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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARD SHAWN ROBINSON,

Defendant and Appellant.

B238328

(Los Angeles County
Super. Ct. No. TA115456)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Jr., Judge. Affirmed as modified with directions.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Leonard Shawn Robinson, of deadly weapon assault. (Pen. Code,¹ § 245, subd. (a)(2).) The jury further found defendant personally used a firearm (§ 12022.5, subd. (a)) and inflicted great bodily injury on the victim, Thornton Nightingale. (§ 12022.7, subd. (a).) The jury acquitted defendant of attempted murder (§§ 187, subd. (a), 664) and attempted voluntary manslaughter charges. (§§ 192, subd. (a), 664.) Defendant was sentenced to 17 years in state prison.

II. THE EVIDENCE

A. The Prosecution Case

The two principal witnesses for the prosecution were the victim, Mr. Nightingale, and Alvenus Scorpio Hillis. Mr. Nightingale and Mr. Hillis were friends. Their versions of the incident involving defendant differed in several respects.

1. Mr. Nightingale

Mr. Nightingale was defendant's roommate. Defendant's girlfriend, Priscilla Diaz, was also living with them. They were living in an apartment rent free. The apartment was leased to Mr. Hillis's girlfriend, Marjorie Eaton.

On November 15, 2009, defendant accused Mr. Nightingale of stealing money from Ms. Diaz. Mr. Nightingale denied the accusation. Mr. Nightingale described defendant as: "Very angry. Very raw." Mr. Nightingale telephoned Mr. Hillis. Defendant also spoke to Mr. Hillis. Mr. Nightingale could hear defendant's side of the

¹ All further statutory references are to the Penal Code except where otherwise noted.

conversation with Mr. Hillis. Defendant was told that if he was going to be violent, he would have to leave the apartment.

Mr. Nightingale left the apartment and walked down the street to talk to Mr. Hillis. Mr. Hillis was sitting in the driver's seat of a van parked in front of an appliance shop. Mr. Nightingale testified he stood by the passenger window. There, Mr. Nightingale spoke to Mr. Hillis for several minutes. Mr. Nightingale testified he did not get into the van. Mr. Hillis told Mr. Nightingale to go on back to the apartment. Mr. Nightingale walked back to the apartment. On the way, he saw Ms. Diaz and another woman sitting in a parked car. Ms. Diaz was in the passenger seat. Defendant was outside the apartment with another man.

As Mr. Nightingale passed by, defendant said, "What you doing?" Defendant followed Mr. Nightingale inside. Mr. Nightingale testified: "He pointed, he took the gun, he was like, 'I know you got my girl's money.' I said, 'What's happening?' Then he opened up my jacket like that. Like I had something on me, which I didn't have anything on me. And that's when he pointed the gun in my face." Defendant pulled the gun out of his waistband. Defendant pointed the gun at Mr. Nightingale's forehead. Mr. Nightingale tried to leave, but made it only to the front steps. Defendant then hit Mr. Nightingale in the back of the head. Mr. Nightingale fell to the ground. Defendant and the other man kicked Mr. Nightingale in the face and head. When Mr. Nightingale looked up, he saw the barrel of the gun pointed at him. Defendant was standing right above Mr. Nightingale. Mr. Nightingale turned his face to the ground. Defendant shot Mr. Nightingale in the head.

Defendant and the unidentified man fled. Mr. Nightingale heard Ms. Diaz's voice. Mr. Nightingale saw defendant and the other man get into the car with Ms. Diaz. Mr. Nightingale saw the car pull away. He ran to the appliance store where he collapsed on the ground. Mr. Nightingale denied taking anything out of Mr. Hillis's car. Mr. Nightingale denied speaking to defendant or taking any aggressive action. Mr. Nightingale denied reaching into his waistband or putting his hand in his jacket to make it look like he had a gun.

On cross-examination, Mr. Nightingale admitted that two hours prior to the altercation, he drank two 12-ounce cans of beer. Mr. Nightingale denied seeing Mr. Hillis's girlfriend, Ms. Eaton, that day. Mr. Nightingale testified she was not with Mr. Hillis inside the van. Mr. Nightingale denied ever getting into the van with Mr. Hillis. At the preliminary hearing, however, Mr. Nightingale testified about speaking with Mr. Hillis while inside the van. Mr. Nightingale testified the man who was with defendant also had a gun.

2. Mr. Hillis

Mr. Hillis testified to receiving a telephone call from Mr. Nightingale on November 14, 2009. They talked about problems Mr. Nightingale was having with defendant. Both Mr. Nightingale and Mr. Hillis were having issues with defendant at that time. Mr. Hillis and Mr. Nightingale agreed defendant should be removed from the apartment. Mr. Hillis spoke to Mr. Nightingale again the following day about their issues with defendant. There were a variety of issues that led Mr. Hillis to conclude that defendant must leave the apartment. Among the issues were that Mr. Robinson had other people living in the residence.

Mr. Hillis and defendant had a telephone conversation. Mr. Hillis described their discussion: "My conversation with Mr. Robinson was pertaining to him having the people in the house. And I was asking him to leave. And he said he wasn't going anywhere. So . . . me and him was back and forth. . . . I was asking him, he had people stayed in the house that wasn't supposed to be there, they supposed to get out I want all you guys to get out of the lady's property." Defendant refused to leave.

Mr. Hillis was sitting in his truck which was parked down the street from the apartment. Mr. Hillis was talking by cellular telephone to defendant. Mr. Hillis was parked about three houses north of the apartment, near a glass shop where he worked. There was also an appliance shop there. Ms. Eaton was with Mr. Hillis. Mr. Hillis had previously a face-to-face confrontation with defendant. That was why Mr. Hillis did not

park directly in front of the apartment building. Mr. Nightingale came out to the truck to speak with Mr. Hillis. Mr. Nightingale sat in the back seat while they talked, for 15 or 20 minutes. Mr. Nightingale said he was being accused of theft. Mr. Hillis said defendant probably just wanted to provoke Mr. Nightingale. Mr. Hillis told Mr. Nightingale to just go back inside the apartment. Mr. Hillis denied giving anything to Mr. Nightingale. Mr. Hillis did not see Mr. Nightingale with a weapon, knife, gun or hammer. As Mr. Nightingale prepared to leave, Mr. Hillis saw defendant standing in front of the apartment building.

Mr. Hillis watched Mr. Nightingale walk back towards the apartment. Mr. Hillis testified: "What I saw in my rearview mirror, as Mr. Nightingale turned to go into the walkway of the duplex, [defendant] had pulled on a glove and he had his hand right here in his waistband and he bounced off the car and went right directly behind [Mr. Nightingale] as they both entered between the buildings where I could not see. Within seconds I heard a pow." Mr. Hillis described defendant's glove as a blue Spalding racquetball glove or something similar. It completely covered defendant's right hand.

Within 60 seconds of what sounded like a gunshot, Mr. Hillis saw four people run out of the walkway of the duplex. They got into an older model green Nissan or Honda Accord and drove away. Mr. Hillis chased them. There were two males and two females in the car. One was defendant's girlfriend, Ms. Diaz. Ms. Diaz was driving. The unidentified male had a large object in both his hands. It looked like a shotgun. The women were carrying bags. Mr. Hillis followed the fleeing car but eventually lost sight of it. Mr. Hillis returned to the apartment building. Mr. Hillis found Mr. Nightingale lying on the ground in front of the appliance store. There was blood coming from the back of Mr. Nightingale's head. Paramedics arrived and treated Mr. Nightingale. Mr. Hillis stayed until the police arrived. Mr. Hillis spoke to police officers at that time. Mr. Hillis wrote out a statement. He spoke to the police again the following day, November 16, 2009.

On cross-examination, Mr. Hillis confirmed seeing defendant follow Mr. Nightingale into the apartment complex. Mr. Hillis did not see anyone else. Immediately after defendant disappeared from view, Mr. Hillis heard the gunshot. Then Mr. Hillis saw defendant and the other man run away from the apartment building holding what looked like a weapon. Mr. Hillis spoke with Mr. Nightingale off and on in the hospital. They spoke about the altercation with defendant.

3. Officer Jonathan Vander Lee

Officer Lee and a partner, identified only as Officer Mercado, arrived at the shooting scene. They found Mr. Nightingale lying on the ground. Paramedics were tending to him. Mr. Nightingale told them, “Rob shot [me].” The officers searched the area for evidence, including all the nearby dumpsters. No evidence was found at the scene.

Officers Lee and Mercado subsequently interviewed Mr. Nightingale at the hospital. The interview lasted approximately 20 minutes. When cross-examined, Officer Lee gave the following testimony: “Q. He told you that prior to being shot, he had seen [defendant] and [defendant’s] girlfriend Priscilla and two other people; is that correct? [¶] A. Yes.” Mr. Nightingale admitted getting into an argument with defendant. Mr. Nightingale stated that he had been kicked during the altercation. The person who kicked Mr. Nightingale was the unidentified man accompanying defendant. Mr. Nightingale never said the unidentified male who accompanied defendant possessed a shotgun.

4. Detective Kelley Sullivan

Detective Sullivan and a partner, identified only as Detective Peters, interviewed Mr. Nightingale at the hospital on November 16, 2009, the day after the incident. Mr. Nightingale was in the intensive care ward with staples in the back of his head. The

interview lasted 15 minutes. Mr. Nightingale told Detective Sullivan that the second suspect—other than defendant—had a shotgun. Mr. Nightingale said both men had kicked him. Also on November 15, Detective Sullivan interviewed Mr. Hillis.

Detective Sullivan returned to the hospital on November 17 to interview Mr. Nightingale again. Detective Sullivan wanted to show Mr. Nightingale some more photographs and to clear up some details. Detective Sullivan arrived at Mr. Nightingale's hospital room. Mr. Nightingale was speaking on the telephone with Mr. Hillis. Detective Sullivan believed they were talking about the altercation with defendant. Part of their telephone conversation involved Mr. Nightingale's identification of defendant from a photographic lineup. Mr. Nightingale told Mr. Hillis that defendant was in position No. 4 in a photographic lineup prepared by the police. During their telephone conversation Mr. Nightingale made arrangements to be picked up from the hospital by Mr. Hillis.

During the interview, Mr. Nightingale described the conversation with Mr. Hillis. According to Mr. Nightingale, Mr. Hillis had followed defendant's car after the shooting. Mr. Hillis said that he had been able to see three numbers on the license plate. Detective Sullivan told Mr. Nightingale not to discuss the case with any other witnesses. In Detective Sullivan's opinion, it was "improper for witnesses to talk to each other" about a case. The interview with Mr. Nightingale on November 17 was audio recorded. Both men—Mr. Nightingale and Mr. Hillis—were cooperative when Detective Sullivan spoke with them.

B. The Defense Case

1. Officer Onan Urena

Officer Urena interviewed Mr. Nightingale in the ambulance and again at the hospital. Mr. Nightingale provided a written statement. Officer Urena testified as follows: "He told you about how someone named Rob had shot him; is that correct? [¶]

A. Yes. . . .” Mr. Nightingale did not mention another man being present during the shooting.

2. Defendant

Defendant testified he had been living with Mr. Nightingale for more than two months at the time of the shooting. They had not had any problems. Defendant was, however, having problems with Mr. Hillis. On the morning of November 15, 2009, Ms. Diaz discovered money missing from her purse, which she had left in the kitchen the previous night. Ms. Diaz accused Mr. Nightingale of taking the money. Defendant and Mr. Nightingale had an argument about the stolen money. Mr. Nightingale denied he took the money. Defendant told Mr. Nightingale to pack and leave the apartment. Mr. Nightingale telephoned Mr. Hillis.

Defendant and Ms. Diaz left the apartment and went outside. They walked out the front gate and stood on the sidewalk. Defendant saw Mr. Hillis drive past, make a U-turn, and pull up in front of the glass shop. Mr. Hillis was looking at them when he drove past. Ms. Eaton pulled in behind Mr. Hillis in her sport utility vehicle.

Defendant pulled some gloves out of his pocket and put them on. Defendant explained why he put on the gloves, “I had pulled some gloves out of my pocket and put them on because I thought he was coming to help him jump me.” Mr. Hillis got into Ms. Eaton’s car. Mr. Hillis began digging through some clothing on the back seat as if he was looking for something. Mr. Nightingale came out of the apartment wearing a “big” coat and walked to the sport utility vehicle. Mr. Nightingale spoke to Mr. Hillis for a minute. Defendant testified, “[It] looked like [Mr. Hillis] hand[ed] him something.” The trial court described defendant’s hand motion, “[T]he witness is simulating placing something in the waistband.” Defendant thought Mr. Hillis had given Mr. Nightingale a gun. Defendant testified: “[F]or one, it was no reason for him to have no big coat on. It was hot outside. I had on a jersey, T-shirt jersey. It was hot. And what else could he be stuffing into his waistband.”

Defendant told Ms. Diaz, "Let's go." They went back to the apartment where Ms. Diaz retrieved her purse and cellular telephone. She walked on ahead while defendant locked the door. He was fumbling with the keys when Mr. Nightingale came back in through the gate. He was still wearing the big coat. Defendant thought he was about to be shot. As Mr. Nightingale drew closer, defendant stepped away from the door. Defendant testified: "I grabbed him by this coat and I rushed him into the bar door which was at our front door. And as I rushed him into the bar door, he was kind of off balance. So I, you know, I was - - I had my arms around him, but I was reaching into the waistband of his coat to, you know, find where he had this weapon at. And in the mi[d]st of the tussle he was like, you know, off - - like I said, he was off balance and he was like finning fall off. [Sic] So I kind of clipped his legs. He fell over into the dirt right next to the door. When he fell over, he fell on his back and he immediately popped right back up. And [I] threw a kick at him. And when I kicked at him, the gun came out the sleeve of his coat. And soon as I grabbed - - well, I seen the gun, I grabbed the gun, and I hit him with the gun and the gun and the gun discharged." Defendant threw the gun in a dumpster in the alley. Defendant denied intending to shoot Mr. Nightingale.

Defendant admitted that he put on his gloves prior to the incident. According to defendant, he always had gloves "on me" for "work, play, whatever." At the time, defendant was not working nor was he engaging in any type of play. When asked on cross-examination why he had gloves in his pocket, defendant testified, "It was better than having a gun."

On cross-examination, defendant admitted that when the fight started, he had not seen a gun. Mr. Nightingale never said he had a gun. Nor had defendant reached into his waistband. Mr. Nightingale had not swung at defendant. Mr. Nightingale was just walking towards defendant. But defendant thought Mr. Nightingale's demeanor was "different." Defendant testified, "Because the way he was . . . the way he was walking towards me like, you know, like he wanted some problems, you know, like he was [planning] to do something to me." When cross-examined, defendant explained what happened next: "I did not grab him from the back and throw him on the ground. We ran

into -- well, I rushed him into the bar door and we tussled right there for a minute. I was trying to find a gun on his waistband.” Mr. Nightingale did not have a gun in his waistband. However, defendant continued to attack Mr. Nightingale. Defendant “knew” Mr. Nightingale had a gun. This was despite the fact that defendant had not seen a gun. Defendant testified: “I knew he had a weapon. [¶] . . . I knew he had one from what had happened, the exchange, you know. I just did not physically see a weapon, but I knew he had one.”

Eventually, defendant kicked Mr. Nightingale in the face. A gun “very quickly” came out and defendant grabbed the weapon. Defendant picked up the gun and struck Mr. Nightingale. Defendant described how he held the gun, “When I grabbed it, it was sideways in my hand.” Defendant denied that his finger was on the trigger. Defendant denied shooting Mr. Nightingale. And defendant explained, “I did not have no gun in my hand, as far as my hands being on the trigger on the butt of the gun.” According to defendant, the gun went off without his finger being on the trigger.

Defendant thought that Mr. Nightingale had been struck behind the left ear. Later, after being shown some pictures, defendant admitted that his recollection was incorrect. Defendant testified: “I backed up off of him, because when the gun went off I wasn’t expecting that. [¶] . . . I just backed up off of him.” Defendant stood over Mr. Nightingale for one minute. Defendant described what happened next, “Well, he grabbed for his head, then he got up and ran out the gate.” Defendant ran the other way.

As he ran, defendant continued to hold onto the gun. Defendant explained why he fled: “I don’t know. Like I said, I don’t know. I just panicked and ran.” At another point, defendant explained why he fled: “I don’t know, . . . My history in California, you know, I’ve been to jail a couple of times you know, I just panicked.” Defendant admitted he had previously been convicted of: forgery in 2009; felony conspiracy to violate a narcotics law in Las Vegas in 2003; possession of marijuana for sale in 1993; and grand theft of an automobile in 1991. As he was fleeing, defendant threw the gun into a dumpster.

Defendant did not go to the police to report what had happened. It was not until he was arrested, more than a month later in December 2009, that defendant spoke with law enforcement officers. Defendant did not immediately explain how Mr. Nightingale came to be injured. In fact, when questioned, defendant kept talking about the problems with Mr. Nightingale. When cross-examined, defendant testified: “He asked me how did he get shot. And I didn’t -- did not know he had got shot because he did not get shot. I did not shoot him.”

C. Stipulated Facts

The parties stipulated to the following facts. “Alicia Anderson, a certified court reporter[,] was present at the preliminary hearing of People versus Leonard Robinson . . . on March 1st, 2010. [¶] At this preliminary hearing[,] Thorton Nightingale took an oath to tell the truth. Ms. Anderson prepared a verbatim transcript of all questions and answers at this preliminary hearing. At the preliminary hearing[,] Mr. Nightingale was asked the following questions and gave the following answers: [¶] “A[)] ‘Attorney Sender: Okay. Now you called Mr. Hillis that morning, right. [¶] Mr. Nightingale: Talking about Scorpio? [¶] Attorney Sender: Yes. [¶] Mr. Nightingale: Yes.’ [¶] B) ‘Attorney Sender: Do you know who Margie is? [¶] Mr. Nightingale: Yes. [¶] Attorney Sender: Who is she? [¶] Mr. Nightingale: Scorpio’s girlfriend.’ [¶] C) ‘Attorney Brookens: Were you on the sidewalk? Were you in the car? [¶] Mr. Nightingale: I was on the sidewalk. [¶] Attorney Brookens: And where was Mr. Hillis? Was he in a vehicle? [¶] Mr. Nightingale: Yes. [¶] Attorney Brookens: At some point did you get in that vehicle with him? [¶] Mr. Nightingale: Yes. [¶] Attorney Brookens: Now, at the end of the conversation you got out of the vehicle? [¶] Mr. Nightingale: Yes.’ D) Attorney Sender: Now, when you went to speak to Mr. Hillis, he was sitting in the driver seat of a gray S.U.V.? [¶] Mr. Nightingale: Yes. [¶] Attorney Sender: And was the ignition on or off? [¶] Mr. Nightingale: I don’t remember. [¶] Attorney Sender: You were standing outside of

the car speaking to him? [¶] Mr. Nightingale: Yes. Attorney Sender: Were you standing outside the car speaking to him? [¶] Mr. Nightingale: Yes. [¶] Attorney Sender: Were you standing on the passenger side or the driver side? [¶] Mr. Nightingale: The driver side. The passenger side. Sorry. [¶] Attorney Sender: The passenger side. And was the window rolled up or down? [¶] Mr. Nightingale: I don't remember. [¶] Attorney Sender: At some point you got into the car? [¶] Mr. Nightingale: Yes. [¶] Attorney Sender: And why is that? [¶] Mr. Nightingale: Just to talk to him, you know, tell him what was going on. [¶] Attorney Sender: But you started the conversation standing outside the door? [¶] Mr. Nightingale: Yes. Yes. [¶] Attorney Sender: Did he tell you, why don't you come into the car? Mr. Nightingale: No. I just opened up and I just got in. [¶] E) Attorney Brookens: Where did you' - - I'm sorry. [¶] The Court: Slow down. [¶] E) 'Attorney Brookens: Did you see where he got this gun from? [¶] Mr. Nightingale: I didn't see where he got it from. I think it was from his waistband. Waistband, in there.' [¶] F) 'Attorney Sender: Where was this other guy? After you were shot, where was he? [¶] Mr. Nightingale: He was - - he was in the gate too. [¶] Attorney Sender: So he didn't say anything to you? [¶] Mr. Nightingale: No. [¶] Attorney Sender: He didn't hit you? [¶] Mr. Nightingale: No. [¶] Attorney Sender: Did he kick you? [¶] Mr. Nightingale: No.'"

III. DISCUSSION

A. Excluded Evidence

On redirect examination of defendant, defense counsel, Michelle Ahnn, asked, "And was there anything about Mr. Hillis prior to this day that made you think that Mr. Hillis, those actions that you saw, digging through the car, that he might have brought a gun?" Deputy District Attorney Rachel Hardiman objected. An extensive sidebar discussion followed. Ms. Ahnn said she wanted to ask if defendant was afraid of Mr. Hillis: "[T]he question the jury is going to be asking [is whether defendant had a

reasonable belief in the need to defend himself]. So this all goes into [defendant's] belief and goes to whether the jury can consider it to be reasonable or unreasonable that he believed that Mr. Nightingale had a gun and that he had gotten that gun from Mr. Hillis.” Ms. Ahnn argued, “It’s . . . not hearsay because I’m only trying to elicit the statements to show the effect on the listener, the effect on [defendant].” Ms. Ahnn continued: “[I]f [defendant] testifies, for example, that he had been threatened by Mr. Hillis and that Mr. Hillis said he was going to point a gun at him, and let’s just say I don’t know for sure if that’s what he’s going to say, let’s say he said that, then obviously that contributes to his reasonable belief that Mr. Hillis passed a gun to Mr. Nightingale based on the actions that he actually did see, which contributes to his reasonable belief that he had to attack Mr. Nightingale before Mr. Nightingale did anything.” Ms. Ahnn further asserted, “I know based on what he told the police in his interview he’s going to say that there is bad blood.” The trial court ruled defendant’s state of mind as to Mr. Hillis was irrelevant and speculative.

Defendant argues the trial court violated his constitutional rights to present a complete defense and to a fair trial. According to the opening brief, “[Defendant’s] testimony regarding his past relationship with [Mr.] Hillis and his awareness of any threatening or violent behavior by [Mr.] Hillis was admissible to show [defendant’s] state of mind.” Defendant asserts the evidence was admissible: to show his state of mind; as character evidence under Evidence Code section 1103; and to impeach Mr. Hillis’s credibility. We disagree.

First, the only argument raised in the trial court was the evidence was admissible to show defendant’s state of mind when Mr. Nightingale approached. The additional arguments raised for the first time on appeal have been forfeited. (*People v. Valdez* (2012) 55 Cal.4th 82, 142; *People v. Fuiava* (2012) 53 Cal.4th 622, 691; *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 314.)

Second, defendant made no offer of proof. As noted, the broad question posed to defendant was, “And was there anything about Mr. Hillis prior to this day that made you think that Mr. Hillis, those actions that you saw, digging through the car, that he might

have brought a gun? And in her argument to the trial court, Ms. Ahnn admitted she had no specific idea what defendant would say. Absent any offer of proof, we cannot adequately determine error or assess prejudice and the issue is thus forfeited. (Evid. Code, § 354, subd. (a); *People v. Lightsey* (2012) 54 Cal.4th 668, 727; *People v. Anderson* (2001) 25 Cal.4th 543, 580-581; *People v. Whitt* (1990) 51 Cal.3d 620, 648-649.)

Third, the link between any threatening, violent or weapon-possessing conduct by Mr. Hillis and defendant's belief Mr. Nightingale was armed was weak. Our Supreme Court has held that evidence of third party threats may be admissible to support a self-defense claim. This is an issue of relevance. (*People v. Tafoya* (2007) 42 Cal.4th 147, 164-166; *People v. Minifie* (1996) 13 Cal.4th 1055, 1070.) But there must be evidence the defendant reasonably associated the victim with the threats. (*People v. Minifie, supra*, 13 Cal.4th at pp. 1055, 1060, 1064-1066; see *People v. Tafoya, supra*, 42 Cal.4th at p. 165.) We review relevance issues for an abuse of discretion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 815; *People v. Jablonski* (2006) 37 Cal.4th 774, 821.)

In *Minifie*, the defendant fired a gun at the victim during a face-to-face confrontation. The defendant argued he acted in self-defense. He asserted he had been repeatedly threatened by members of a violent family. These family members were closely associated with the victim. In *Minifie*, it was the defendant's fear of the victim that supported the self-defense claim. Here, defendant did not seek to establish fear of Mr. Nightingale because of an association with Mr. Hillis. Rather, defendant alleges that Mr. Hillis was a violent, gun-possessing man. Further, Mr. Hillis did not like defendant. Hence, defendant reasons that Mr. Hillis must have given a gun to Mr. Nightingale. According to defendant, the gun was given to Mr. Nightingale so as to accomplish the shooting. Thus, defendant argues he reasonably feared he was about to be shot. But it was not Mr. Hillis who was to be the assailant; rather, it was Mr. Nightingale under defendant's theory. The trial court reasonably could conclude that the logical link was too attenuated.

Fourth, Evidence Code 1103 is inapplicable here. Evidence Code section 1103 governs the admissibility of evidence of a *victim's* character or trait. The evidence may be used to prove the victim's conduct was in conformity with that character or trait. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827-828; *People v. Wright* (1985) 39 Cal.3d 576, 587.) Mr. Hillis was not the victim in this case.

Finally, even if we were to conclude the trial court abused its discretion, on the record before us, we would not find any prejudice to defendant. Regardless of who possessed the gun prior to the incident, defendant admitted holding the firearm when Mr. Nightingale was shot. It is not reasonably probable the jury would have reached a different verdict. Because we find no error and no prejudice, defendant's constitutional claims fail as well. (*People v. Streeter* (2012) 54 Cal.4th 205, 264; *People v. Hawthorne* (2009) 46 Cal.4th 67, 103, overruled on another point in *People v. McKinnon* (2011) 52 Cal.4th 610, 637-643.)

B. Presentence Custody Credit

The trial court gave defendant credit for 740 days in presentence custody. However, defendant was in presentence custody for 750 days, from December 27, 2009, to January 5, 2012. The judgment must be modified to award defendant 750 days of presentence custody credit plus 112 days of conduct credit for a total of 862 days. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027.)

IV. DISPOSITION

The judgment is modified to award defendant 750 days of presentence custody credit plus 112 days of conduct credit for a total of 862 days. The judgment is affirmed in all other respects. Upon remittitur issuance, the superior court clerk is to prepare an

amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.