

APPENDIX

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 17 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL BURCIAGA,

Petitioner-Appellant,

v.

RAYMOND MADDEN, Warden, Centinela
State Prison,

Respondent-Appellee.

No. 19-55006

D.C. No.

2:17-cv-03830-JVS-PJW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted April 2, 2020**
Pasadena, California

Before: CALLAHAN and LEE, Circuit Judges, and LYNN,*** District Judge.

Michael Burciaga was convicted in Los Angeles County Superior Court of
shooting at an occupied motor vehicle, unlawful possession of a firearm by a felon,

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Barbara M. G. Lynn, Chief United States District
Judge for the Northern District of Texas, sitting by designation.

and the attempted murders of Eddie Campbell and Adrian Torres. The jury found that Burciaga committed the attempted murders with premeditation and deliberation and also committed the attempted murders and the vehicle shooting for the benefit of his gang and with the specific intent to assist criminal conduct by members of the gang, qualifying Burciaga for certain sentencing enhancements. On appeal, the California Court of Appeal found insufficient evidence to maintain the gang enhancement for the attempted murder of Campbell, but otherwise affirmed the verdict.¹

Burciaga filed a petition for writ of habeas corpus with the district court, claiming insufficient evidence of premeditation and deliberation for both attempted murders and of specific intent for the remaining gang enhancements. The district court denied the petition on all grounds, but granted a certificate of appealability as to the sufficiency of the evidence of premeditation and deliberation for the attempted murder of Torres. Burciaga now appeals the district court's denial of habeas relief and seeks certificates of appealability on the remaining issues.²

¹ The California Court of Appeal found that, although gang members were at the scene, there was no evidence that Burciaga acted with them when he attempted to murder Campbell. In contrast, the court found that the evidence of Burciaga's cooperation with a gang member, Robert Valdivia, when Burciaga shot at Torres was sufficient for the remaining gang enhancements.

² Burciaga also filed a Motion to Take Judicial Notice of a photograph of the house at which the shootings took place, admitted at trial as People's Exhibit 4, and an aerial image of the house prepared by Burciaga's counsel. The Motion is granted with respect to People's Exhibit 4, and denied with respect to the aerial image.

A petition for habeas relief challenging the sufficiency of the evidence must establish that, after viewing the evidence in the light most favorable to the prosecution, “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Under the Antiterrorism and Effective Death Penalty Act of 1996, relief is available if the California Court of Appeal’s decision to affirm Burciaga’s conviction was an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1).

There was sufficient evidence to support the jury’s finding that Burciaga acted with premeditation and deliberation when shooting at Torres. Premeditation and deliberation require advanced thought and the “careful weighing of considerations in forming a course of action.” *People v. Cole*, 33 Cal. 4th 1158, 1224 (2004). Evidence demonstrating premeditation and deliberation includes: (1) planning; (2) motive; and (3) manner of the crime. *People v. Anderson*, 70 Cal. 2d 15, 26–27 (1968).

Shortly before Burciaga fired at Torres, Robert Valdivia identified Torres’ presence by yelling, “That’s his nephew. Get him.” This evidences that Burciaga and Valdivia came to an agreement for Burciaga to shoot Torres, though the time of the dialogue was brief. *See People v. Bolin*, 18 Cal. 4th 297, 332 (1998), *as modified on denial of reh’g* (Aug. 12, 1998). Furthermore, both Burciaga and

Torres were members of the Puente Trece gang. Torres may have had a “Puente” tattoo on his forehead at the time, and Burciaga may have seen Campbell—an “original” and presumably well-known member of Puente Trece—hand Torres a gun.

Given the internal strife in the Puente Trece gang at the time, Burciaga and Torres’ common membership in the gang supports the reasonable inference that there was gang-related animosity between them. Potential gang rivalries can support the existence of “a *preplanned*, purposeful resolve to shoot” gang rivals. *See People v. Sanchez*, 26 Cal. 4th 834, 849 (2001) (emphasis present). Even if Burciaga did not know Torres or his gang affiliation, Burciaga may still have considered Torres a gang rival because Torres was associated with Campbell, a well-known gang member with whom Burciaga’s brother had animosity. *See People v. Rand*, 37 Cal. App. 4th 999, 1001–02 (Ct. App. 1995). Given the evidence of planning and motive, a rational trier of fact could have found beyond a reasonable doubt that Burciaga acted with premeditation and deliberation when he fired at Torres, and the California Court of Appeal’s decision affirming the conviction was not an unreasonable application of federal law. *See Davis v. Woodford*, 384 F.3d 628, 640 (9th Cir. 2004).

Burciaga also challenges (1) the sufficiency of the evidence as to whether he shot Campbell with premeditation and deliberation and (2) whether he possessed

the necessary specific intent when he shot at Torres, who was in an occupied vehicle, to apply the gang enhancement. We construe Burciaga's briefing of these uncertified issues as a motion to expand the certificate of appealability. *See* 9th Cir. R. 22-1(e). So construed, we grant the certificates, assuming Burciaga "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must show that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.") (internal quotation marks and alteration omitted).³ However, we deny Burciaga's sufficiency claims on the merits.⁴

Consideration of the *Anderson* factors supports the sufficiency of the evidence of Burciaga's premeditation and deliberation when he shot Campbell. After Campbell announced that he did not have a gun, Burciaga approached him and then shot him during their argument. It was reasonable for the jury to infer

³ In his opening brief, Burciaga also challenges the sufficiency of the evidence of specific intent for the gang enhancement to his firearm possession charge. However, the record indicates that the jury did not find the gang enhancement for the firearm possession charge. Accordingly, Burciaga's request for a certificate of appealability on that issue is denied.

⁴ Under Ninth Circuit Rule 22-1(f), we must allow the respondent an opportunity to brief any previously uncertified issues before we grant relief. Because we deny relief for Burciaga's previously uncertified claims, we find no need to require further briefing on those issues.

that Burciaga approached the unarmed Campbell with a gun and a plan to shoot him, if warranted when they talked. *See People v. Romero*, 44 Cal. 4th 386, 401 (2008). Burciaga also shot Campbell in the stomach at point-blank range, further demonstrating premeditation and deliberation. *See People v. Koontz*, 27 Cal. 4th 1041, 1082 (2002) (firing at a vital area of the body at close range is evidence of premeditation and deliberation.). Viewing the trial record in the light most favorable to the prosecution, a rational juror could have concluded that Burciaga acted with premeditation and deliberation when shooting Campbell. The California Court of Appeal did not unreasonably apply federal law in affirming that conviction.

There was also sufficient evidence that Burciaga shot at Torres with the necessary specific intent to apply the gang enhancement. Cal. Penal Code § 186.22(b) requires proof that Burciaga committed the charged offenses “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.” A jury may infer specific intent to promote, further, or assist if the “evidence establishes that the defendant intended to and did commit the charged felony with known members of a gang.” *People v. Albillar*, 51 Cal. 4th 47, 68 (2010).

Valdivia yelled, “That’s his nephew. Get him,” before Burciaga shot at the

vehicle in which Torres sat. Valdivia was a member of the Perth Street clique of Puente Trece. Given Burciaga's willingness to accept the suggestion from Valdivia to commit a violent act, Burciaga likely knew Valdivia's identity and gang membership. This certainly supports a reasonable inference that Burciaga acted with a known Puente Trece–Perth Street clique member to shoot at an occupied vehicle and attempt to murder Torres. Viewing the evidence in the light most favorable to the prosecution, a rational juror could have concluded that Burciaga acted with the necessary specific intent. Moreover, the California Court of Appeal did not unreasonably apply federal law when it held that there was sufficient evidence of specific intent to apply gang enhancements to Burciaga's attempted murder of Torres and shooting of an occupied vehicle.

On appeal, Burciaga challenges, for the first time, the gang enhancements based on the sufficiency of the evidence as to the existence of the gang that Burciaga allegedly sought to promote, further, or assist. A habeas petitioner must exhaust his state remedies before filing a petition for relief under 28 U.S.C. § 2254. *Manning v. Foster*, 224 F.3d 1129, 1132 (9th Cir. 2000). A procedural default from the failure to do so may be excused if the petitioner “can demonstrate cause for the default and actual prejudice . . . or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The latter is reserved for “an extraordinary case, where

a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Such an innocence claim requires “new reliable evidence . . . that was not presented at trial.” *Cook v. Schriro*, 538 F.3d 1000, 1028 (9th Cir. 2008).

We see no cause to excuse Burciaga’s procedural default. He has not demonstrated a fundamental miscarriage of justice as he does not claim actual innocence or present any new evidence. Therefore, his argument that there was insufficient evidence to establish the existence of a gang, to support the gang enhancement, is not properly before us.

AFFIRMED.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL BURCIAGA,) CASE NO. CV 17-3830-JVS (PJW)
)
Petitioner,)
) J U D G M E N T
v.)
)
WARDEN, CENTINELA STATE PRISON,)
)
Respondent.)
_____)

Pursuant to the Order Accepting Report and Adopting Findings,
Conclusions, and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and this action is
dismissed with prejudice.

DATED: December 4, 2018.



JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL BURCIAGA,)	CASE NO. CV 17-3830-JVS (PJW)
)	
Petitioner,)	ORDER ACCEPTING REPORT AND
)	ADOPTING FINDINGS, CONCLUSIONS,
v.)	AND RECOMMENDATIONS OF UNITED
)	STATES MAGISTRATE JUDGE, AND
WARDEN, CENTINELA STATE PRISON,)	GRANTING CERTIFICATE OF
)	APPEALABILITY IN PART
Respondent.)	
_____)	

Pursuant to 28 U.S.C. Section 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Petitioner and Respondent have objected. The Court accepts the Report and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

Further, for the reasons stated in the Report and Recommendation, the Court finds that, on all his claims but one, Petitioner has not made a substantial showing of the denial of a constitutional right and, therefore, a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The Court grants a certificate of appealability with respect to the issue of whether there was

1 sufficient evidence to establish that Petitioner acted with
2 premeditation and deliberation when he shot at Torres.

3
4 DATED: December 4, 2018.



JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA

10 MICHAEL BURCIAGA,) CASE NO. CV 17-3830-JVS (PJW)
11)
12 Petitioner,)
13 v.) REPORT AND RECOMMENDATION OF
14 WARDEN, CENTINELA STATE PRISON,) UNITED STATES MAGISTRATE JUDGE
15 Respondent.)
_____)

16 This Report and Recommendation is submitted to the Hon. James V.
17 Selna, United States District Judge, pursuant to 28 U.S.C. § 636 and
18 General Order 05-07 of the United States District Court for the
19 Central District of California. For the reasons discussed below, it
20 is recommended that the Petition be denied and the action be dismissed
21 with prejudice.

22 I.

23 SUMMARY OF PROCEEDINGS

24 A. State Court Proceedings

25 In 2014, a jury in Los Angeles County Superior Court found
26 Petitioner guilty of shooting at an occupied motor vehicle, unlawful
27 possession of a firearm by a felon, and two counts of attempted
28 murder. (Clerk's Transcript ("CT") 222-28.) The jury also found that

1 Petitioner discharged a firearm causing great bodily injury and that
2 the offenses were committed for the benefit of a criminal street gang.
3 (CT 223-27.) The trial court determined that Petitioner had served
4 three prior prison terms and sentenced him to 83 years to life in
5 prison. (CT 278, 303-07.)

6 Petitioner appealed to the California Court of Appeal, which
7 reversed the gang enhancement as to one of the attempted murder
8 convictions and remanded the case to the trial court to correct
9 sentencing errors, but otherwise affirmed the judgment. (Lodged
10 Document Nos. 4-7.) Petitioner sought review in the California
11 Supreme Court, which was summarily denied. (Lodged Document Nos. 8-
12 9.) He then filed habeas corpus petitions in the Los Angeles County
13 Superior Court, the California Court of Appeal, and the California
14 Supreme Court, which were denied. (Lodged Document Nos. 12-17.)

15 B. Federal Court Proceedings

16 On May 16, 2017, Petitioner, proceeding pro se, filed a petition
17 for writ of habeas corpus in this court, raising three claims for
18 relief. (Docket No. 1, hereinafter "Petition.") After being granted
19 a stay and abeyance to exhaust additional claims in state court,
20 Petitioner filed an Amended Petition (hereinafter "Amended Petition"),
21 raising the following nine grounds for relief:

- 22 1. There was insufficient evidence to support a finding of
23 premeditation.
- 24 2. There was insufficient evidence to support the gang
25 enhancements.
- 26 3. Petitioner's Sixth Amendment right to counsel was violated
27 when the trial court granted his "ambiguous and equivocal
28 request to represent himself."

1 4. The prosecutor committed misconduct by allowing witnesses to
2 give false testimony, and counsel was ineffective for
3 failing to raise the issue.

4 5. Trial counsel was ineffective for allowing the prosecutor to
5 present false evidence.

6 6. Petitioner's due process rights were violated by the use of
7 an "unduly suggestive identification" procedure, and counsel
8 was ineffective for failing to raise the issue.

9 7. The prosecutor committed misconduct by knowingly using false
10 evidence.

11 8. Trial counsel was ineffective for failing to file a motion
12 to obtain impeachment evidence against the law enforcement
13 officers involved in his case.

14 9. There was insufficient evidence to convince a "reasonable
15 jury of his guilt beyond a reasonable doubt."

16 (Petition at 15-18; Amended Petition at 3, 9-122.¹)

17 II.

18 FACTUAL SUMMARY

19 The following statement of facts was taken verbatim from the
20 California Court of Appeal's opinion affirming Petitioner's
21 conviction:

22 The Puente Trece gang had numerous cliques. The
23 Blackwood clique wanted to separate from the gang to form
24 its own gang, and this caused internal Puente Trece gang turmoil,
25 including several shootings.

27 ¹ The page numbers used herein are those inserted by the court's
28 electronic filing system, not the hand-written page numbers filled in
by Petitioner.

1 On May 19, 2013, [Edward] Campbell, an "original"
2 member of the Puente Trece gang and a member of its Perth
3 Street clique, drove a vehicle in La Puente, and picked up
4 Adrian Torres, another member of that gang and a member of
5 the Ballista clique.² Campbell offered to give Torres a
6 ride home, but told Torres that Campbell first had to go to
7 the house of Matthew Burciaga,³ [Petitioner's] brother, to
8 obtain "some answers" about the death of "Joker," a Puente
9 Trece gang member who had been shot the night before.
10 Torres knew there was "bad blood" between Campbell and
11 Matthew.

12 When Campbell and Torres arrived at Matthew's house,
13 there were three people outside, in front of a garage:
14 [Petitioner], Robert Valdivia,⁴ and Matthew. [Petitioner]
15 and Valdivia were members of the Puente Trece gang. Matthew
16 was in a wheelchair; he had been a member of the Puente
17 Trece gang, Perth Street clique, until he was shot when he
18 was about 17 years old.

19 Before getting out of the vehicle, Campbell handed
20 Torres a gun, which Torres placed in the center console.
21 Campbell then told the men who were in front of the garage,
22 "I'm not armed. I just--I just need to ask some questions."

24 ² At the time of trial, Torres was attempting to "get out" of
25 the gang.

26 ³ Because Matthew Burciaga and [Petitioner] share the same
27 surname, we refer to Matthew Burciaga as Matthew. Matthew is
sometimes referred to in the record as "Porky."

28 ⁴ Valdivia was also charged in the underlying case, but he is
not a party to this appeal.

1 Campbell exited the vehicle and walked toward Matthew,
2 Valdivia, and [Petitioner]. Torres remained in the vehicle.
3 [Petitioner] approached Campbell; Matthew and Valdivia
4 remained near the garage. [Petitioner] and Campbell got
5 "close to" one another and spoke. The conversation led to
6 an argument. Then, Torres heard four or five gunshots, and
7 saw [Petitioner] shoot Campbell. Campbell backed up,
8 holding his stomach. Matthew and Valdivia were still near
9 the garage.

10 Campbell walked toward the vehicle; he was crouched
11 over and holding his stomach. Torres moved from the
12 passenger seat of the vehicle to the driver's seat.
13 Campbell, whose shirt was bloody, entered the passenger seat
14 of the vehicle and asked Torres to take him to a hospital.
15 While the vehicle was still parked, Torres then heard
16 Valdivia yell, "That's his nephew. Get him."⁵ [Petitioner]
17 began shooting "at least one shot" at the vehicle. In
18 response, Torres used the gun Campbell gave him to fire one
19 shot at [Petitioner]; the gun then "jammed." Torres drove
20 off, and while en route to the hospital, Torres put his hand
21 on Campbell's stomach, trying to hold Campbell's "guts in."
22 From photographic lineups, Torres identified [Petitioner] as
23 the person who shot Campbell, and Valdivia as the man who
24 was "behind the shooter."

25 Los Angeles County Sheriff's Department Detective
26 Carlos Gutierrez, the prosecutor's gang expert, testified

28 ⁵ Torres referred to Campbell as his "uncle" even though they
were not actually related.

1 the Puente Trece gang had approximately 768 members, and was
2 divided into 16 different cliques. The gang's primary
3 activities included drug sales and shootings (drive-by
4 shootings, walk-up shootings, murders, and assaults with
5 deadly weapons). In 2012, two Puente Trece gang members
6 were convicted of assault with a firearm.

7 Detective Gutierrez opined the shootings were for the
8 benefit of and in association with Puente Trece, stating:
9 "[T]he way the gang's benefitting from [] this is that, by
10 having shot at this other individual, a member of their own
11 clique, they are promoting or benefitting the gang's
12 reputation of being violent. They are letting everybody
13 know, within their own clique as well as rival cliques that,
14 hey, if we are willing to kill or attempt to kill our own
15 people, we're willing to kill anybody. [¶] In addition to
16 that, with that reputation of being violent comes a cloud of
17 fear. People within the neighborhood are going to be
18 fearful to report this to police, because if they are
19 willing to kill their own gang members, they're willing to
20 kill other people."

21 (Lodged Document No. 7 at 3-5.)

22 III.

23 STANDARD OF REVIEW

24 The standard of review in this case is set forth in 28 U.S.C.
25 § 2254:

26 An application for a writ of habeas corpus on behalf of a
27 person in custody pursuant to the judgment of a State court
28 shall not be granted with respect to any claim that was

1 adjudicated on the merits in State court proceedings unless
2 the adjudication of the claim--

3 (1) resulted in a decision that was contrary to, or
4 involved an unreasonable application of, clearly established
5 Federal law, as determined by the Supreme Court of the
6 United States; or

7 (2) resulted in a decision that was based on an
8 unreasonable determination of the facts in light of the
9 evidence presented in the State court proceeding.

10 28 U.S.C. § 2254(d).

11 A state court decision is "contrary to" clearly established
12 federal law if it applies a rule that contradicts Supreme Court case
13 law or if it reaches a conclusion different from the Supreme Court's
14 in a case that involves facts that are materially indistinguishable.
15 *Bell v. Cone*, 535 U.S. 685, 694 (2002). To establish that the state
16 court unreasonably applied federal law, a petitioner must show that
17 the state court's application of Supreme Court precedent to the facts
18 of his case was not only incorrect but objectively unreasonable.
19 *Renico v. Lett*, 559 U.S. 766, 773 (2010). Where no decision of the
20 Supreme Court has squarely decided an issue, a state court's
21 adjudication of that issue cannot result in a decision that is
22 contrary to, or involves an unreasonable application of, clearly
23 established Supreme Court precedent. *See Harrington v. Richter*, 562
24 U.S. 86, 101 (2011).

25 Petitioner raised the claims in Grounds One, Two, and Three in
26 his direct appeal in the appellate court and in his petition for
27 review in the California Supreme Court. (Lodged Document Nos. 6, 8.)
28 The supreme court did not explain why it was denying the claims; the

1 appellate court did. (Lodged Document Nos. 7, 9.) This Court
2 presumes that the supreme court denied these claims for the same
3 reasons the appellate court did. *Wilson v. Sellers*, 138 S. Ct. 1188,
4 1194 (2018). As such, the Court looks to the appellate court's
5 reasoning and will not disturb it unless it concludes that "fairminded
6 jurists" would all agree that the decision was wrong. *Richter*, 562
7 U.S. at 102; *Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013)
8 (approving reviewing court's "look through" of state supreme court's
9 silent denial to last reasoned state-court decision).

10 Petitioner first raised his remaining claims in his state habeas
11 petition in the California Supreme Court, which did not explain its
12 reasons for denying them. (Lodged Document Nos. 9-10.) In this
13 situation, the Court will review the entire record to determine
14 whether there was *any* reasonable basis for denying relief. *Richter*,
15 562 U.S. at 98; *see also Hein v. Sullivan*, 601 F.3d 897, 905 (9th Cir.
16 2010).

17 IV.

18 DISCUSSION

19 A. Insufficient Evidence

20 In Grounds One and Two, Petitioner claims that there was
21 insufficient evidence to prove that he acted with premeditation when
22 he shot Campbell and tried to shoot Torres. (Petition at 14.) He
23 also contends that there was not enough evidence to prove that he had
24 the specific intent to benefit his gang when he did. (Petition at
25 14.) In Ground Nine, he contends that the evidence was insufficient
26 to "link him to the crime." (Amended Petition at 114-15.) For the
27 reasons explained below, these claims are denied.
28

1 As the United States Supreme Court made clear in *Jackson v.*
2 *Virginia*, 443 U.S. 307, 324 (1979), federal habeas corpus relief is
3 not available for a claim of insufficient evidence unless a petitioner
4 can show that, considering the trial record in a light most favorable
5 to the prosecution, "no rational trier of fact could have found proof
6 of guilt beyond a reasonable doubt." In evaluating such claims, the
7 Court presumes that the jury resolved any conflicting inferences in
8 favor of the prosecution. *Wright v. West*, 505 U.S. 277, 296-97
9 (1992). The Court reviews the state court's decision "with an
10 additional layer of deference," granting relief only when the state
11 court's judgment was contrary to or an unreasonable application of
12 *Jackson*. *Juan H. v. Allen*, 408 F.3d 1262, 1274-75 (9th Cir. 2005).

13 In evaluating an insufficiency claim, the Court looks to state
14 law to determine what evidence is necessary to convict. *Jackson*, 443
15 U.S. at 324. Under California law, premeditation and deliberation can
16 be established by: (1) planning activity; (2) motive; and (3) the
17 manner of killing. *People v. Anderson*, 70 Cal.2d 15, 26-27 (1968).

18 The gist of Petitioner's argument is that his encounter with
19 Campbell was unexpected and brief and that the shooting bore the
20 trademark of an impulsive act of rage following an argument, not
21 deliberation. He argues that there was just not enough time for him
22 to reflect on what he was doing before the shooting to rise to the
23 level to premeditation and deliberation.

24 This argument was rejected by the state appellate court, which
25 found premeditation based on planning, motive, and manner:

26 Relevant to planning, [Petitioner], while in possession
27 of a gun, approached Campbell, an original member of the
28 Puente Trece gang. After an argument ensued between the two

1 of them, [Petitioner] shot at Campbell. This supports an
2 inference that [Petitioner] planned to attack Campbell if
3 their "exchange" did not progress in a manner [Petitioner]
4 considered satisfactory.

5 There was evidence [Petitioner] had a motive--here, a
6 gang related motive--for attempting to kill Campbell and
7 Torres. There was a dispute within the Puente Trece gang
8 over the effort of the Blackwood clique to separate from the
9 Puente Trece gang. This caused violent shootings. The jury
10 could reasonably infer this dispute within the gang resulted
11 in the death of one of its gang members the day before the
12 incident, and it appears Campbell believed Matthew had some
13 "answers" as to how that happened. As Detective Gutierrez
14 opined, the shootings benefitted the gang by promoting the
15 gang's reputation for violence and discouraging people in
16 the neighborhood from reporting crimes, particularly since
17 the message here is the gang members are willing to kill
18 their fellow gang members.

19 Regarding the manner of the shootings . . . Campbell
20 visibly disarmed himself, and he said aloud to [Petitioner],
21 "I'm not armed. I just--I just need to ask some questions."
22 [Petitioner] therefore knew Campbell was not a threat.

23 Campbell was standing very close to [Petitioner] when
24 the two began to argue. [Petitioner] fired four or five
25 shots at Campbell at point blank range. The shots
26 perforated Campbell's stomach, resulting in his "guts"
27 falling out. The jury could reasonably infer [Petitioner's]
28

1 manner of shooting Campbell demonstrated a deliberate plan to
2 kill him.

3 . . .

4 This evidence of planning, motive, and manner of attempting
5 to kill supports an inference the attempted murders were the
6 result of reflection.

7 (Lodged Document No. 7 at 6-8 (internal footnotes and citations
8 omitted).)

9 To prevail on his insufficiency claim, Petitioner would have to
10 convince the Court that no rational trier of fact could have concluded
11 based on this evidence that he acted with premeditation and
12 deliberation when he shot Campbell and that the appellate court's
13 finding upholding the verdict was contrary to or an unreasonable
14 application of *Jackson*. *Jackson*, 443 U.S. at 324; *Juan H.*, 408 F.3d
15 at 1274-75. Petitioner has not come remotely close to doing so. A
16 rational jury could have concluded that, at some point during
17 Petitioner's encounter with Campbell, Petitioner formulated the intent
18 to shoot and kill Campbell. And, to the extent that Petitioner is
19 arguing that, as a matter of California law, the circumstances of the
20 shooting could not support a finding of premeditation, the state
21 appellate court made clear that that argument is without merit. That
22 finding is binding on this Court. See *Bradshaw v. Richey*, 546 U.S.
23 74, 76 (2005).

24 As to the jury's finding that Petitioner acted with premeditation
25 and deliberation when he shot at Torres, this is a much closer call.
26 The record is murky, at best, when it comes to Petitioner's thought
27 process with regard to shooting Torres. It is not clear when
28 Petitioner first realized that Torres was in the truck that Campbell

1 drove to the scene. Certainly, it was not later than when Valdivia
2 told Petitioner, "That's his nephew, get him." It is also not clear
3 why Petitioner shot at Torres. Based on the record, it could be for
4 any number of reasons, including because Torres was a witness to
5 Campbell's shooting, because Torres was related to Campbell, because
6 Torres was a gang member, or because Valdivia told Petitioner to shoot
7 him. The record does not definitively establish the motive.

8 There is no question about when Petitioner shot at Torres. It
9 was immediately after Valdivia told him to do so, not leaving much
10 time, it seems, for premeditation or deliberation, assuming it was
11 Valdivia's coaxing that caused Petitioner to shoot at Torres.

12 The state appellate court upheld the jury's finding that
13 Petitioner acted with premeditation on the ground that Petitioner had
14 a motive to shoot Torres because Torres was a gang member and because,
15 when it comes to gang shootings, premeditation can be established even
16 though the period between the sighting and the shooting is very brief.
17 (Lodged Document No. 7 at 6-8.) The problem with this analysis is
18 that it is not clear from the evidence that Petitioner knew that
19 Torres was a gang member when he shot at him. Though it was clear at
20 trial that Torres was a gang member, it was not clear whether
21 Petitioner knew that on the day of the shooting. Torres testified
22 that he did not know Petitioner and had never seen him before the day
23 of the shooting. (Reporter's Transcript ("RT") 1066-67.) Torres was
24 18 or 19 when Petitioner shot at him and Petitioner was in his 30s.
25 The gang expert testified that there were 768 members of the Puente
26 gang at the time and that not all of them knew each other. (RT 1249.)
27 And, though Torres had the word "Puente" tattooed on his forehead when
28

1 he testified at trial, he was not sure whether he had gotten the
2 tattoo before or after Petitioner shot at him. (RT 1074.)

3 Nevertheless, reviewing this record in a light most favorable to
4 the prosecution and with deference to the state court's findings, the
5 Court concludes that Petitioner is not entitled to relief on this
6 claim. In reaching this conclusion, the Court concludes that the jury
7 could have found that Torres had the Puente tattoo on his face at the
8 time of the shooting and that, when Campbell made a display of handing
9 the gun to Torres so that Petitioner would know that Campbell was not
10 armed when he approached, Petitioner discovered that Torres was a
11 Puente gang member and was in the truck. Under this scenario, it was
12 reasonable for the jury to conclude that Petitioner acted with
13 premeditation and deliberation when he shot at Torres after shooting
14 Campbell.

15 The jury found that Petitioner's attempt to murder Torres was
16 committed in association with other gang members. Petitioner argues
17 that there was not enough evidence to support this finding because
18 there was no proof that his attempt to kill Torres was to benefit the
19 gang. The prosecution was not required to prove that Petitioner had
20 the specific intent to benefit the gang, rather, it only had to prove
21 that Petitioner intended to commit the offenses in association with
22 other gang members. See *People v. Morales*, 112 Cal. App.4th 1176,
23 1198 (2003) (holding "specific intent to *benefit* the gang is not
24 required," but rather "specific intent to promote, further, or assist
25 in any criminal conduct by gang members" (internal quotation marks
26 omitted)). There was more than enough evidence that Petitioner shot

1 at Torres in association with Valdivia. For these reasons,
2 Petitioner's claim in Ground Two is also denied.⁶

3 As for Petitioner's claim in Ground Nine that there was not
4 enough evidence to "link him to the crime," this argument is rejected
5 also. Torres identified Petitioner as the shooter after the shooting
6 and testified at trial that Petitioner shot Campbell and then shot at
7 him. (RT 985, 1007-08, 1219-20.) That was more than enough evidence
8 to support the convictions. See *United States v. Larios*, 640 F.2d
9 938, 940 (9th Cir. 1981). But there was more. Torres's testimony was
10 corroborated in part by the fact that Petitioner's fingerprint was
11 found on a beer can that he left behind and in part by Petitioner's
12 father's statement to police that Petitioner was outside the house
13 when the shooting occurred. (RT 928, 938-50, 1213-16.) Petitioner's
14 argument that there was not enough evidence to convict him is without
15 merit.

16 B. Violation of Right to Counsel

17 In Ground Three, Petitioner claims that his Sixth Amendment right
18 to counsel was violated when the trial court granted his "ambiguous
19 and equivocal request to represent himself" at sentencing. (Petition,
20 Docket No. 1 at 15.) He argues that his post-conviction letter to the
21 court requesting "new counsel" made his subsequent oral request to
22 represent himself "ambiguous" and, thereby, rendered the waiver of his
23 right to counsel invalid. (Traverse at 17-18.) This claim is
24 rejected.

25
26
27 ⁶ To the extent that Petitioner is challenging the gang
28 enhancement for the attempted murder of Campbell, that claim is moot
because the appellate court reversed that finding. (Lodged Document
No. 7 at 9, 17.)

1 Under the Sixth Amendment, a criminal defendant has a right to
2 represent himself, *Faretta v. California*, 422 U.S. 806, 819 (1975);
3 see also *Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000)
4 (noting right extends to sentencing, too), provided he makes an
5 unequivocal request to do so. See *Stenson v. Lambert*, 504 F.3d 873,
6 882 (9th Cir. 2007).

7 Approximately two months after he was convicted at trial,
8 Petitioner sent a letter to the court, complaining about his trial and
9 blaming his attorney for not proving his innocence. (Lodged Document
10 No. 3, Attachment B.) He asked for a retrial with a new court
11 appointed lawyer. (Lodged Document No. 3, Attachment B.) The court
12 did not read the letter when it was received.

13 On the date set for sentencing, Petitioner's attorney told the
14 court that Petitioner wanted the court to read the letter and that
15 Petitioner was requesting "pro per status" from "this point on." (RT
16 1802.) Petitioner confirmed that that was correct. (RT 1802.) The
17 court indicated that it had not read the letter because it was "an
18 improper . . . ex parte communication" with the court. (RT 1802-03.)
19 Before reading the letter, the court asked Petitioner if he was
20 "absolutely certain" that he wished to represent himself at sentencing
21 and at a trial on his prior convictions. (RT 1803.) Petitioner
22 confirmed that he was. (RT 1803.) The trial court then informed
23 Petitioner that to do so he would be giving up his constitutional
24 right to counsel and that he would not receive the "court's help" or
25 "attorney help" at any subsequent hearings or at sentencing. (RT
26 1803-04.) Petitioner again affirmed that that was what he wanted to
27 do. (RT 1804.)
28

1 Thereafter, Petitioner completed and signed a waiver form, giving
2 up his right to counsel and electing to proceed on his own. (CT 249-
3 52.) He later acknowledged that he had initialed and signed the
4 waiver form and that he was "giving up" his right to an attorney "in
5 order to represent [him]self as [his] own lawyer." (RT 1805.) The
6 court again questioned Petitioner regarding the rights he was waiving
7 and, when it was satisfied that Petitioner knew what he was doing,
8 granted his request to represent himself. (RT 1805-06.)

9 The court then proceeded to hold a court trial on Petitioner's
10 prior convictions with Petitioner representing himself. (RT 1810-21.)
11 After the evidence was presented, the court found true the allegations
12 that Petitioner had suffered three prior felony convictions. (RT
13 1820; CT 278.)

14 Only then did the court read Petitioner's earlier letter to the
15 court. (RT 1822.) After summarizing the contents of the letter on
16 the record, the court said it was concerned that Petitioner requested
17 that he be appointed an attorney after having just been relieved of
18 representation. (RT 1822-23.) The court informed Petitioner that he
19 could not get a new court-appointed attorney after asking to have the
20 last court-appointed attorney removed. (RT 1823.) Petitioner told
21 the court that he understood that he was now proceeding pro se and
22 wanted time to file a motion for a new trial. (RT 1823-25.) The
23 court then appointed Petitioner standby counsel "in the event the need
24 arises." (RT 1826-27.) Thereafter, Petitioner representing himself,
25 filed motions and proceeded to sentencing without ever requesting the
26 assistance of counsel. (RT 2101-04, 2401-23.)

27 On appeal, Petitioner claimed that the trial court erred in
28 allowing him to represent himself. In denying the claim, the

1 California Court of Appeal concluded that the trial court had not
2 erred because Petitioner's request to represent himself was not
3 unequivocal:

4 [Petitioner's] request for self-representation was
5 unequivocal. At the January 8, 2015, hearing, [Petitioner]
6 was present and, after he and his counsel conferred off the
7 record, [Petitioner], through his counsel, requested to
8 represent himself. The trial court confirmed the request
9 directly with [Petitioner]. Thereafter, the trial court
10 inquired of [Petitioner] whether he was "absolutely
11 certain["] that he wanted to represent himself, and
12 [Petitioner] said, "Yes. I wish to do that at this time,
13 Your Honor."

14 The trial court, in making "certain" [Petitioner]
15 understood what he was "getting [himself] into," explained
16 the "pitfalls" of representing himself because he would not
17 have "assistance by anyone"; he was "on [his] own" and would
18 not have the assistance of an attorney. "With that
19 additional information," the trial court asked [Petitioner]
20 whether it was still his "desire to go forward and represent
21 yourself[?]" [Petitioner] replied, "Yes, Your Honor."

22 The trial court stated, in [Petitioner's] presence, it
23 recessed the matter "to allow [Petitioner] to complete a
24 *Faretta* waiver advisement, waiver of right to counsel in
25 order for the court to entertain his motion for pro per
26 status and to represent himself from this point on"
27 [Petitioner] initialed and signed the waiver of rights
28

1 form.⁷ He confirmed he reviewed the document, "understood
2 the rights that [were] mentioned on [the] document," and was
3 "waiving and giving up those rights in order to represent
4 [himself] as [his] own lawyer."

5 The trial court reiterated for [Petitioner] that "[t]he
6 consequences" of his waiving his rights specified in the
7 document was he would "receive absolutely no attorney
8 assistance in this matter pertaining to the rules of law,
9 rules of procedure that you'll be required to know and
10 follow in order to represent yourself from this point on."
11 In response to the trial court's inquiry, [Petitioner] again
12 said that he "underst[ood] that." [Petitioner] also
13 confirmed, "Having all those consequences in mind, it [was]
14 still [his] desire to waive [his] constitutional right to have
15 counsel represent [him] free of charge."

16 Once the trial court read [Petitioner's] letter, the
17 trial court noted the letter contained a request for
18 state-appointed counsel and asked [Petitioner] if, despite
19 the letter, he understood he was now on his own.

20 [Petitioner] said he understood he was on his own, made no
21 objection to proceeding on his own, and made no request for
22

23 ⁷ The waiver of rights form is included in the record on appeal
24 and we have reviewed it. It is three pages long and divided into five
25 somewhat self-explanatory sections--constitutional rights, personal
26 information, dangers and disadvantages of self-representation, charges
27 and consequences, and court's advice and recommendation. The form
28 lists 28 advisements and instructs [Petitioner] to initial the box
after each advisement only if he "understand[s] and agree[s] with it."
At the end of the form, above his signature, is the following: "I
hereby certify that I have read, understood and considered all of the
above warnings included in this petition and I still want to act as my
own attorney. I freely and voluntarily give up my right to have a
professional attorney represent me."

1 substitute counsel. The trial court appointed "standby
2 counsel" in the event [Petitioner] changed his mind and
3 choose to exercise his right to have counsel, but there is
4 no indication in the record [Petitioner] ever changed his
5 mind and requested the appointment of counsel. [Petitioner]
6 continued to represent himself in two subsequent hearings,
7 and the record does not show, at any time after the trial
8 court granted [Petitioner's] request to represent himself,
9 he requested the appointment of counsel.

10 The only request regarding representation [Petitioner]
11 made in open court was for self-representation. Even after
12 the trial court read [Petitioner's] letter, which it had
13 received about one month before, [Petitioner] said he
14 understood he was "on [his] own[", and did not request the
15 appointment of new counsel. Indeed, because the trial court
16 appointed "standby counsel" in the event [Petitioner]
17 changed his mind and choose to exercise his right to have
18 counsel, the trial court was prepared to appoint standby
19 counsel as [Petitioner's] counsel. That never occurred;
20 [Petitioner] never changed his mind.

21 (Lodged Document No. 7 at 14-15.)

22 The Court agrees with the appellate court that Petitioner's
23 request to represent himself was unequivocal. To the extent that he
24 now claims that his letter seeking new counsel called into question
25 the firmness of his position, any ambiguity was resolved by the trial
26
27
28

1 court when it questioned Petitioner about the letter and Petitioner
2 persisted in representing himself.⁸

3 C. Unduly Suggestive Identification Procedures

4 In Ground Six, Petitioner contends that his due process rights
5 were violated by the use of an unduly suggestive identification
6 procedure. (Petition, Docket No. 16 at 91.) This claim is denied.

7 The United States Supreme Court has held that evidence derived
8 from a pre-trial identification procedure may be inadmissible on due
9 process grounds if the challenged procedure was so "impermissibly
10 suggestive as to give rise to a very substantial likelihood of
11 irreparable misidentification." *Simmons v. United States*, 390 U.S.
12 377, 384 (1968). This can occur if an individual's photograph in a
13 photographic lineup "is in some way emphasized." *Id.* at 383.

14 Petitioner believes that the detectives circled his photograph in
15 the photographic lineup before showing it to Torres and then
16 instructed him to circle Petitioner's photo. (Petition, Docket No. 16
17 at 91.) Petitioner, however, offers no evidence to support this
18 claim. He points only to the fact that his photograph was circled
19 multiple times. (Petition, Docket No. 16 at 99.) This claim is
20 completely speculative and, as such, cannot support a claim for habeas
21 relief. See *James v. Borg*, 24 F.3d 20, 26 (9th Cir. 1994); see also
22 *Yu v. Cate*, 2010 WL 517904, at *9 (C.D. Cal. Feb. 9, 2010) (rejecting
23 claim that photographic lineup was unduly suggestive where there was
24 "no evidence in the record that, in presenting the photographic lineup

25
26 ⁸ The letter Petitioner submitted to the trial court was lost
27 prior to his state court appeal. (See Lodged Document No. 3.) It was
28 recreated on appeal by the Petitioner, his attorney, and the trial
court "to the satisfaction of all parties." (Lodged Document No. 3.)
The reproduced letter served as the basis of this claim in state
court.

1 to [the witness], the police said or did anything to call [the
2 witness's] attention to petitioner's photograph"). Accordingly,
3 Petitioner's conclusory claim in Ground Six fails to merit relief.⁹

4 D. Prosecutorial Misconduct for the Presentation of False Evidence

5 In Grounds Four and Seven, Petitioner claims that the prosecutor
6 committed misconduct by knowingly presenting false evidence.

7 (Petition, Docket No. 16 at 9-67 and 100-07.) There is no merit to
8 these claims.

9 A conviction obtained by the knowing use of false evidence or
10 perjured testimony is fundamentally unfair and violates a defendant's
11 constitutional rights. *United States v. Agurs*, 427 U.S. 97, 103
12 (1976); see also *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) ("A
13 lie is a lie, no matter what its subject, and, if it is in any way
14 relevant to the case, the district attorney has the responsibility and
15 duty to correct what he knows to be false and elicit the truth."
16 (internal quotation marks omitted)). To merit habeas relief, a
17 petitioner must show that the testimony was actually false, that the
18 prosecutor knew or should have known that it was false, and that the
19 falsehood was material to the case. *Jackson v. Brown*, 513 F.3d 1057,
20 1071-72 (9th Cir. 2008). A *Napue* violation is material if there is
21 any reasonable likelihood that the false testimony could have affected
22 the jury's decision. *Libberton v. Ryan*, 583 F.3d 1147, 1164 (9th Cir.
23 2009).

24 Petitioner contends that Torres gave a "false and misleading
25 version of events" at trial, as evidenced by the many inconsistencies
26 _____

27 ⁹ Petitioner faults counsel for failing to "discover and move to
28 exclude the identification prior to trial." (Petition, Docket No. 16
at 91.) This claim--and all of Petitioner's claims of ineffective
assistance of counsel--are addressed in Section IV(E) below.

1 between his testimony at the preliminary hearing and at trial.
2 (Petition, Docket No. 16 at 9.) He notes, for example, that Torres
3 testified that there were four people at the scene at the preliminary
4 hearing, but stated there were only two at trial. (Petition, Docket
5 No. 16 at 11-12.) Torres also admitted at trial that he circled
6 Petitioner's photograph in the photo lineup after denying that he did
7 so in the preliminary hearing. (Petition, Docket No. 16 at 38.)
8 Petitioner also cites other instances when Torres was unable to
9 remember events at trial that he testified to at the preliminary
10 hearing. (See, e.g., Petition, Docket No. 16 at 13.) He also
11 complains that there were other times at trial where Torres's
12 testimony was more detailed than his testimony at the preliminary
13 hearing. (See, e.g., Petition, Docket No. 16 at 22, 30, 34.)

14 Inconsistent statements by a witness, however, do not establish
15 that a witness's testimony was false. See *United States v. Croft*, 124
16 F.3d 1109, 1119 (9th Cir. 1997) ("The fact that a witness may have
17 made an earlier inconsistent statement, or that other witnesses have
18 conflicting recollections of events, does not establish that the
19 testimony offered at trial was false."). Moreover, even assuming for
20 purposes of argument that Torres was being untruthful, Petitioner has
21 not presented evidence that the prosecutor knew this. See *Murtishaw*
22 *v. Woodford*, 255 F.3d 926, 959 (9th Cir. 2001) (rejecting
23 prosecutorial misconduct claim because, even assuming testimony was
24 false, petitioner presented no evidence the prosecution knew it was
25 false); see also *See United States v. Zuno-Arce*, 44 F.3d 1420, 1423
26 (9th Cir. 1995) (noting "[l]awyers in criminal cases, for prosecution
27 and defense, sometimes swim in a sea of lies, and must necessarily
28

1 trust the jury to determine what is true, or whether reasonable doubt
2 remains about what is true").

3 Petitioner further contends that the prosecutor introduced a
4 bullet casing that must have been planted by police at the scene
5 because it looked very old. He also complains that the beer can found
6 at the scene with his fingerprints on it must have been tampered with.
7 (Petition, Docket No. 16 at 100-02.) These conclusory claims,
8 however, are unsupported by any evidence. As such, they do not merit
9 habeas relief. See *Jones v. Gomez*, 66 F.3d 199, 204-05 (9th Cir.
10 1995) (holding conclusory allegations do not warrant habeas relief);
11 see also *Wood v. Bartholomew*, 516 U.S. 1, 8 (1995) (*per curiam*)
12 (noting courts cannot grant habeas corpus relief "on the basis of
13 little more than speculation").

14 E. Ineffective Assistance of Counsel

15 In Grounds Five and Eight, Petitioner claims that trial counsel
16 was ineffective for allowing the prosecutor to present false evidence
17 and for failing to file a *Pitchess* motion to obtain impeachment
18 evidence against the law enforcement officers involved in his case.¹⁰
19 (Petition, Docket No. 16 at 68-90 and 108-13.) These claims are
20 without merit.

21 The Sixth Amendment right to counsel guarantees not only
22 assistance, but effective assistance, of counsel. See *Strickland v.*
23 *Washington*, 466 U.S. 668 (1984). In order to prevail on a claim of
24 ineffective assistance of counsel, Petitioner must establish that
25

26 ¹⁰ *Pitchess v. Superior Court*, 11 Cal.3d 531, 537-39 (1974),
27 requires the government to disclose evidence of police misconduct,
28 including prior allegations of excessive force and dishonesty, upon a
sufficient showing that the discovery of the information is needed for
a fair trial.

1 counsel's performance fell below an "objective standard of
2 reasonableness" under prevailing professional norms and that there is
3 a reasonable probability that, but for counsel's performance, he would
4 not have been convicted. *Id.* at 687-88, 694. A claim of ineffective
5 assistance must be rejected upon finding either that counsel's
6 performance was reasonable or that the alleged error was not
7 prejudicial. *Id.* at 697.

8 Petitioner asserts that counsel allowed the prosecutor to present
9 false evidence against him--namely, a beer can with Petitioner's
10 fingerprint on it and a bullet casing that had been tampered with by
11 police. As discussed previously, however, Petitioner's claim that the
12 police tampered with the evidence is wholly speculative and without
13 evidentiary support. Absent any suggestion that the police had
14 tampered with the evidence, trial counsel had no basis for objecting.
15 As such, his failure to do so was not ineffective. *See Juan H.*, 408
16 F.3d at 1273 ("[T]rial counsel cannot have been ineffective for
17 failing to raise a meritless objection."); *Rupe v. Wood*, 93 F.3d 1434,
18 1445 (9th Cir. 1996) (holding counsel's "failure to take a futile
19 action can never be deficient performance").

20 As for Petitioner's claim that trial counsel was ineffective for
21 failing to file a *Pitchess* motion and obtain the officers' files,
22 Petitioner has not identified any useful evidence that was in the
23 personnel files. Mere speculation that there might have been is not
24 enough. *See Osumi v. Giurbino*, 445 F. Supp.2d 1152, 1163 (C.D. Cal.
25 2006).

26 Petitioner contends that trial counsel was ineffective for
27 failing to challenge the photographic lineup shown to Torres and to
28 move to exclude Torres's identification of him based on the photos.

1 (Petition, Docket No. 16 at 91, 96-97.) Again, the Court has already
2 determined that Petitioner failed to demonstrate any valid reason to
3 do so. Counsel's failure to make a meritless motion cannot support
4 Petitioner's claim here. *James*, 24 F.3d at 27. Petitioner's claim
5 that appellate counsel was ineffective for not raising the same issue
6 on appeal fails for the same reason. *See Wildman v. Johnson*, 261 F.3d
7 832, 840 (9th Cir. 2001) ("[A]ppellate counsel's failure to raise
8 issues on direct appeal does not constitute ineffective assistance
9 when appeal would not have provided grounds for reversal.").

10 Finally, Petitioner's unsupported and unpersuasive claims that
11 counsel was ineffective because he failed to: (1) subpoena Campbell to
12 testify at trial; (2) conduct an adequate pre-trial investigation; and
13 (3) adequately cross-examine a "key witness," (Petition, Docket No. 16
14 at 64, 112), are also denied. *Jones*, 66 F.3d at 205.

15 V.

16 RECOMMENDATION

17 For these reasons, IT IS RECOMMENDED that the Court issue an
18 Order (1) accepting this Report and Recommendation and (2) directing
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1 that Judgment be entered denying the Petition and dismissing the case
2 with prejudice.¹¹

3 DATED: October 12, 2018.



4
5 PATRICK J. WALSH
6 UNITED STATES MAGISTRATE JUDGE
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23
24

25 ¹¹ The Court is inclined to issue a certificate of appealability
26 on the issue of whether there was sufficient evidence to establish
27 that Petitioner acted with premeditation and deliberation when he shot
28 at Torres. See Rule 11, Federal Rules Governing Section 2254 Cases
("The district court must issue or deny a certificate of appealability
when it enters a final order adverse to the applicant."). The parties
should set forth in their objections whether they believe a certifi-
cate should issue for this claim or any others.

Court of Appeal, Second Appellate District, Division Five - No. B263517

S234483

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

MICHAEL BURCIAGA, Defendant and Appellant.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

SUPREME COURT
FILED

JUN 15 2016

Frank A. McGuire Clerk

Deputy

CANTIL-SAKAUYE

Chief Justice

Filed: 4/7/16

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COURT OF APPEAL – SECOND DIST.

FILED

Apr 07, 2016

JOSEPH A. LANE, Clerk

dlee

Deputy Clerk

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL BURCIAGA,

Defendant and Appellant.

B263517

(Los Angeles County
Super. Ct. No. KA105904)

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Mike Camacho, Jr., Judge. Affirmed in part, reversed in part, modified, and remanded.

Christopher Nalls, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, David A. Wildman, Deputy Attorney General, for Plaintiff and Respondent.

Following a jury trial, defendant and appellant Michael Burciaga was convicted of two counts of premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a);¹ counts 1 & 2), shooting at an occupied vehicle (§ 246; count 3), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 4). The jury also found defendant intentionally discharged a firearm in the commission of the offenses charged in counts 1 through 3, and that those offenses were committed for the benefit of a criminal street gang in violation of section 186.22, subdivision (b). It was further determined that defendant had three prior convictions within the meaning of section 667.5, subdivision (b). Defendant was sentenced to consecutive 40-year-to-life terms on counts 1 and 2, plus one year for each prior conviction. The trial court stayed imposition of sentence on counts 3 and 4 pursuant to section 654.

Defendant contends there was insufficient evidence (a) the attempted murders were premeditated, and (b) he had the required intent, i.e., to benefit criminal conduct by gang members, necessary for the gang enhancement. He also maintains the trial court should have denied his request to represent himself because it was “ambiguous and equivocal;” and the court separately erred by shorting him two days of presentence custody credit.

We reverse the portion of the judgment concerning the gang enhancement on the conviction for attempted murder of Edward Campbell (count 1). We also accept the Attorney General’s concession that defendant is entitled to two additional days of presentence custody credit and remand the case for the court to modify the judgment to reflect those additional days. In all other respects, the judgment is affirmed.

¹ All statutory references are to the Penal Code.

FACTS

The Puente Trece gang had numerous cliques. The Blackwood clique wanted to separate from the gang to form its own gang, and this caused internal Puente Trece gang turmoil, including several shootings.

On May 19, 2013, Campbell, an “original” member of the Puente Trece gang and a member of its Perth Street clique, drove a vehicle in La Puente, and picked up Adrian Torres, another member of that gang and a member of the Ballista clique.² Campbell offered to give Torres a ride home, but told Torres that Campbell first had to go to the house of Matthew Burciaga,³ defendant’s brother, to obtain “some answers” about the death of “Joker,” a Puente Trece gang member who had been shot the night before. Torres knew there was “bad blood” between Campbell and Matthew.

When Campbell and Torres arrived at Matthew’s house, there were three people outside, in front of a garage: defendant, Robert Valdivia,⁴ and Matthew. Defendant and Valdivia were members of the Puente Trece gang. Matthew was in a wheelchair; he had been a member of the Puente Trece gang, Perth Street clique, until he was shot when he was about 17 years old.

Before getting out of the vehicle, Campbell handed Torres a gun, which Torres placed in the center console. Campbell then told the men who were in front of the garage, “I’m not armed. I just—I just need to ask some questions.”

Campbell exited the vehicle and walked toward Matthew, Valdivia, and defendant. Torres remained in the vehicle. Defendant approached Campbell; Matthew and Valdivia remained near the garage. Defendant and Campbell got “close to” one another and

² At the time of trial, Torres was attempting to “get out” of the gang.

³ Because Matthew Burciaga and defendant share the same surname, we refer to Matthew Burciaga as Matthew. Matthew is sometimes referred to in the record as “Porky.”

⁴ Valdivia was also charged in the underlying case, but he is not a party to this appeal.

spoke. The conversation led to an argument. Then, Torres heard four or five gunshots, and saw defendant shoot Campbell. Campbell backed up, holding his stomach. Matthew and Valdivia were still near the garage.

Campbell walked toward the vehicle; he was crouched over and holding his stomach. Torres moved from the passenger seat of the vehicle to the driver's seat. Campbell, whose shirt was bloody, entered the passenger seat of the vehicle and asked Torres to take him to a hospital. While the vehicle was still parked, Torres then heard Valdivia yell, "That's his nephew. Get him."⁵ Defendant began shooting "at least one shot" at the vehicle. In response, Torres used the gun Campbell gave him to fire one shot at defendant; the gun then "jammed." Torres drove off, and while en route to the hospital, Torres put his hand on Campbell's stomach, trying to hold Campbell's "guts in." From photographic lineups, Torres identified defendant as the person who shot Campbell, and Valdivia as the man who was "behind the shooter."

Los Angeles County Sherriff's Department Detective Carlos Gutierrez, the prosecutor's gang expert, testified the Puente Trece gang had approximately 768 members, and was divided into 16 different cliques. The gang's primary activities included drug sales and shootings (drive-by shootings, walk-up shootings, murders, and assaults with deadly weapons). In 2012, two Puente Trece gang members were convicted of assault with a firearm.

Detective Gutierrez opined the shootings were for the benefit of and in association with Puente Trece, stating: "[T]he way the gang's benefitting from [] this is that, by having shot at this other individual, a member of their own clique, they are promoting or benefitting the gang's reputation of being violent. They are letting everybody know, within their own clique as well as rival cliques that, hey, if we are willing to kill or attempt to kill our own people, we're willing to kill anybody. [¶] In addition to that, with that reputation of being violent comes a cloud of fear. People within the

⁵ Torres referred to Campbell as his "uncle" even though they were not actually related.

neighborhood are going to be fearful to report this to police, because if they are willing to kill their own gang members, they're willing to kill other people.”

DISCUSSION

A. Substantial Evidence Regarding Premeditation

1. Standard of Review

“When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.] We determine ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citation.] In so doing, a reviewing court ‘presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

Circumstantial evidence and reasonable inferences are included in determining whether there is substantial evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358; *People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) In determining whether substantial evidence supports a conviction, “we do not reweigh the evidence, resolve conflicts in the evidence, draw inferences contrary to the verdict, or reevaluate the credibility of witnesses.” (*People v. Little* (2004) 115 Cal.App.4th 766, 771, citing *People v. Jones* (1990) 51 Cal.3d 294, 314.)

2. Applicable Law

“Attempted murder requires (1) a specific intent to kill and (2) a direct but ineffectual act toward accomplishing the intended killing. [Citation.] Unlike murder, an

attempted murder therefore requires express malice and cannot be proved based upon a showing of implied malice. [Citation.] Also, unlike murder, attempted murder is not divided into degrees. The prosecution, though, can seek a special finding that the attempted murder was willful, deliberate, and premeditated, for purposes of a sentencing enhancement. [Citations.]” (*People v. Mejia* (2012) 211 Cal.App.4th 586, 605.)

“““[P]remeditation” means thought over in advance. [Citations.] “The process of premeditation . . . does not require any extended period of time. ‘The true test is not the duration of time as much as it is the extent of the reflection.’ [Citation.]” [Citation.]”⁶ (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) “[T]he requisite reflection need not span a specific or extended period of time. Thoughts may follow each other with great rapidity, and cold, calculated judgment may be arrived at quickly. [Citations.]” (*People v. Nelson* (2011) 51 Cal.4th 198, 213.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the court identified three categories of evidence typically considered when determining if a defendant acted with premeditation and deliberation: planning activity, motive, and the manner of killing. (*Id.* at pp. 26-27.) “*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court’s assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]” (*People v. Pride* (1992) 3 Cal.4th 195, 247.)

3. Analysis

Here, there is evidence of all three *Anderson* factors. Relevant to planning, defendant, while in possession of a gun, approached Campbell, an original member of the Puente Trece gang. After an argument ensued between the two of them, defendant shot

⁶ For purposes of determining whether sufficient evidence of premeditation exists, there is no distinction between attempted murder and completed murder. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462-1463, fn. 8, overruled on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 199.)

at Campbell. This supports an inference that defendant planned to attack Campbell if their “exchange” did not progress in a manner defendant considered satisfactory.⁷

There was evidence defendant had a motive—here, a gang related motive—for attempting to kill Campbell and Torres. There was a dispute within the Puente Trece gang over the effort of the Blackwood clique to separate from the Puente Trece gang. This caused violent shootings. The jury could reasonably infer this dispute within the gang resulted in the death of one of its gang members the day before the incident, and it appears Campbell believed Matthew had some “answers” as to how that happened. As Detective Gutierrez opined, the shootings benefitted the gang by promoting the gang’s reputation for violence and discouraging people in the neighborhood from reporting crimes, particularly since the message here is the gang members are willing to kill their fellow gang members.

Regarding the manner of the shootings, “[T]he method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder.” (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) Campbell visibly disarmed himself, and he said aloud to defendant, “I’m not armed. I just—I just need to ask some questions.” Defendant therefore knew Campbell was not a threat.

Campbell was standing very close to defendant when the two began to argue. Defendant fired four or five shots at Campbell at point blank range. The shots perforated

⁷ When evaluating the sufficiency of evidence for premeditation and deliberation, the perpetrator’s decision to bring a gun to a shooting constitutes evidence of planning. (*People v. Romero* (2008) 44 Cal.4th 386, 401 (*Romero*)). We recognize there is an argument that defendant did not “bring the gun to the shooting” because it was Campbell who sought out defendant. For purposes of assessing sufficiency of the evidence, however, we must view the evidence in the light most favorable to the verdict. (*People v. Edwards, supra*, 57 Cal.4th at p. 715.) In this respect, a rational trier of fact could have concluded that defendant parted from his friends and walked toward Campbell after making the conscious decision to maintain possession of the gun, thus, coming within the confines of *Romero*. Nonetheless, as will be discussed, there was more than enough evidence of the motive and manner of killing to support a finding of premeditation and deliberation notwithstanding the possible infirmities corresponding to the evidence of planning.

Campbell's stomach, resulting in his "guts" falling out. The jury could reasonably infer defendant's manner of shooting Campbell demonstrated a deliberate plan to kill him. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [firing at a vital area at close range supports finding of premeditation and deliberation].)

As to Torres, after defendant shot Campbell and Campbell struggled to return to his car, Torres, with Campbell, attempted to drive away from the scene of the incident. At that point, Valdivia yelled out to defendant, "That's his nephew, get him too." Defendant then attempted to do just that by shooting at Torres. (*People v. Sanchez* (2001) 26 Cal.4th 834, 849 ["Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief"].)

This evidence of planning, motive, and manner of attempting to kill supports an inference the attempted murders were the result of reflection. There was sufficient evidence for a rational trier of fact to find defendant guilty of premeditated attempted murder. Even if the evidence might also "reasonably be reconciled with a contrary finding," reversal would not be warranted. (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

B. Substantial Evidence Regarding Gang Enhancements

1. Applicable Law

To establish a gang enhancement, the prosecutor must prove two elements: (1) the crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) the defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members" ⁸ (§ 186.22, subd. (b)(1).) With respect to the second element, "if substantial evidence establishes that the defendant intended to and did commit the charged felony *with* known members of a gang, the jury

⁸ Defendant concedes that the first element was satisfied.

may fairly infer that the defendant had the specific intent to promote, further, or assist criminal conduct by those gang members.” (*People v. Albillar* (2010) 51 Cal.4th 47, 68, italics added.)

2. Analysis

The jury found true the gang allegations as to the convictions for attempted murder of Campbell (count 1), attempted murder of Torres (count 2), and shooting at an occupied motor vehicle (count 3). There was insufficient evidence defendant’s attempted murder of Campbell was committed with other gang members. Matthew and Valdivia, the other gang members with defendant, were simply at the scene of the incident.⁹ There was no evidence Matthew or Valdivia participated in the attempted murder of Campbell.¹⁰

There however was substantial evidence defendant’s attempted murder of Torres, and his shooting at an occupied motor vehicle, were committed with at least one other gang member. Torres, i.e., a self-described nephew of Campbell, was specifically targeted by defendant and his fellow gang member—Valdivia. After defendant shot Campbell, Valdivia yelled, “That’s his nephew. Get him.” Defendant complied by shooting “at least one shot” at the vehicle as Torres sat in the driver’s seat. A rational trier of fact could have concluded it was Valdivia’s encouragement that cause defendant to fire toward Torres. There was sufficient evidence defendant committed these offenses with Valdivia thereby satisfying the intent component of the enhancement.

⁹ We use the term “at the scene” rather loosely as the record is not specific in this regard. Torres testified, when Campbell exited the car, defendant and Campbell walked toward one another while Matthew and Valdivia “stayed back by the garage.” Thus, although Matthew and Valdivia were at the general scene, it appears that they were positioned in a location different from defendant and Campbell when Campbell was shot.

¹⁰ Notably, although Valdivia was charged in the information with attempted murder of Torres and shooting at a vehicle, neither Matthew nor Valdivia were charged with the attempted murder of Campbell.

C. Granting Defendant's Request to Represent Himself

1. Standard of Review

“In determining on appeal whether the defendant invoked the right to self-representation, we examine the entire record de novo. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 932.)

2. Applicable Law

“A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.]’ [Citation.]” (*People v. James* (2011) 202 Cal.App.4th 323, 328-329.)

Faretta v. California (1975) 422 U.S. 806 (*Faretta*) “holds that the Sixth Amendment grants an accused personally the right to present a defense and thus to represent himself upon a timely and unequivocal request. [Citation.] The right to self-representation obtains in capital cases as in other criminal cases [citation], and may be asserted by any defendant competent to stand trial—one’s technical legal knowledge, as such, being irrelevant to the question whether he knowingly and voluntarily exercises the right [citations]. The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such waiver. [Citation.]” (*People v. Dunkle* (2005) 36 Cal.4th 861, 908-909, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A request for self-representation must be unequivocal. (*People v. Doolin, supra*, 45 Cal.4th at p. 453; *People v. Marshall* (1997) 15 Cal.4th 1, 22-23, 27 (*Marshall*).) When determining whether a request for self-representation is unequivocal, “courts must determine ‘whether the defendant truly desires to represent himself or herself.’

[Citation.] Thus, ‘an insincere request or one made under the cloud of emotion may be denied.’ [Citation.]” (*Marshall, supra*, 15 Cal.4th at pp. 21, 23; *People v. Tena* (2007) 156 Cal.App.4th 598, 607.) All the facts surrounding a defendant’s request for self-representation must “constitute an articulate and unmistakable invocation” of that right. (*People v. Danks* (2004) 32 Cal.4th 269, 297, citing *Marshall, supra*, 15 Cal.4th at p. 21.)

3. Background

On December 9, 2014, after the November 7, 2014 jury verdicts, the trial court received a letter written by defendant,¹¹ addressed to the trial court. In it, defendant stated he did not receive a fair trial because a witness was improperly coached and another witness testified falsely. Defendant complained his trial counsel failed to prove those witnesses “lied,” failed to use defendant’s notes during his cross-examination of those witnesses, “did not fight for [defendant’s] innocence,” and “was more a negotiator than anything else.” Defendant claimed that at one point his trial counsel walked out on him and told him to find another lawyer, but defendant did not know how to get another lawyer so defendant allowed his trial counsel to continue to represent him which led to defendant receiving ineffective assistance of counsel. Defendant stated in the letter, “I needed help with a [l]awyer to represent me and I still do. [¶] I would please like to file motions for a [r]etrial with a [s]tate[-a]ppointed [l]awyer so we can look through my case and prove my innocence.”

On January 8, 2015, the day set for a court trial on the prior conviction allegations and hearings on formal probation and sentencing, defendant and his counsel conferred off the record. Defendant’s counsel said, “Your Honor . . . before we proceed, [defendant] is indicating to me that he would like the court to read a letter that he addressed to the court.

¹¹ Defendant wrote the letter although he was represented by counsel. The record does not contain the original letter. The parties stipulated during record correction proceedings that a reproduction of the original letter accurately reflected its contents.

I've reviewed it. He is requesting pro per status to handle his case at this point on. [¶] Is that correct, [defendant]?" Defendant replied, "Yes, that's correct."

The trial court explained that it had received a handwritten letter purportedly prepared by defendant, but did not read it because it was an improper ex parte communication with the court. Upon the trial court's inquiry, defendant stated he wanted the trial court to read the letter. The trial court then stated, "Before I do that, [defendant], your attorney, at least at this time . . . has mentioned that you're making a request to represent yourself although at a late stage of the case. This is for sentence and trial on the prior convictions. Are you absolutely certain that is what you wish to do?" Defendant responded, "Yes. I wish to do that at this time, Your Honor."

The trial court continued, "Well, before I can approve your request, I have to make certain that you understand what you're getting yourself into and that you understand you still have a right to have counsel represent you at all critical stages of your case, including today's hearings. You need to understand that. More importantly, you need to waive and give up those rights. Those are constitutional protections that you have that. Evidently, you're willing to give up [those protections] and proceed on your own as your own counsel. [¶] You have to understand the pitfalls that you will certainly experience by representing yourself, and you will receive no assistance by anyone. You will not have co-counsel. You will not have an attorney [to] help you. You will not have the court's help. You're on your own. So, again, with that additional information, is it still your desire to go forward and represent yourself[?]" Defendant replied, "Yes, Your Honor."

The trial court then stated, "Okay. Well, I need for you to fill out certain documents before I proceed on that request. It's called a waiver of right to counsel and other things you need to understand and acknowledge. We'll have to recess for about . . . 15 minutes, to give [defendant] an opportunity to complete the *Faretta* waivers" After the recess, the trial court stated, "The court recessed the matter to allow [defendant] to complete a *Faretta* waiver advisement, waiver of right to counsel in order for the court to entertain his motion for pro per status and to represent himself from this point on albeit it's post-jury trial conviction." The trial court confirmed that

defendant signed the completed waiver of rights form. Defendant confirmed that he reviewed the document, “understood the rights that [were] mentioned on [that] document,” and was “waiving and giving up those rights in order to represent [himself] as [his] own lawyer.”

The trial court continued, “The consequences [of] you doing so, again, as I’ve mentioned earlier that you will receive absolutely no attorney assistance in this matter pertaining to the rules of law, rules of procedure that you’ll be required to know and follow in order to represent yourself from this point on. [¶] Do you understand that?” Defendant replied, “Yes, I do, Your Honor.”

The trial court then said, “Having all those consequences in mind, is it still your desire to waive your constitutional right to have counsel represent you free of charge?” Defendant responded, “Yes.” The trial court accepted defendant’s waiver and allowed defendant to proceed “as [his] own lawyer.”

Immediately thereafter, defendant represented himself at the court trial on defendant’s prior conviction allegations. At the conclusion of the court trial, the trial court found the prior conviction allegations true.

The trial court then asked defendant if he still wanted the court to read the letter, and defendant said he did. The trial court read the letter, and said, “You bring many issues to the court, one of which causes me concern because in the letter you are requesting the court appoint you counsel. Well, you’ve already given up your right to have an attorney so I cannot grant that request unless you wish to have an attorney represent you. But . . . you just had the court relieve [your] state-appointed lawyer So that is no longer an issue. You are on your own so whatever motion for retrial, as you’re describing it, must be done by you. [¶] You understand that now; correct?” Defendant responded, “Yes, I do, Your Honor.”

After a recess, the trial court appointed “standby counsel out of an abundance of caution in the event [defendant] changes his mind and chooses to exercise his right to have counsel despite his request, which was granted today to represent himself in proper.” Standby counsel was present and accepted the appointment. Defendant continued

to represent himself in two subsequent hearings and made several motions, including a motion for transcripts, a request for discovery, a motion for additional money for pro per funds, and a motion for a continuance.

4. *Analysis*

Defendant's request for self-representation was unequivocal. At the January 8, 2015, hearing, defendant was present and, after he and his counsel conferred off the record, defendant, through his counsel, requested to represent himself. The trial court confirmed the request directly with defendant. Thereafter, the trial court inquired of defendant whether he was "absolutely certain that he wanted to represent himself, and defendant said, "Yes. I wish to do that at this time, Your Honor."

The trial court, in making "certain" defendant understood what he was "getting [himself] into," explained the "pitfalls" of representing himself because he would not have "assistance by anyone"; he was "on [his] own" and would not have the assistance of an attorney. "With that additional information," the trial court asked defendant whether it was still his "desire to go forward and represent yourself[?]" Defendant replied, "Yes, Your Honor."

The trial court stated, in defendant's presence, it recessed the matter "to allow defendant to complete a *Faretta* waiver advisement, waiver of right to counsel in order for the court to entertain his motion for pro per status and to represent himself from this point on" Defendant initialed and signed the waiver of rights form.¹² He confirmed

¹² The waiver of rights form is included in the record on appeal and we have reviewed it. It is three pages long and divided into five somewhat self-explanatory sections—constitutional rights, personal information, dangers and disadvantages of self-representation, charges and consequences, and court's advice and recommendation. The form lists 28 advisements and instructs defendant to initial the box after each advisement only if he "understand[s] and agree[s] with it." At the end of the form, above his signature, is the following: "I hereby certify that I have read, understood and considered all of the above warnings included in this petition and I still want to act as my own attorney. I freely and voluntarily give up my right to have a professional attorney represent me."

he reviewed the document, “understood the rights that [were] mentioned on [the] document,” and was “waiving and giving up those rights in order to represent [himself] as [his] own lawyer.”

The trial court reiterated for defendant that “[t]he consequences” of his waiving his rights specified in the document was he would “receive absolutely no attorney assistance in this matter pertaining to the rules of law, rules of procedure that you’ll be required to know and follow in order to represent yourself from this point on.” In response to the trial court’s inquiry, defendant again said that he “underst[ood] that.” Defendant also confirmed, “Having all those consequences in mind, it [was] still [his] desire to waive [his] constitutional right to have counsel represent [him] free of charge.”

Once the trial court read defendant’s letter, the trial court noted the letter contained a request for state-appointed counsel and asked defendant if, despite the letter, he understood he was now on his own. Defendant said he understood he was on his own, made no objection to proceeding on his own, and made no request for substitute counsel. The trial court appointed “standby counsel” in the event defendant changed his mind and choose to exercise his right to have counsel, but there is no indication in the record defendant ever changed his mind and requested the appointment of counsel. Defendant continued to represent himself in two subsequent hearings, and the record does not show, at any time after the trial court granted defendant’s request to represent himself, he requested the appointment of counsel.

The only request regarding representation defendant made in open court was for self-representation. Even after the trial court read defendant’s letter, which it had received about one month before, defendant said he understood he was “on [his] own, and did not request the appointment of new counsel. Indeed, because the trial court appointed “standby counsel” in the event defendant changed his mind and choose to exercise his right to have counsel, the trial court was prepared to appoint standby counsel as defendant’s counsel. That never occurred; defendant never changed his mind.

D. Correction Regarding Defendant's Actual Custody Credit

A defendant is entitled to credit for all days in custody commencing with the day of arrest (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645) and including partial days and the day of sentencing (*People v. Browning* (1991) 233 Cal.App.3d 1410, 1412; *People v. Fugate* (1990) 219 Cal.App.3d 1408, 1414). The trial court stated defendant was entitled to 787 days of presentence custody credits, consisting of 685 days of actual custody credit and 102 days of conduct credit.

Defendant however was arrested on May 23, 2013 and was in custody though his sentencing hearing on April 9, 2015—totaling 687 days of actual custody, not 685. Defendant is also entitled to good conduct credit computed at 15 percent of that actual time in custody. (§ 2933.1 [“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”].) Defendant therefore is entitled to 103 days of conduct credit, not 102. Thus, the judgment should be modified, and the abstract of judgment must be amended, to reflect defendant is entitled to receive 790 days of presentence custody credits, consisting of 687 days of actual custody credit and 103 days of conduct credit.

DISPOSITION

We reverse the portion of the judgment concerning the gang enhancement on the conviction for attempted murder of Campbell (count 1). The matter is remanded for the trial court to modify the judgment and amend the abstract of judgment to reflect defendant is entitled to receive 790 days of presentence custody credits, consisting of 687 days of actual custody credit and 103 days of conduct credit. The trial court is to forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.*

We concur:

TURNER, P. J.

BAKER, J.

* Judge of the Superior Court of the County of Los Angeles, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.



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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

ADMITTED IN EVIDENCE

DATE: 11-6-14 DNA ☐

TYPE OF HEARING: Final

CASE NO. KATOS 909

People EXH. NO. 4

BY: ZNY DEPUTY

JOHN A. CLARK, EXECUTIVE OFFICIAL/CLERK
CRIM 129 07-07 (replaces CR-108)

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