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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIO CESAR HERNANDEZ,

Defendant and Appellant.

G046437

(Super. Ct. No. 09CF3054)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W.  
Michael Hayes, Judge. Affirmed as modified.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, James D. Dutton and  
Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Julio Cesar Hernandez appeals from a judgment after a jury convicted him of attempted premeditated and deliberate murder, aggravated assault, and street terrorism, and found true he used a deadly weapon, inflicted great bodily injury, and committed the offenses for the benefit of a criminal street gang. Hernandez argues the prosecutor committed misconduct, the sentence for street terrorism should be stayed, and he is entitled to conduct credits. We agree with his latter two contentions but not the first. We affirm the judgment as modified.

### FACTS

One September evening, Eduardo Albarran and his friends were standing in a neighborhood school parking lot after having just finished playing soccer. They were associated with the tagging crew Nonstop Bombers (NSB). A grey sports utility vehicle with about five occupants began circling the school. An occupant of the vehicle yelled, “BES,” the initials of a tagging crew known as the Brown Evil Santaneros (BES), a NSB rival. An occupant of the vehicle threw a beer bottle at Albarran and his friends. The vehicle eventually stopped and Hernandez, who was armed with a knife, and his friends confronted their rivals and asked who was from NSB. Hernandez charged towards Albarran and stabbed him in the abdomen. When the police arrived, Albarran’s intestines were protruding from his abdomen and he was drifting in and out of consciousness.

Detective Patricia Navarro interviewed Hernandez. Hernandez admitted he was the “shot caller” for BES. He explained BES conducts missions where it searches for rivals to fight with. He admitted stabbing Albarran and explained the incident in question was retaliation for an earlier incident.

An information charged Hernandez with willful premeditated and deliberate attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))<sup>1</sup> (count 1), aggravated assault (§ 245, subd. (a)(1)) (count 2), and street terrorism (§ 186.22,

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<sup>1</sup> All further statutory references are to the Penal Code.

subd. (a) (count 3). As to counts 1 and 2, the information alleged Hernandez personally used a deadly weapon (§ 12022, subd. (b)(1)), personally inflicted great bodily injury (§ 12022.7, subd. (a)), and committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

At trial, the prosecutor offered the testimony of Detective Roland Andrade, a gang expert. Andrade testified that based on his training and experience, and his review of the case, BES was a criminal street gang, and Hernandez was an active participant in BES at the time of the offenses. Based on hypothetical questions mirroring the facts of this case, Andrade opined the offenses were committed for the benefit of and to promote a criminal street gang.<sup>2</sup>

During closing argument, the prosecutor stated: “We charged that [Hernandez] committed this attempted murder with premeditation and deliberation. Now, premeditation and deliberation is a cold, calculated decision to kill, but the law says *it can be reached very quickly*. The test is the extent of reflection, not the length of time. [¶] I’m going to give you an example, ladies and gentlemen, where we have all done something with premeditation and deliberation and *we’ve done it instantaneous*. [¶] We’ve all been in our cars. We’ve all approached intersections. We have looked up and that light goes from green to yellow. And what do we do? In a matter of maybe two seconds, we take the risks, the benefits, we may have looked to the intersection to see if there’s any car coming, we look at our speed, we may even look in our rearview mirror to see if there’s any police around, and we either accelerate, thinking we can make it, or we start to slow down, knowing, you know what, I better slow down and stop. In those two seconds to three seconds, what have we done? We’ve premeditated and deliberated and

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<sup>2</sup> Because Hernandez does not dispute there was sufficient evidence supporting his conviction for street terrorism and the jury’s finding he committed counts 1 and 2 for the benefit of a criminal street gang, we provide only a brief summary of Andrade’s testimony.

come to a decision of whether to stop or go through that intersection. [¶] Another example for those of you that play baseball, as imagined, after a hit, there's a base runner and he's rounding third. He has to make the decision to run home. What is he going to do? He's going to look back, he's going to look towards home, he's going to look to see if he can make it in those 90 feet. There's a lot of things that are going on in his head instantaneous on whether to stop at third or go into home and slide. *So we know that premeditation and deliberation can happen very quickly.* [¶] Ladies and gentlemen, if you find that this is attempted murder, there is no doubt that this crime was committed with premeditation and deliberation. We have a defendant who arms himself with a large knife. He gets in the car with three other gang members. He drives into rival territory. He circles [the school] like a shark. He looks for victims, stops the car, gets out, and approaches the victim. You can't have more premeditation and deliberation than this crime. So I would ask that you find that this attempted murder was committed with premeditation and deliberation." (Italics added.)

The jury convicted Hernandez on all counts and found true all the enhancements. The trial court selected count 1 as the principal term and sentenced Hernandez to life in prison with the possibility of parole plus a consecutive three-year term on the great bodily injury enhancement and a consecutive one-year term on the personal use of a deadly weapon enhancement. The court imposed and stayed the sentence on count 2 and its related enhancements. The court imposed a concurrent term of two years on count 3. The court awarded him 805 days of actual credit but no days of conduct credit.

## DISCUSSION

### *I. Prosecutorial Misconduct*

Hernandez contends the prosecutor committed misconduct when he misstated the law on premeditation and deliberation. We disagree.

“““““A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citation.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*Id.* at p. 284.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 420 (*Doolin*)). “[W]e may not reverse the judgment if it is not reasonably probable that a result more favorable to the defendant would have been reached in its absence. [Citation.]” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

“[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]’ [Citation.]” (*People v. Hill* (1998) 17 Cal.4th 800, 829-830, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Here, based on our review of the prosecutor’s statements, the prosecutor did not misstate the law. The prosecutor’s statements when read in their entirety concerned the amount of time necessary to form premeditation and deliberation. The prosecutor analogized to the everyday life experience of running a yellow light, or rounding third base and running home, and explained these are split-second decisions. The prosecutor attempted to explain to the jury premeditation and deliberation can be

arrived at quickly. Hernandez recognizes the prosecutor drew the analogy in the context of time. Not only do the prosecutor's statements not misstate the law, they coincide with the trial court's instruction that "[a] cold, calculated decision to kill can be reached quickly." (CALCRIM No. 601; see also *People v. Stitely* (2005) 35 Cal.4th 514, 543.) We are not faced here with the situation where the prosecutor analogized the beyond a reasonable doubt standard to making everyday life decisions and thereby lowered the prosecutor's burden of proof. Thus, the prosecutor did not commit misconduct by analogizing the time required to form the required premeditation and deliberation to driving and sports.

Hernandez's reliance on *People v. Johnson* (2004) 119 Cal.App.4th 976, is misplaced as that case did not concern prosecutorial misconduct. It involved the sufficiency of the evidence and reasonable doubt instruction. (*Id.* at pp. 978, 984-986.)

Hernandez also contends that if defense counsel's failure to object to the alleged prosecutorial misconduct forfeits appellate review of the issue, his counsel was deficient. But we have addressed the merits of his claim. And there was certainly sufficient evidence to support Hernandez's convictions and the allegations such that it was not a reasonable probability that, but for counsel's unprofessional errors, Hernandez would have received a more favorable result. (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 421.) The record includes overwhelming evidence Hernandez committed premeditated and deliberate attempted murder. The evidence established Hernandez armed with a knife searched for a rival gang member to retaliate for an earlier incident. When Hernandez found a NSB gang member he stabbed him so viciously, Albarran's intestines were spilling out from his abdomen. This was evidence of planning, motive, and manner of killing to demonstrate premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 27.) Finally, we note Hernandez does not dispute sufficient evidence supports all his convictions and their accompanying enhancements.

## *II. Section 654*

Relying on *People v. Mesa* (2012) 54 Cal.4th 191, Hernandez argues his sentence on count 3, street terrorism, must be stayed because he cannot be punished for committing street terrorism and the underlying felonies used to establish the felonious criminal conduct element of the substantive offense of street terrorism. The Attorney General agrees that based on *Mesa*, where the California Supreme Court held section 654 precludes separate punishment for both street terrorism and the underlying felony used to prove the “felonious criminal conduct” element of that offense (*id.* at pp. 197-198), his sentence must be stayed.

To the extent Hernandez asserts that pursuant to section 654, he cannot be punished for committing the substantive offense of street terrorism, and street terrorism enhancements attached to *other* counts, his claim is moot as we have ordered the punishment stayed on count 3.

## *III. Conduct Credits*

Hernandez argues he is entitled to actual credits and the trial court erred in failing to award him conduct credits. The Attorney General concedes the errors.

A defendant is entitled to actual custody credit for “all days of custody” in county jail and residential treatment facilities, including partial days. (§ 2900.5, subd. (a); *People v. Smith* (1989) 211 Cal.App.3d 523, 526.) Calculation of custody credit begins on the day of arrest and continues through the day of sentencing. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 735.)

Hernandez was arrested on September 26, 2009, and he remained in custody until he was sentenced on January 27, 2012. That is a total of 854 days, not 805. Hernandez and the Attorney General agree he is entitled to 854 days of actual credit.

Section 2933.1, subdivision (a), states, “Notwithstanding any other law, any person who is convicted of a felony offense listed in subdivision (c) of section 667.5 shall accrue no more than 15 percent of worktime credit, as defined in [s]ection 2933.”

Attempted murder is listed in section 667.5, subdivision (c)(12), and attempted willful, deliberate, and premeditated murder is not a crime for which a defendant is denied worktime credits. (§ 2933.2.) Thus, the trial court should have awarded conduct credits at a rate of 15 percent of his actual credits for a total of 128 days. Both Hernandez and the Attorney General agree he is entitled to 128 days of conduct credit. We modify the judgment to reflect Hernandez is awarded 854 actual days and 128 conduct credits days for a total of 982 days of credit. (*People v. Flores* (2009) 176 Cal.App.4th 1171, 1182 [appellate court calculate conduct credits in interests of judicial efficiency].)

#### DISPOSITION

The matter is remanded to the trial court to stay imposition of the term imposed on count 3 pursuant to section 654. The clerk of the superior court is directed to reflect Hernandez has 854 of actual days plus 128 days of conduct credit for a total of 982 days credit. The clerk of the superior court is directed to prepare new abstracts of judgment reflecting the stay of the sentence as to count 3 and the new award of credits, and to forward the amended abstract of judgment to the Department of Corrections, Division of Adult Operations. We affirm the judgment as modified.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.