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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re E.R., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. E.R., Defendant and Appellant.	A124706 (City & County of San Francisco Super. Ct. No. JW076057)

This is one of four appeals now before us arising from a single trial in which wardship and commitments to the Division of Juvenile Justice (DJJ) have been imposed on four minors for their roles in a gang-related shooting in which one innocent youth was killed and another wounded.

On March 16, 2007, Antwanisha Morgan, Thomas J. [1], Antoine S., Chante P., and other young people were talking outside a recreation center in the Bayview District of San Francisco. About a month earlier, some of these youths (not identified as members of any gang) had chased members of the G-3 criminal street gang away from a talent show at the recreation center where the gang members had started a disturbance. On March 16,

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of the Background and Parts 2 through 7 of the Discussion.

[1] Because so many juveniles were involved in this case, for clarity we have used initials to identify those against whom wardship petitions were brought and the first names and last initials to identify those juveniles who were not parties to the proceedings. Individuals identified by their full names are not minors.

three members of the G-3 gang, T.Tr., E.R., and D.B., returned to the center and two of the three shot at the group of youths that were congregated there, killing Antwanisha and wounding Thomas J. Immediately after the shooting, all three drove off in a waiting car driven by Kamisha Gray and occupied by two other gang members, T.Tu. and another youth. An expert on criminal street gangs testified that he believed each of the four accused minors was a member of the G-3 gang, and that the shooting was in retaliation for the prior incident at the talent show and an attempt to rehabilitate the reputation of the gang by instilling fear in the community.

The juvenile court found that E.R. committed conspiracy, first degree murder, two counts of attempted murder, and assault with a deadly weapon. The court found true allegations that E.R. personally used a firearm in the commission of these offenses. The court also found that he committed the crimes for the benefit of or in association with a criminal street gang. E.R. was committed to the DJJ for a maximum of two terms of 25 years to life for the conspiracy and the murder, and additional concurrent terms for the remaining offenses. A maximum term of 25 years to life was imposed but stayed for the gang enhancement.

E.R. contends that after the court found him guilty of second degree murder, the court improperly changed its "verdict"[2] on the murder charge from second degree to first degree, that the court improperly changed its finding on personal use of a firearm, that there was insufficient evidence to support the court's findings on the conspiracy, gang and assault allegations, and that the juvenile court erred in various ways in its dispositional order. In the published portion of this opinion, we conclude that the juvenile court erred when it changed its verdict on the murder charge. In the unpublished portions we conclude that the disposition order must be corrected in several respects, but find no merit to E.R.'s remaining contentions.

[2] The court prepared and filed forms entitled "Verdict" with respect to each of the four juveniles who were the subjects of the proceedings. These verdict forms contain the court's findings, and we shall therefore refer to the verdicts and the findings interchangeably.

BACKGROUND*

Approximately one month before the shooting, Antoine was in a dance competition at the International School for the Arts (ISA), a high school. During the performance an altercation occurred between "two different crowds." Antoine's friend Chris was also present and Antoine saw "somebody else come on in front of him and shake . . . their hair in front of him. The next thing I know [is] the staff . . . came in between and was breaking it up." The person who shook his hair in Chris's face had dreadlocks.

Alex H. was also present at the ISA talent show and was also at the recreation center on March 16. He testified that while Antoine was dancing at the talent show "[p]eople got on stage and they started shaking their dreads in [Antoine's] face." One boy repeated this behavior with Chris, who was standing next to Alex. Alex pushed the boy who did this and the two started arguing. Alex was asked if "shaking your dreads [is] part of a dance," and he answered that it was not, but also testified that some of the people shaking their dreadlocks were doing so as part of a dance. Thomas J. was also in the audience at the ISA talent show. He left when the fight broke out.

Chante P. was at the talent show with Antoine, Alex and two other young people. She saw some girls come in through the side door whom she described as "loud and disrespectful" to Chante and her friends. They were "walking by us and pushing us and mugging us." She had previously seen the girls in the Potrero Hill neighborhood. One of the girls made a phone call and T.Tu. (also known as Bad Boy) and some other boys came into the auditorium through the side door. "They said let's have a . . . dance battle. And they were dancing on stage. . . . And somebody pushed another person. And that person got mad. And then they was about to fight. And a security guard that was there said you guys are not going to fight in here. Take that outside." Everyone left the auditorium. Then "everybody started arguing," and Alex, Antoine and another boy followed T.Tr. and T.Tu. up Potrero Hill.

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* The Background of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

On March 16, Antoine, Antwanisha, and several other youths were standing outside of the Bayview recreation center on Third Street between Revere and Quesada waiting for Antwanisha's mother. Three boys walked by. Antoine heard a sound "like a firecracker" and Antwanisha fell to the ground. One of his friends grabbed Antoine and they ran. As they were running they heard "bullets hitting on cars and the wall and the street." Antoine heard "a lot" of shots; some sounded like firecrackers and the others sounded "a little bit louder, sounded like a gun." Thomas J. was shot in his hip. He saw two boys, each holding a gun.

A witness was sitting in her car at the intersection of Quesada and Third Street on March 16 when she "heard some popping sounds." She looked to her left and saw an African-American person wearing dark clothing shooting a gun. When he had fired five or six shots, he "went up the street. There was a car sitting there waiting. And [he] got in the car and the car took off." She reported the license plate number of the car to the police.

Chante was standing in front of the recreation center with Antwanisha when she was killed. "A group of boys walked down the street. And we stopped talking. And put our heads down. And they walked by us." There were four or five boys in the group. They walked around the corner onto Quesada, arguing. At the corner the boys looked back at the group in front of the recreation center. One of the boys came back around the corner and began shooting. "His gun got jammed. And another boy came around the corner and started shooting." She recognized the first shooter as "E-Boy" or E.R. and the second shooter as "Bad Boy," or T.Tu. She identified a third person in the group as D.B.[3]

Chris C., a friend of Antwanisha, had been at the ISA talent show and was also present in front of the recreation center on March 16. He saw a boy with a gun in his hand who also had his hands over his face. The boy said to Chris, "You got five," and in response Chris ran.

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[3] Chante later testified that she did not know D.B. and had not seen him that night, and that she had based her testimony that he was present on the fact that "someone told [her] that they thought [D.B.] was there with the shooters."

Kamisha testified[4] that on March 16, she drove T.Tu., T.Tr., D.B., E.R. and a boy named "Smed" to Third Street and Quesada. She turned onto Revere and stopped at the corner because someone in the car said, "There he is." D.B., T.Tr. and E.R. got out of the car. Kamisha pulled the car forward and parked on Quesada. T.Tr. and E.R. fired shots then got back in the car along with D.B. While E.R. and T.Tr. were shooting, D.B. "was standing there. He wasn't doing nothing." As they drove away, T.Tu. opened the door of the car and said to some people, "You see how we do." The three boys who had gotten out of the car talked about the shooting and said that "somebody should have got hit." Kamisha drove them to D.B.'s house.

Kamisha left D.B.'s home with T.Tu. and they drove to Kamisha's house, then to Potrero Hill. While they were driving, another car in which there were three people wearing masks pulled alongside them. Kamisha pulled onto the freeway with the other car following behind. On the freeway, someone in the other car shot at them and T.Tu. shot back. When Kamisha pulled off the freeway, she collided with another vehicle, then got out of the car and ran.

On December 21, 2007, a juvenile wardship petition was filed under Welfare and Institutions Code section 602, subdivision (a) alleging that E.R. had committed conspiracy (Pen. Code, § 182, subd. (a)(1))[5] (count 1), murder (§ 187) (count 2), two attempted murders (§§ 187, 664) (counts 3 and 4), and assault with a deadly weapon (§ 245, subd. (a)(2)) (count 5). An arrest warrant was attached to the wardship petition. The warrant alleged personal use of a firearm with great bodily injury which caused the death of Antwanisha (§ 12022.53, subd. (d)), that E.R. was a principal in the commission of the first four counts within the meaning of section 12022.53, subdivision (e), personal use of a firearm causing great bodily injury to Thomas J. (§ 12022.53, subd. (d)), and that the crimes were committed for the benefit of a criminal street gang with the intent to

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[4] Kamisha was given immunity for her testimony and placed in a witness protection program.

[5] Further statutory references are to the Penal Code unless otherwise specified.

promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(C)).

Leonard Broberg, a member of the San Francisco Police Department Gang Task Force, testified as an expert on gang culture in San Francisco. He has been aware of and investigated the "25th Street" gang since 1996. The gang's territory is the Potrero Hill housing development. G-3 is a subset of the 25th Street gang. "Zoo Block" is another gang that occupies the Potrero Hill Annex on the north side of the housing development. Broberg identified a photograph of T.Tu. using the G-3 hand sign and one of T.Tr., D.B., and T.Tu. using the G-3 sign. He identified two other photographs of D.B. along with various other juveniles using the G-3 sign. In another photograph, D.B. was simulating holding two guns. Broberg opined that "[f]requently gang members . . . will not have pictures of themselves tak[en] holding actual guns, but they will simulate holding guns to basically show people that they would pick up a gun." In another photograph, D.B. was identified using the 25th Street gang sign. Two other photographs showed D.B. with documented members of the Zoo Block and 25th Street gangs. Broberg identified D.B. in a photograph taken from his home; on the bottom of the photograph was written "25th" and "G-3 Rude."

Broberg opined that 25th Street was a criminal street gang based on his "knowledge of the individuals involved with the gang. Their criminal histories. Their associations. Some of their activities in committing some of the predicate crimes that are enumerated under [section] 186.22. And that some of the 25th Street gang members have pled guilty to being 25th Street gang members." In reaching his opinion Broberg had reviewed hundreds of police reports involving the gang.

Broberg testified that "[o]ne of the things to remember about gang culture is the fact that fear and respect are interchangeable. In order to be respected, you have to be feared. In order to be feared, you have to resort to acts of violence." "In order to be a member of the gang, you'd have to have gained their respect. You've also had to gain their confidence. And this is done in any number of ways, but most of all it's by your actions and by showing your loyalty to the gang . . . either [by] committing acts on behalf

of the gang, participating in criminal activities of the gang, or if you're arrested at various points and you're not snitching on the gang." In Broberg's experience, "gang members aren't going to commit acts of violence or extremely heinous acts with someone that they don't trust. And in order to trust you, you pretty much need to be a member of the gang or a really trusted associate and that may be one . . . seminal act that will get you to cross over from being just a mere associate as to being a member within the gang. Also, committing an act of violence, again, what you're doing then is you're establishing your reputation not just within the gang but you're establishing your reputation outside the gang . . . . And an individual . . . in order to be respected within a gang culture, you need to be feared. The more feared you are, the more respected you are. And then the gang benefits because the gang will be more respected because they will be feared. And this is usually accomplished through acts of violence."

The fact that everyone in the car that day was a gang member or an associate of the gang indicated to Broberg that everyone in the car was supporting one another and participating in the crimes. The fact that three of the people in the car were dropped off, and the car waited for them nearby suggested that the crimes were planned. He testified that gang members commit crimes together "in order to give each other moral support. They'll commit crimes together, depending on some of the factors where maybe they need to help protect or act as lookouts or serve as an additional person that can shoot or protect the gang."

Broberg was of the opinion that the crimes committed in this case were for the benefit of a street gang and were done in retaliation for the incident at the talent show. He based that opinion on "the basic interchangeability of fear and respect. Some of the letters that I reviewed during the course of this investigation where they're talking about the need to reestablish themselves, they need to assert themselves, references to G-3 and the members of G-3 . . . that were not taken seriously."

Broberg knew about the fight at the ISA talent show from speaking with the school's principal. Broberg testified that "shaking dreads" in someone's face is a sign of disrespect. He was aware that E.R., and T.Tu. were present at the talent show, as were the

boys who were with Antwanisha in front of the recreation center the night of the shooting—Alex H., Antoine, Chris C., and Thomas J. The three youths who walked by the recreation center "made absolutely no attempt to conceal their identity because people recognize[d] them." That was significant because "as they're walking by they wanted people to know who they were or where they were from." "The fact that they're not worried about people identifying them just tells you the grip that this whole idea has in the community about . . . not snitching, about not cooperating with the police. . . . [T]hey weren't concerned with who saw them. In fact, they wanted people to know that they were there, that they were sending that message of disrespect."

The recreation center was "a neutral zone. That's pretty much where kids can hang out and feel fairly safe . . . ." The people who were shot at were not documented gang members. Broberg testified that the statement, "that's how we do," was "a statement saying this is how we answer any forms of disrespect." "This is . . . a reference to the fact that they're willing to resort to violence in order to establish themselves." Broberg believed that the shooting was committed because the gang needed to reestablish respect after the disrespect that had been shown them at the talent show.

The juvenile court found true the allegations in count 1 that E.R. conspired to commit murder, that he was a principal in the crime, that the conspiracy was committed for the benefit of a criminal street gang, and that E.R. personally used a firearm. The court found true the allegations in count 2 that E.R. committed first degree murder and in counts 3 and 4 the attempted murders of Alex H. and Antoine S., that he was a principal in those crimes, that the crimes were committed for the benefit of a criminal street gang, and that he personally used a firearm in the commission of those crimes. Finally, the court found true the allegation in count 5 that E.R. committed an assault with a firearm on Thomas J.

E.R. was committed to the DJJ for two concurrent maximum terms of 25 years to life for the conspiracy and the murder, two concurrent terms of five years for each of the attempted murders, and a concurrent term of two years for the assault with a deadly weapon. The court imposed but stayed a term of 25 years to life for the great bodily

injury enhancement and imposed but stayed a term of 10 years for the gang enhancement. E.R. timely appealed.

DISCUSSION

1. *Finding that the murder was first degree*

At the conclusion of the jurisdiction hearing, the juvenile court announced its finding on the first count that E.R. had engaged in a conspiracy to commit murder, and on the second count that E.R. had committed "murder of the second degree." Citing *People v. Cortez* (1998) 18 Cal.4th 1223 (*Cortez*), the prosecutor objected, arguing that having found true the allegation of conspiracy to commit murder, the murder necessarily was first degree. After further argument the court stated, "In that case, unless I hear otherwise from defense counsel, I will find all the murders as to count two for all these minors to be in the first degree."

In *Cortez*, the defendant and other members of a gang planned a drive-by shooting that targeted members of a rival gang in retaliation for an earlier assault. During the shooting, one of the members of the defendant's gang, Corletto, was killed and the defendant was charged with the murder of his fellow gang member on the theory that the defendant's actions had provoked the return fire that resulted in Corletto's death. The defendant was also charged with conspiracy to commit murder on the theory that he and Corletto had conspired to murder rival gang members. (*Cortez, supra,* 18 Cal.4th at p. 1228.) The jury found the defendant guilty of the conspiracy but could not reach a verdict on the murder charge. On appeal the defendant argued that the trial court erred by not requiring the jury to determine the degree of the murder that was alleged as the target offense of the conspiracy count. The Supreme Court disagreed. It reasoned that "conspiracy is a specific intent crime requiring both an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy. [Citation.] Murder that is premeditated and deliberated is murder of the first degree. ' "[P]remeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." [Citations.] . . . [¶] Consequently, it logically

follows that where two or more persons conspire to commit murder—i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder—each has acted with a state of mind 'functionally indistinguishable from the mental state of premeditating the target offense of murder.' [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder—hence all murder conspiracies are conspiracies to commit first degree murder, so to speak." (*Id.* at p. 1232.) The court held that "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder, and that all murder conspiracies are punishable in the same manner as murder in the first degree . . . ." (*Id.* at pp. 1237-1238.)

E.R. contends that the juvenile court erred when it changed the verdict on the murder charge from second to first degree. He argues, "Although the high court in *Cortez* held that there is no crime in California law of conspiracy to commit second degree murder, the case does not speak to what a trier of fact must find when the killing which is the objective of the conspiracy is separately charged pursuant to Penal Code section 187." He argues that there is no inconsistency in concluding that a person both conspired to commit first degree murder and committed a murder that under the circumstances was second degree. We agree with this contention.

Cortez is not dispositive here. The Supreme Court did not hold that a defendant may not be found guilty of conspiracy to commit murder and also of the substantive offense of murder in the second degree. While any conspiracy to commit murder is necessarily a conspiracy to commit murder in the first degree, as *Cortez* holds, a person can conspire to commit first degree murder but nonetheless commit a murder under circumstances that were not contemplated and which amount to no more than murder in the second degree. Indeed, it is possible for a person to conspire to commit a murder and

no murder to occur.[6] Whether a murder that does occur was premeditated or was prompted by circumstances meeting the criteria of second degree murder is a question of fact, not one of law.

We do not question that the evidence in this case would support a finding that E.R. committed murder in the first degree, particularly in view of the evidence and finding that the conspirators planned to commit a murder of one of the youths who was in front of the recreation center that night. Nevertheless, the juvenile court explicitly found that the murder was of the second degree. Even if that finding is inconsistent with the conspiracy finding, "as a general rule, inherently inconsistent verdicts are allowed to stand." (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) "[I]f an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both." (*People v. Santamaria* (1994) 8 Cal.4th 903, 911.)

The juvenile court changed its finding on the murder count in response to the prosecutor's argument that the court was compelled by *Cortez* to do so. Since *Cortez* does not compel such a result, the finding on count 2 should be corrected to reflect the trial court's original finding of second degree murder.

2. *Personal discharge of a firearm*[*]

When reading the verdicts it had prepared, the juvenile court stated that it found E.R. had not personally discharged a firearm. After the lunch recess, the court indicated that it had misspoken and that it found E.R. *had* personally discharged a firearm. E.R. argues that the court had no jurisdiction to change the finding.

When announcing the verdict for E.R., the trial court stated, "I cannot find who was the second . . . shooter. So I am going to find [E.R.] and [T.Tr.] not to be the second shooter. In that—you did not prove it beyond a reasonable doubt in that either one of them was the second shooter. Even if there was testimony that seemed to indicate so."

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[6] There is no crime of conspiracy to commit attempted murder. (*People v. Iniguez* (2002) 96 Cal.App.4th 75.)

[*] Part 2 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

Shortly thereafter, the court began to announce its findings on the overt acts alleged in support of the conspiracy count. The court stated, "On or about March 16th, 2007, [T.Tu.] and Kamisha Gray did drive together to the intersection of Third and Quesada Streets. You know what? I am not going to find that allegation. Because I am not sure whether he was in the car or not in the car. Since I found that he was not in the car due to [Chante's] testimony, I am not going to find that he was in the car with Kamisha Gray. . . . I find [Chante's] testimony to be a lot more reliable than Kamisha Gray's testimony." The prosecutor interrupted, stating, "Your honor, I just want to clarify something here. When you are saying about [Chante] and you're saying the person she identified in court was [T.Tu.] . . . [¶] — So we are now doing [E.R.]." The court stated, "Okay, Let me look at my notes again. She identified two boys, E Boy[7] and Bad Boy . . . and Bad Boy is . . . [T.Tu.]" The court then stated, "I do not find the personal and intentional discharge of firearm GBI allegation pursuant to Penal Code section 12022.53(d) to be true." The court also found "the personal and intentional discharge of a firearm [great bodily injury] allegation pursuant to Penal Code section 12022.53(d) on Thomas J[.], to be not true." The court found the personal discharge of a firearm allegations alleged regarding the murder to be not true as well.

After the court recessed for lunch, the court announced, "I need to correct a clerical mistake in my reading of the verdict as well as maybe a substantive mistake. What happened when I was looking at the verdict form as I read . . . [E.R.]'s verdict from my notes I used the word [T.Tu.]. So I misspoke. And as I read [T.Tu.]'s verdict from my notes, I misspoke and said [E.R.] So it was my mistake in misspeaking the names of the two individuals." E.R.'s counsel objected, stating, "The court rendered a verdict, found allegations—announced that my client was not the shooter. Found the allegations of personal use not true. I believe that jeopardy has attached. The court can't change the verdict. It doesn't really have jurisdiction now to change her verdict." After some discussion of whether the court could change the verdict, it stated, "All along I meant to

[7] E.R.'s godmother testified that his nickname is E-boy.

find personal use as to [E.R.] And not as to [T.Tu.] It was a mistake in my pronouncing of their names. So I would like to correct that as a mistake on my part in my reading of the verdict. The verdict forms on the other hand as signed by me are correct, which is [E.R.] is the personal usage and [T.Tu.] is not—I do not find it to be true that he personally used the gun." The court continued, addressing E.R.'s attorney, "I can see that you may wish to appeal my situation right now, whether or not jeopardy has attached. But I want to clarify on the record that when I pronounced orally the verdict as to [T.Tu.], I meant it to be [E.R.] and that the special gun allegation applied only to [E.R.] and not to the other three minors." At the end of the hearing the prosecutor asked, "Your honor, can we put something on the record just so we are clear? Is that now for the first time, if I am not mistaken, the court is recording the verdicts. They were not recorded earlier. Is that correct?" The court asked the clerk if that was correct and the clerk replied, "The verdict has not been signed." The court stated, "Okay, now I have signed it." The prosecutor asked, "And now they are going to be recorded for the first time?" The court replied, "They are now recorded."[8]

"It is not open to question that a court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts. [Citations.] The power exists independently of statute and may be exercised in criminal as well as in civil cases. [Citation.] . . . The court may correct such errors on its own motion or upon the application of the parties. [Citation.] [¶] Clerical error, however, is to be distinguished from judicial error which cannot be corrected by amendment. The distinction between clerical error and judicial error is 'whether the error was made in rendering the judgment,

[8] The clerk's transcript contains two substantively identical copies of the verdict form, both signed by the court, but the two copies are not identical and appear to have been copied at different times. The first contains various deletions and corrections throughout, including a crossed out "not true," replaced by "true" as to the section 12022.53, subdivision (e) enhancement on count 1. This copy bears no file stamp. On the second copy, which is file-stamped, it appears that the prior entries were whited out and replaced with entries corresponding to the corrected entries on the first copy. Thus, it appears that the judge corrected the verdict form, then signed and copied it, and that likely the clerk cleaned up the form and recorded it.

or in recording the judgment rendered.' [Citation.] Any attempt by a court, under the guise of correcting clerical error, to 'revise its deliberately exercised judicial discretion' is not permitted. [Citation.] [¶] An amendment that substantially modifies the original judgment or materially alters the rights of the parties, may not be made by the court under its authority to correct clerical error, therefore, unless the record clearly demonstrates that the error was not the result of the exercise of judicial discretion." (*In re Candelario* (1970) 3 Cal.3d 702, 705.)

E.R. relies on *People v. Parks* (2004) 118 Cal.App.4th 1 to support his contention that the juvenile court was without jurisdiction to change its findings. In that case, "[t]he trial court acquitted Parks of attempted murder but found him guilty of assault with a firearm. [Citation.] When Parks first objected, a month later, that assault with a firearm is not a lesser included offense of attempted murder, the trial court amended its verdict to reflect a conviction of attempted voluntary manslaughter [citation], which is a lesser included offense of attempted murder." (*Id.* at p. 3.) "[T]he trial court heard the evidence, listened to argument from the parties and announced its verdict on November 14, 2002. A minute order prepared for that date records the verdict. However, the verdict worked as an acquittal of attempted murder and its lesser included offenses." (*Id.* at p. 9.) The court concluded that "the trial court acquitted Parks of attempted murder and all lesser included offenses on November 14, 2002. Thus, the trial court lacked jurisdiction to convict Parks of attempted voluntary manslaughter on December 20, 2002." (*Ibid.*)

E.R. also relies on *People v. Garcia* (1985) 166 Cal.App.3d 1056, in which the defendant was charged with forcible rape, among other things. At the close of the prosecution's case, the defendant made a motion for acquittal on the rape charge, which the court granted. After a recess, the prosecutor expressed the opinion that the defendant still could be convicted of the necessarily included lesser offense of attempted rape. The court agreed, instructed the jury accordingly, and the defendant was convicted of attempted rape. The Court of Appeal reversed, holding that "When the trial court granted the defendant's . . . motion it was, in effect, directing entry of a judgment of acquittal as to the offense charged in count I. [Citation.] [¶] Once a judgment is rendered it cannot be

altered or changed." (*Id.* at p. 1067.) The court reasoned that in cases where the information charges only the greater offense, an acquittal on that offense is held to be an acquittal on all lesser included offenses. When the trial court granted the motion to acquit the defendant of forcible rape without mention of attempted rape it had therefore acquitted him of both crimes. The court clarified, however, that "[t]his does not mean that the court was without power to limit its judgment solely to the greater offense leaving the question of defendant's guilt or innocence of the lesser included offense to be determined in due course during the trial. Since counsel did not request separate consideration of lesser included offenses and since the court did not, on its own motion, indicate an intent to limit its ruling solely to the greater offense, we must conclude that the judgment rendered encompasses all offenses. Once the judgment was rendered the court was without jurisdiction to reconsider or change it." (*Id.* at p. 1069.)

The situation in this case is not analogous to either of the cases on which E.R. relies. The opinions in both *Parks* and *Garcia* rely heavily on the fact that the defendants had not received fair notice of the revised charge on which they were ultimately convicted. Here, E.R. was fully aware of the enhancement charge from the outset of the proceedings. After reading its verdict following the close of evidence, the court recessed for lunch and then returned to explain its error. Unlike the situation in both *Parks* and *Garcia*, the error was clerical, not substantive. The record clearly demonstrates that the error was not the result of the exercise of judicial discretion. The court was explicit that she had intended to recite one juvenile's name and instead recited that of another. Given the length of the trial, the number of juveniles involved—both those subject to delinquency petitions and those who were percipient witnesses—and the fact that most of these juveniles had gang monikers that were used interchangeably throughout the proceedings with their given names, not to mention the fact that two of the juveniles subject to petitions had the same first name (and the same initial letter of their last names), it is hardly surprising that the juvenile court became momentarily confused and misspoke when pronouncing the verdicts. The court was clear that it intended at the time

the verdict was announced to find true the allegation that E.R. had personally used a firearm and that the "not true" finding was merely a clerical error.

Finally, the correction of this clerical error did not expose E.R. to double jeopardy nor result in a deprivation of his right to due process. E.R. relies on *Smith v. Massachusetts* (2005) 543 U.S. 462, where the court acquitted the defendant of one of three charges halfway through the trial, then reconsidered the acquittal and allowed all three counts to go to the jury, which found defendant guilty on all three. The high court's holding that this violated the defendant's constitutional rights hinged on prejudice where a defendant believes, midtrial, that he has been acquitted of one of the charges. "The seeming dismissal may induce a defendant to present a defense to the undismissed charges when he would be better advised to stand silent." (*Id.* at p. 472.) Moreover, "false assurance of acquittal on one count may induce the defendant to present defenses to the remaining counts that are inadvisable—for example, a defense that entails admission of guilt on the acquitted count." (*Ibid*.) No such prejudice accrued here, as nothing of substance occurred between the court's mistaken pronouncement of its verdict and the correction of the verdict. The Supreme Court also noted that "Double-jeopardy principles have never been thought to bar the immediate repair of a genuine error in the announcement of an acquittal, even one rendered by a jury." (*Id.* at p. 474.) The trial court's correction of its clerical error did not violate double jeopardy principles.

3. *Sufficiency of the evidence*[*]

E.R. argues that there was insufficient evidence to support the finding that he participated in a conspiracy to commit murder. "To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must

[*] Part 3 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

resolve the question of sufficiency in light of the record as a whole." (*People v. Johnson* (1993) 6 Cal.4th 1, 38, abrogated on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826, 879.)

"The doctrine of conspiracy plays a dual role in our criminal law. First, conspiracy is a substantive offense in itself—'an agreement between two or more persons that they will commit an unlawful object (or achieve a lawful object by unlawful means), and in furtherance of the agreement, have committed one overt act toward the achievement of their objective.' [Citations.] Second, proof of a conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy." (*People v. Salcedo* (1994) 30 Cal.App.4th 209, 215.)

"The elements of conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.' [Citations.] To prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.' " (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024-1025.)

There was ample circumstantial evidence to support the juvenile court's finding that E.R. drove to the recreation center with his fellow gang members, got out of the car with D.B. and T.Tr., shot at the group of young people gathered there, then got back in the waiting car. Kamisha testified to all of these facts. She also testified that someone in the car said, "there he is" just before she stopped the car and D.B., E.R. and T.Tr. got out and commenced shooting, which suggests that the group was driving with the purpose of finding a particular individual to shoot. This bolsters Broberg's testimony that the shooting was an attempt for the gang to reestablish credibility after the incident at the dance since several of the individuals in front of the recreation center were also present at the talent show. Finally, the conspiracy finding is supported by the evidence that T.Tu. shouted as they drove away, "That's how we do," before they returned together to Kamisha's house.

E.R. cites evidence suggesting that the shooting was spontaneous. The fact that Kamisha testified that the youths were driving aimlessly before the shooting occurred does not mean that the circumstantial evidence of a conspiracy must be disregarded. "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The evidence was sufficient to support the juvenile court's finding that E.R. committed conspiracy to commit murder.

4. *Gang enhancement*[*]

E.R. also argues that the evidence was insufficient to support the juvenile court's finding that 25th Street/G-3 was a criminal street gang under section 186.22, subdivision (e) and that the crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

E.R.'s first argument is that there was insufficient evidence of the 25th Street gang's primary activities to establish that it is a criminal street gang within the meaning of section 186.22, subdivision (f). That section provides that " 'criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, or (31) to (33), inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would

[*] Part 4 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

necessarily exclude the occasional commission of those crimes by the group's members." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323.)

The prosecution may prove the gang's primary activities by introducing evidence that gang members have consistently and repeatedly committed the crimes listed in section 186.22. (*People v. Sengpadychith, supra,* 26 Cal.4th at p. 324.) Primary activities may also be proven through expert testimony. (*Ibid*.) The court in *Sengpadychith* cited with approval the evidence used to establish the gang's primary activities in *People v. Gardeley* (1996) 14 Cal.4th 605. "There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith,* at p. 324.)

In this case, Broberg testified that he had been aware of the 25th Street gang since 1996, that he was charged with investigating the gang, and that G-3 is a subset of the 25th Street gang. He also testified that he had investigated narcotics crimes, robberies, aggravated assaults, shootings and homicide investigations involving members of the 25th Street gang, all of which are among the crimes enumerated in the designated portions of section 186.22, subdivision (e). He then identified three individuals who had pled guilty to committing a robbery and who had admitted to being members of the 25th Street gang and that indicated that the robbery was committed for the benefit of the gang. Broberg testified that D.B. had "participated in crimes that can be related to the gang's activities. He was arrested for possession of a stolen car in which a car was taken at knife point. [D.B.] was arrested fleeing from the car that he had discarded in the Potrero Hill Public Housing area." He further testified that T.Tu., whom he identified as a member of the 25th Street gang, was arrested with another gang member for discharging a gun at an inhabited dwelling and that "he was firing at the house because the woman was perceived to be snitching." T.Tr. was detained for that crime as well. Broberg opined that the

shooting in retaliation for "snitching" "sends a huge message to residents in the area or people that would cooperate with the police that you could be subject to this too. And, again, it goes back to that whole thing about fear and respect in the gang culture."

Broberg testified that one of the predicate crimes of the gang was possession for sale of cocaine (Health & Saf. Code, § 11351.5) on June 5, 2002, by a gang member named "Mister Alan." Broberg believed the crime was committed for the benefit of the gang because it was committed within the 25th Street gang's territory and "based on my knowledge and my experience regarding gangs and some of their dealings in narcotics trafficking, I know that only gang members or individuals that had the approval of gangs can sell narcotics within the gang's territory." Broberg identified a second degree robbery committed by a Zoo Block gang member that he believed was for the benefit of the 25th Street gang because "[t]his robbery occurred in the gang's territory in broad daylight. . . . [The gang member] ultimately pled guilty to the robbery charges and being a gang member and elocuted in court at the time of his sentencing that this crime was committed for the benefit of the gang, in particular 25th Street."

"To establish the second element, the nature of the gang's primary activities, the trier of fact may look to both the past and present criminal activities of the gang." (*In re Alexander L.* (2007) 149 Cal.App.4th 605, 611.) E.R. cites without discussion several cases in which the court found that evidence of a gang's primary activities was insufficient. All are distinguishable. In *Alexander L.,* the expert's "entire testimony on this point is quoted above—he 'kn[e]w' that the gang had been involved in certain crimes. No specifics were elicited as to the circumstances of these crimes, or where, when, or how Lang had obtained the information. He did not directly testify that criminal activities constituted Varrio Viejo's primary activities." (*Id.* at pp. 611-612.) In *In re Jorge G.* (2004) 117 Cal.App.4th 931, 945-946, *no* expert testimony on the gang's primary activities was presented. In *People v. Perez* (2004) 118 Cal.App.4th 151, 160, the court held that "evidence of the retaliatory shootings of a few individuals over a period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members *consistently and repeatedly* have committed criminal

activity listed in the gang statute.' " In *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 998, a police officer who was qualified to testify about gangs in South San Francisco testified regarding a gang in San Bruno that "the primary activity of all gangs in his area was criminal, including assaults and batteries, weapons possession offenses, assaults with deadly weapons, resisting or obstructing police, and fighting."

This case is distinguishable. Broberg testified to the fact that he had been investigating the 25th Street gang for more than 10 years and that through his investigations he had learned of the gang's activities. He testified to specific crimes committed by specific members of the 25th Street gang where the gang members had admitted that the crimes were committed for the benefit of the gang. Although there is not one specific portion of Broberg's testimony in which he was asked to identify the gang's primary activities as such, his testimony was sufficient to establish that the crimes were not individual acts but that committing crimes enumerated in section 186.22, subdivision (e) is a primary activity of the 25th Street gang.

E.R. also argues that there was insufficient evidence that this shooting was committed for the benefit of the 25th Street gang. Section 186.22, subdivision (b)(1) provides enhanced punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." In order to be subject to this enhancement, "the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, *or in association with any criminal street gang*, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' " (*People v. Gardeley*, *supra*, 14 Cal.4th at pp. 616-617, italics added.)

In *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198, the defendant argued that the evidence showed only that the three defendants belonged to the same gang. The court rejected that claim. "Arguably, such evidence alone would be insufficient, even when supported by expert opinion, to show that a crime was committed for the *benefit* of a gang. The crucial element, however, requires that the crime be committed (1) for the

benefit of, (2) at the direction of, *or* (3) in *association* with a gang. . . . Admittedly, it is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there was no evidence of this. Thus, the jury could reasonably infer the requisite association from the very fact that defendant committed the charged crimes in association with fellow gang members." (*Id.* at p. 1198.)

Here, there was ample evidence that E.R. was in the company of gang members. There was evidence that D.B., T.Tu., T.Tr., and E.R. were members, and that Kamisha was an associate, of the G-3 gang, a subset of the 25th Street gang. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime." (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322, citing *People v. Morales, supra,* 112 Cal.App.4th at p. 1998.) There was evidence that D.B. was the leader of the gang and had been urged to reestablish the gang's credibility. These crimes were committed immediately upon D.B.'s release from custody. T.Tu.'s statement, "You see how we do," also substantiates the theory that the crime was committed for the benefit of the gang. [9] The expert testified that the gang was trying to rehabilitate its reputation by instilling fear, and that gang members do not generally commit crimes with non-gang members. His opinion that the crimes were committed for the benefit of the gang was based on evidence in the record.

E.R. also argues that there was insufficient evidence that he was a gang member. He argues that the evidence that he "was a member of the G-3 subset was extremely weak, which tends to prove he did not have a specific intent to promote the gang." Broberg testified that there was a field identification of E.R. on August 7, 2006 in "an

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[9] E.R. takes issue with the credibility of Kamisha's testimony that T.Tu. shouted "you see how we do" after the shooting because the version of events she related changed multiple times over the course of the investigation and trial. However, " 'we have no power to judge of the effect or value of the evidence, to weigh the evidence, *to consider the credibility of the witnesses,* or to resolve conflicts in the evidence or in the reasonable inference that may be drawn therefrom.' " (*In re Stephen W.* (1990) 221 Cal.App.3d 629, 642, italics added.)

area where the members of 25th Street and G[3] will come together with the members of Zoo Block. It's sort of like the boundary between 25th Street and Zoo Block's territory but because they're allied, they always associate there." There was a photograph of E.R. with three documented members of the Zoo Block gang. Broberg also believed that E.R. was a gang member because on the occasion of the field identification, "when the police arrived, [E.R.] and [another gang member] ran to Connecticut, which is within the safety zone for the 25th Street G-3 gang members." Broberg also relied on police reports that E.R. was arrested for an assault in which a documented gang member was also involved, and a second assault in which E.R. "assaulted the young man and referred to himself as E-boy and said that this was for snitching." Broberg also relied on an incident in which E.R. had contact with the police because he and T.Tu. were involved in a robbery using a replica gun. E.R. was involved in the altercation at the talent show and Broberg opined that this shooting was an attempt to bolster the gang's credibility following that incident. Finally, Broberg testified that gang members do not generally commit crimes with non gang members, so the fact that the other occupants of the car on the day of the shooting were gang members or associates is strong evidence that E.R. was also a member of the G-3 gang.

There was substantial evidence to support the juvenile court's conclusion that the crime was committed in association with a gang, which is sufficient to support the enhanced punishment under section 186.22, subdivision (b)(1).

5. *Evidence regarding the assault on Thomas*[*]

Antwanisha was killed by a bullet fired by a .25 caliber handgun, which the court found was fired by E.R.[10] Thomas was shot with a .38 caliber bullet. The court indicated that it was not convinced beyond a reasonable doubt whether D.B. or T.Tr. was the second shooter whose bullet struck Thomas, and it therefore did not find true that the

[*] Part 5 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

[10] The court found that "the conspirators" fired such a handgun, and found true the personal discharge of a firearm causing death to Antwanisha as to E.R., but not as to either D.B. or T.Tr.

"conspirators" fired a .38 caliber revolver. The court nonetheless found true count five of the petition, that E.R. committed assault with a firearm on Thomas, and the enhancement that E.R. personally and intentionally discharged a firearm and proximately caused great bodily injury to Thomas.

Although Thomas was not struck by a bullet fired from the gun that E.R. was found to have used, his firing of the .25 caliber handgun in the direction of Thomas could properly have been found to be an assault on Thomas. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) Section 245, subdivision (a)(2) punishes "an assault upon the person of another with a firearm." E.R. argues that he could have committed an assault on Thomas only if there was evidence that Thomas was in a place where he was likely to have been shot with the .25 caliber gun, and that "it was not established that Thomas J. was in a location in which he was likely to be injured by the weapon appellant was found to have fired." The "present ability" element of assault is met "when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168, fn. omitted.)

There was ample evidence that Thomas was standing with the other youths in front of the recreation center when E.R. and D.B. or T.Tr. began shooting into the group. Therefore, there was evidence that Thomas was in danger from both shooters. E.R. argues that Thomas had moved to a slightly different location when the shooting began, but the evidence established that he was still in the vicinity of the shooting and was in danger. E.R. argues that "[t]he boy who fired the .25 Taurus from the intersection of Third and Quesada Streets did not have the means and location to strike Thomas J. immediately."This assertion is not supported by the record. Although Thomas may not

have been standing with the group, there was no evidence that he was out of the range of the shooters. Simply because he was hit with a .38 caliber bullet does not compel the conclusion that he was not in a place where he could have been shot with the .25 caliber gun.

E.R. also argues that because he was found to have fired only the .25 caliber weapon and Thomas was struck with a .38 caliber bullet, the evidence was insufficient to sustain the enhancement against him under section 12022.53, subdivision (d) with respect to the injury to Thomas. "Section 12022.53(d) enhances the sentence of anyone who, in the commission of specified felonies including murder and attempted murder [citation], 'intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death, to any person other than an accomplice . . . .' " (*People v. Bland* (2002) 28 Cal.4th 313, 333-334.) Although this enhancement applies only if the individual "personally discharged a firearm," it is not necessary that the great bodily injury be caused by a bullet from that firearm. It is only necessary that, in addition to firing a weapon, the person have "proximately caused"—i.e., substantially contributed to—the victim's injury. (*Ibid.*)

"A [proximate] cause of [great bodily injury] [or] [death] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the [great bodily injury] [or] [death] and without which the [great bodily injury] [or] [death] would not have occurred." (CALJIC No. 17.19.5.) "A person can proximately cause a gunshot injury without personally firing the weapon that discharged the harm-inflicting bullet. For example, in *People v. Sanchez* [2001] 26 Cal.4th 834, two persons engaged in a gun battle, killing an innocent bystander. Who fired the fatal bullet, and thus who personally inflicted the harm, was unknown, but we held that the jury could find that *both* gunmen proximately caused the death. (*Id*. at pp. 848-849.) The same is true here. If defendant did not fire the bullets that hit the victims, he did not *personally inflict*, but he may have *proximately caused*, the harm." (*People v. Bland*, *supra*, 28 Cal.4th at pp. 337-338.) In *Bland*, the court held that "section 12022.53(d) does not require that the defendant fire a bullet that directly inflicts

the harm. The enhancement applies so long as defendant's personal discharge of a firearm was a proximate, i.e., a substantial, factor contributing to the result." (*Id.* at p. 338.)

E.R. argues that the evidence was insufficient to establish that he proximately caused Thomas's injuries because the evidence did not establish beyond a reasonable doubt that he or any of his accomplices fired a .38 caliber gun. While the juvenile court found that the district attorney had not proven the *identity* of the second shooter, it did not, as E.R. suggests, find that there was *not* a second shooter or that a second gun was not used. Thomas was indisputably shot in the hip with a .38 caliber bullet during a shooting that was initiated by the members of the conspiracy. Both Chante and Antoine identified E.R. as a shooter and there is no dispute that Thomas was injured in the shooting initiated by the gang members.

E.R. quotes the dissent in *People v. Bland, supra,* 28 Cal.4th at page 344, for the proposition that if one of E.R.'s accomplices fired first, Thomas's injuries were not proximately caused by E.R. He suggests that one of the youths in front of the recreation center fired the other weapon. There is no evidence whatsoever in the record to support such a theory. Moreover, it is irrelevant who shot first. The evidence establishes that the gang members initiated the shooting, that E.R. personally used a firearm during the shooting, and that one of the gang members shot a .38 caliber gun, wounding Thomas. The juvenile court was fully justified in finding that E.R.'s conduct was a substantial factor contributing to Thomas's injuries, and thus a proximate cause of those injuries within the meaning of section 12022.53, subdivision (d) and the related enhancement under subdivision (e).

6. *Maximum time of confinement*[*]

E.R. argues that the juvenile court erred when it imposed a 25-year-to-life term for both conspiracy to commit murder and for the murder. "Penal Code section 654 prohibits the imposition of sentences, whether concurrent or consecutive, for both a murder and

[*] Part 6 of this opinion is not certified for publication. (See fn., *ante*, p. 1.)

conspiracy to commit the murder. [Citations.] However, 'if "a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense." ' " (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 819.)

E.R. likens this case to *People v. Vu, supra,* 143 Cal.App.4th 1009, where the defendant shot at four boys and killed one of them. There, the Attorney General conceded that the trial court had erred in imposing a sentence on the defendant for both conspiracy to commit murder and the murder. Since the point was conceded, the court did not analyze the issue and therefore it is of little assistance here.

The petition did not allege a specific target of the conspiracy but alleged only that the juveniles entered into a conspiracy to commit murder. "The defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence. [Citation.] 'We review the court's determination of [a defendant's] "separate intents" for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence.' " (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.) One member of the conspiracy shouted, "There *he* is" before Kamisha pulled the car over and the shooting began. This implies that the target of the conspiracy was male. The murder victim was female. Thus there is sufficient evidence to support the trial court's implied finding that the conspiracy had a separate objective.

E.R. also argues that the juvenile court erred by imposing and staying a term of 25 years to life for the gang enhancement under section 186.22, subdivision (b)(1)(C). The Supreme Court in *People v. Lopez* (2005) 34 Cal.4th 1002 held that if a gang enhancement is found true with respect to the underlying offense of murder, no additional sentence should be imposed. The 15-year parole eligibility minimum under section 186.22, subdivision (b)(5) applies in this circumstance. (*Lopez,* at p. 1007.) The Attorney General concedes that the additional term for the gang enhancement should be struck.

7. *Confidential informant, restitution order, and DNA fee*[*]

Finally, E.R. joins in the arguments made by T.Tr. regarding the juvenile court's refusal to disclose the identity of a confidential informant, the imposition of a restitution fee to be paid to the district attorney, and the imposition of a $10 fee for the collection of DNA. The facts and law regarding the confidential informant and the DNA fee are identical in this case and therefore we adopt our analysis and holding in *In re T.Tr.* (A125597). The court properly refused to order the identity of the informant disclosed but improperly imposed the $10 fee.

As for the restitution, we conclude in *In re T.Tr.* that any portion attributable to the relocation of Kamisha is improperly imposed, but that any portion attributable to the relocation of Antwanisha's mother may properly be imposed. Here, the court imposed a $500 restitution fine, presumably based on the probation officer's report. Neither the report nor the juvenile court explained how this number was derived. Presumably the court considered both the proper and improper elements that were considered in T.Tr.'s case. E.R. was also ordered to pay $700 in "state restitution" without explanation. Remand is thus also required to re-evaluate and clarify the basis for the restitution awarded in this case.

DISPOSITION

The matter is remanded with directions to correct the finding on count 2 from murder in the first degree to murder in the second degree and to modify the dispositional order in conformity with this opinion. In all other respects the jurisdiction and disposition orders are affirmed.

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Pollak, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

[*] Part 7 of this opinion is not certified for publication. (See fn., *ante,* p. 1.)

Superior Court of the City & County of San Francisco, No. JW076057, Lillian Kwok Sing, Judge.

COUNSEL

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General, Martin S. Kaye, Supervising Deputy Attorney General, Christopher W. Grove, Deputy Attorney General, for Plaintiff and Respondent.

Lisa M. Romo, under appointment by the Court of Appeal, for Defendant and Appellant.

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