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Briefs and Other Related Documents

Court of Appeal, Second District, Division 2, California.
The PEOPLE, Plaintiff and Respondent,
v.
David Ray WROTEN, Defendant and Appellant.
No. B188462.
(Los Angeles County Super. Ct. No. BA268267).
Dec. 26, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. Ann I. Jones, Judge. Affirmed with directions.
Edward H. Schulman, under appointments by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

DOI TODD, J.
*1 David Ray Wroten appeals from the judgment entered upon his convictions by jury of one count of first degree murder (Pen.Code, § 187, subd. (a), count 3) [FN1] and two counts of attempted murder (§§ 664/187, subd. (a), counts 4 & 5).[FN2] The jury also found that the attempted murders were committed willfully, deliberately and with premeditation within the meaning of section 664, subdivision (a), that the firearm allegations within the meaning of section 12022.53, subdivisions (b) and (c), as to all counts, and subdivision (d) as to count 4, were true, and that each offense was committed for the benefit of, at the direction of, or in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1). The trial court sentenced appellant on count 3, to a prison term of 25 years to life plus a 20-year determinate term for the firearm-use enhancement, on count 4, to a consecutive life term with a minimum 15 years before parole eligibility plus a consecutive 25 years to life for the firearm-use enhancement and, on count 5, to a

consecutive life term with a minimum of 15 years before parole eligibility plus a consecutive six years eight months for the firearm-use enhancement.

FN1. All further statutory references are to the Penal Code unless otherwise indicated.
FN2. The jury deadlocked and a mistrial was declared on counts 1 and 2 for murder and attempted murder, respectively, arising from a separate shooting incident on May 21, 2004. Retrial by a second jury of the mistried counts again ended in a deadlock, resulting in the dismissal of those counts.
Appellant contends that (1) the trial court erred in failing to suppress his postarrest statements to investigating officers which were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and were involuntary under *Jackson v. Denno* (1964) 378 U.S. 368, (2) the trial court erred in failing to instruct the jury in accordance with CALJIC No. 8.73 and related explanatory instructions, (3) the evidence was insufficient to support the attempted murder conviction in count 5, and (4) the abstract of judgment must be corrected to include presentence custody credits for actual time spent in detention.

We remand for consideration of presentence custody credits but otherwise affirm.

FACTUAL BACKGROUND

The prosecution's evidence

The July 4, 2004 shooting

We review the record in accordance with the usual rules on appeal. (See *People v. Snow* (2003) 30 Cal.4th 43, 66.) On July 4, 2004, at approximately 9:30 p.m., Durand Sipple, a Black P-Stone (BPS) gang member known as “D-Dogg,” and another person were shot and killed on August Street, in BPS gang territory known as the “Lower Baldwin Village” or “the Jungle.”

Approximately one-half hour later, Darlene Coleman was in an alley outside her residence, near Degnan Boulevard and 43rd Street, in Los Angeles, when her neighbor, Derrick Darden, wearing a blue and white hat, pulled into the alley in his white Lincoln Continental. This area is in the heart of the territory of the Rolling 40's Crips gang, a BPS rival, whose gang color is blue. Neither Coleman nor Darden were gang members. Darden exited his car, stood two feet from Coleman and conversed with her.

They were still talking 15 minutes later, when Coleman turned to leave. As she did, Darden saw two African-American men 12 to 15 feet away, approaching and shooting at them.[FN3] The shooters said nothing and made no reference to any gang affiliation. Coleman began screaming and ran to her porch, and Darden followed. He was shot in the right arm. When the shooting stopped, one gunman lay in front of Darden's car. He died a day and one-half later from a single gunshot wound to the back of the neck.

FN3. Coleman testified that, “when we looked over, they started shooting, and we ran.”

The investigation

Crime scene investigation

*2 Los Angeles Police Officer Vanessa Chin and her partner, Officer Smerdel, responded to the scene. They found an African-American male, identified as Gerald Mosley, a BPS gang member known as “Little Bool Aid,” face down, with a gunshot injury to the head. A small, blue-steel, .38-caliber, five-shot revolver, with three spent and two live rounds inside, was found under him. Two .38-caliber bullet casings were located at the crime scene. Five .32 caliber casings were also found, and later determined to have been fired from the same gun. Bullet fragments, a bullet jacket and a bullet core were recovered from Mosley during his autopsy. One was likely a .32-caliber bullet that came from the same firearm as a .32-caliber bullet jacket recovered from the crime scene. The bullet taken from Mosley's body was not fired from the gun found under him.

Morris Phillips

Morris Phillips (Phillips), a BPS gang member known as “J Moe” and “Little Nut Case,” gave a recorded statement to Detectives David Garrido and Robert Lait in which he identified Mosley as “Bool Aid.” He said he was aware of the shootings on July 4, 2004, and identified a photo of appellant as “Roe,” FN4 whom Phillips had also heard called “Mayhem.” Phillips said that appellant told him that he and Bool Aid went to the Rolling 40's area and began shooting at a car, and the next thing appellant knew, Bool Aid was on the ground.

FN4. Appellant's moniker is spelled as both “Row” and “Roe” in the record before us. At trial, Phillips testified that on the night of the shooting, he was in the August Street alley when appellant stated that he “went [to the] 40[']s” with Bool Aid to do a “retaliatory shooting” and Bool Aid was shot.FN5

FN5. At trial, Phillips testified that he did not want to testify because it made him a snitch. He was unable to remember many things he said in his recorded conversation or at the preliminary hearing. Hence, much of the evidence recited above was from Phillips's preliminary hearing testimony and his recorded statement used to impeach him.

Chris Smith

Chris Smith lived in Lower Baldwin Village and was a close, longtime friend of appellant.FN6 In October 2004, Detectives Garrido and Lait gave him and his brother a ride home, and surreptitiously recorded their conversation. Smith said that appellant stayed with him after the July 4, 2004 shooting, told him he did not know how Mosley was shot and began crying. Appellant told Smith that only he and Mosley went to Degnan

Boulevard and that appellant shot five times and Mosley got in front of him. Smith said he was sure it was an accident.

FN6. Smith referred to appellant as "Tiny Row."
At trial, Smith acknowledged that the recording contained his voice and admitted telling the detectives that Mosley's shooting was an accident. He also admitted he was from the Rolling 20's gang, but was evasive about whether he knew Mosley and appellant's gang affiliation. When asked what he knew about Mosley's shooting, he stated: "I guess he was murdered or something like that...." He denied telling detectives that appellant came to his house on the night of the shooting, and claimed that he told them that Donovan, his "play brother," came to his house. Smith denied speaking with appellant about Mosley's death. He also denied that appellant told him that he fired five shots or that Smith told that to the detectives. He testified that appellant said it was an accident. When the recording of his interview was played, Smith admitted telling detectives "something about missions," but claimed that he heard about Mosley's shooting from Donovan, not appellant.

*3 Detective Garrido testified that Smith never mentioned Donovan in the recorded conversation and that Smith said that appellant told him that appellant and Mosley were doing a "mission," that appellant fired five shots and that Mosley was hit when he moved into appellant's line of fire.

Appellant's arrest and interrogation

Appellant was arrested at approximately 9:00 p.m. on July 14, 2004, and interviewed regarding the shooting at approximately 2:00 a .m. the next morning by Detectives Garrido and Lait.[FN7] The interview was recorded. After advising appellant of his *Miranda* rights, each of which he separately stated he understood, the detectives asked if he wanted to talk about Mosley's shooting. They said they already had enough evidence to proceed and knew he was involved but that this was his opportunity to shed light on whether the shooting was intentional or accidental.

FN7. The interview was concluded before 3:15 a.m., when Detectives Evans and Jackson began interviewing appellant regarding a May 21, 2004 shooting.
Appellant admitted that he was "with" the Rolling 20's gang, had the moniker "Mayhem," and lived in the Rolling 40's gang area. He denied knowing "Little Bool Aid," being involved in his shooting and ever using a gun. He claimed he was at his aunt's house in Hawthorne from 8:30 a.m. on July 4, 2004, until the following day. The detectives then played the recording of Phillips's interview.

After doing so, Detective Garrido resumed questioning appellant, explaining that "we believe that you weren't the only one there, and you weren't the one that accidentally shot [Mosley] in the back of the head. Okay. We know that. All Right. What we need to do here is get it cleared up, so we can get you cleared up, okay. We need to know what happened out there."

Appellant then gave the following account: He heard shots and saw D-Dogg lying in the August Street alley. Appellant was told that the Rolling 40's gang shot him. He, "Mad Moe" (Antoine Downs), a BPS gang member, and Mosley drove to Muirfield alley where they obtained firearms. They proceeded to the alley near Degnan Boulevard and saw a white car with its door open. Appellant had a bad feeling and told his accomplices, "[W]e shouldn't do this." But the next thing he knew, shots were being fired, he was firing, "dumping" the gun, and Mosley fell down. Appellant had a .25-caliber, automatic gun, Mosley a .38 or a .32-caliber gun, and Mad Moe a .380. Mosley started shooting first, firing two shots. Appellant stated he also fired only two shots, aiming at the white car. Mad Moe fired seven shots. After Mosley was shot, Mad Moe took off running, while appellant tried to help Mosley. Appellant said that he shot at Rolling 40's gang members in retaliation for the Rolling 40's shooting of Sipple in BPS's territory.

Later in the interview, appellant admitted shooting five or six, not two, times, and using a .32-caliber, not a .25-caliber, gun. He said he shot at a white car, though the detectives never mentioned the color of the car.

Gang evidence

Officer Robert Murray, a gang expert, testified that BPS is a "Blood" gang whose colors are red. The BPS gang got along with the Rolling 20's gang, another Blood gang, but not with the Rolling 40's or Rolling 30's Crips gangs. BPS gang income was derived from various violent and drug-related crimes. Gang guns are held at a repository for gang use as needed.

*4 Officer Murray opined that the shooting near Degnan Boulevard benefited, was in association with and was at the direction of the BPS gang. That gang is known for quick retaliation, and the shooting was consistent with a retaliation for the killing of Sipple, a BPS gang member, 45 minutes earlier. Darden was wearing a blue hat, the Rolling 40's gang color. The shooting was in the Rolling 40's gang territory and benefited BPS because it sent a message that it would not tolerate killing of its members.

Other officers testified to numerous convictions of BPS gang members of serious and violent crimes before the July 4, 2004 shooting and to contacts with appellant within a month before in the company of BPS gang members. On one occasion, appellant admitted being a Rolling 20's gang member with the Moniker "Roe."

Effectiveness of* Miranda *waiver

Dr. Hy Malinek, a clinical and forensic psychologist, reviewed records pertaining to appellant's prior psychological and disability evaluations, including educational records, tapes and transcripts of the two police interrogations of appellant, and the defense expert's report. He then met twice with appellant to evaluate his "cognitive abilit[ies] and legal competencies," the first time, administering several tests, including an intelligent

quotient (I.Q.) test, and the second time interviewing appellant regarding the police interrogations.

Appellant received an overall score of 73 and a verbal score of 76 on the I.Q. test. Scores of 70 to 80 reflect borderline I.Q., "meaning certain intellectual deficits." Appellant's educational records revealed four different test scores in the mild retardation range. But some past psychological reports reflected that appellant's scores might have been affected by his not wanting to participate. Dr. Malinek conceded that it was possible that individuals with appellant's intellect are more susceptible to making false confessions. But he found that appellant conversed clearly with the interrogators, was able to give details and indicated "pretty good memory." Appellant did not appear to Dr. Malinek to have a personality that was easily susceptible to pressure or that needed others' approval.

The defense's evidence

Matthew McCoy, Smith's step-brother, testified for appellant. McCoy was in the police car when Detective Garrido questioned Smith about the Mosley shooting. McCoy testified that the detectives, not Smith, said that appellant reported that the shooting was accidental, and the officers told Smith that if he so testified, appellant could be charged with a lesser offense.

Appellant's uncle, James Prince, testified that he was visiting family in Hawthorne for the July 4, 2004 holiday. Appellant, who was also visiting, spent most of his time inside playing video games. At approximately 5:00 p.m., Prince left the house for 30 minutes, and appellant was still there when he returned. Appellant's sister Sheila Cox and cousin Lakeshia Combs, who were also at the Fourth of July gathering, also testified, corroborating Prince's testimony. Neither believed appellant had any gang affiliation.

*5 Richard Leo, Ph.D., a professor of criminology and sociology whose studies focused on interrogations and confessions in criminal proceedings, testified for the defense. He examined the incident reports, the two interrogation tapes and transcripts, and reviewed Dr. Malinek's report, but never spoke with appellant. He testified that interrogations use sppistivpecialized techniques that are psychologically powerful, sometimes manipulative, and are designed to encourage the suspect to admit involvement and obtain incriminating statements. Some techniques are inherently coercive, including deprivations of food, water or sleep, threats of harm or promises of leniency, and can lead to involuntary, false and unreliable statements. Lengthy interrogation of six to 12 hours is also coercive, although one hour of questioning is not excessive. In another technique, examiners suggest that the offense was accidental, thereby minimizing the suspect's perception of the consequences of an admission and implying that an accidental killing might result in leniency. This technique can increase the risk of a false confession. The risk increases when the suspect is a juvenile, is mentally impaired, or has a low I.Q. or stress tolerance. Personality traits are also factors in false confessions. The more experience a suspect has with law enforcement, the less likely he or she will cooperate.

Dr. Leo also testified that reliability of a confession is evaluated by examining whether the suspect's postadmission account reflects knowledge of the details of the crime, which false confessors tend not to know. Therefore, once a suspect admits committing a crime, interrogators should not try to supply answers but should gather the details from the suspect to test the suspect's knowledge.

DISCUSSION

I.

MIRANDA CLAIMS

A. *Suppression hearing*

Before voir dire began, appellant moved to suppress his statements to detectives on the grounds that they were not voluntary and that he lacked the capacity to understand the *Miranda* waiver. The trial court conducted an Evidence Code section 402 hearing at which the People called Dr. Malinek to testify. Regarding his preparation for, and conduct of, his evaluation of appellant, he testified substantially as he did at trial, as reflected in the above factual summary. He concluded that "the totality of the database does not suggest [appellant] was incapable of waiving his *Miranda* rights."

Dr. Malinek's opinion was based on several factors. First, although on prior psychological testing since age six, appellant consistently scored on the borderline between average and below average intellectually, and had dyslexia and attention issues, there was no evidence of significant cognitive deficits. He had not been identified as mentally retarded. Second, school based deficits and testing at a third grade level in some categories do not necessarily translate into an inability to waive *Miranda* rights. Third, appellant understood Dr. Malinek's questions and responded appropriately, giving no bizarre or unusual responses. He understood what a "right" was. Fourth, Dr. Malinek failed to find such substantial cognitive deficit in appellant's responses at the police interrogations to suggest that he was unable to waive his rights. A review of those interviews led Dr. Malinek to conclude that appellant understood the questions, provided specific and responsive, detailed answers, and revealed a good memory of the sequence of events. Finally, Dr. Malinek noted that appellant was not new to the justice system, having previously been arrested and interrogated.[FN8]

FN8. Immediately after the interview with Detectives Garrido and Lait regarding the July 4, 2004 shooting, appellant was interviewed by Detectives Jackson and Evans related to the May 21, 2004 shooting and murder that was the subject of dismissed counts 1 and 2. Appellant initially denied any involvement in that shooting. Detective Jackson suggested that appellant shot the victim in self-defense because he felt threatened, which the detective said people have a right to do. Appellant then confessed, adopting the

detectives' version of what occurred. But in describing the shooting, appellant provided facts that were inconsistent with evidence the detectives had uncovered, including, the time of day the shooting occurred, his conduct at the scene during and after the shooting, and the type of gun that he used. Based upon his review of that entire interview, Dr. Malinek did not believe that these discrepancies undermined his opinion that appellant was not susceptible to external pressures.
*6 Dr. Cowardin, an expert on "educational issues," testified for the defense. She had never testified for the prosecution. She evaluated appellant by meeting with him in January 2005 and administering various tests. She found his receptive vocabulary to be at the eight years three months level and his verbal I.Q. to be 69, both below the first percentile. He was learning disabled and suffered from attention deficit disorder. Although he was tested in kindergarten and found to be educationally mentally retarded, he was not clearly mentally retarded. She opined that these disabilities would impact his ability to waive rights. She also opined that a person had to be approximately 12 years old to understand *Miranda,* as abstract ability comes around age 12. Appellant's receptive vocabulary test scores and verbal test scores were at ages eight through 10, with only a couple of the scores approaching the age 12 level.

But Dr. Cowardin did not listen to the entire taped interviews of appellant. She only listened to the *Miranda* portion plus an additional part just to "get the gist of the conversational flow." She said that in the first interview, the detectives did not explain appellant's rights in more detail after reading them and did not give him an opportunity to ask questions. In her opinion, the *Miranda* statements were at an eighth to ninth grade level of reading ability because it involved abstract concepts which, for a person like appellant, are limited.

Dr. Cowardin testified that people with appellant's level of intellectual functioning are usually deferential to authority figures and try to give what people want from them. This might be reflected by his denial of involvement in the May 21 shooting followed by his adoption of the self-defense scenario suggested by the detectives. Appellant passed the Grisso tests administered by Dr. Cowardin which are geared specifically to assess a person's ability to knowingly waive *Miranda* rights. She did not include these test results in her report because appellant said he recently learned about *Miranda* in jail.

B. The trial court's ruling

The trial court found appellant's statements to be voluntary and his *Miranda* rights knowingly and intelligently waived. With respect to appellant's understanding of the *Miranda* waivers, the trial court accepted Dr. Malinek's analysis. Appellant was familiar with police interrogations and *Miranda* advisements, having been previously questioned by police on at least two occasions. He saw the interrogation as a way to minimize his culpability by suggesting that Mad Moe shot Bool Aid, reflecting his understanding of the consequences of that waiver. The trial court rejected Dr. Cowardin's testimony because she failed to mention in her report that appellant passed the Grisso tests which established that he understood his *Miranda* rights and consequences of waiving them.

With respect to the voluntariness of the statements, the trial court found no suggestion in the record that the police resorted to physical or psychological pressure to elicit the waiver. The interview was not overlong in duration. Appellant was not worn down by improper or lengthy interrogation tactics, nor did he receive any improper promises. The detectives showed a genuine interest in learning appellant's involvement in the shooting and whether it was intentional or accidental.

*7 After voir dire, defense counsel requested the trial court revisit its ruling. He explained that Dr. Cowardin had sent a letter containing the Grisso tests to defense counsel that was lost in the mail, and she provided another copy of it. She had not included it in her report because she had not been asked to conduct those tests. The trial court accepted counsel's explanation and reviewed the letter, but again found Dr. Cowardin's testimony lacking in credibility and rejected it.

C. Appellant's contentions

Appellant contends that trial court erred in allowing admission of his interrogation by Detectives Garrido and Lait. The bases of his argument are twofold; his waiver of *Miranda* rights was not made with full awareness of both the nature of his rights and the consequences of abandoning them because he was "learning disabled," and his confession was not voluntary because the detectives implied that he would receive leniency if he admitted involvement in the shooting. This contention is without merit.

D. Standard of review

In reviewing a trial court ruling on the admissibility of a confession or statement against a claim that it was obtained in violation of the defendant's rights under *Miranda,* we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence, and independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained. (*People v. Whitson* (1998) 17 Cal.4th 229, 248 (*Whitson*).) The question of the intelligent and understanding waiver of *Miranda* " 'is a factual matter to be decided by the trial judge in each case.' " (*People v. Lara* (1967) 67 Cal.2d 365, 391.) The People bear the burden of establishing the waiver by a preponderance of the evidence. (*Whitson, supra,* at p. 248.)

In assessing whether admissions or statements were voluntary or coerced, we look to the totality of the circumstances, including the characteristics of the accused and the details of the interrogation. (*People v. Hogan* (1982) 31 Cal.3d 815, 841 (*Hogan*), disapproved on other grounds in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) The burden is on the prosecution to prove by a preponderance of the evidence the voluntariness of a recorded statement made after the giving of *Miranda* warnings. (*People v. Sapp* (2003) 31 Cal.4th 240, 267; *People v. Markham* (1989) 49 Cal.3d 63, 65, 71.)

E. Appellant knowingly and intelligently waived his Miranda rights

To protect a suspect's privilege against self-incrimination, when the suspect is taken into custody "[h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Miranda, supra,* 384 U.S. at p. 479.) Once properly advised of *Miranda* rights, a suspect may waive them provided the waiver is voluntarily, knowingly and intelligently made. (*Ibid.*)

*8 "[A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." (*Miranda, supra,* 384 U.S. at p. 475.) But an express waiver is not required where the defendant's actions make clear that a waiver is intended. "Once the defendant has been informed of his rights, and indicated that he understands those rights, it would seem that his choosing to speak and not requesting a lawyer is sufficient evidence that he knows of his rights and chooses not to exercise them." (*People v.. Johnson* (1969) 70 Cal.2d 541, 558, disapproved on other grounds in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8; see also *Whitson, supra,* 17 Cal.4th at p. 246; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1233.)

Here, appellant impliedly waived his *Miranda* rights. He was read those rights and asked after each whether he understood it. In each case, he said "yes." After the rights were read and understood, Detective Garrido asked, "Do you want to talk about what happened?" Appellant did not say "no," did not request an attorney and made no comment suggesting that he did not want to talk or was hesitant to do so. He simply asked, "Happened about what?" A discussion of the Mosley murder ensued.

Having determined that appellant waived his *Miranda* rights, there are two aspects to the inquiry into whether that waiver was voluntary, knowing and intelligently made. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421, italics added; see also *Whitson, supra,* 17 Cal.4th at p. 247.) Mental subnormality does not require automatic exclusion of a confession, "and the 'totality of circumstances' test still applies." [FN9] (*People v. Lara, supra,* 67 Cal.2d at p. 385.)

FN9. Numerous cases have upheld confessions by mentally subnormal individuals. (See *People v. Isby* (1947) 30 Cal.2d 879, 897-898 [26-year-old, ' "well down the scale of feeble-mindedness," ' with a mental age of 8 years and 8 months and an I.Q. of 58]; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1171 [" 'A confession of a crime is not inadmissible merely because the accused was of subnormal intelligence, although

subnormal intelligence is a factor that may be considered with others in determining voluntariness' "]; *In re Norman H.* (1976) 64 Cal.App.3d 997, 1001-1002 [confession voluntary although the defendant was 15 years old and had an I.Q. of a seven or eight-year-old, was ignorant of the meaning of many words and phrases, including rudimentary words, and had an eagerness to please and cooperate].)

Here, the trial court's factual finding that appellant's waiver was intelligent and understanding is supported by substantial evidence. After extensive evaluation of appellant and his medical, educational and psychological records, Dr. Malinek concluded that "the totality of the database does not suggest [appellant] was incapable of waiving his *Miranda* rights." While he found that appellant had historically tested borderline between average and below average, there was no evidence of "significant cognitive difficulties." Appellant's responses to his interview with Dr. Malinek were appropriate. He understood the meaning of a "right." Both Dr. Malinek and the trial court found appellant's answers during the police interrogation to be specific, responsive and detailed. The trial court pointed out that while appellant made several key admissions during the interrogation, he also attempted to use the interview to minimize his culpability by suggesting that "Mad Moe," the third person appellant said accompanied him and Mosley to the Degnan Boulevard shooting, shot Mosley. The trial court also considered that appellant was most probably familiar with police interrogations and *Miranda* advisements, having been questioned by police on at least two prior occasions. Finally, appellant's own expert, Dr. Cowardin, administered a test to appellant specifically designed and used to determine a person's capacity to understand *Miranda* rights and waivers of those rights, which appellant passed. While this test was given some time after the charged offense, when appellant had been in the legal system where he might have learned about *Miranda,* it still demonstrated his capacity to understand the tested concepts.

F. Appellant's confession was voluntary

*9 Appellant contends that his confession was involuntary. He argues that the detectives used chicanery by impliedly promising him leniency if he admitted being present at the shooting scene. Appellant points to Detective Lait's statement that "this is a million dollar opportunity for you, because.... We already have the information that we need to go forward. The thing is you might be able to shed some light on whether this thing was done intentionally or on [*sic*] accident. That's what we're trying to figure out here 'cause it makes a difference. All right. I'm not asking you to know the law, to know what kind of difference it makes, but it makes a difference in how we proceed." After these statements were made, the recorded interview of Phillips was played for appellant, with the warning that he should "be thinking about trying to clear your name." After it was played, Detective Garrido said: "You got some explaining to do because not only that person there, but a lot of people have called giving you up.... We-we believe that you weren't the only one there, and you weren't the one that accidentally shot him in the back of the head. Okay. We know that. All right. What we need to do here is get it cleared up, so we can get you cleared up, okay." Appellant then admitted involvement in the shooting.

Use of a statement obtained by force, threat or a promise of immunity or reward is a denial of due process under federal and state Constitutions. (*Malloy v. Hogan* (1964) 378 U.S. 1, 7; *People v. Clark* (1993) 5 Cal.4th 950, 988.) Where psychological coercion is claimed, the question raised by the due process clause "is whether the influences brought to bear upon the accused were 'such as to overbear [the accused's] will to resist and bring about [statements or admissions] not freely self-determined.' " (*Hogan, supra,* 31 Cal.3d at p. 841.) Promises of leniency, express or implied, or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and render it involuntary as a matter of law. (*Id.* at p. 838.) Where promises of leniency have invalidated confessions, the promises often permeate the entire interrogation. (See, i.e., *In re Shawn D.* (1993) 20 Cal.App.4th 200, 216.) But " " '[w]hen the benefit pointed out by the police ... is merely that which flows naturally from a truthful and honest course of conduct," the subsequent statement will not be considered involuntarily made. [Citation.]' " (*People v. Howard* (1988) 44 Cal.3d 375, 398.) Use of deception or communication of false information to a suspect, while not alone sufficient to render a resulting statement involuntary, is a factor weighing against a finding of voluntariness. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240; *Hogan, supra,* at pp. 840-841.) Causation in fact is insufficient as there must be a proximate causal connection between the deception and the confession. (*People v. Musselwhite, supra,* at p. 1240.)

*10 Appellant's confession was voluntary. His interrogation did not continue over an extended period but lasted only approximately an hour. Appellant did not suggest that he was tired because of the lateness of the hour. When he complained that the interrogation room was cold at the outset of the interrogation, the detectives immediately obtained a blanket for him which he said made him comfortable. There was little evidence of psychological or physical pressure to overbear appellant's will to resist.

There were also no promises of leniency made to appellant. The statements he points to as making such promises are at worst ambiguous and, in any event, did not pervade the interrogation. Detective Lait's statement that they were giving appellant a "million dollar opportunity" to explain whether the shooting was intentional or accidental contains no promise of benefit. While the detective stated that knowing whether the murder was intentional or accidental might make a difference in "how we proceed," he did not say it would benefit appellant or that it would make a difference as to whether they would proceed. Furthermore, after Detective Lait made those statements, appellant continued to deny involvement in the Mosley shooting. (See *People v. Williams* (1997) 16 Cal.4th 635, 660-661 [promise not motivating factor where defendant maintained innocence after it was made].) Those statements did not overbear his will to resist and proximately cause him to confess. Detective Garrido's statement that they wanted to get appellant "cleared up" was little more than encouragement to tell the truth.

Even if construed as promises of benefit if appellant confessed, those promises were not the motivating factors for his confession. The most salient factor in inducing appellant's confession appears to have been the playing of Phillips's recorded statement directly implicating appellant in Mosley's murder and indicating that he had been "sold out" by a

BPS gang member. After the recording was played, he immediately admitted to being present at the scene, structuring his story to suggest that Mad Moe was the killer.

The facts here can be clearly distinguished from those presented in cases invalidating confessions as involuntary. (See *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1485-1487 [defendant questioned for nearly eight hours, was exhausted and had nothing to eat, got sick upon being shown autopsy photographs of the victim, indicated on several occasions that he no longer wanted to talk, had been drinking and was distraught and continually lied to]; *People v. Vasila* (1995) 38 Cal.App.4th 865, 874, [promises made that federal prosecution would not be instituted and defendant would be released on his own recognizance]; *Hogan, supra,* 31 Cal.3d at pp. 837-838 [promises stating that interrogators would see what they could do to help the defendant and where interrogators engaged in psychological coercion and falsely told the defendant he had been seen committing the charged offenses]; *People v. Neal* (2003) 31 Cal.4th 63, 81-85 [despite multiple requests for counsel or invoking right to remain silent, investigators made threats and promises to an immature and uneducated defendant who was held incommunicado and without food for more than 24 hours]; *People v. Jimenez* (1978) 21 Cal.3d 595, 610-611, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17 [investigator told the defendant he could get the death penalty if he did not admit the offense]; *In re Shawn D., supra,* 20 Cal.App.4th at pp. 213-216 [interrogators falsely told defendant that witnesses would identify him, that a truthful statement would benefit the defendant's girlfriend and that the suspect would not be tried as an adult if he confessed].)

II.

FAILURE TO INSTRUCT

*11 Appellant contends that the trial court erred in failing to instruct sua sponte in accordance with CALJIC No. 8.73 and related explanatory instructions pertaining to provocation and heat of passion. He argues that while the trial court correctly refused to instruct on manslaughter, the manslaughter instructions could be tailored to relate the concepts of provocation and heat of passion to whether appellant subjectively harbored the mental state of premeditation and deliberation. This contention is without merit.

During the jury instruction conference, the trial court rejected manslaughter instructions as inapplicable. Defense counsel did not object. CALJIC No. 8.73 was not discussed nor given. It provides: “If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation.”

A. Sua sponte instruction

In criminal cases, " ' "even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." ' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court encompasses an obligation to instruct on all essential elements of the charged offense where it relates to a material issue presented by the evidence. (*People v. Banks* (1983) 147 Cal.App.3d 360, 367.) Even an accurate instruction need not be given if there is no evidence to which it properly relates. (See *People v. Ortiz* (1923) 63 Cal.App. 662, 667.)

In *People v. Saille* (1991) 54 Cal.3d 1103, 1117, the California Supreme Court held that a trial court in a murder case is not required to instruct sua sponte that the jury should consider the defendant's voluntary intoxication in determining whether defendant premeditated and deliberated. The Supreme Court explained: " '[W]hen a defendant presents evidence to attempt to negate or rebut the prosecution's proof of an element of the offense, a defendant is not presenting a special defense invoking sua sponte instructional duties. While a court may well have a duty to give a 'pinpoint' instruction relating such evidence to the elements of the offense and to the jury's duty to acquit if the evidence produces a reasonable doubt, such 'pinpoint' instructions are not required to be given sua sponte and must be given only upon request. [Citations .]' " (*Id.* at p. 1117.) Relying upon this logic, our Supreme Court explicitly held in *People v. Rogers* (2006) 39 Cal.4th 826, 878-879 that CALJIC No. 8.73 is a pinpoint instruction that need not be given sua sponte. Hence, the trial court did not err here where no request for that instruction was made.

*12 The trial court did not err for an additional reason. Provocation which incites a defendant to homicidal conduct in the heat of passion must be caused by the victim or be conduct reasonably believed by the defendant to be engaged in by the victim. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583.) There was no evidence that any of the victims had done anything to provoke appellant. As such, there was insufficient evidence to justify giving CALJIC No. 8.73, even if requested.

B. Ineffective assistance of counsel

Appellant contends that if a request for CALJIC No. 8.73 is required, he suffered ineffective assistance of counsel by virtue of his attorney's failure to request that instruction. We disagree.

The standard for establishing ineffective assistance of counsel is well settled. The defendant bears the burden of showing, " 'first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.' " (*People v.*

Hernandez (2004) 33 Cal.4th 1040, 1052-1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 (*Strickland*).) It is presumed that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland, supra,* at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

The record before us does not reflect the reason defense counsel did not request CALJIC No. 8.73, and no request to counsel for an explanation of his failure was made. We cannot say that counsel could have had no tactical reason for failing to request CALJIC No. 8.73. Appellant asserted an alibi defense and introduced evidence to negate the admissions he made during his interrogation. Defense counsel could reasonably have concluded that to instruct on provocation would have undermined both appellant's claim that he was not present at the shooting and his claim that his admissions to interrogators were coerced.

Additionally, had defense counsel requested CALJIC No. 8.73, it is not reasonably probable that appellant would have realized a more favorable result. As we stated above, there was insufficient evidence of provocation by the victim to warrant the instruction. Hence, a request for it would have likely been denied.

III.

SUFFICIENCY OF EVIDENCE

Appellant was convicted of the attempted murder of Coleman. He contends that there is insufficient evidence to support that conviction. He argues that in order for the prosecution to prove attempted murder it must prove that he had the specific intent to kill Coleman and performed a direct but ineffectual act toward accomplishing the intended killing, but that the evidence only suggests an intent to kill Darden. He further argues that he cannot be found culpable under the "kill zone" theory or as an aider and abettor. Under the former theory, he asserts that the evidence was that Coleman was not in the vicinity of Darden when the shots were fired and hence was not in the "kill zone." This contention is without merit.

*13 "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the

evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless " 'upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' " (*People v. Bolin, supra,* at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

Attempted murder requires the specific intent to unlawfully kill another human being and proof of a direct but ineffectual act done towards that end. (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) In *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), the court concluded that "although the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what it termed the 'kill zone.' 'The intent is concurrent ... when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, ... a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire ... [t]he defendant has intentionally created a "kill zone" ...." ' (*Id.* at pp. 329-330; see also *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565 [attempted murder charges affirmed where defendants sprayed numerous bullets into two houses with high powered, wall-piercing weapons though defendants may have targeted only one person at each house].)

Appellant and his associates created a "kill zone" in the Degnan alley. Appellant saw that Darden's car door was open and thought that there were people inside. He saw three people standing near the car. He did not see any females but only saw "dudes." He said that the men he saw were Rolling 40's gang members. He retaliated by shooting them, intending to hit any Rolling 40's gang members he could. Bullets began to fly and he "dumped" his gun, firing five or six bullets. His associates also fired. The bullets were sprayed throughout the immediate area, hitting Darden's car and a nearby building. The fact that appellant may not have known Coleman's gender does not insulate him from culpability for shooting at her as she stood in the "kill zone." While appellant argues that Coleman had proceeded to her apartment and hence was not in the "kill zone," Darden testified that he and Coleman were together when the shooting began. Coleman testified that the shooters "just walked up and we looked over at them, and they just started shooting ." There was no delay between the time Coleman saw her attackers and shooting began. There was no evidence that she had left the "kill zone" before the shooting began. Appellant unloaded his gun on his targets, intending to kill everyone in the area. FN10

FN10. Having concluded that there was sufficient evidence to support appellant's conviction of attempted murder of Coleman on a "kill zone" theory, we need not consider the alternative possibility that appellant was guilty as an aider and abettor.

IV.

PRESENTENCE CUSTODY CREDIT

*14 Appellant was in continuous custody from the time of his arrest on July 14, 2004, until the date of his sentencing in this matter on December 14, 2005. At the time of sentencing, a probation violation case against appellant was trailing. The parties agreed that appellant could be sentenced in the instant case based upon the probation report in the probation matter. At the hearing, the trial court did not order any presentence credits for time actually served .[FN11] It ordered probation terminated in the trailing matter, but did not impose any sentence in connection with it.

FN11. As reflected in the reporter's transcript of the sentencing hearing, the trial court said nothing about custody credits during the hearing. But the minute order of that hearing states: "The court states that the defendant is not entitled to any custody credits in this matter."

Appellant contends that the trial court erred in refusing to award presentence credits for time served.

Section 2900.5 accords all defendants presentence credits for actual time spent in custody. (§ 2900.5, subd. (a).) Subdivision (b) of section 2900.5 provides: "(b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a single period of custody attributable to multiple offenses for which a consecutive sentence is imposed." The purpose of this section is to "ensure that one held in pretrial custody on the basis of unproven criminal charges will not serve a longer overall period of confinement upon a subsequent conviction than another person who received an identical sentence but did not suffer preconviction custody." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1183-1184 (*Bruner*).)

The trial court failed to state any reasons for its failure to accord appellant actual time presentence custody credits. A defendant convicted of murder is not precluded from receiving such credit (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645-646), although such defendant is precluded from receiving worktime credits (§ 2933.2). Moreover, a defendant is entitled to credit for presentence custody only if he shows the conduct that led to his conviction "was the sole reason for his loss of liberty during the presentence period." (*Bruner, supra,* 9 Cal.4th at p. 1191; *People v. Mendez* (2007) 151 Cal.App.4th 861, 864.) Thus, a "criminal sentence may not be credited with jail or prison time attributable to a parole or probation revocation that was based only in part upon the same criminal episode." (*Bruner, supra,* at p. 1191.)

The record before us fails to provide adequate information for us to assess whether the probation matter affects appellant's entitlement to presentence custody credit. We therefore remand this case for the trial court to make that determination.

DISPOSITION

The matter is remanded for the trial court to determine whether presentence custody credits should be awarded. The judgment is otherwise affirmed.

We concur: BOREN, P.J., and CHAVEZ, J.

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