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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TOM CURTIS BRYANT, Defendant and Appellant.	C068481 (Super. Ct. No. 08F07257)

Defendant Tom Curtis Bryant was charged with three counts of attempted murder (Pen. Code, §§ 664, 187, subd. (a));[1] in each count it was alleged that defendant intentionally discharged a firearm, causing great bodily injury (§ 12022.53, subd. (d)), and committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). Counts one and two were based on

[1] Undesignated statutory references are to the Penal Code in effect at the time of defendant's sentencing on June 10, 2011, prior to the enactment of the Criminal Justice Realignment Act of 2011, which became operative on October 1, 2011. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 1.)

a shooting on July 9, 2008, and count three was based on a shooting on July 28, 2008.

A jury found defendant guilty of count three and found true its enhancement allegations. As to counts one and two the jury was unable to reach a verdict, and the trial court declared a mistrial as to those counts. Sentenced to state prison for 42 years to life,[2] defendant appeals, contending (1) the trial court erred by admitting certain gang evidence; (2) the trial court erred by not instructing, on its own initiative, on attempted voluntary manslaughter; (3) there was insufficient evidence of great bodily injury; and (4) his sentence is unconstitutionally cruel and unusual. We shall affirm the judgment.

FACTUAL BACKGROUND[3]

Between 7:30 and 8:00 p.m. on July 28, 2008, DeMarea Fulbright and his good friend, Phillip Tigner, were riding on a light rail train. Fulbright was a member of G-Mobb, an African-American street gang; Tigner was not affiliated with a gang. Several members of a rival African-American gang, Fourth Avenue Blood (FAB), including defendant,[4] were also riding on that light

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[2] The sentence was calculated as follows: the middle term of seven years for attempted murder, plus a consecutive 10 years for the gang enhancement, and a consecutive indeterminate term of 25 years to life for the firearm enhancement.

[3] Because defendant was not convicted on counts one and two, we set forth only the evidence relevant to count three and its enhancements.

[4] Defendant is also known as "Tom-Tom."

rail train. One of the FAB members recognized Fulbright as being the person who may have "jumped" (fought) another FAB member. When Fulbright and Tigner got off the train, a group of 10 to 15 FAB members, including defendant, confronted them.

After defendant and the other FAB members yelled gang slurs, they surrounded Fulbright and attacked him with their fists. Tigner joined the fight, exchanging punches with those who were fighting Fulbright. During the melee, Tigner felt something hard hit him on the back of the head, which he suspected was a gun. He turned around and punched the person who had struck him; this person was later identified as defendant.

Seconds later, Tigner heard a gunshot and took off running down the street. After a few blocks he stopped, because he felt a "burning" sensation on his side. He lifted his shirt and realized that he had been shot in his torso. There was a hole and he was bleeding. He began to feel "dizzy," but managed to make it on foot to Fulbright's home where they called for an ambulance. Tigner was taken to the hospital where he was treated for a "through-and-through"[5] gunshot wound to his right torso. He was released the next day after tests revealed no vital organs had been damaged.

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[5] "Through-and-through" means the bullet entered and exited the body.

Right after the incident, defendant and the other FAB members involved got back on the light rail. On the light rail, defendant told Keenan Williams, an FAB member, "I think I popped that Nigger. . . . I think I popped that Nigger 'cause after that I—I actually seen him run around the corner and I think he fell." In addition, defendant handed the gun to Christopher Jones, another FAB member. According to Jones, he gave the gun back to defendant because he (Jones) did not want to be blamed for the shooting.

On August 12, 2008, defendant was interviewed by Detective Justin Saario of the Sacramento Police Department. After initially denying any knowledge of the shooting,[6] defendant admitted that he pulled a gun from his pocket and fired it at the ground. According to defendant, the bullet skipped up and struck Tigner. In addition, defendant acknowledged there was an ongoing dispute between FAB and G-Mobb.

Defendant was interviewed a second time by Detective Saario. During this interview, defendant gave an alternate story about how Tigner was shot. Defendant stated that he was aiming for Tigner's legs, but when he pulled the trigger the gun "jerked up," which apparently caused him to hit Tigner's torso. Defendant added that he shot Tigner following a sequence of fisticuffs in which Tigner hit two guys defendant was with, then

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[6] Defendant denied being at the light rail station until Detective Saario showed him a surveillance photograph of defendant there.

defendant hit Tigner in the back of the head, and then Tigner hit defendant.

DISCUSSION

I. Gang Evidence and the Letter

Defendant contends the trial court erred by admitting (1) "irrelevant, highly prejudicial and cumulative evidence" of defendant's gang membership and uncharged gang crimes, and (2) a letter containing, among other things, threats against witnesses. We disagree.

A. Gang Evidence

Background

At trial, the prosecution sought to introduce expert testimony from Detective Saario, an expert on African-American gangs in Sacramento. The testimony to be elicited included evidence of FAB and G-Mobb violence that erupted after defendant's charged shooting;[7] the prosecutor described this evidence as a "direct effect" or "a chain reaction" resulting from the charged crimes. The prosecutor also sought to introduce testimony from Saario regarding the shooting of G-Mobb member Douglas ("Tiger") Livingston. It was believed that defendant had something to do with this shooting because he boasted about it on his MySpace page. The prosecutor explained the evidence was meant to illustrate how the "gang war" between FAB and G-Mobb began and continued, even after the arrest of

[7] The prosecution was not going to discuss every incident; rather the prosecution was going to focus on the "key ones."

defendant. It was the prosecutor's belief that this evidence tended to show the motive for the charged crimes and tended to prove that the charged crimes were committed for the benefit of a criminal street gang.

Over defendant's Evidence Code section 352 objection, the trial court agreed with the prosecution and ruled that the testimony to be elicited from Detective Saario was relevant and probative. However, the trial court excluded a prosecution exhibit that showed all of the uncharged crimes, because it suggested that defendant was "somehow responsible for all of that [(the uncharged crimes)], [and the jury] could be easily misled to think that."

During trial, Detective Saario testified about the rivalry between FAB and G-Mobb, about how defendant supposedly boasted on his MySpace page that he was involved in a prior shooting (according to the victim of that shooting, "Tiger" Livingston, a G-Mobb member), and about how the charged incidents and the subsequent murder of one Robert Haynes escalated the gang rivalry, resulting in approximately 26 more shootings in a year-and-a-half time frame. In addition, Saario opined that, based on defendant's own statements, tattoos, and involvement "in gang-related crimes as well as being involved in gang-related activities," defendant was a member of FAB.

Analysis

Evidence Code section 352, the basis of defendant's objection to this evidence, provides: "The court in its

discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In addition, "California courts have long recognized the potential prejudicial effect of gang membership evidence. However, they have admitted such evidence when the very reason for the crime is gang related. (See, e.g., *People v. Manson* (1976) 61 Cal.App.3d 102 [motive for murders]; *In re Darrell T.* (1979) 90 Cal.App.3d 325, 328-334 [motive]; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194 [motive]; *People v. Frausto* (1982) 135 Cal.App.3d 129 [motive and intent].) Due to its potential prejudicial impact on a jury, our Supreme Court has condemned the introduction of 'evidence of gang membership if only tangentially relevant, given its highly inflammatory impact.' (*People v. Cox* (1991) 53 Cal.3d 618, 660.)" (*People v. Ruiz* (1998) 62 Cal.App.4th 234, 239-240.)

We review the trial court's ruling under an abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

The record does not support defendant's contention that the gang evidence "had no relevance" to his intent, and was "extraordinarily inflammatory." Detective Saario described the violent rivalry between FAB and G-Mobb, and how the violence escalated after defendant was charged with the shooting of

Tigner. This evidence was relevant and probative to the street gang enhancement, where the prosecution was required to prove the underlying felony was committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).)

Moreover, evidence that defendant was suspected of being involved in the shooting of "Tiger" Livingston, a G-Mobb member, was relevant to show that defendant himself had animosity towards G-Mobb as an FAB member. This evidence also provided a motive for why defendant shot Tigner; it was meant to benefit defendant's street gang and if defendant did not use the gun it would make FAB look "weak." Furthermore, this evidence was not covered by defendant's rejected stipulation to the prosecution that he was an FAB member.

In addition, the testimony regarding the murder of Robert Haynes and the testimony stating, "[I]n a year and a half time frame [after the charged incidents in July 2008 and the murder of Robert Haynes in August 2008], there were approximately 26 shootings between these two gangs [(FAB and G-Mobb)] where people were actually shot and hit," was not irrelevant nor an abuse of discretion to admit. Again, this evidence was meant to illustrate the motive for the charged shooting and to show the charged shooting was meant to benefit the criminal street gang. The evidence was also relevant to the jury's assessment of witness credibility because it tended to show the bias and

motives for how some of the witnesses testified. (*People v. Harris* (1985) 175 Cal.App.3d 944, 957 ["evidence of gang membership was relevant on possible threats to prosecution witnesses, resulting in obvious bias during testimony"].)

Defendant relies largely on *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*), but *Albarran* is distinguishable. In *Albarran*, the trial court admitted gang evidence for the purpose of showing a gang respect motive and intent for the defendant's attempted murder charge. (*Id*. at p. 222 & fn. 4.) On appeal, the court reversed. (*Id*. at p. 227.) The appellate court opined that this was not a case about gang respect; the shooters did not announce their presence or purpose, before, during or after the shooting. (*Ibid*.) The trial court had allowed in evidence of gang-graffiti threats to kill police officers (the attempted murder was not of an officer), descriptions of the criminal activities of other gang members, and reference to the Mexican Mafia, constituting a "panoply of incriminating gang evidence, which . . . had no bearing on the underlying charges." (*Id*. at p. 227.) In the final analysis, the only evidence in *Albarran* to support the gang respect motive was the defendant's gang affiliation; because of this, the court reversed. (*Ibid*.)

Here, the prosecution did not present a "panoply of incriminating gang evidence"; rather, the gang evidence was probative of defendant's intent and motive concerning the charged offense and the gang enhancement. The gang motive in

this case dealt with a gang rivalry that was not present in *Albarran*. (*Albarran*, *supra*, 149 Cal.App.4th at p. 227 [stating there was no known or relevant gang rivalries].)

Because the challenged gang evidence was probative and relevant to motive and intent, was not highly inflammatory, and because the instant case is distinguishable from *Albarran*, the trial court did not abuse its discretion in admitting this evidence.

B. The Letter

Background

Also admitted into evidence, over defense counsel's objection, was a letter that was purportedly written by defendant. The letter described, among other things, the incident at the light rail station, that a prosecution witness was on the author's "hit list," and it also instructed potential witnesses to fabricate testimony. According to the trial court, the letter was self-authenticating because it was written by "Tom-Tom" (defendant's gang nickname), it contained information only defendant would know, and, when compared with another letter defendant had written, it appeared to be penned by defendant. Moreover, the trial court believed the probative value of the letter outweighed its prejudicial effect because the letter was unlikely to invoke a uniquely emotional response from the jury.

Defendant argues that the trial court abused its discretion in admitting the letter because the prosecution failed to authenticate it. Again, we disagree.

Analysis

Evidence Code section 1401, subdivision (a) requires a writing to be authenticated before it may be admitted into evidence. Evidence Code section 1421, in turn, states, "A writing may be authenticated by evidence that the writing refers to or states matters that are unlikely to be known to anyone other than the person who is claimed by the proponent of the evidence to be the author of the writing."

Contrary to defendant's argument, the trial court did not err by admitting the letter. The author specifically referred to himself as "Tom-Tom," which was defendant's gang nickname, and the letter was sent to a fellow FAB member, identified as Diquan Davis. In addition, the letter stated facts peculiar to defendant: The letter referred to a shooting the author committed at a light rail station; it threatened a witness who implicated defendant in the shooting (referring to "Man-Man" who was identified as Keenan Williams); and it referred to another witness who stated that defendant handed him a gun (corroborating Christopher Jones's statement to Detective Saario). This constituted sufficient evidence for the trial court to have deemed the letter written by defendant. (See *People v. Gibson* (2001) 90 Cal.App.4th 371, 383 [stating

circumstantial evidence, content and location are valid means of authentication].)

II. Voluntary Manslaughter Instructions

Defendant next contends the trial court erred by failing to instruct the jury, on the court's own initiative, on the lesser included offense of attempted voluntary manslaughter. Defendant argues there was enough evidence for the jury to conclude that he acted in a heat of passion or sudden quarrel, or acted in imperfect self-defense—two legal theories that negate the malice element required to prove murder—and therefore the jury could have concluded that he committed attempted voluntary manslaughter. (§ 192, subd. (a); *People v. Cruz* (2008) 44 Cal.4th 636, 664.) We disagree.

"[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, citing *People v. Flannel* (1979) 25 Cal.3d 668, 684.)

A. Heat of Passion or Sudden Quarrel

The evidence here of heat of passion or sudden quarrel was not substantial enough to merit the jury's consideration.

Heat of passion or sudden quarrel must result from provocation, either from the victim or conduct reasonably believed by the defendant to have been from the victim. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) This conduct may be physical or verbal, but it must be sufficiently provocative to cause a reasonable person to act rashly or without due deliberation and reflection. (*Ibid.*) "A light blow, though it may constitute a battery, can not constitute a reasonable provocation; but a violent, painful blow, with fist or weapon, ordinarily will do so. . . . [H]owever, [a defendant] may not have his homicide reduced to voluntary manslaughter if he himself by his own prior conduct (as by vigorously starting the fracas) was responsible for that violent blow." (2 LaFave, Substantive Criminal Law (2d ed. 2003) Manslaughter; Suicide Assistance, § 15.2(b)(1), p. 496 (LaFave); 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against the Person, § 214, pp. 826-827 (Witkin & Epstein); see also *People v. Hoover* (1930) 107 Cal.App. 635, 639 [one who has instigated a quarrel may not reasonably contend he was acting in heat of passion or sudden quarrel].)

Here, defendant fails to point to any substantial evidence that the jury could have reasonably relied on in determining defendant acted under heat of passion or a sudden quarrel. Instead, defendant merely notes, "the shooting occurred during a confrontation with rival gang members, after the victim punched [defendant]," and he points to *People v. Ramirez* (2010)

189 Cal.App.4th 1483 (*Ramirez*), as requiring an instruction on heat of passion-attempted voluntary manslaughter.

Defendant not only understates the facts, but fails to articulate how this amounts to heat of passion or sudden quarrel. Defendant does not point out the severity of the blow he received nor the amount of pain defendant felt as a result of it. After reviewing the record, the only evidence as to the severity of the blow was the prosecution's statement that defendant may have been "dazed." As noted, defendant hit Tigner in the back of the head with a gun before Tigner hit defendant. More importantly, defendant and his friends started the fracas with Fulbright and Tigner, and were therefore the aggressors. Thus, even if the punch to defendant was a "violent blow" sufficient for provocation, he is still barred from claiming heat of passion or sudden quarrel because his conduct was responsible for the blow. (See 2 LaFave, *supra*, Manslaughter; Suicide Assistance, § 15.2(b)(1), p. 496; 1 Witkin & Epstein, *supra*, Crimes Against the Person, § 214, pp. 826-827.) These "aggressor" facts distinguish the present case from *Ramirez*; in *Ramirez*, there was no evidence that the defendant had struck the victim before the victim punched him, and no evidence that the defendant had provoked the gang-related confrontation. (*Ramirez*, *supra*, 189 Cal.App.4th at pp. 1485-1486.)

B. Imperfect Self-defense

Defendant also argues that since this altercation involved rival gang members who are often armed and expected to use a firearm during a confrontation, defendant was acting under the actual but unreasonable belief he was in imminent danger of death or great bodily injury and therefore needed to use his firearm. This argument is without merit.

Attempted voluntary manslaughter may also be based on an attempted killing in imperfect self-defense—i.e., when the defendant attempts to kill in the actual but unreasonable belief that he was in imminent danger of death or great bodily injury. (See *People v. Cruz*, *supra*, 44 Cal.4th at p. 664.)

Here, defendant relies solely on Detective Saario's testimony regarding gangs and gang mentality. Defendant does not point to any evidence regarding his actual belief that he was acting in imperfect self-defense, nor did defendant claim in his interview with Detective Saario that he fired at Tigner because he feared death or injury. Instead, defendant's argument is based on speculation and nothing more. Furthermore, were we to adopt the premise underlying defendant's argument, we would venture toward creating an additional nonstatutory offense of voluntary manslaughter based simply on rival gang confrontations. We reject defendant's claim that the trial court erred by not instructing, on its own initiative, on imperfect self-defense.

III. Great Bodily Injury

Defendant also claims there was insufficient evidence to support the great bodily injury finding for the section 12022.53, subdivision (d) firearm enhancement. Defendant argues that because Tigner did not require surgery and did not testify that he suffered any excessive pain or any prolonged aftereffects, the evidence therefore failed to amount to great bodily injury. We disagree.

"'Great bodily injury' means a significant or substantial physical injury," which is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury. (§ 12022.7, subd. (f); *People v. Cross* (2008) 45 Cal.4th 58, 63, 66.) For there to be a significant or substantial physical injury, it is not necessary for "the victim to suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v. Escobar* (1992) 3 Cal.4th 740, 750.) The determination of great bodily injury is a question of fact for the jury to decide, and if there is sufficient evidence to sustain the jury's finding, an appellate court is bound to accept it. (*Ibid.*)

Here, there was sufficient evidence to support the jury's finding. In fact this case is no different than *People v. Lopez* (1986) 176 Cal.App.3d 460, a case where the court upheld a great bodily injury finding. In *Lopez*, two victims were shot during a confrontation. (*Id.* at p. 462.) One victim was shot in the hip

and felt only his fall to the ground because he was "dazed." (*Ibid*.) The other victim was shot in the leg, having the bullet penetrate and exit her thigh. (*Ibid*.) This victim felt "fire" in her leg, but still managed to drag the other victim to safety. (*Ibid*.) Although in the present case, Tigner testified that he had not immediately realized that he had been shot, he did testify that after he ran a few blocks he felt a "burning" on his side. After a few more blocks, Tigner testified that he began to feel "dizzy" and felt that this could "be something serious." When Tigner arrived at Fulbright's house, he called for an ambulance to take him to the emergency room. At the hospital, Tigner was treated for a "through-and-through" gunshot wound, meaning the bullet entered and exited Tigner's body. The injury suffered by Tigner is no different than the victims' injuries in *Lopez* and is sufficient to support the great bodily injury finding.

IV. Cruel and Unusual Punishment

Lastly, defendant claims his prison sentence of 42 years to life constitutes cruel and unusual punishment. Defendant was 17 years old at the time of the offense, and 19 when he was sentenced. Relying on *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825] (*Graham*) and *People v. Mendez* (2010) 188 Cal.App.4th 47 (*Mendez*), defendant argues that he will not be eligible for parole until he is 61, thereby depriving him of a "meaningful opportunity" to be released within his lifetime,

and constituting a disproportionate and de facto sentence of life without parole for a nonhomicide offense.[8] We disagree.

In *Graham*, the United States Supreme Court held that the federal Constitution's Eighth Amendment—which prohibits cruel and unusual punishment—prohibits a sentence of life without parole (LWOP) for a juvenile offender who commits a nonhomicide offense. (*Graham*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 845].) The Supreme Court ruled, "A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment forbids a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life. Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not foreclose the possibility that persons

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[8] Defendant mentions the federal and state constitutional factors for cruel and unusual punishment articulated in *Ewing v. California* (2003) 538 U.S. 11, 22 [155 L.Ed.2d 108, 118] and *In re Lynch* (1972) 8 Cal.3d 410, 424; however, defendant does not specifically state their applicability. Instead, defendant relies on *Graham* and *Mendez*. (*Graham*, *supra*, 560 U.S. at p. ___ [176 L.Ed.2d at p. 845]; *Mendez*, *supra*, 188 Cal.App.4th 47.)

convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." (*Graham*, at p. ___ [176 L.Ed.2d at pp. 845-846].)

In *Mendez*, *supra*, 188 Cal.App.4th 47, the Second Appellate District, Division Two, considered a sentence of 84 years to life for a defendant who was 16 years old at the time of his offenses, which included one count of carjacking, one count of assault with a firearm, and seven counts of second degree robbery, all of which were committed for the benefit of a criminal street gang. (*Id*. at p. 50.) After noting the life expectancy for an 18-year-old male was 76 years (Mendez was 18 when sentenced), the court concluded that his sentence (which would have made him eligible for parole at 88) was "'materially indistinguishable'" from an LWOP sentence. (*Id*. at p. 63.) While noting *Graham* was not technically controlling in the case, the court concluded the principles of *Graham* did apply. (*Mendez*, at pp. 63-64 [concluding the sentence imposed did not give the defendant a meaningful opportunity for release].)

Even assuming defendant is correct that he will not be eligible for parole until the age of 61 (the People maintain it is a few years sooner), we believe defendant's case is distinguishable from *Graham* and *Mendez*. Citing *Mendez*, defendant claims his life expectancy ranges from 64 to 72 years of age. However, *Mendez* states the life expectancy of an 18-

year-old male is 76 years. (See *Mendez*, *supra*, 188 Cal.App.4th at p. 63 [citing a June 2010 report by the National Center for Health Statistics, Centers for Disease Control].) Therefore, unlike Mendez, who was eligible for parole after his life expectancy passed, defendant is eligible for parole 15 years prior. Fifteen years is enough time to allow defendant to have a "meaningful opportunity" to be released within his lifetime under *Graham* and *Mendez*.

DISPOSITION

The judgment is affirmed.[9]

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.

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[9] Regarding credit for time served, defendant was sentenced pursuant to section 2933.1. Recent amendments to sections 2933 and 4019 do not provide defendant with any additional presentence custody credit, as he was committed for attempted murder, a violent felony. (See § 667.5, subd. (c)(12).)