Cal.4th 900, 948; *People v. Mayfield* (1997) 14 Cal.4th 668, 769.) The evidence, viewed in totality and in the light most favorable to the judgment, as it must be, supports the finding that Marcus harbored the requisite intent to kill the victim. (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945–946.)

Further, the conviction of Marcus of attempted murder is supported by evidence that he was an integral part of a conspiracy with Harrison, Lonnel and Freeman to kill White. The multitude of phone calls, along with the concerted actions of Marcus and Freeman convincingly prove a conspiracy. Harrison even directed Marcus to the locations of the magazine and the gun used to shoot White. Even if Marcus did not personally intend to kill White with his shots, Freeman's act of shooting directly at the head of the victim established intent to kill. And, "The law has been settled for more than a century that each member of a conspiracy is criminally responsible for the acts of fellow conspirators committed in furtherance of, and which follow as a natural and probable consequence of, the conspiracy, even though such acts were not intended by the conspirators as a part of their common unlawful design." (*People v. Zielesch* (2009) 179 Cal.App.4th 731, 739.) The shot directed by Freeman at the victim's head was intended to kill him, and, even if unplanned by Marcus, was a reasonably foreseeable consequence of the conspiracy. (*People v. Medina* (2009) 46 Cal.4th 913, 920.) The conviction is

therefore also supported under a conspiracy theory by substantial evidence. (*Id.* at p. 922)

***VI. The Evidence to Support the Conviction of Defendant Joseph Harrison for Assault with a Semiautomatic Firearm. (Defendant Harrison.)***

Harrison challenges the sufficiency of the evidence to support his conviction for assault with a semiautomatic firearm in violation of section 245, subdivision (d)(2). He asserts that the evidence failed to prove he “had the ‘present ability’ to commit violent injury,” an element required to support any assault offense. His contention is based on the lack of evidence of his position related to officer Patterson at the time of the shooting, or the “direction in which the shots were fired,” and the fact that “no evidence was adduced that any shots hit anything or might have hit anything.”

Section 245, subdivision (d)(2), provides “Any person who commits an assault upon the person of a peace officer or firefighter with a semiautomatic firearm and who knows or reasonably should know that the victim is a peace officer or firefighter engaged in the performance of his or her duties, when the peace officer or firefighter is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for five, seven, or nine years.” “Assault requires the willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury.” (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269.) “An assault is defined in section 240, which introduces the chapter on assaults, as ‘an unlawful attempt, *coupled with a present ability*, to commit a violent injury on the person of another.’ This is the definition which applies where the term assault is used in the succeeding sections.” (*People v. Smith* (1997) 57 Cal.App.4th 1470, 1481, italics added; see also *People v. Rundle* (2008) 43 Cal.4th 76, 143.) “‘[T]o constitute an assault the wrongdoer must have a *present ability* to injure. . . .’ [Citation.]” (*People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1325.)

The present ability to commit violent injury “is not the same as a possibility. An ability is ‘a personal attribute—what a given individual has the capacity to do in contrast

with those who lack this quality—not an environmental factor.’ [Citation.] Therefore, the present ability element does not require an absence of external obstacles and does not require that the infliction of injury be physically possible. It requires only that the defendant ‘have maneuvered himself into such a location and equipped himself with sufficient means that he appears to be able to strike immediately at his intended victim.’ ” (*In re Edward G.* (2004) 124 Cal.App.4th 962, 968, quoting from *People v. Valdez* (1985) 175 Cal.App.3d 103, 111, 112.) “ ‘Once a defendant has attained the means and location to strike immediately he has the “present ability to injure.” ’ [Citation.]” (*People v. Licas* (2007) 41 Cal.4th 362, 366–367.)

Contrary to Harrison’s assertion, the evidence adequately establishes that officer Patterson was within his firing range. Seconds before the shooting Harrison threatened to kill the officer, and yelled that he was about to shoot, which indicates he, at least, felt he was in position to effectively carry out his threat, and intended to do so. That Harrison had the present ability to injure officer Patterson may be inferred from the officer’s account of his location on the street in front of Tony’s Liquor store when the shots were fired, in conjunction with White’s description of where Harrison was standing behind a wrought iron gate when he exclaimed, “I’m fixing to bust,” just before the shots were fired, and the discovery of the .40-caliber casings near the wrought iron gate in the yard of the unoccupied duplex at 2036 23rd Avenue. Evidence of the distance between the wrought iron gate and officer Patterson’s patrol vehicle was also presented, so the jury had information on which to base a finding of the present ability element of the crime.

A conviction of assault with a deadly weapon does not require evidence that the defendant actually pointed a gun at the victim. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263–264.) Presenting a gun at a person within range constitutes an assault, even if the weapon is not pointed directly at the person. (*Id.* at p. 267; see also *People v. Thompson* (1949) 93 Cal.App.2d 780, 782.) “[I]t is a defendant’s action enabling him to inflict a present injury that constitutes the actus reus of assault. There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay.” (*People v. Chance* (2008) 44 Cal.4th 1164, 1172.) “[W]hen a

defendant equips and positions himself to carry out a battery, he has the ‘present ability’ required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury.” (*Ibid.*) The “ ‘ “present ability” element’ ” of assault is satisfied where defendants “ ‘have acquired the means to inflict serious injury and positioned themselves within striking distance . . . .’ [Citation.]” (*Id.* at p. 1174.) Thus, in *Chance* the “ ‘present ability to inflict injury’ ” was found although the defendant was mistaken “as to the officer’s location,” (*id.* at p. 1176) and “would have had to turn, point his gun at the officer, and chamber a round before he could shoot . . . .” (*Id.* at p. 1171.)

Here, Harrison was in a position to strike with a loaded weapon. He threatened the officer, then presented and shot a semiautomatic gun from a distance capable of inflicting injury. The evidence is sufficient to support Harrison’s conviction for assault with a semiautomatic firearm.

Accordingly, the judgments against all three defendants are affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Margulies, J.