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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALEMAN,

Defendant and Appellant.

F063601

(Super. Ct. No. VCF227938A)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

A.M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Jesus Aleman was charged, by third amended information, with murder (Pen. Code,<sup>1</sup> § 187, subd. (a); count 1), attempted premeditated murder (§§ 187, subd. (a), 664, subd. (a); counts 2 & 3), discharge of a firearm at an inhabited dwelling house (§ 246; count 4), and discharge of a firearm from a motor vehicle (former § 12034, subd. (c); counts 5-7).<sup>2</sup> As to count 1, special circumstances of murder perpetrated by means of discharging a firearm from a motor vehicle with the intent to inflict death (§ 190.2, subd. (a)(21)), and murder perpetrated by an active participant in a criminal street gang and carried out to further the activities of the gang (*id.*, subd. (a)(22)), were alleged. A gang enhancement (§ 186.22, subd. (b)) was alleged as to each count, as were enhancements for firearm use (§ 12022.5, subd. (a)) and firearm discharge (§ 12022.53, subds. (c), (d), (e)(1)). Enhancements for discharge of a firearm from a motor vehicle with intentional infliction of great bodily injury or death (§ 12022.55) were further alleged as to counts 5 through 7.

Defendant's first jury convicted him as charged on counts 2 through 7 and found all attendant allegations to be true, but was unable to reach a verdict on count 1. A mistrial was declared as to that count. Following retrial, defendant was convicted of first degree murder on count 1 and all special allegations were found to be true. The People having elected not to seek the death penalty, defendant was sentenced to prison for life without the possibility of parole (LWOP) plus multiple indeterminate terms, and was ordered to pay restitution and various fees, fines, and assessments.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> Former section 12034, subdivision (c) was repealed and continued without substantive change at section 26100, subdivision (c). (Stats. 2010, ch. 711, § 4, operative Jan. 1, 2012.)

On appeal, defendant raises a number of claims of trial and sentencing error. We order sentence on counts 5, 6, and 7 stayed and direct correction of the abstract of judgment and sentencing minutes to reflect the sentence actually imposed, but otherwise affirm.

## **FACTS**

### *First Trial*

Shortly before 5:40 p.m. on October 3, 2009, Raylyne Subia was driving her white Pontiac to the Super 7 on Inyo Street, Tulare, to get gas. With her was Alexander Espino, a northern gang associate. They were on Inyo, waiting for a train to pass, when a black Honda Civic pulled up next to the driver's side of the Pontiac. There were perhaps five people in the Honda, all staring. Subia saw the Honda's driver and front passenger with a gun, although she was not sure if each had his own gun or if the driver passed the gun to the passenger.

Once the train passed, Subia continued on to the Super 7. The black car came back around toward Inyo, then pulled over on I Street, near to where Subia and Espino were pumping gas. The driver pointed a gun at Subia. Espino took his own gun out in response, but did not point it at anyone. Subia did not remember where they went when they left the Super 7.<sup>3</sup> Shown a photographic lineup by police, Subia and Espino each identified defendant as the person who pointed the gun.

Shortly after the incident at the Super 7, Isabel Rodriguez, her sister Mireya Rodriguez, brother Antonio Rodriguez, and friend Lovina Gonzalez, were in the garage of the Rodriguez apartment in the 100 block of West Owens, at I Street, in Tulare. Also present were George Vieira, Anthony Brooks, and Raymond.<sup>4</sup> Everyone was just

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<sup>3</sup> Surveillance video from the Super 7 showed Subia and Espino getting gas; a black car, subsequently identified as belonging to defendant's girlfriend, on I Street; Espino ducking down; and the white Pontiac quickly leaving.

<sup>4</sup> Raymond's last name is not established in the record.

“hang[ing] out,” talking, and Raymond may have been smoking a cigarette.<sup>5</sup> The car door to the garage was open. Isabel did not see anyone with a weapon.

According to Isabel, three vehicles passed by while the teenagers were in the garage. The people in the first two vehicles merely stared. The third vehicle, a black Honda, passed by on I Street. Isabel saw two people in the front, and either two or three people in the back. Defendant was driving. Jesus Vargas, whom Isabel knew from school and who associated with southern gang members, was the front seat passenger. The first time they passed, no weapon was displayed. They drove slowly by and “mugged” those in the garage (“staring at [them] real ugly”), then turned down Owens Street and went around the block. The black Honda drove past again and made a U-turn. On one occasion when they passed, Vargas “threw up a three” with his fingers — something southerners do — and said something. After the car made the U-turn, defendant pulled out a revolver and started shooting. Isabel heard three or four shots, about a second’s pause, and then a couple more. She did not remember if defendant said anything to those in the garage before he started shooting. She just remembered people screaming. Defendant, who was closest to Isabel, held the gun with his arm extended, while Vargas held the steering wheel. When defendant first pointed the gun, Isabel was outside of the garage. The others were still inside it. Defendant was pointing the gun at the entrance of the garage.

Mireya said she had been shot, then fell to the ground. Isabel and Lovina picked her up and tried to move her inside, as shots were still being fired. Isabel called 911. Other than Mireya, no one was injured in the shooting.<sup>6</sup>

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<sup>5</sup> Insofar as the record shows, those in the garage were all teenagers. For the sake of clarity, we refer to them by their first names. No disrespect is intended.

<sup>6</sup> George recalled some males across the street “mean mugging” those in the garage. Four or five jumped in a black four-door Honda and took off south on I Street. Nobody in the garage said anything to anyone in the vehicle, but the car turned around on I Street

Officer O'Donohoe of the Tulare Police Department was the first officer on the scene. He arrived at approximately 5:45 p.m., and found Mireya lying on the cement walkway between the doors of the two apartments closest to I Street. She was conscious and vomiting, and near her navel was what appeared to be the entrance wound of a small caliber bullet. O'Donohoe took a statement from Isabel, who was wearing a red 49ers jacket.

No shell casings were found at the scene, suggesting the gun used was a revolver. Police counted five shots to the structure itself, including two that went through the back wall of the garage into the apartment beyond, plus a sixth to Mireya.

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and came back toward the garage. As they drove by with the window rolled down, the driver yelled "South Side Kings," and George heard about four shots. There was a crown — the symbol of the South Side Kings — on the back window of the car. George denied being a gang member, but admitted associating with northerners at the time of the shooting.

When interviewed by a detective on May 28, 2010, Anthony related that just before the shots were fired, he saw one of the passengers holding a gun and pointing it at the people in the garage. He never saw the driver with the gun.

Lovina recalled all the car windows being down the first time the Honda drove past. There were two people in the front seat, and two or three in the back. One of them yelled "South Side Kings," then the car made a U-turn. When it drove by again, only the driver — defendant, whose picture she saw in the paper sometime after the shooting — had his window down. Defendant pulled out a revolver and started shooting at those in the garage. He was wearing a blue T-shirt. Nobody in the garage said anything to the people in the Honda. Lovina did not recall whether anyone in the garage was wearing red; she, Mireya, and Isabel were not, although Lovina was wearing a black baseball cap. Lovina did not claim gang membership, although she occasionally talked to northerners. Isabel likewise denied being a gang member, although she occasionally associated with northerners (Norteños). She recalled Lovina wearing a red hat at the time of the shooting. Nobody else in the garage was wearing red, although Isabel subsequently put on a red jacket.

Someone at a neighbor's house heard shots, saw a black car drive by, and saw a handgun in the driver's side window. Shown a photographic lineup by police, he tentatively identified defendant as the person he saw with the gun.

Mireya died from a gunshot wound to the abdomen. The bullet, which lodged in her spine and was determined to be .22 caliber, went through the abdominal aorta, causing her to bleed to death internally.

A day or two after the shooting, defendant, who was under arrest, waived his rights and spoke to Detectives Brian and James Haney.<sup>7</sup> Defendant, whose moniker was “Brown Boy,” denied being involved in any kind of gang, but admitted hanging out with the South Side Kings, a southern gang. On Saturday, he drove to Mulcahy Park in the black four-door Honda Civic that belonged to his father-in-law. He arrived at the park around 5:30 or 5:40 p.m. There were about 10 people at the park. He stayed until around 8:00 p.m., but some northerners came and there was shooting, so he just walked to his friend’s house. He left the car at the park. When he returned, the police came, so he gave the keys to his friend “Charito,” who took the car. Defendant did not want to get caught because he did not have a license. When the fight broke out at the park, Charito had a .45-caliber gun. Defendant stated that he himself never carried a gun.

After further discussion, defendant denied being involved in an incident in which he shot a gun from his car. He related that before he went to the park, he went to the fairgrounds. When he left, he drove down Inyo Street and got stopped by a train. A white car pulled up next to him. A woman was driving. The man in the car lowered the window and pointed a gun at defendant. Defendant recognized the man as being a northerner. After the train passed, the white car went to the Super 7. Defendant drove past and turned around and slowly drove past again, and the man took out the gun again. Defendant then just left for the park. Defendant admitted Jesus Vargas was in the car

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<sup>7</sup> An audio-video recording of the interview was played for the jury.

Detective James Haney testified to contacting defendant on October 5, 2009. In the interview, however, Detective Brian Haney stated he wanted to talk about “yesterday,” “Saturday.”

with him when this happened. Told Vargas had talked to the detectives, defendant insisted he only went to the park. He denied anyone in his car had a gun, but admitted a Sureño known as “Mundo” and someone called “Morte” (meaning death) were also in the car. Defendant denied ever going on I Street. Defendant admitted taking the Marquis Auto Sales license plate frame and the crown decal off of the car.<sup>8</sup>

Eventually, defendant said he did not mean for someone to get hurt. Defendant was not trying to hurt anyone or scare them; he was not the one who shot. Defendant named Charito as the person who shot. After further discussion, defendant said he was not trying to kill anyone. Told he had been picked out of photo lineups and asked whether he wanted to kill someone or just to scare them, defendant said “scare.” He admitted shooting more than once, although he did not know how many times, with a small, .22-caliber gun. Defendant claimed Vargas, Michael (whose nickname was “Bullet,” but whose last name defendant did not know), and Morte also shot. After the shooting, the guns — which belonged to the gang — disappeared. Morte took them both.

Defendant said he felt bad about what happened. Asked what caused him to do it, defendant said some fat guy acted like he had a gun. Defendant did not see a gun, but that was how he had gotten shot once before. Defendant admitted being involved in gangs since he was 12. He claimed Morte was the one who pointed the gun at the man in the white car. As for the house at which the shooting occurred, defendant frequently passed by there. It was close to Super 7. The people at the house called him a “scrap.”<sup>9</sup>

Tulare Police Officer Guzman testified as an expert in criminal street gangs. He explained that a gang is three or more people who associate together on a regular basis,

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<sup>8</sup> Detective James Haney found pieces of a decal near the driveway of defendant’s residence.

<sup>9</sup> Defendant also said something about “Norteño,” but his voice was too soft for the transcriber to understand the rest of what he said.

and who have common symbols, numbers, and colors that they use to identify themselves. They usually “hang out” in a certain area. They have a hierarchy, and they collectively and individually engage in criminal activity to benefit the gang. Sureños — also known as southerners — are a gang that started in the prison system. South Side Kings, or SSK, is a local clique that falls under the umbrella of the Sureño gang. The primary activities of the southern gang are homicide, attempted homicide, drive-by shooting, robbery, drug sales, extortion, rape, and assault with deadly weapons. The South Side Kings claim what they call the southwest, which is on the west side of Tulare in the area of Mulcahy School. They wear blue and claim the number 13, while their rivals — Norteños or northerners — wear red and claim the number 14. South Side Kings have usually had orders to do what they have to, including fighting, stabbing, and shooting, when they come across rival gang members.

Guzman researched defendant, whose moniker was Brown Boy and who had a tattoo of three dots, which represented the number 13, on a finger. In Guzman’s opinion, defendant was an active southern gang member. Through hypothetical questions, Guzman opined the shooting in this case promoted and benefitted the gang. He explained that “scrap” is a derogatory term used by northern gang members to disrespect southern gang members. Respect is important in the gang culture. A gang member cannot let an insult, such as being called a scrap, go; to do so would allow the gang member to be seen as weak by both fellow and rival gang members, and weakness is not welcome in a gang. The shooting would benefit the gang by intimidating and inflicting fear on rival gang members. It would also benefit the gang by intimidating citizens in the area.

#### *Retrial on Count 1*

Shortly before 5:40 p.m. on October 3, 2009, Raylyne Subia and Alexander Espino, a northerner, were waiting near the Super 7 in Tulare for a train to pass, when a black Honda containing a “carload of people” pulled up alongside. Someone in the car

said something about South Side Kings, and one of the vehicle's occupants waived a gun at Subia and Espino.

Subia and Espino continued on to the Super 7. A black Honda drove by and pulled over to the curb on I Street while Subia was pumping gas, and the driver pointed a gun at her. Espino pulled out his own gun, but did not point it. The couple got in Subia's car and left. The Honda was headed southbound on I Street, and Subia went the opposite way. When Subia subsequently was shown a photographic lineup, she identified defendant as the person she thought was the Honda's driver.

Shortly after the incident at the Super 7, Isabel Rodriguez was at her house at the intersection of I Street and Owens. She, her sister Mireya, brother Antonio, friends Lovina Gonzalez and Raymond, and Antonio's friends George Vieira and Anthony Brooks, were in the garage, talking and "hanging out."<sup>10</sup> Nobody had any weapons.

A black Honda containing four or five people drove slowly by, headed southbound on I Street. Defendant was driving. Isabel recognized the front passenger as Jesus Vargas, with whom she had gone to school and whom she knew to associate with southerners. At some point, Vargas threw up three fingers, a gang sign signifying southerners. Isabel believed he did this the first time the car drove by. Those in the car were looking at those in the garage, and Isabel stared at them as they passed. She did not hear anyone in the garage say anything to the people in the Honda at any time.

The car went around the block and then came back by, again slowly heading southbound. Isabel did not see any weapons. The car then turned around and came back north, traveling "pretty slow" in the middle of the road. Defendant, who was still the driver, pulled out a revolver she believed was .22 caliber, and started shooting. Vargas held the steering wheel while defendant fired. Isabel was standing outside of the garage.

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<sup>10</sup> Isabel was 17 at the time of the incident. She believed she was the oldest among those in the garage.

Everyone else was in the garage. While defendant was still firing, Mireya said she was shot and fell to the ground. Isabel and Lovina tried to pick her up because she said she could not walk, but they were unable to carry her. As they put her on the ground, Isabel saw she had been shot in the stomach. Isabel called 911. Defendant turned west on Owens and drove off. Isabel believed six or seven shots were fired.<sup>11</sup>

At approximately 5:45 p.m. on Saturday, October 3, 2009, Officer O'Donohoe of the Tulare Police Department responded to a dispatch of a shooting at a multi-residence dwelling in the 100 block of West Owens in Tulare. He was the first officer on the scene,

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<sup>11</sup> Antonio recalled people in the Honda screaming something at those in the garage that sounded gang related, possibly Sur or SSK. When the shooting started, Antonio ran. He did not actually see anybody shoot a gun from the black Honda, nor did he see the driver.

George did not hear anything the first time the black Honda drove by, but when it turned around, he saw the windows were rolled down and heard SSK or something like that. He did not remember if anyone in the garage yelled back. Then the shooting started and everybody got down. George saw a revolver out the driver's side window. The driver's window was closest to the garage at the time of the shooting. George had seen the black Honda around the neighborhood prior to the shooting. There was a crown sticker on the back of the window.

Lovina recalled the Honda going southbound on I Street, then it made a U-turn and stopped in front of Isabel's driveway. Defendant, whom she had never seen before, held a revolver out, pointed it at Lovina and Mireya, and started shooting. Lovina heard six or seven gunshots.

Lovina did not give a statement to police on the date of the shooting. When interviewed on May 25, 2010, however, she told the officer that she saw the person who did the shooting. The officer did not show her any photographs, but she was able to tell him defendant's name because she had seen defendant's photograph in the newspaper. Her identification in court was from seeing his face at the time of the shooting.

Two people at a neighbor's house saw the shooting. One recalled seeing a black Honda drive by and glimpsing the driver shooting a black revolver with a long barrel, which he believed to be .22 caliber, with his right hand. Shown a photographic lineup a couple days later, he selected a photograph of defendant as appearing to be the person, although he was not positive. The other witness also selected defendant's photograph and said he appeared to be the person who did the shooting.

and arrived to find Mireya lying on the ground with people surrounding her. She was still alive, but had an entrance wound for what appeared to be a small caliber handgun next to her navel. She was vomiting. Mireya subsequently died. The cause of death was a gunshot wound to the abdomen. A bullet that was approximately .22 caliber was recovered from her spine. It had gone through her abdominal aorta, causing her to bleed to death within minutes. Assuming Mireya was standing when shot, the track of the bullet was front to back, approximately horizontal, and 30 degrees right to left.

Six bullet holes were found inside the garage. Several went completely through the wall shared by the garage and residence beyond. No shell casings were found, indicating the weapon used was probably a revolver. Twenty-two-caliber revolvers typically hold six-to-eight rounds. No gun was ever found in this case.

At the time of the shooting, Lovina was wearing a red hat. Isabel, Mireya, and Lovina associated with northerners, but nobody inside the garage was wearing red clothing aside from the hat. Although Isabel was wearing a red jacket when interviewed by the police, she did not put it on until after the shooting. The day after the shooting, Isabel was shown photographic lineups and identified defendant as the driver and Vargas as the passenger.

Vargas was arrested early on the morning after the shooting. Defendant was arrested that evening. Although he was on foot at the time, he confirmed he drove a black Honda. At the time of his arrest, he was wearing a black shirt with a light blue-and-white logo and letter S on the front. In the experience of Tulare Police Detective Brian Haney, this was consistent with attire that Sureño gang members would wear.

Haney executed a search warrant at defendant's residence. While he was there, a black Honda driven by defendant's girlfriend pulled up. The car was consistent with the Honda visible on the video taken at Super 7 of the incident involving Subia and Espino. In the trash next to the driveway was a discarded decal consistent with the crown decal described by witnesses to the shooting. No blue clothing or gang indicia were found in

the residence. However, a CD case with “SSK” on the front was found in the driver’s map pocket of the Honda. A metal dog tag on the ignition key ring had “Kings” with a crown on the front. No ammunition or ballistics evidence was found in the car.

Haney interviewed defendant following his arrest and after advising defendant of his rights.<sup>12</sup> Defendant admitted being in the area of Super 7, and said he recognized Espino and knew him to be a northerner. Defendant said he himself associated with the southerners. Defendant admitted driving a four-door, black Honda Civic, and said it belonged to his live-in girlfriend. Defendant admitted the car had had a crown decal in the back window, but said he took it and the Marquis Auto Sales license plate frame off of the car after the shooting.

Defendant admitted being involved in the shooting. He said he was driving the Honda, and there were three other people in the car. Defendant identified Jesus Vargas as the front passenger, but would not identify, by full name, the two people in the back. He related that after the incident at Super 7, he proceeded southbound on I Street and passed the victim’s residence. He saw several people in the garage and believed they were northerners. He drove past the residence, then made a U-turn and came back. He then fired a .22-caliber handgun at the people he thought were northerners.

Officer Guzman testified as a gang expert. SSK — South Side Kings — is a clique of the Sureño gang that had about 15 to 20 members at the time of trial, and possibly 30 members in 2009. In the prison system in the 1960’s, inmates from Southern California formed the Mexican Mafia to protect themselves from other prison gangs, like their main rivals the Nuestra Familia. Sureños — southerners — identify with the color blue and the number 13, the latter representing the 13th letter of the alphabet, M, which shows allegiance to the Mexican Mafia. A tattoo of three dots is common and goes back to the number 13. Northern gang members, also known as Norteños, are the rivals of

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<sup>12</sup> The recording of the interview was not played for the jury during the retrial.

Sureños. Norteños identify with the color red and the number 14. The latter represents the 14th letter of the alphabet, N, for northern or “Norte.” Four dots is a common Norteño tattoo.

A Sureño will commonly hold up three fingers to indicate his allegiance to the southern gang. Hand signs usually are shown to rival gang members as a form of disrespect. Guzman had investigated and heard of cases in Tulare in which Sureños identified themselves to rival gang members, by hand signs or shouting their gang name, just before committing a crime against those rivals. Rival gangs go into each other’s areas and commit crimes. Doing so shows disrespect to the gang in whose territory the crime is committed. The 100 block of West Owens is considered a northern area.

In 2009, the primary activities of the Sureño gang, including the South Side Kings, were murder, attempted murder, robbery, carjacking, drug sales, possession of firearms, assault with deadly weapons, drive-by shooting, and battery. Guzman knew, and had researched, defendant. Defendant was a member of the South Side Kings. During a contact on September 24, 2009, defendant admitted to Guzman that he was an active southern gang member and had been one since he was 13 years old.<sup>13</sup> Defendant said he was jumped in by three South Side Kings members for 13 seconds. At the time of his arrest in this case, defendant was with other southern gang members. Defendant was wearing a South Pole-brand shirt, which is commonly used by southern gang members because it has a blue S written on it. In addition, defendant’s inmate classification questionnaire stated he associated with southerners and he did not get along with northerners.

Guzman opined that as of October 3, 2009, defendant was an active member of the South Side Kings Sureño gang. Guzman further opined that Jesus Vargas, with whom he was familiar from prior contacts, was also an active member of the South Side Kings

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<sup>13</sup> Defendant was 20 years old at the time of the contact.

Sureño gang on that date. Isabel and Mireya were associates of the northern gang, as shown by gang-related writing found on a mirror in their home.

In answer to hypothetical questions based on the evidence adduced at trial, Guzman opined that a shooting such as occurred in this case was committed in association with a criminal street gang, in that it involved a carload of southern gang members associating together. He further opined it would benefit the Sureños by inflicting fear and intimidation on a rival gang and its associates, and by earning respect.

## **DISCUSSION**

### **I**

#### **INEFFECTIVE ASSISTANCE OF COUNSEL**

Despite finding defendant committed attempted premeditated murder with respect to the live victims, the jury in his first trial could not unanimously agree whether his killing of Mireya constituted first degree or second degree murder.<sup>14</sup> The jury in the retrial of count 1 convicted defendant of first degree murder. Defendant now points to evidence of alleged provocative conduct by the victims (for example, wearing red and shouting profanity or insults at defendant and his group) that was presented in the first trial, but not the second. He faults his trial attorney for not presenting this evidence, or at least eliciting it through cross-examination, and says counsel's deficient performance prejudiced him because it is reasonably probable the absence of the evidence made the difference between a conviction of second degree murder and a conviction of first degree murder with special circumstances. Defendant's claim lacks merit.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a

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<sup>14</sup> The first jury was also given the options of convicting defendant of voluntary or involuntary manslaughter, which they apparently rejected.

defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.) This is a "high bar," and surmounting it is not easy. (*Harrington v. Richter* (2011) 562 U.S. \_\_\_\_ [131 S.Ct. 770, 788].)

In order to prevail on a claim of ineffective assistance of counsel on appeal, the defendant "must establish deficient performance based upon the four corners of the record" (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003), which "must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 349.) "Judicial scrutiny of counsel's performance must be highly deferential.... A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington, supra*, 466 U.S. at p. 689; accord, *People v. Hinton* (2006) 37 Cal.4th 839, 876.) In addition, the defendant must prove prejudice "as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel. [Citation.]" (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

In the present case, defense counsel asked the first jury to consider a verdict of voluntary manslaughter based on sudden quarrel or heat of passion. From the jury's verdicts on the attempted murder counts — and even the numerical split on the murder charge (nine votes for first degree murder and three votes for second degree murder) — it was readily apparent the strategy was completely unsuccessful.

Under the circumstances, counsel reasonably employed different tactics at the retrial. Although he argued to the court, unsuccessfully, that the court might base voluntary manslaughter instructions on the theory that when defendant shot into the garage, he was still angry from his confrontation with Subia and Espino, counsel did not expend much effort in an attempt to garner a voluntary manslaughter verdict from evidence that simply did not demonstrate the requisite provocation. (See, e.g., *People v. Enraca* (2012) 53 Cal.4th 735, 759 [for objective component of heat-of-passion voluntary manslaughter, victim's conduct must have been sufficiently provocative to cause ordinary person of average disposition to act rashly or without due deliberation and reflection; standard is not reaction of "reasonable gang member," and insults and gang-related challenges are insufficient to merit voluntary manslaughter instruction]; *People v. Najera* (2006) 138 Cal.App.4th 212, 226 [victim's calling defendant derogatory name insufficient to cause ordinary person to lose reason and judgment under objective standard; hence, defendant not entitled to voluntary manslaughter instruction].) Rather, recognizing his client had confessed — a circumstance that "did not bode well for a successful defense" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212) — defense counsel used his questioning of Detective Haney to try to plant the notion defendant's incriminating statement was the product of the detectives threatening to arrest his girlfriend and have his child taken away from him if he did not confess, and he focused on attacking the eyewitness identifications of defendant as the shooter.

"It is not deficient performance for a criminal defendant's counsel to make a reasonable tactical choice. [Citations.] Reasonableness must be assessed through the

likely perspective of counsel at the time.” (*People v. Ochoa* (1998) 19 Cal.4th 353, 445, fn. omitted; see *People v. Slaughter* (2002) 27 Cal.4th 1187, 1221-1222 [record on appeal failed to show use of different tactics at retrial was unreasonable under the circumstances].)

Moreover, defendant has manifestly failed to establish prejudice. “To prove first degree murder of any kind, the prosecution must first establish a murder within section 187 — that is, an unlawful killing with malice aforethought. [Citations.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 794.) Malice may be express or implied. (§ 188.) Express malice exists when there is an intent to kill, while implied malice exists “when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (*Ibid.*) Where the killing occurs upon a sudden quarrel or heat of passion, the malice aforethought required for murder is negated and the offense is reduced to voluntary manslaughter. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

“Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation and deliberation.” (*People v. Thomas* (1945) 25 Cal.2d 880, 903.) In the present case, however, not only was defendant prosecuted for first degree murder on the theory the murder was willful, deliberate, and premeditated, he was also prosecuted on the alternate theory of so-called drive-by murder.

Section 189 establishes drive-by murder as a separate category of first degree murder. (*People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163-164; see *People v. Chavez* (2004) 118 Cal.App.4th 379, 385-386.)<sup>15</sup> ““A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] ‘Deliberation’ refers to careful weighing of considerations in forming a course of action; ‘premeditation’ means thought over in advance. [Citations.]”” (*People v. Booker* (2011) 51 Cal.4th 141, 172.) Drive-by first degree murder, by contrast, does not require a showing of premeditation and deliberation. Rather, “[e]ven without a showing of premeditation, if defendant was shown to have intentionally discharged his firearm from a motor vehicle with the specific intent to inflict death, then his crime was murder in the first degree by operation of section 189.” (*People v. Sanchez* (2001) 26 Cal.4th 834, 849; accord, *People v. Chavez, supra*, 118 Cal.App.4th at pp. 386-387 [drive-by murder requires specific intent to kill, but not premeditation, in order to constitute first degree murder under § 189].)

We are aware of no authority, and defendant cites none, in which provocation has been held to negate, or raise a reasonable doubt as to the existence of, intent to kill. (See *People v. Rogers* (2006) 39 Cal.4th 826, 878-880 & cases cited [discussing CALJIC No. 8.73 (counterpart of CALCRIM No. 522), relating provocation to premeditation]; but see *People v. Cole* (2004) 33 Cal.4th 1158, 1211-1212 [provocation as related to mental state required for murder by torture, i.e., intent to inflict extreme pain].) We know, from the jury’s unanimous finding on the drive-by special circumstance, that, whatever jurors concluded with respect to premeditation, they at least unanimously agreed defendant

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<sup>15</sup> “All murder which is perpetrated ... by any ... kind of willful, deliberate, and premeditated killing, ... or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.” (§ 189.)

committed a drive-by murder with respect to which he harbored express malice. Given the jury's finding, the killing could not be anything less than first degree murder. (Cf. *People v. Seaton* (2001) 26 Cal.4th 598, 665 [under felony-murder rule, killing in commission of felonies enumerated in § 189 constitutes first degree murder even if killer acted in unreasonable self-defense]; *People v. Battle* (2011) 198 Cal.App.4th 50, 75 [if jury found murder by lying in wait, provocation was irrelevant because, under § 189, murder could not be reduced to second degree murder].)

## II

### JURY INSTRUCTIONS

#### A. Unanimity

Count 3 of the third amended information charged defendant with the attempted murder of “A.R., L.G., A.B., G.V., R.L.”<sup>16</sup> Count 5 charged him with shooting from a motor vehicle at “M.R., L.G., A.B., G.V., R.L.” As to count 3, the jury returned a verdict finding defendant guilty of the attempted premeditated murder of “A.R., L.G., A.B., G.V.” As to what was designated count 7, the jury returned a verdict finding defendant guilty of shooting from a motor vehicle at the same four individuals.<sup>17</sup>

Despite the fact that charging and convicting defendant of a single count alleging a crime of violence against multiple victims would appear to have been to defendant's benefit since he ultimately was sentenced on fewer counts than he could have been, defendant now says each crime against each victim comprised a separate offense, and

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<sup>16</sup> In quoting from the accusatory pleadings and verdicts, we omit unnecessary capitalization and boldface.

<sup>17</sup> For some reason, the counts charged in the third amended information and the counts stated on the verdict forms did not correlate directly. For instance, the jury's verdict on count 5 found defendant guilty of shooting from a motor vehicle at Mireya Rodriguez, the “M.R.” in the accusatory pleading. In our discussion, we will refer to counts 3 and 7.

hence the accusatory pleading was defective because it alleged multiple offenses in each of the two counts. (See *People v. McNeill* (1980) 112 Cal.App.3d 330, 334 (*McNeill*).)<sup>18</sup> He acknowledges his failure to demur to the accusatory pleading forfeited any objection to the defect (*id.* at pp. 334-335), but says the trial court committed reversible error by failing to instruct jurors they must unanimously agree on the identity of the victim or victims for counts 3 and 7. We are not convinced error occurred, but if it did, it was harmless.<sup>19</sup>

“In a criminal case, a jury verdict must be unanimous. [Citations.] The court here so instructed the jury. (See [CALCRIM No. 3550].) Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.] [¶] This requirement of unanimity as to the criminal act ‘is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.’ [Citation.]” (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

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<sup>18</sup> *McNeill*, upon which defendant relies, involved the charging of assault with a deadly weapon on four named victims in a single count. The appellate court stated: “Assaults upon separate victims, even though perpetrated by a single individual during an indivisible course of conduct, each comprise a separate, punishable offense. [Citations.]” (*McNeill, supra*, 112 Cal.App.3d at p. 334.) We assume, without deciding, that the same holds true of attempted murder where, as here, the so-called “kill zone” theory comes into play.

<sup>19</sup> A trial court has a sua sponte duty to instruct on unanimity “‘where the circumstances of the case so dictate.’ [Citation.]” (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) Although it has been suggested a defendant must nevertheless request the instruction be amplified or modified to instruct upon the necessity of juror agreement regarding a specific victim or victims (*People v. Frederick* (2006) 142 Cal.App.4th 400, 419), the Attorney General does not contend defendant forfeited the issue by failing to do so here.

On the other hand, “[a] unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged.’ [Citations.] ‘[W]here the acts were substantially identical in nature, so that any juror believing one act took place would inexorably believe all acts took place, the instruction is not necessary to the jury’s understanding of the case.’ [Citations.]” (*People v. Beardslee* (1991) 53 Cal.3d 68, 93.)

In the present case, the evidence showed the victims named in counts 3 and 7 were all inside the garage when multiple shots were fired at the garage. Either defendant was the perpetrator (directly or as an aider and abettor) or he was not. There was simply no reasonable basis for the jury to distinguish between the victims, acts, or mental state(s) with which defendant acted. (See *People v. Crandell* (1988) 46 Cal.3d 833, 875, overruled on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365.)

*People v. Carrera* (1989) 49 Cal.3d 291 is instructive. In that case, the husband-and-wife managers of a motel were found stabbed to death, and money was missing from the motel office receipts. (*Id.* at p. 300.) The defendant was charged, inter alia, with one count of robbery in which both victims were named. (*Ibid.*) On appeal, he claimed the trial court should have given a unanimity instruction to avoid the possibility some jurors may have found him guilty of robbing one of the victims, while other jurors found him guilty of robbing the other victim. (*Id.* at p. 311.) The California Supreme Court rejected his argument, stating:

“By asserting that multiple acts were involved, defendant incorrectly assumes that the critical question is whether one or two robberies was committed. But here Jack and Carol Hayes were the joint custodians of the motel receipts, and the funds were taken from the immediate presence of both of them by force or violence as to both. Although two counts of robbery could have been charged [citations], defendant can hardly complain that he was charged here with but one count of robbing two victims. It was not necessary that the jury distinguish between the two victims as there was no evidence here from which the jury could have found defendant was guilty of robbing one of the victims and not the other. [Citation.]

Defendant did not proffer different defenses as to the allegedly different acts, and even the testimony of [two witnesses] — which suggested that defendant took no part in the attack on Jack Hayes — would not affect his culpability as an aider and abettor for the robbery as to Jack.” (*Id.* at pp. 311-312.)

Defendant relies on *McNeill*, *supra*, 112 Cal.App.3d 330 as support for his claim of prejudicial error. In that case, the defendant and Charles Muller had an argument and agreed to meet later to fight. Defendant went home and retrieved his gun. Meanwhile, Muller drove to the rendezvous point, accompanied by four friends who came to watch the fight. While the friends remained at a distance, Muller and the defendant walked toward each other and exchanged a few words. The defendant then pulled his gun, shot Muller in the head, and fired several shots in the direction of Muller’s friends. He was convicted of second degree murder and one count of assault with a deadly weapon and by means of force likely to produce great bodily injury. (*Id.* at pp. 333-334.) At his trial, the jury was instructed: “It is not necessary in order to find the defendant guilty of ASSAULT WITH A DEADLY WEAPON OR BY MEANS OF FORCE LIKELY TO INFLICT GREAT BODILY INJURY, as alleged in Count II of the Information, that the defendant committed these acts against each of the four individuals named therein. *It is sufficient if you find that defendant committed these acts on only one of the named individuals.*” (*Id.* at p. 335, Italics added.) Jurors were not instructed that they must unanimously agree as to a single individual upon whom an assault was committed. (*Ibid.*)

On appeal, the failure to give a unanimity instruction was held to constitute prejudicial error. The appellate court reasoned:

“Where defendant is charged in a single count with several offenses and the evidence tends to show that he committed more than one such offense, the jury must agree upon the particular act committed in order to convict. [Citation.] The possibility that the jurors may have come to different conclusions as to the identity of the assault victim vitiates the constitutionally required assurance of juror unanimity as to the assault conviction. While it is of course possible that the jurors agreed unanimously as to a particular victim of the assault, such agreement would

necessarily be fortuitous in the absence of a proper instruction. More to the point, on the record before us we have no way to ‘gauge the precise effect’ [citation] of the instructional lacuna upon the verdict actually rendered. Since we cannot say that the jurors agreed unanimously upon the act constituting the offense charged in count II, we have no assurance that a miscarriage of justice did not occur. Therefore, the judgment of conviction under the assault count must be reversed. [Citation.]” (*McNeill, supra*, 112 Cal.App.3d at pp. 335-336.)

*McNeill* is readily distinguishable from the present case. Here, the trial court told jurors, “Your verdict on each count and any special findings must be unanimous. This means that to return a verdict, all of you must agree to it.” The court further instructed: “The defendant is charged with murder, attempted murder, shooting at an inhabited dwelling, and shooting from a motor vehicle in Counts 1 through 7. In addition, there are lesser included offenses. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed.” Finally, with respect to the attempted murder charges, and in direct contrast to the emphasized instruction given in *McNeill*, the trial court told jurors: “A person may intend to kill a specific victim or victims and at the same time intend to kill everyone at a particular zone of harm or kill zone. In order to convict the defendant of the attempted murder of Antonio Rodriguez, Isabel Rodriguez, Lovina Gonzalez, Anthony Brooks, *and* George Vieira, the People must prove that the defendant not only intended to kill those people or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill those individuals by killing everyone in the kill zone, then you must find the defendant not guilty of attempted murder of Antonio Rodriguez, Isabel Rodriguez, Lovina Gonzalez, Anthony Brooks, *and* George Vieira.” (Italics added.)

““[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citation.]’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 987.) In

our view, the unanimity requirement was adequately conveyed to defendant's jury.<sup>20</sup> Moreover, when we construe the verdicts reasonably, in light of the issues submitted to the jury and the court's instructions (*People v. Jones* (1997) 58 Cal.App.4th 693, 710), it is unmistakable that jurors unanimously found defendant guilty as to all victims named in counts 3 and 7.<sup>21</sup>

**B. Kill Zone**

Defendant fired multiple shots at a group of people in, and just outside, a garage. With respect to counts 2 and 3, which charged him with attempted premeditated murder, the jury was instructed in pertinent part, pursuant to CALCRIM No. 600:

“The defendant is charged in Counts 2 AND 3 with attempted murder.

“To prove that the defendant is guilty of attempted murder, the People must prove that:

“1. The defendant took direct but ineffective steps toward killing another person;

“AND

“2. The defendant intended to kill that person. [¶] ... [¶]

“A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’ In

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<sup>20</sup> Were we to find otherwise, we would conclude the error was harmless beyond a reasonable doubt. (*People v. Metheney* (1984) 154 Cal.App.3d 555, 563-564, fn. 5; see *People v. Wolfe* (2003) 114 Cal.App.4th 177, 185-188 & cases cited.) As previously discussed, there was simply no evidence on which reasonable jurors could disagree as to which act or acts defendant committed. (Compare, e.g., *People v. Wolfe, supra*, 114 Cal.App.4th at p. 188 & *People v. Brown* (1996) 42 Cal.App.4th 1493, 1502 with *People v. Davis* (2005) 36 Cal.4th 510, 561-562, *People v. Metheney, supra*, 154 Cal.App.3d at pp. 564-565, & *People v. Moore* (1983) 143 Cal.App.3d 1059, 1064-1066.)

<sup>21</sup> Jurors did not have to agree unanimously whether defendant intended to kill each specific victim or everyone within the zone of harm: Unanimity as to theory is not required. (*People v. Millwee* (1998) 18 Cal.4th 96, 160; see *People v. Nakahara* (2003) 30 Cal.4th 705, 713.)

order to convict the defendant of the attempted murder of ANTONIO RODRIGUEZ, ISABEL RODRIGUEZ, LOVINA GONZALEZ, ANTHONY BROOKS, AND GEORGE VIE[I]RA, the People must prove that the defendant not only intended to kill ANTONIO RODRIGUEZ, ISABEL RODRIGUEZ, but also either intended to kill LOVINA GONZALEZ, ANTHONY BROOKS, RAYMOND LOPEZ, AND GEORGE VIE[I]RA, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill ANTONIO RODRIGUEZ, ISABEL RODRIGUEZ, LOVINA GONZALEZ, ANTHONY BROOKS, AND GEORGE VIE[I]RA or intended to kill, LOVINA GONZALEZ, ANTHONY BROOKS, RAYMOND LOPEZ, AND GEORGE VIE[I]RA by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of ANTONIO RODRIGUEZ, ISABEL RODRIGUEZ, LOVINA GONZALEZ, ANTHONY BROOKS, AND GEORGE VIE[I]RA.”<sup>22</sup>

Defendant now contends use of the term “kill zone” in the instruction was inflammatory and unnecessary, and, hence, constituted reversible error. Alternatively, he says that if use of the term was proper, the trial court was required to define it because it has a technical legal meaning, and failure to do so was prejudicial error. We reject both claims.

The doctrine of transferred intent does not apply to the crime of attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 317 (*Bland*)). “A person who intends to kill only one is guilty of the attempted (or completed) murder of that one but not also of the attempted murder of others the person did not intend to kill.” (*Ibid.*) Thus, in order to be convicted of multiple counts of attempted murder, each involving a different victim, the prosecution must prove the perpetrator acted with the specific intent to kill each victim.

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<sup>22</sup> The court orally instructed, in part: “In order to convict the defendant of the attempted murder of Antonio Rodriguez, Isabel Rodriguez, Lovina Gonzalez, Anthony Brooks, and George Vieira, the People must prove that the defendant not only intended to kill those people or intended to kill everyone within the kill zone.” Jurors were provided with a copy of the written instructions, which control over the oral version when a discrepancy exists. (*People v. Mills* (2010) 48 Cal.4th 158, 201.) Accordingly, we have set out the written instruction. We note, however, that defendant’s claims of error, and our analysis thereof, are not affected by the differences in the two versions.

(*People v. Smith* (2005) 37 Cal.4th 733, 739.) “The defendant’s mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.” (*Bland, supra*, 28 Cal.4th at p. 328.)

A person who shoots at a group of people may nevertheless be found guilty of the attempted murder of everyone in the group, even if he or she primarily targeted only one of them, if the person also, concurrently, intended to kill others within what has been termed the “kill zone.” (*Bland, supra*, 28 Cal.4th at p. 329.) “The intent is concurrent ... when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity. For example, an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A’s death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a “kill zone” to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.... Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.” (*Id.* at pp. 329-330; see *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)<sup>23</sup>

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<sup>23</sup> The fact defendant used a revolver that likely only contained six or eight rounds is of no import under the circumstances: Although the kill zone explanation quoted from sister-state authority by the California Supreme Court in *Bland* uses the example of an attack with automatic weapon fire (*Bland, supra*, 28 Cal.4th at p. 330), the gun used in *Bland* itself was a .38-caliber handgun (*id.* at p. 318).

The kill zone theory thus “addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other, nontargeted, persons.” (*People v. Stone* (2009) 46 Cal.4th 131, 138.) “[A] shooter may be convicted of multiple counts of attempted murder on a ‘kill zone’ theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the ‘kill zone’) as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. [Citation.]” (*People v. Smith, supra*, 37 Cal.4th at pp. 745-746; see *People v. Ervine* (2009) 47 Cal.4th 745, 789 [intent required for attempted murder can be satisfied by intent to kill particular person and by generalized intent to kill someone]; but see *People v. Perez* (2010) 50 Cal.4th 222, 225, 230-231 [indiscriminate firing of single shot at group of persons, without more, does not amount to attempted murder of everyone in group].) As stated in *Bland, supra*, 28 Cal.4th at pages 330-331: “Even if the jury found that defendant primarily wanted to kill [the driver of the car] rather than [the driver’s] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers.” (Fn. omitted.)

Defendant does not challenge application of the theory of concurrent intent to his case, but says the legal principles should have been conveyed to the jury without using the term “kill zone.” Use of this “irrelevant and inflammatory” term, he contends, violated his federal constitutional rights and requires reversal of his convictions on counts 2 and 3. He recognizes that the court in *People v. Campos* (2007) 156 Cal.App.4th 1228 (*Campos*) held otherwise, but urges us not to follow that decision.

We agree with the Attorney General that defendant’s claim has been forfeited by his failure to object to use of the term “kill zone” at trial. We previously have concluded CALCRIM No. 600 correctly states the law. (*People v. Lawrence* (2009) 177 Cal.App.4th 547, 557.) “A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification [or modification] of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citations.]” (*People v. Lee* (2011) 51 Cal.4th 620, 638; see also *Campos, supra*, 156 Cal.App.4th at p. 1236.)

In any event, we agree with *Campos* on the merits. That case rejected the argument use of the phrase “kill zone” is inflammatory, argumentative, and inappropriate, saying: “An instruction is argumentative when it recites facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law. [Citation.] ‘A jury instruction is [also] argumentative when it is “‘of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence.’ [Citations.]” [Citation.] [¶] CALCRIM No. 600 merely employs a term, ‘kill zone,’ which was coined by our Supreme Court in *Bland* and referred to in later California Supreme Court cases. [Citation.] It does not invite inferences favorable to either party and does not integrate facts of this case as an argument to the jury. Other disparaging terms, including ‘flight’ [citation], ‘suppress[ion] of evidence’ [citation] and ‘consciousness of guilt’ [citation] have been used in approved, longstanding CALJIC instructions. We see nothing argumentative in this instruction.” (*Campos, supra*, 156 Cal.App.4th at p. 1244.)<sup>24</sup>

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<sup>24</sup> Defendant says the “powerful impact” of the term “kill zone” is illustrated by its use as the title “of a well-known popular modern classic Hong Kong cinema gangster film starring several major Hong Kong film stars.” We are not familiar with the film to which defendant refers. Significantly, the record on appeal contains no reference to the film, and defendant makes no request for judicial notice thereof.

Defendant argues, however, that inclusion of the term in the attempted murder instruction improperly suggested he “was a person of bad character prone to committing violent acts within a lethal territory created by [defendant] and his companions, a ‘kill zone.’” Since inviting jurors to consider bad character as a basis for conviction violated due process, he claims, federal constitutional error occurred.

We categorically reject the notion that use of the phrase “kill zone” suggests anything about a defendant, or that it is irrelevant to the issues, or poses a threat of prejudicing jurors against a defendant. It does not run afoul of the principle that jury instructions must be neutral and nonargumentative. (See, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223, 1276, overruled on another ground in *People v. Edwards* (1991) 54 Cal.3d 787, 835; *People v. Wright* (1988) 45 Cal.3d 1126, 1143.) If anything, use of the term emphasizes the requirement of an intent to kill in a way “zone of harm” or “zone of danger” (either of which, we suspect, would come under challenge for improperly stating, or creating an ambiguity with respect to, the mental state required for attempted murder) do not. That the phrase “zone of fatal harm” might convey the same requirement does not mean “kill zone” is improper.

Moreover, contrary to defendant’s alternative claim, the trial court did not err by failing to define “kill zone” for jurors. As defendant acknowledges, the California Supreme Court has rejected the argument such a definition is required. (E.g., *People v. Stone, supra*, 46 Cal.4th at pp. 137-138; *People v. Smith, supra*, 37 Cal.4th at pp. 756-757; *Bland, supra*, 28 Cal.4th at p. 331, fn. 6.) Defendant’s assertion we should address the issue despite this adverse authority necessarily fails. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)<sup>25</sup>

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<sup>25</sup> In conjunction with this and at least one other issue, defendant contends the trial errors cumulatively denied him his rights to due process and a fundamentally fair trial. By simply adding a paragraph asserting cumulative prejudice where purportedly applicable, defendant’s briefing violates California Rules of Court, rule 8.204(a)(1)(B),

### III

#### SENTENCING

##### **A. Drive-By Special Circumstance**

The special circumstance established by section 190.2, subdivision (a)(21) applies where “[t]he murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death.” Defendant says it is unconstitutionally overbroad, because the same elements are also used to establish first degree murder on a drive-by shooting theory.<sup>26</sup> Because there is no meaningful distinction between first degree murder and the

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which requires that each brief state each point under a separate heading or subheading. In any event, we have examined the entire record and are persuaded that if errors occurred at trial, they were not prejudicial either by themselves or in combination with each other. Defendant received a fair trial. (See *People v. Boyette* (2002) 29 Cal.4th 381, 468.)

Defendant also asserts the alleged instructional error violated the federal constitutional guarantee of substantive due process. The briefing on this issue, which again is not set out under a separate heading or subheading, simply consists of defendant’s bald assertion, followed by the citations of several cases. There is no discussion of why substantive due process has purportedly been violated, or how the cases cited are applicable to defendant’s case. Simply stating a claim does not make it so, and we decline to address the issue further. (See *People v. Wharton* (1991) 53 Cal.3d 522, 563; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396-1397.)

<sup>26</sup> Jurors were instructed defendant was being prosecuted for first degree murder under two theories: premeditation and shooting a firearm from a vehicle. With respect to the latter theory, the trial court instructed that the People had to prove three things: “One, he [defendant] shot a firearm from a motor vehicle; Two, he intentionally shot at a person who was outside the vehicle, and; Three, he intended to kill that person.”

Jurors were further instructed there were two special circumstances: murder by shooting a firearm from a motor vehicle in violation of section 190.2, subdivision (a)(21), and committing the murder while an active participant in a criminal street gang in violation of section 190.2, subdivision (a)(22). As to the former, the trial court instructed the People must prove: “One, the defendant shot a firearm from a motor vehicle killing Mireya Rodriguez; Two, the defendant intentionally shot at a person who was outside the vehicle, and; Three, at the time of the shooting, the defendant intended to kill.”

special circumstance, he concludes, the special circumstance violates the due process and cruel and unusual provisions of the United States Constitution. (See, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 189; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1442.)<sup>27</sup>

Defendant raises no challenge with respect to the gang special circumstance (§ 190.2, subd. (a)(21)); hence, any impropriety with respect to the drive-by special circumstance cannot have harmed him. Once a single special circumstance allegation was found true, imposition of a sentence of LWOP was mandatory. (*Id.*, subd. (a).) In any event, the California Supreme Court has consistently and repeatedly rejected defendant's claims. (See, e.g., *People v. Nelson* (2011) 51 Cal.4th 198, 225 [California homicide law and special circumstances listed in § 190.2 adequately narrow class of murderers eligible for death penalty]; *People v. Williams* (2010) 49 Cal.4th 405, 469 [§ 190.2 is not impermissibly overbroad in violation of federal Constitution; number of special circumstances is not so high as to fail to perform constitutionally required narrowing function; special circumstances are not overinclusive, either facially or as interpreted by California Supreme Court]; *People v. Abilez* (2007) 41 Cal.4th 472, 528 [double counting charged felonies — once to elevate degree of homicide to first degree murder and again to render defendant eligible for death penalty — is permissible]; *People v. Kennedy* (2005) 36 Cal.4th 595, 640 [same], disapproved on another ground in *People v. Williams, supra*, 49 Cal.4th at p. 459; *People v. Pollock* (2004) 32 Cal.4th 1153, 1195 [statutory special circumstances adequately narrow class of persons subject to death

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<sup>27</sup> In light of the nature of the issue raised by defendant, we decline to find forfeiture by virtue of his having failed to raise it in the trial court. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 888; *People v. Smith* (2001) 24 Cal.4th 849, 852.) We also decline to be drawn into a discussion of whether defendant, having been sentenced to LWOP and not death, lacks standing to raise the issue. (See, e.g., *Harmelin v. Michigan* (1991) 501 U.S. 957, 995; *People v. Leung* (1992) 5 Cal.App.4th 482, 490, fn. 2; *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906-907.)

penalty]; *People v. Catlin* (2001) 26 Cal.4th 81, 158 [8th Amend. is not offended where first degree murder liability and special circumstance findings are based on common elements]; *People v. Lewis* (2001) 25 Cal.4th 610, 676 [California's death penalty sufficiently narrows class of death-eligible defendants]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1050 [special circumstances set forth in § 190.2 are not overinclusive by number or terms and have not been construed in unduly expansive manner]; *People v. Marshall* (1990) 50 Cal.3d 907, 945-946 [triple use of same facts — to support conviction for first degree murder on theory of felony murder, finding of felony-murder special circumstance, and imposition of death penalty — does not violate federal Constitution]; see also *Lowenfield v. Phelps* (1988) 484 U.S. 231, 241-246 [rejecting challenge to death sentence on ground sole aggravating circumstance found by jury at sentencing phase was identical to element of capital crime of which defendant was convicted]; *People v. Rodriguez, supra*, 66 Cal.App.4th at pp. 163-164, 172-174 [upholding constitutionality of § 190.2, subd. (a)(21) against claims it impermissibly duplicates elements that elevated homicide to first degree murder, and that it is overbroad and permits excessive sentence for possibly unpremeditated murder].)

We are bound to follow the pronouncements of our state's high court. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.) Accordingly, we reject defendant's claim.

**B. Section 654**

Defendant was convicted, in count 1, of murdering Mireya Rodriguez and, in count 5, of shooting at her from a motor vehicle. He was convicted, in count 2, of attempting to murder Isabel Rodriguez and, in count 6, of shooting at her from a motor vehicle.<sup>28</sup> Defendant was further convicted, in count 3, of attempting to murder Antonio

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<sup>28</sup> Except with respect to Mireya, the verdict forms identified victims by their first and last initials.

Rodriguez, Lovina Gonzalez, Anthony Brooks, and George Vieira and, in count 7, of shooting from a motor vehicle at those same four individuals. Consecutive sentences were imposed on all these counts. Defendant now contends sentence on one of each pair of counts must be stayed pursuant to section 654.<sup>29</sup>

Section 654, subdivision (a) provides in pertinent part: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” The purpose of this statute is to ensure that punishment will be commensurate with culpability. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 367.)

“In determining whether section 654 has been violated, two tests have been applied. One test examines whether the offense arises out of a single act. [Citations.] The other test applies where a course of conduct violates more than one statute and comprises an indivisible transaction. [Citation.]” (*People v. Gbadebo-Soda* (1989) 215 Cal.App.3d 1371, 1375.) “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334.) “Where a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he may be punished for more than one crime even though the violations share common acts or are parts of an otherwise indivisible course of conduct. [Citation.]” (*People v. Blake* (1998) 68 Cal.App.4th 509, 512.) Whether a defendant harbored a separate intent and objective for each offense is a factual

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<sup>29</sup> Defendant’s failure to object on this ground at sentencing does not preclude him from raising the issue on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17; *People v. Alvarez* (1992) 9 Cal.App.4th 121, 126, fn. 5 & cases cited.)

determination for the trial court, and its conclusion will be sustained on appeal if supported by any substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) On review of this issue, we consider the evidence in the light most favorable to the judgment. (*People v. Williamson* (1979) 90 Cal.App.3d 164, 172.)

Defendant contends section 654 mandates that sentence on one of each pair of counts be stayed, because each pair of counts is based on the same act. The Attorney General concedes defendant is correct with respect to counts 1 and 5 (in which Mireya was the named victim) and counts 2 and 6 (in which Isabel was the named victim). Since, of the two pairs, counts 1 and 2 carried the longest potential term of imprisonment (see § 654, subd. (a)), sentence on counts 5 and 6 must be stayed. (See *People v. Correa, supra*, 54 Cal.4th at p. 337; *In re Wright* (1967) 65 Cal.2d 650, 655-656.) The Attorney General argues defendant is incorrect with respect to counts 3 and 7, however, due to the multiple-victim exception to section 654. Although we agree counts 3 and 7 involved multiple victims, we are constrained to conclude, upon the unusual circumstances of this case, that section 654 nevertheless requires us to stay sentence on count 7.

The California Supreme Court has “long held that ‘the limitations of section 654 do not apply to crimes of violence against multiple victims.’ [Citation.] As [that court has] explained: ‘The purpose of the protection against multiple punishment is to insure that the defendant’s punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates more than one statute and such an act that harms more than one person is well settled. Section 654 is not “... applicable where ... one act has two results each of which

is an act of violence against the person of a separate individual.” [Citations.]’ [Citation.]” (*People v. Oates* (2004) 32 Cal.4th 1048, 1063, quoting *Neal v. State of California, supra*, 55 Cal.2d at pp. 20-21.)

““[W]hether a crime constitutes an act of violence that qualifies for the multiple-victim exception to section 654 depends upon whether the crime ... is defined to proscribe an act of violence against the person.” [Citation.]” (*People v. Martin* (2005) 133 Cal.App.4th 776, 782.) Attempted premeditated murder qualifies as a crime of violence for purposes of the multiple-victim exception. (*People v. Oates, supra*, 32 Cal.4th at p. 1063.)<sup>30</sup> Accordingly, had the prosecution charged defendant with, and the jury convicted him of, a separate count of attempted premeditated murder for each victim named in count 3, defendant could have been separately punished for each such count.

The problem here arises because of the prosecution’s decision to name the same four victims — Antonio, Lovina, Anthony, and George — in one count of attempted murder and one count of shooting from a motor vehicle. While “the application of section 654 does not depend on the *allegations* of the charging instrument, but on what was *proven* at trial” (*People v. Assad* (2010) 189 Cal.App.4th 187, 200), this flaw was carried over into the verdict forms. What was proven at trial with respect to count 3 was that defendant attempted to murder Antonio, Lovina, Anthony, and George, and that, with respect to count 7, he shot from a motor vehicle at *exactly* those same four individuals. In this case, however, the prosecution chose to treat the four named individuals as a single, unified victim. Because there was no difference in victims between the two counts, the multiple-victim exception to section 654 does not apply.

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<sup>30</sup> We think there can be little question former section 12034, subdivision (c), which proscribed the willful and malicious discharge of a firearm from a motor vehicle *at another person*, also qualifies.

We have been able to find no case in which the multiple-victim exception was applied where, as here, the exact same individuals were named as victims in the counts in question. A number of cases are instructive, however.

In *In re Ford* (1967) 66 Cal.2d 183, the petitioner was separately sentenced for burglary, robbery, and kidnapping for robbery, where all three offenses were part of a criminal transaction that had the single objective of taking a safe from a restaurant. The Attorney General conceded the burglary sentence violated section 654. The state Supreme Court found, however, that the petitioner was properly sentenced for both kidnapping and robbery, because the prosecution alleged and proved, and the jury found, the petitioner kidnapped victims A, B, and C for the purpose of robbery (the basis of count I) and robbed victim C (the basis of count II). The court found section 654 did not apply because the petitioner's single course of conduct had harmed more than one victim. (*In re Ford, supra*, at pp. 183-184.)

In *People v. Miller* (1977) 18 Cal.3d 873 (*Miller*), overruled on another ground as stated in *People v. Oates, supra*, 32 Cal.4th at pages 1067-1068, footnote 8, the defendant and an accomplice entered a jewelry store. John Keating waited on the accomplice, while the defendant approached Charles Burk, the security guard. Ultimately, the defendant shot Burk; the accomplice ordered Keating to the floor at gunpoint; and both perpetrators made off with the contents of a display case. The defendant was convicted of robbery, burglary, and assault with a deadly weapon. (*Miller, supra*, at pp. 877-879.) On appeal, the California Supreme Court determined the defendant could be punished for both the robbery and the burglary convictions. It determined that the victim of the robbery, as alleged, proved, and found to be true, was Keating; the victim of the burglary was Burk. Under the circumstances of the case, both offenses were crimes of violence. (*Id.* at p. 886.) Since the defendant was convicted of "a second crime of violence against a second victim," he could be punished for both. (*Ibid.*) In a footnote, the court observed: "Our conclusion that defendant may be punished for both the robbery and the burglary

convictions does not depend on our ... determination that Burk was not alleged as a victim of the robbery. Even had defendant been convicted of a robbery involving both Keating and Burk as victims, section 654 would not be applicable to preclude punishment for both that crime and the burglary involving Burk as a victim, as each crime would involve at least one different victim.” (*Id.* at fn. 11.)

In *People v. Robinson* (1988) 198 Cal.App.3d 674, the defendant entered a motel room containing two couples. An altercation and stabbing ensued. The defendant was ultimately convicted of a number of offenses, including burglary, assault with a deadly weapon on Ava Baldwin, and assault with a deadly weapon on Arthur Baldwin. (*Id.* at pp. 676-677.) Relying on *Miller*, and particularly footnote 11 thereof, the appellate court rejected the defendant’s claim he should not have been separately sentenced for both assault convictions and the burglary. The court stated: “Here the trial court imposed punishment for count I — the burglary with great bodily injury of Don Rockey, and the use of a knife. The court stayed the enhancement for great bodily injury of Ava. It then imposed punishments as to count II — ADW against Arthur, and count III, the ADW against Ava. Thus, each count for which the court ordered service of sentence involved ‘at least one different victim,’ of a violent crime as authorized by *Miller*. [Citation.]” (*People v. Robinson, supra*, at p. 681.)

In *In re Sergio R.* (1991) 228 Cal.App.3d 588, the defendant claimed a finding of assault with a deadly weapon had to be reversed because it was duplicative of a finding he discharged a firearm from a vehicle. The appellate court disagreed and held the defendant could be punished for both offenses, because different victims were involved. (*Id.* at p. 598.) The court stated: “In the present case Blanca was the only victim with regard to the assault with a deadly weapon finding. The discharge of a firearm from a motor vehicle finding on the other hand was not victim specific; rather, it pertained to all the victims, Blanca and Jasmine, as well as Melda ....” (*Ibid.*)

In *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, the defendant shot into a car containing Sandra Zarate and three other persons. Zarate was struck in the head. The defendant was convicted of attempted murder (count I) and discharging a gun into an occupied motor vehicle (count II), and was sentenced to consecutive terms on the two counts. The appellate court rejected his claim he could not be punished for both, concluding section 654 was inapplicable because the defendant's act was likely to cause harm to all four persons in the vehicle. (*People v. Gutierrez, supra*, at pp. 1733, 1736-1737.)

In *People v. Higareda* (1994) 24 Cal.App.4th 1399, the defendant robbed two victims, then fired a shotgun in the direction of their car, in which a third person was a passenger. On appeal, the defendant contended firing the shotgun was part of a course of conduct indivisible from the robbery; hence, it could not be separately punished. The Court of Appeal disagreed, reasoning that the third person in the car was not a robbery victim, and so the defendant could be separately punished for endangering her by his violent crime. (*Id.* at p. 1413.)

In *People v. Garcia* (1995) 32 Cal.App.4th 1756 (*Garcia*), the defendant robbed or attempted to rob four men, then fired several shots at their car as it drove away. He was convicted, inter alia, of one count of shooting at an occupied motor vehicle and four counts of assault with a firearm, one for each victim. The trial court imposed a separate sentence on each count. (*Id.* at pp. 1762-1764.) On appeal, the defendant claimed imposing unstayed sentences on shooting at an occupied motor vehicle and the assault count in which Mr. Verdin was the named victim violated section 654. (*Garcia, supra*, at p. 1780.) After reviewing a number of cases applying section 654 to convictions for shooting at an occupied motor vehicle and the resulting assault on one or more of the vehicle's occupants (*Garcia, supra*, at pp. 1781-1782), the court stated:

“In ... every ... case we have found holding that the multiple victim exception permitted unstayed sentences both for shooting at an occupied

motor vehicle (or an analogous crime) and for one or more simultaneous assaults (or analogous crimes)[,] there was at least one victim of the former who was not also a victim of the latter. The ‘leftover’ victim or victims formed the basis of the separate, unstayed sentence for shooting at an occupied motor vehicle. [Citations.] Here, by contrast, defendant was convicted of assaulting *all* the occupants of the vehicle. If we found this distinction significant, then defendant could be given an unstayed sentence for shooting at an occupied motor vehicle, or for each of the four assaults, but not both. However, we do not.

“The multiple victim exception, simply stated, permits one unstayed sentence per victim of all the violent crimes the defendant commits incidental to a single criminal intent. Where one person is the victim of both a shooting at an occupied motor vehicle and a simultaneous assault, the trial court can impose an unstayed sentence for one or the other, but not for both. [Citations.] We believe this is equally true where the same *persons* are the victims of a shooting at an occupied motor vehicle and of simultaneous *assaults*: the trial court can impose an unstayed sentence for the shooting, based on any given victim, or for the assault on that victim, but not for both.” (*Garcia, supra*, at pp. 1783-1784, fn. omitted.)

As support for this view, the court relied on *Miller, supra*, 18 Cal.3d 873, and particularly footnote 11 at page 886. (*Garcia, supra*, 32 Cal.App.4th at pp. 1784-1785.) The court concluded: “Applying this footnote here, defendant was properly punished both for the crime of shooting at an occupied motor vehicle, the victims of which were Verdin and three others, and for the assault on Verdin, because each crime involved at least one different victim.” (*Id.* at p. 1785.)

In *People v. Felix* (2009) 172 Cal.App.4th 1618, the defendant shot at a house in which several people were present. He was charged with, and convicted of, one count of attempted murder (with Martin Gomez as the named victim), three counts of assault with a firearm (one of which named Martin Gomez as the victim), and one count of shooting at an inhabited dwelling. The trial court imposed concurrent sentences on all counts, except that it stayed the Martin Gomez assault. (*Id.* at pp. 1622-1624.) On appeal, the defendant contended his convictions on count 1 (attempted murder of Martin Gomez) and count 2 (shooting at an inhabited dwelling) were based on the same act, committed

during a single indivisible course of conduct; hence, sentence on count 2 also should have been stayed. (*Id.* at p. 1630.) The appellate court agreed with the People, who responded that even if the defendant shot at an inhabited dwelling for the primary purpose of murdering Gomez, count 2 involved a separate act of violence against other victims, because there were other people in the house. (*Ibid.*) The court concluded: "... Martin Gomez's houseguests were victimized by the shooting into the dwelling but were not named victims in any other count. It follows that the trial court properly declined to stay the sentence on count 2 (shooting at an inhabited dwelling) because it is governed by the multiple victim exception of Penal Code section 654." (*Id.* at p. 1631.)

In each of the foregoing cases, there is at least some degree of differentiation between the named victim or victims in the count or counts for which the sentence was unchallenged, and the count or counts for which the defendant claimed sentence should have been stayed pursuant to section 654. Even in *Garcia*, in which some of the Court of Appeal's comments seem broad enough to apply to the situation before us, there is only one count of shooting at an occupied motor vehicle (and it is not victim specific), not one in which each named assault victim is also the named victim. (*Garcia, supra*, 32 Cal.App.4th at p. 1763.)

Here, by contrast, there was no such differentiation. If the prosecution had charged each victim of count 3 and count 7 separately, as they did with Mireya and Isabel, the counts charging defendant with shooting from a motor vehicle would have to be stayed pursuant to section 654, as the Attorney General has conceded with respect to the counts naming Mireya and Isabel as victims. Although defendant could be separately sentenced for each count of attempted murder, he could not also be separately sentenced for each count of shooting from a motor vehicle, since each count of shooting from a motor vehicle would be based on the same act, and involve the same single victim, as each count of attempted murder. The People cannot avoid this result by charging multiple specific victims in a single count of attempted murder, and the same multiple

specific victims in a single count of shooting from a motor vehicle. Moreover, while the trial court “is entitled to make any necessary factual findings *not already made by the jury*” in determining whether section 654 applies (*People v. Centers* (1999) 73 Cal.App.4th 84, 101, italics added), we know of no authority allowing it to *supplant* the jury’s findings by determining, for example, that two of the four named victims were the victims for purposes of count 3, while the other two named victims were the victims for purposes of count 7.

In sum, while we agree that defendant, who sought to harm multiple victims, was more culpable — and more deserving of harsher punishment — than someone who sought to harm a single victim, we are bound by the verdicts the jury returned as a result of the way this case was pleaded. The sentence on count 7 must be stayed.

**C. The Parole Revocation Restitution Fine**

The probation officer’s report recommended that defendant be ordered to pay a parole revocation restitution fine pursuant to section 1202.45, with said fine to be suspended pending successful completion of parole. At the outset of the sentencing hearing, the trial court stated, “Well, also, LWOP no 1202.45 is imposed because there is no parole.” During the formal imposition of sentence, the court omitted any reference to a section 1202.45 fine. Despite this fact, both the sentencing minutes and the abstract of judgment reflect the imposition and stay of a \$1,200 fine pursuant to section 1202.45.

As the Attorney General concedes, the trial court correctly determined the fine should not be imposed. (*People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1184-1186; see *People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) We will order the sentencing minutes and abstract of judgment amended to conform to the judgment as orally pronounced by the court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; *In re Candelario* (1970) 3 Cal.3d 702, 705; *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3; *People v. Zackery* (2007) 147 Cal.App.4th 380, 388-389; *People v. Williams* (1996) 50 Cal.App.4th 1405, 1408, fns. 2 & 3.)

#### **D. Time Credits**

Defendant, who is serving a term of life in prison with *no* possibility of parole, asks us to hold he is entitled to one additional day of presentence custody credit. His claim turns on whether such credits accrue from the date he was arrested (Oct. 4, 2009) or the date he was booked into jail (Oct. 5, 2009).<sup>31</sup>

Section 2900.5, subdivision (a), provides in pertinent part: “In all felony ... convictions, ... when the defendant has been in custody, including, but not limited to, any time spent in a jail ... or similar residential institution, all days of custody of the defendant ... shall be credited upon his or her term of imprisonment ....” Subdivision (d) of the statute places upon the court imposing sentence the duty “to determine the date or dates of any admission to, and release from, custody prior to sentencing and the total number of days to be credited pursuant to this section.”

In *People v. Ravaux* (2006) 142 Cal.App.4th 914 (*Ravaux*), the court held: “[A] defendant is not in custody within the meaning of section 2900.5 prior to being processed into a jail or similar custodial situation as described in” subdivision (a) of the statute. Accordingly, a defendant’s custody credits are to be calculated beginning when the defendant was booked into jail rather than from the time of his or her arrest. (*Ravaux, supra*, at p. 919.) The court examined the wording of the statute, and concluded: “The

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<sup>31</sup> We recognize defendant can raise this issue notwithstanding section 1237.1. (*People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12; *People v. Acosta* (1996) 48 Cal.App.4th 411, 419-420, 427-428.) We also note, however, that the Second District Court of Appeal has held that when, as here, a party has failed to object to a purported custody credit error in the trial court, the alleged error is de minimis, the sentence is lengthy, and other issues “dominate” the appeal, it will “not entertain an issue of custody credit error. [Citations.]” (*People v. Walton* (1996) 42 Cal.App.4th 1004, 1020, disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; accord, *People v. Nwafor* (1996) 46 Cal.App.4th 39, 47; see also *People v. Bolden* (1996) 44 Cal.App.4th 707, 718 [four-day error not de minimis in light of three-year prison sentence].) If any purported miscalculation of credits could be said to be de minimis in light of the sentence, this is it.

plain language of section 2900.5 addresses only residential custody arrangements and makes no mention of detention, seizure or arrest by the police as being the type of custody included in the calculation of custody credits.... Arrest or detention by police prior to booking is not mentioned anywhere in section 2900.5. It is clear from the plain language of the statute that custody credits are to be given for time spent within a residential detention facility, not for merely being in the custody of police.” (*Id.* at pp. 919-920.)

Defendant argues that the statute does not mention a booking requirement, and he points out that he was arrested and subjected to custodial interrogation. He says there is no indication the Legislature intended to “relegate the determination of the commencement of custodial credit accrual to the unfettered discretion of arresting officers and/or interrogators,” and points to what he represents as being a number of published decisions that say presentence custody credits accrue from the date of arrest to the date of sentencing.

None of the cases on which defendant relies — *People v. Johnson* (2010) 183 Cal.App.4th 253, 289; *People v. Frausto* (2009) 180 Cal.App.4th 890, 903; *People v. Lopez* (1992) 11 Cal.App.4th 1115, 1124; *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Smith* (1989) 211 Cal.App.3d 523, 526-527 — address the issue presented here, or provide any reason to believe the date of arrest differed from the booking date. These cases are no more persuasive on the point than those we have found that refer to the number of days the defendant spent in jail. (E.g., *People v. Culp* (2002) 100 Cal.App.4th 1278, 1280; *People v. Dailey* (1992) 8 Cal.App.4th 1182, 1183-1184; *People v. DeVore* (1990) 218 Cal.App.3d 1316, 1318; *People v. Martinez* (1980) 106 Cal.App.3d 524, 537; *People v. Helton* (1979) 91 Cal.App.3d 987, 991-992.) Indeed, two of the cases defendant expressly represents as “stat[ing] that pre-sentencing custody credits accrue from the *arrest* date to the sentencing date” do not even discuss calculation of credits in the published portion of the opinion. (See *People v. Shields* (2011) 199

Cal.App.4th 323, 329, 334-335; *People v. Sharret* (2011) 191 Cal.App.4th 859, 862-863, 870-871.)

“‘It is axiomatic that cases are not authority for propositions not considered.’ [Citation.]” (*People v. Avila* (2006) 38 Cal.4th 491, 566.) Moreover, it is an attorney’s duty “[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.” (Bus. & Prof. Code, § 6068, subd. (d); see also Rules Prof. Conduct, rule 5-200(A)-(C).)

In any event, we agree with *Ravaux*. The only reasonable reading of section 2900.5, subdivision (a) is that it is limited to time spent in custody in a jail or similar residential institution.<sup>32</sup> This is consistent with the California Supreme Court’s longstanding pronouncements as to the statute’s purpose. For instance, in *In re Rojas* (1979) 23 Cal.3d 152, 156, the court stated:

“The history of section 2900.5 points to the Legislature’s intent. When this section was first enacted the original wording provided that all the days a defendant spent *in jail* from the date of arrest to the day on which sentence was imposed should be credited upon the defendant’s sentence. The legislative purpose appears to have been to eliminate the unequal treatment suffered by indigent defendants who, because of their inability to post bail, served a longer overall confinement than their wealthier counterparts. [Citations.]

“Recognizing that defendants may be in pretrial custody *in institutions* other than ‘jails’ for reasons other than indigency, the Legislature and the courts have extended subdivision (a) of the statute to include a broad range of custodial situations for which credit must be granted upon conviction. [Citations.]” (Italics added.)

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<sup>32</sup> Thus, the so-called “rule of lenity” does not come into play: The language of the statute does not reasonably permit a different construction. (See *People v. Overstreet* (1986) 42 Cal.3d 891, 896 (lead opn. of Broussard, J.).)

In *People v. Riolo* (1983) 33 Cal.3d 223, 228, the court further observed: “In addition, the statute helps to equalize the actual time *served* in custody for given offenses. [Citation.] Thus, it awards credit not only for pretrial custody which is the result of the inability to post bail, but also for time served as a condition of probation and for pretrial custody which is not the result of indigency [citation]. ‘[S]ection[] 2900.5 ... reflect[s] the basic philosophy that when a person *is incarcerated* he is being punished by the reality of incarceration. Thus, ... any presentence time is credited towards his ultimate sentence.’ [Citation.]” (Italics added.)

As noted in *Ravaux*, granting custody credit beginning at the time of arrest does not further the purposes for which section 2900.5 was adopted. (*Ravaux, supra*, 142 Cal.App.4th at p. 920.) Moreover, it would lead to absurd results. “[A] defendant would be eligible for a day of custody credit on occasions when he was detained by the police and questioned, but released without being booked into jail. In the course of an ongoing criminal investigation a defendant may be contacted and questioned by police several times, each time potentially putting the defendant in custody .... Because defendants are given credit based on the number of days in custody rather than the number of 24-hour periods, a full day would be credited regardless of the actual length of the detention. [Citation.] Further ambiguity would be created by virtue of the court having to review in detail the circumstances surrounding the detention of a defendant, possibly on more than one occasion and for varying reasons, in order to determine at what time or times he was placed into custody and whether that custody was related to the offense for which he was convicted. By contrast, the booking of a suspect into jail represents a bright line for trial courts to begin counting credits.” (*Id.* at p. 921.)

Defendant is not entitled to an additional day of presentence credit.

### **DISPOSITION**

The judgment is modified to stay, pursuant to Penal Code section 654, the sentences on counts 5, 6, and 7. As so modified, the judgment is affirmed.

The trial court is directed to cause to be prepared an amended abstract of judgment reflecting said modification and the absence of a parole revocation restitution fine (Pen. Code, § 1202.45), and corrected sentencing minutes showing that no such fine was imposed, and to forward a certified copy of same to the appropriate authorities.

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DETJEN, J.

WE CONCUR:

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LEVY, Acting P.J.

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POOCHIGIAN, J.