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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. BRYAN CALLES, Defendant and Appellant.	B225763 (Los Angeles County Super. Ct. No. BA341253)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dennis J. Landin, Judge. Affirmed in part as modified, reversed in part, and remanded.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Steven D. Matthews, Supervising Deputy Attorneys General, Robert David Breton and Linda C. Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of DISCUSSION, parts A, B, and C.

INTRODUCTION

Defendant and appellant Bryan Calles (defendant) was convicted of two counts of gross vehicular manslaughter (Pen. Code, § 192, subd. (c)(1)[1]), three counts of leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), and one count of second degree murder (§ 187, subd. (a)). On appeal, defendant claims that certain errors occurred at trial. In the published portion of this opinion, we hold that the jury did not commit misconduct by using a watch to time a period in question in order to consider the events that could have taken place in that period. We also hold that the trial court erred in certain respects by staying execution of defendant's sentence on some counts, enhancing defendant's sentence and failing to stay the execution of a sentence enhancement on certain counts, and awarding defendant presentence conduct credits. We reverse and remand the matter for sentencing consistent with this opinion, and otherwise affirm the judgment.

BACKGROUND

A. Factual Background

1. Prosecution Evidence

Juan Rodriguez worked with defendant at the Bullet Freight Company. On May 16, 2008, they were scheduled to work at 7:00 p.m. At approximately 5:00 or 6:00 p.m. that day, Rodriguez dropped off defendant at his car after they intentionally inhaled nitrous oxide for about three to four hours.

Gustavo Lezama also worked with defendant at Bullet Freight Company and also was scheduled to begin work at 7:00 p.m. on May 16, 2008. On that day, Lezama was driving east on East Washington Boulevard on his way to work. When stopped at a red traffic light, Lezama heard defendant shout Lezama's name, and Lezama saw defendant

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[1] All statutory citations are to the Penal Code unless otherwise noted.

perspiring and waiving at him from his Honda Civic in the left adjacent lane. When the traffic light turned green, Lezama drove forward through the intersection, but defendant remained at the intersection for three or four seconds and continued waving while still looking in the direction of where Lezama's vehicle had been when he had been stopped at the traffic light.

Lezama then saw defendant's vehicle leave the intersection and follow about three to four car lengths behind Lezama's vehicle. When defendant had traveled approximately one-quarter mile, Lezama saw defendant drive into the middle divider lane as if to make a u-turn, and he heard the engine of defendant's vehicle "roar." Lezama, looking over his shoulder, saw defendant's vehicle accelerate, swerve across oncoming traffic, and turn toward the sidewalk striking four pedestrians. Lezama saw two of the pedestrians "fly up really high." One pedestrian landed on the top of a fence and the other slammed into a wall. Lezama also saw that a woman was under defendant's vehicle. Lezama did not hear any sound, such as a "screeching sound," that would have indicated that defendant pressed hard on the brakes before the impact. Lezama pulled over to the side of the road, approximately 15 feet from the accident and exited his vehicle to attend to the accident victims.

May 16, 2008, Michelle Pineda was walking on the sidewalk adjacent to East Washington Boulevard with her friends from work, Lisa Santee, Miguel Rocha, and Dominic Medina, when a car suddenly hit her friends. Following the impact, Rocha's body was near a pole and there was a pool of blood emanating from his head.

According to Pineda, as a result of the impact, Medina was impaled and suspended off the ground by spikes on a wrought iron fence. Lezama testified that the fence spikes entered Medina's abdomen and exited his chest. Daniel Dragotto, a Los Angeles City Fire Department paramedic, and others cut Medina down from the fence. Medina was alive and transported to the hospital with parts of the spikes still in his chest.

Lezama testified that following the impact, Santee was under the driver's side of defendant's vehicle "screaming for help loudly." Pineda observed that Santee's arms were unnaturally bent, as if they were broken.

According to Lezama and Pineda, Pineda continuously screamed "Oh God." Pineda noticed defendant stare at her. Defendant had both eyes open, and he appeared to be in a state of shock.

Faye Shen, the owner of a nearby business, saw the accident scene shortly after defendant's vehicle struck the pedestrians. Shen noticed that defendant's eyes were open and that defendant stared straight ahead for a "couple of minutes" without any reaction.

Neither Pineda nor Shen saw defendant get out of his car. Pineda testified that defendant never checked on the welfare of anyone who was in that area.

Just after Pineda started to walk to her nearby office to get help, defendant started his vehicle. She heard defendant's vehicle "rev[] up," the tires "screech," and Santee scream. Lezama saw defendant reverse his vehicle, which was on the sidewalk, over Santee; the tire rim exposed by a blown out tire on defendant's vehicle "grinded her." Pineda saw Santee "bouncing" from the sidewalk to the gutter.

Shen was about two feet from defendant when he started to back up, and she yelled at him, "Oh my God, please stop. Stop." Defendant, whose driver's side window was rolled down, ignored Shen's pleas and, without looking back to see if any cars were coming, continued to back up into the street, dragging Santee's body across the sidewalk and rolling over her body as it fell into the gutter. After defendant backed into the street, Lezama saw him drive away from the scene westbound on East Washington Boulevard.

Defendant's co-worker, Rodriquez, explained that as he was driving to work at Bullet Freight Company with two friends, he saw defendant driving in the opposite direction. Defendant's face was bloody, and his vehicle was "totaled" and driving "on its rims." Rodriguez executed a u-turn, caught up to defendant, and gestured for defendant to meet them at a nearby McDonald's. Defendant and Rodriguez made a series of turns and entered the McDonald's parking lot.

According to Rodriguez, the driver's door of defendant's vehicle was damaged, its window was shattered, and the roof and front fender were smashed. When Rodriguez and his friends asked defendant what had happened, defendant, who had blood "running from his forehead all the way to his cheeks," said nothing and was mumbling to himself.

Defendant appeared to be in a state of shock. Rodriguez and his friends took items from defendant's vehicle and placed them in Rodriguez's vehicle, including a tank of nitrous oxide, papers, and clothing. Defendant entered Rodriquez's vehicle with Rodriquez and his friends, and they drove to the Bullet Freight Company so defendant and Rodriguez could commence work.

After defendant started his work shift, Alex Prosak, the assistant manager at Bullet Freight Company, asked defendant if he had been involved in an incident. Defendant responded that he was involved in a "hit-and-run accident" approximately six miles away near the 710 and 105 freeways. The intersection of the 710 and 105 freeways was not near the accident involving the pedestrians on East Washington Boulevard. Defendant responded to all of Prosak's questions, but his "mind seemed to be wandering."

Los Angeles Police Department Officer Jorge Gonzalez testified that he went to a McDonald's parking lot where he saw defendant's vehicle. Defendant's vehicle had two flat tires, the windshield and roof were caved in, the front bumper was almost completely detached, and the left portion of the one of the bumpers was missing. There was blood on the undercarriage, roof, seat, gear shift, and what was left of the windshield. The Los Angeles Police Department impounded defendant's vehicle and placed an agency hold on it.

Officer Gonzalez arrested defendant in the early morning of May 17, 2008. Defendant had a laceration on his forehead and complained of pain in his face and shoulder. Defendant received medical treatment at the county jail.

Los Angeles Police Department Collision Investigator Danny Balmaceda did not perform any mechanical analysis of defendant's vehicle, but he saw the vehicle and went inside it. He did not notice "anything odd" about the position of the steering wheel.

As a result of the accident, Medina's right lung was pierced, both of his legs and left forearm were broken, and his mouth was lacerated. Medina was hospitalized for about two months, undergoing surgery and follow-up care, and was still receiving physical therapy at the time of trial.

When Christopher Hare, a City of Los Angeles Fire Department Captain, arrived at the scene of the accident, Rocha was dead. Los Angeles County Coroner's Office Medical Examiner Kevin Young opined that Rocha died from the severe and multiple injuries he had sustained. Rocha had sustained massive skull and facial fractures which partially severed his brain stem. In addition, Rocha's pelvis, right femur, left tibia, and half of his ribs were fractured, and his lungs, spleen, and liver had been perforated.

When Benjamin Arnold, a paramedic for the City of Los Angeles Fire Department, arrived at the scene of the accident, Santee was still alive. He and other paramedics initiated life support procedures, but Santee "lost her pulse" and died while being transported to the hospital. According to Jeffrey Gutstadt, a deputy medical examiner who performed Santee's autopsy, testified that Santee sustained numerous injuries, including to her internal organs, and fractures to her collarbone, sternum, and all of her ribs. Gutstadt could not determine with "medical certainty" whether the initial impact with defendant's vehicle or the subsequent "rolling over action" when defendant's vehicle backed over Santee was the actual cause of her death.

2. Defense Evidence

Dr. Paul Herrmann, defendant's forensic expert, could not determine whether Santee's death was caused by her initial impact with defendant's vehicle or by the injuries she suffered when defendant backed over her. All Santee's injuries occurred when she was still alive. Dr. Herrmann could not determine the exact order of her injuries because they were "so numerous and . . . similar."

Dale Stephens, defendant's accident reconstruction expert, opined that defendant's vehicle was traveling at approximately 40 miles per hour upon impact with the pedestrians. After the incident, defendant's vehicle was originally impounded by the police and then towed to a storage facility where the police placed an agency hold on it. It was released from impound three months after the accident.

B. Procedural Background

The Los Angeles County District Attorney filed a fourth amended information charging defendant with the gross vehicular manslaughter of Rocha and Santee in violation of section 192, subdivision (c)(1) (counts 1 and 2); leaving the scene of an accident, in violation of Vehicle Code section 20001, subdivision (a) (counts 3, 7, and 8); and the second degree murder of Santee in violation of section 187, subdivision (a) (count 9). The District Attorney alleged as to counts 1 and 2 that defendant left the scene of **a** crime in violation of Vehicle Code section 20001, subdivision (c), and as to all counts that defendant inflicted great bodily injury in violation of section 12022.7, subdivision (a). Defendant filed *Trombetta/Youngblood*[2] motions concerning the destruction of evidence, which the trial court denied.

Following trial, the jury found defendant guilty on all counts, and found that the special allegations true. On count 1, the jury convicted defendant of the gross vehicular manslaughter of Rocha (§ 192, subd. (c)(1)), found that great bodily injury was inflicted on both Santee and Medina (§ 12022.7, subd. (a)), and found that defendant left the scene of the crime (Veh. Code, § 20001, subd. (c)).[3] On count 2, the jury convicted defendant of the gross vehicular manslaughter of Santee (§ 192, subd. (c)(1)), found that great bodily injury was inflicted on both Rocha and Medina (§ 12022.7, subd. (a)), and found that defendant left the scene of the crime (Veh. Code, § 20001, subd. (c)). On counts 3, 7, and 8, defendant was convicted of leaving the scene of an accident. (Veh. Code, § 20001, subd. (a).) Each leaving the scene of an accident count named a different victim upon whom great bodily injury was inflicted: Medina in count 3, Santee in count 7, and Rocha in count 8. On count 9, the jury convicted defendant of the second degree murder

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[2] The motions were made pursuant to *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*); *Arizona v. Youngblood* (1988) 488 U.S. 51 (*Youngblood*) (*Trombetta/Youngblood* motions).

[3] Vehicle Code section 20001, subdivision (c) provides that a defendant's sentence shall be enhanced if he flees the scene of a "crime" after committing a violation of, inter alia, section 192. Subdivision (a) provides that a driver involved in an accident resulting in injury to a person shall stop the vehicle at the scene of the "accident."

of Santee (§ 187, subd. (a)) and found great bodily injury was inflicted on both Rocha and Medina (§ 12022.7, subd. (a)). The trial court denied defendant's motion for new trial or modification of the verdict made, in part, on the ground of juror misconduct. The trial court stayed execution of sentence on all counts except count 9. On count 9, the trial court sentenced defendant to state prison for a term of 23 years to life, consisting of a term of 15 years to life; 5 years based on a purported allegation of leaving the scene of a crime in violation of Vehicle Code section 20001, subdivision (c);[4] and 3 years based on the allegation of inflicting great bodily injury in violation of section 12022.7, subdivision (a).[5]

The trial court ordered defendant to pay a $7,500 victim compensation and government claims board fee, a $3,659.72 restitution fee to Santee (presumably, her successors), a $200 restitution fee, a $200 parole revocation restitution fine, a $30 court security fee for each count, and orally imposed a $30 criminal conviction assessment as to each count for which defendant was convicted. The trial court awarded defendant 855 days of custody credit consisting of 744 days of actual custody credit and 111 days of conduct credit.

DISCUSSION

A. Motion Based on Lost Evidence

Defendant contends that the trial court erred in denying his *Trombetta*/*Youngblood* motions made on the ground the prosecutor failed to preserve defendant's vehicle three months after the accident. We disagree.

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[4] As discussed *post*, defendant was not charged in count 9 with an enhancement allegation of leaving the scene of a crime in violation of Vehicle Code section 20001, subdivision (c).

[5] The trial court stated that two great bodily injury enhancements concerning count 9—one as to Rocha and one as to Medina—were to run concurrently with each other.

1. Standard of Review

On review of a *Trombetta*/*Youngblood* motion, "we must determine whether, viewing the evidence in the light most favorable to the superior court's finding, there was substantial evidence to support its ruling. (*People v. Griffin* (1988) 46 Cal.3d 1011, 1022 [251 Cal.Rptr. 643, 761 P.2d 103].)" (*People v. Roybal* (1998) 19 Cal.4th 481, 510.)

2. Applicable Law

"'"Law enforcement agencies have a duty, under the due process clause of the Fourteenth Amendment, to preserve evidence 'that might be expected to play a significant role in the suspect's defense.' (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 2535, 81 L.Ed. 2d 413] [*Trombetta*]; accord, *People v. Beeler* (1995) 9 Cal.4th 953, 976 [39 Cal.Rptr.2d 607, 891 P.2d 153].) To fall within the scope of this duty, the evidence 'must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.' [Citations.] The state's responsibility is further limited when the defendant's challenge is to 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.' (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [109 S.Ct. 333, 337, 102 L.Ed.2d 281].) In such case, 'unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.' (*Id*. at p. 58 [109 S.Ct. at p. 337]; accord, *People v. Beeler*, *supra*, 9 Cal.4th at p. 976.)" [Citation.]' (*People v. Catlin* [(2001)] 26 Cal.4th [81,] 159-160.)" (*People v. Farnam* (2002) 28 Cal.4th 107, 166.)

"The presence or absence of bad faith by the police for purposes of the Due Process Clause . . . necessarily turn[s] on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." (*Youngblood, supra*, 488 U.S. at pp. 56-57, fn. *; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1000.) A due process violation occurs when the state is aware that the evidence could form a basis for exonerating the

defendant and fails to preserve it as part of a conscious effort to circumvent its constitutional discovery obligation. (*Trombetta*, *supra*, 467 U.S. at p. 488; *People v. Beeler*, *supra*, 9 Cal.4th at p. 1000; *People v. Zapien* (1993) 4 Cal.4th 929, 964.)

3. Background

Defendant's counsel declared in support of defendant's initial *Trombetta/Youngblood* motion that, "[o]n March 6, 2009, [the prosecutor] provided contact information for the Investigating Officer assigned to this case. [The prosecutor] explained the Investigating Officer would be able to provide assistance in gaining access to the vehicle. [¶] In March, 2009, [Stephens was] informed that the vehicle was no longer in the possession of the Los Angeles Police Department. [Stephens was] informed that the vehicle had been sold."

At the hearing on defendant's motion, Stephens testified that he was appointed to this case on behalf of defendant on January 29, 2009 as an accident reconstruction expert. He reviewed the discovery provided by the prosecution and the Los Angeles police department regarding this case, including the reports and a disc containing photographs of the scene and defendant's vehicle. The police put an agency hold on defendant's vehicle stored at the tow company's facility.

Stephens testified that he had been informed that the vehicle had been released or sold by the tow company, and he did not at any point have physical or actual access to the vehicle. He wanted to inspect the vehicle for possible brake and steering malfunctions because there was no indication of any pre-impact braking, and a photograph of the vehicle showed that the steering wheel was turned more than 90 degrees but the front tires are facing forward. Stephens testified on cross-examination that it is possible the purported misalignment of the steering wheel and the front tires could have occurred when the vehicle struck the curb.

The trial court denied the motion. It stated, "Looking specifically at whether or not the . . . exculpatory value was apparent at the time it was destroyed, I do note the police filed [a] form asking [that] a hold be put on the vehicle. For whatever reason that

hold was not respected and the car has been destroyed. Looking at what the police knew at the time about this evidence, that the car apparently was at a complete stop in the lane, and then accelerated and hit the sidewalk, hitting the people on the sidewalk, thereafter the car going into reverse, making a u-turn, and traveling five miles, that cuts against whether or not there's any apparent exculpatory value that would permit the defense to sustain their motion in this issue. [¶] I think it's close, but taking everything here, based on what the cops knew, based on the law that's been presented on both—on the defense's motion, I'm going to deny the . . . motion."

Defendant's counsel told the jury during opening statement at trial that, "certain things . . . should have been done to properly secure the evidence in this case [that] were not done." During trial, Stephens testified that the vehicle was released from impound so he never had access to it or seen the vehicle other than in photographs, and it "[kept him] from getting to the root cause [of the incident]." Stephens testified that the vehicle was released from impound three months after the incident, and "it's really important for someone to look at the car and determine is it crash related, or was it a pre-existing or something that failed just prior to the crash. That's the importance of the vehicle."

Defendant renewed the initial *Trombetta/Youngblood* motion during trial, and it was denied by the trial court. The trial court stated that defendant, however, can argue to the jury that "further investigation should have taken place."

The trial court instructed the jury, "In this case you heard testimony regarding the failure of the Los Angeles Police Department to maintain as evidence the vehicle that [defendant] was driving when the alleged crimes occurred. You may make an adverse inference from the loss of this evidence that may be sufficient to raise a reasonable doubt."

Defense counsel told the jury during closing argument, "[The vehicle] was impounded for the purpose of being secured as evidence, and there was a law enforcement hold on that car. . . . The bottom line is that car was not secured as evidence. It was released, and Mr. Stephens, the accident reconstruction expert, was denied an opportunity to evaluate that car for any mechanical failure or analysis as to

what the root cause of that crash may have been." Defense counsel also argued, "Failure to preserve physical evidence. In this case, you heard testimony regarding the failure of the Los Angeles Police Department to maintain as evidence the vehicle that [defendant] was driving when the alleged crimes occurred. You may make an adverse inference from the loss of this evidence. That may be sufficient to raise a reasonable doubt. . . . [¶] [T]here's an instruction that's going to be read to you that specifically says . . . [you may consider that] there was no protection of the evidence, no effort to secure the evidence. . . . You may make an adverse inference from the loss of this evidence, and that may be sufficient to raise a reasonable doubt."

4. Analysis

There is substantial evidence to support the trial court's denial of defendant's *Trombetta/Youngblood* motions. We find no violation of *Trombetta, supra*, 467 U.S. 479.

Stephens testified that he wanted to inspect the vehicle for "possible" brake and steering malfunctions. Defendant's claim concerns the failure to preserve evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." (*Youngblood*, *supra*, 488 U.S. at p. 57.) There is a denial of due process for the police's failure to preserve the evidence, therefore, only if defendant shows the police acted in bad faith. (*Ibid*.)

There is evidence that the Los Angeles Police Department did not know defendant would use the vehicle to exonerate himself to show the vehicle had suffered brake or steering malfunctions causing the accident. Lezama testified that defendant's vehicle came to a complete stop at a traffic light on East Washington Boulevard moments before the accident; when Lezama and defendant left the traffic light, defendant followed behind Lezama for approximately one-quarter mile; and defendant's vehicle then negotiated into the middle divider lane as if to turn. There is evidence that after defendant's vehicle struck the victim pedestrians, defendant's vehicle was reversed, turned and driven off. The vehicle thereafter made a series of turns and stopped in a McDonald's restaurant

parking lot. It is reasonable to infer that the Los Angeles Police Department did not know defendant would use the vehicle to exonerate himself to show the vehicle had suffered brake or steering malfunctions causing the accident.

There is support on the record for the proposition that the destruction of the alleged exculpatory evidence was the product of a failure in communication and not bad faith. Officer Gonzalez testified that the police placed an agency hold on defendant's vehicle when it was impounded by the police department stored at the facility of a tow company. Defendant did not establish that the vehicle was sold in order to deny defendant the opportunity to test it for exculpatory evidence. As the trial court observed, "For whatever reason that hold was not respected and the car has been destroyed." Negligent failure to preserve potentially exculpatory evidence, without evidence of bad faith, will not give rise to a due process violation. (*Youngblood*, *supra*, 488 U.S. at p. 58.)

Defendant contends that he received ineffective assistance of counsel because his counsel did not test defendant's vehicle within three months after the accident, while it was still in the possession of the police department. We disagree.

Defendant has the burden of proving ineffective assistance of counsel. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) In order to establish such a claim, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) If the defendant fails to make a sufficient showing either of deficient performance or prejudice, the ineffective assistance claim fails. (*People v. Foster* (2003) 111 Cal.App.4th 379, 383.)

"When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of ineffective assistance in such a

case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

The record does not reflect why defendant's trial counsel failed to test defendant's vehicle within three months after the accident. There could be a satisfactory explanation for counsel not doing so, including his belief that it would not provide exculpatory evidence and to test the vehicle would be an unjustified use of resources. As noted above, evidence of the driving of defendant's vehicle both before and after the accident strongly suggests that defendant's testing of the vehicle would not lend itself to exculpatory evidence. As noted above, we generally do not determine the claim of ineffective assistance of counsel on appeal because it is a claim more appropriately raised by a petition for a writ of habeas corpus. (*People v. Tafoya* (2007) 42 Cal.4th 147, 196, fn. 12 ["a claim of ineffective assistance of counsel is more appropriately raised in a petition for writ of habeas corpus [citation], where 'relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform the two-pronged inquiry of whether counsel's "representation fell below an objective standard of reasonableness," and whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."'"].)

In addition, defendant has not established that he has been prejudiced by his counsel's failure to test defendant's vehicle within three months after the accident. Defendant has failed to show that a different result would have been reasonably probable had his counsel tested the vehicle, and thus failed to establish that he received ineffective assistance of counsel.

B. Sufficiency of the Evidence in Support of Defendant's Second Degree Murder Conviction

Defendant contends that there is insufficient evidence to support the implied malice element for the second degree murder of Santee. We disagree.

1. Standard of Review

In reviewing a challenge to the sufficiency of the evidence, we apply the following standard of review: "[We] . . . consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt." (*People v. Mincey* (1992) 2 Cal.4th 408, 432, fn. omitted; *People v. Hayes* (1990) 52 Cal.3d 577, 631; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) Our sole function is to determine if "'*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Marshall* (1997) 15 Cal.4th 1, 34; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) The California Supreme Court has held, "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.)

2. Analysis

The trial court instructed the jury on the elements of murder in the second degree, including the element of implied malice pursuant to CALCRIM 520, stating, "[defendant] is charged in count 9 with murder in the second degree. To prove that the defendant is guilty of this crime, the People must prove that: [¶] number 1, the defendant committed an act that caused the death of Ms. Santee; [¶] number 2, when the defendant acted, he had a state of mind called malice aforethought; [¶] number 3, he killed without lawful excuse or justification. [¶] There are two kinds of malice aforethought: express malice and implied malice. [¶] Proof of either is sufficient to establish the state of mind required for murder. The prosecution is proceeding on an implied malice aforethought theory. [¶] The defendant acted with implied malice if: [¶] number 1, he intentionally committed an act; [¶] number 2, the natural and probable consequences of the act were

dangerous to human life; [¶] number 3, at the time he acted, he knew his act was dangerous to human life; and [¶] number 4, he deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward a victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

"[A] finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard." (*People v. Watson* (1981) 30 Cal.3d 290, 296-297.) As defendant states "the question was (and remains) whether [defendant] consciously knew that backing up his car would endanger a human life and then deliberately disregarded that risk by backing up and into the street."

Defendant contends that there is not substantial evidence to support a finding of implied malice because he could not have been aware Santee was under the vehicle. There is substantial evidence to support a finding of implied malice regardless of whether defendant knew specifically that Santee was under his vehicle. It is reasonable to infer that defendant knew his act was dangerous to human life. Defendant had struck several pedestrians, one of whom was struck so hard as to be impaled and suspended off the ground by the spikes of a wrought iron fence. Pineda testified that defendant never got out of his car, nor did he check on the welfare of anyone in the area of the accident. Instead, defendant placed the vehicle in reverse and ran over Santee. It is reasonable to infer that defendant knew backing up his car would endanger a human life, and he deliberately disregarded that risk.

In addition, there is evidence that defendant was put on notice someone was under the vehicle. Lezama testified that Santee was screaming loudly for help while under defendant's vehicle. Also, Shen testified that she was about two feet from defendant, who had his driver's side window rolled down, when she yelled at defendant to stop as defendant started to back up.

Defendant contends that he was in a state of shock after initially hitting the pedestrians and the accident scene was chaotic and therefore he did not know that

backing up his car would endanger a human life. There is evidence that defendant was coherent. Defendant had the clarity of mind after striking the pedestrians to reverse the vehicle, turn and drive on Washington Boulevard, and follow Rodriguez's directions by negotiating a series of turns and driving into the McDonald's restaurant parking lot. Defendant was also able to tell his manager at Bullet Freight Company what can reasonably be inferred to be a false story—that he had been involved in a "hit-and-run accident" near the 710 and 105 freeways, which was not anywhere near where he had the accident involving the pedestrians.

As the jury was instructed, defendant must form the mental state of acting in disregard of human life "before the act that causes death is committed." Defendant contends that there is not substantial evidence to support a finding of implied malice because Arnold and Herrmann testified that they could not determine whether Santee's initial impact with defendant's vehicle or the injuries suffered when defendant backed up over her caused Santee's death.

However, Arnold testified that he could not determine with "medical certainty" whether defendant's initial impact with Santee or defendant's act of reversing his vehicle and running over Santee was "the actual cause" of Santee's death, and Herrmann testified that he could not determine which of the two events was "the cause" of Santee's death. The lack of "the" cause of death with "medical certainty" is not required. "It is proximate causation, not direct or actual causation, which together with the requisite mental state determines the defendant's liability for murder. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845 [111 Cal.Rptr.2d 129, 29 P.3d 209] (*Sanchez*).) Just because the actual cause of death cannot be determined does not undermine a . . . murder conviction. (*Ibid*.) There may be multiple proximate causes even where there is but one actual cause. (*Id*. at p. 846.) The People's burden of proving causation is met if evidence is produced from which it may be reasonably inferred that the defendant's act was a substantial factor in producing the result of the crime. (*People v. Scola* (1976) 56 Cal.App.3d 723, 726 [128 Cal.Rptr. 477] (*Scola*), cited with approval in *People v. Caldwell* (1984) 36 Cal.3d 210, 220 [203 Cal.Rptr. 433, 681 P.2d 274].) The prosecution does not have to prove to a

mathematical certainty that the killing would not have occurred absent the defendant's act. (*Scola*, *supra*, at p. 727.)" (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.)

Gutstadt testified that as a result of Santee's autopsy he determined she sustained internal organ injuries and fractures to her collarbone, sternum, and all 24 of her ribs. It is reasonable to infer that defendant's act of reversing his vehicle and running over Santee was a substantial factor in causing Santee's death.

C. Jury Instructions

Defendant contends that the trial court erred in failing to instruct the jury, sua sponte, on the defense of unconsciousness, and in failing to give proposed pinpoint jury instructions. Regardless of whether the trial court erred in failing to instruct on the defense of unconsciousness, the error was harmless, and the trial court did not err in failing to give defendant's proposed pinpoint jury instructions.

1. Standard of Review

"We review defendant's claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210 [17 Cal.Rptr.3d 532, 95 P.3d 811]; *People v. Sweeney* (2009) 175 Cal.App.4th 210, 223 [95 Cal.Rptr.3d 557].) 'In conducting this review, we first ascertain the relevant law and then "determine the meaning of the instructions in this regard." [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court "fully and fairly instructed on the applicable law . . . ." [Citation.] "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]'" [Citation.] "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]' (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112 [93 Cal.Rptr.2d 433].)" (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707.)

2. Sua Sponte Jury Instruction on Unconscious Act

Defendant contends that the trial court erred in failing to instruct the jury, sua sponte, on the defense of unconsciousness pursuant to CALCRIM 3425. Even if the trial court erred, the error was harmless.

(a) Applicable Law

"A trial court has a duty to instruct the jury 'sua sponte on general principles which are closely and openly connected with the facts before the court.' [Citation.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) "In the absence of a request for a particular instruction, a trial court's obligation to instruct [sua sponte] on a particular defense arises '"only if [1] it appears that the defendant is relying on such a defense, or [2] if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citations.]" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1148; *People v. Maury* (2003) 30 Cal.4th 342, 424.)

CALCRIM 3425 provides that, "The defendant is not guilty of _____ <insert crime[s]> if (he/she) acted while legally unconscious. Someone is legally unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.] [¶] Unconsciousness may be caused by (a blackout[,]/ [or] an epileptic seizure[,]/ [or] involuntary intoxication[,]/ [or] sleepwalking[,]/ or _____ <insert a similar condition>). [¶] The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious. If, however, based on all the evidence, you have a reasonable doubt that (he/she) was conscious, you must find (him/her) not guilty."

(b) Analysis

Regardless of whether the trial court erred in failing to instruct on the defense of unconsciousness, any error was harmless under federal and state law. The jury

necessarily found that defendant was conscious when he left the scene of the accident. Defendant was charged with three counts of leaving the scene of an accident in violation of Vehicle Code section 20001, subdivision (a) (counts 3, 7, and 8). The trial court instructed the jury, pursuant to CALCRIM 2140, that to prove defendant is guilty of counts 3, 7, and 8, the prosecution must prove "number 3, the defendant knew that he had been involved in an accident that injured another person; [¶] and number 4, the defendant willfully failed to perform one or more of the following duties: [¶] A: To stop immediately at the scene of the accident; [¶] B: To provide reasonable assistance to any person injured in the accident; [¶] C: To give to the person struck or any peace officer at the scene of the accident [defendant's name, current residence address, and registration number of the vehicle he was driving]. [¶] Someone commits an act willfully when he does it willingly or on purpose." The jury found defendant guilty of counts 3, 7, and 8. In finding that defendant "willfully or on purpose" left the scene of the accident, the jury necessarily found that defendant was conscious. (*People v. Earp* (1999) 20 Cal.4th 826, 885-886 [finding harmless error where jury rejected defense theory by returning true findings on factually related allegations].) There was no reasonable possibility or probability of a result more favorable to defendant had the jury been instructed on the defense of unconsciousness. (*Chapman v. California* (1967) 386 U.S. 18, 24; Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

3. Pinpoint Jury Instructions on Implied Malice

Defendant contends that the trial court erred in failing to give his proposed pinpoint jury instructions on implied malice. We disagree.

(a) Applicable Law

"'"[A] defendant has a right to an instruction that pinpoints the theory of the defense . . . ."' [Citation.] The court may, however, 'properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or

potentially confusing [citation], or if it is not supported by substantial evidence [citation].' [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

(b) Background

During the trial, defendant submitted to the trial court two proposed jury instructions and contends on appeal that they "pinpointed the defense [defendant] presented to the [second] degree murder charge in Count 9." Defendant contends that the proposed jury instructions clarify the difference between the phrase "conscious disregard for life" needed to prove implied malice in contrast to the phrase "conscious indifference to the consequences," required to prove gross vehicular manslaughter.

Defendant's first proposed jury instruction stated, "An essential distinction between second degree murder based on implied malice and involuntary manslaughter based on criminal negligence is that in the former the defendant subjectively realized the risk to human life created by his conduct, whereas in the latter the defendant's conduct objectively endangered life, but he did not subjectively realize the risk." The second proposed jury instruction stated, "The state of mind of a person who acts with *conscious disregard for life* is, 'I know my conduct is dangerous to others, but I don't care if someone is hurt or killed.' The state of mind of the person who acts with *conscious indifference to the consequences* is simply, 'I don't care what happens.'" (Italics added.)

The trial court denied defendant's request to give the jury the proposed jury instructions, stating inter alia, "I don't think they are necessary. I think the current CALCRIM instruction covers these two topics."

As noted above, the trial court instructed the jury pursuant to CALCRIM 520, stating in part that to show implied malice for second degree murder, the prosecution had to prove that defendant "knew his act was dangerous to human life" and he "deliberately acted with *conscious disregard for human life*." (Italics added.) The trial court also instructed the jury pursuant to CALCRIM 592, stating in part that to show grossly negligent conduct with regard to gross vehicular manslaughter, the prosecution had to prove that defendant acted "in a reckless way that creates a high risk of death or great

bodily injury" that "amount[ed] to disregard for human life or *indifference to the consequences* of that act."[6] (Italics added.)

(c) Analysis

The trial court instructed the jury with CALCRIM 520 and CALCRIM 592, stating the different states of mind that are required for second degree murder based on implied malice and gross vehicular manslaughter. Defendant merely contends that his proposed jury instructions "clarified" the distinction. We must '"""assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.'""" (*People v. Johnson*, *supra*, 180 Cal.App.4th at p. 707.) Because CALCRIM 520 and CALCRIM 592 fully addressed the principles in defendant's proposed instructions, the proposed instructions were duplicative, and the trial court properly rejected them. (*People v. Burney*, *supra*, 47 Cal.4th at p. 246.)

D. Motion for New Trial Based on Juror Misconduct

Defendant contends that the trial court erred in denying his motion for a new trial based, in part, on juror misconduct. We disagree.

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[6] CALCRIM 592 provides in relevant part that, "To prove that the defendant is guilty of gross vehicular manslaughter, the People must prove that: [¶] 1. The defendant (drove a vehicle/operated a vessel); [¶] 2. While (driving that vehicle/operating that vessel), the defendant committed (a/an) (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death); [¶] 3. The defendant committed the (misdemeanor[,]/ [or] infraction[,]/ [or] otherwise lawful act that might cause death) with gross negligence; [¶] AND [¶] 4. The defendant's grossly negligent conduct caused the death of another person. [¶] . . . [¶] Gross negligence involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with gross negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with gross negligence when the way he or she acts is so different from how an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act."

1. Standard of Review

"We review independently the trial court's denial of a new trial motion based on alleged juror misconduct. (*People v. Ault* (2004) 33 Cal.4th 1250, 1261-1262 [17 Cal.Rptr.3d 302, 95 P.3d 523].) However, we will '"accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence."' (*Id*. at p. 1263.)" (*People v. Gamache* (2010) 48 Cal.4th 347, 396.)

2. Background

During closing argument, defendant's counsel asserted that witnesses gave different time periods when estimating the time that elapsed between the initial impact with the pedestrians and the moment defendant started to back up his vehicle. Defendant's counsel argued that Pineda provided various time estimates during her testimony, the total of which was "upwards of 30-plus seconds" from the initial impact to defendant's act of reversing his vehicle and running over Santee. The timing was relevant to what occurred and to defendant's state of mind. Following trial, defendant filed a motion for new trial based, in part, on alleged juror misconduct for conducting a timing "experiment" during deliberations.

Defendant's counsel declared in support of the motion that the jury foreperson told him, and was willing to tell the trial court, that "[d]uring the deliberations in the jury room in the presence of all the jurors a timing demonstration was conducted. [¶] This demonstration consisted of one jury person looking at their analog watch, and timing out 30 seconds according to the second hand on the watch. [¶] While the one jury person was keeping track of time, the other jury members were silent in an attempt to simulate the passing of 30 seconds of time. [¶] During our deliberations, various jurors also participated in verbally constructing what happened during the time between the initial impact and when the defendant backed up. This scenario included a discussion as to the time it takes to shift gears while driving on the rims of the car and the time needed to get the car off of the fence. [¶] About 75% of our deliberations focused on the implied malice aspect of the case and more specifically what he knew at the time of the impact

and what he knew immediately after when he backed up. [¶] The timing of the events between the initial impact and the defendant driving away from the scene played into deciding how much he knew and his state of mind. [¶] During deliberations I was aware of the various time increments that were testified to during the trial by different witnesses. There were three different witnesses who testified to three different time periods during the course of the trial. [¶] These time periods were the amount of time the various witnesses believed passed from the point of impact to when [defendant] started to reverse his car. [¶] The time periods discussed were: 2 to 3 seconds; 30 seconds and 2 to 3 minutes. [¶] However, . . . the timing demonstration was only conducted for the 30 second time period. [¶] This 30 second time demonstration did play a part in [the] deliberative process." The trial court denied the motion, stating that the jury's use of a watch did not rise to the level of juror misconduct warranting a new trial.

3. Applicable Law

Section 1181, subdivision 3, provides that the trial court may grant a new trial when "'the jury has . . . "been guilty of any misconduct by which a fair and due consideration of the case has been prevented . . . ." [¶] We first determine whether there was any juror misconduct. Only if we answer that question affirmatively do we consider whether the misconduct was prejudicial.'" (*People v. Collins* (2010) 49 Cal.4th 175, 242.)

Juror misconduct raises a presumption of prejudice. (*People v. Page* (2008) 44 Cal.4th 1, 59.) Unless the presumption is rebutted by the prosecution, a new trial should be granted. (*Ibid*.) As one court has noted, "[t]his does not mean that every insignificant infraction of the rules by a juror calls for a new trial. Where the misconduct is of such trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside." (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 507; see also *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc*. (2008) 164 Cal.App.4th 1440, 1445.)

The court in *People v. Collins*, *supra,* 49 Cal.4th 175 observed that "[t]his court established the framework for analysis of a jury misconduct claim based on experimentation nearly a century ago in *Higgins v. L. A. Gas & Electric Co*. (1911) 159 Cal. 651 [115 P. 313] (*Higgins*). Justice Hinshaw explained: 'It is a fundamental rule that all evidence shall be taken in open court and that each party to a controversy shall have knowledge of, and thus be enabled to meet and answer, any evidence brought against him. It is this fundamental rule which is to govern the use of exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence, but if their experiments shall invade new fields and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then, manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain.'" (*People v. Collins*, *supra,* 49 Cal.4th at p. 243, italics omitted.)

4. Analysis

Defendant contends the timing "experiment" was an attempt by the jurors to simulate the events of on the evening of the accident, including "the various things [defendant] would have to do to back away from the scene [but the jurors] could not replicate the evidence presented [to the jury] because the jury did not use [defendant's vehicle]." In support of his contention, defendant cites *Bell v. State of California* (1998) 63 Cal.App.4th 919. In that case, the court held that it was juror misconduct when, during deliberations, one of the jurors advised the others that she and a third party had tried to replicate the manner in which the plaintiff claimed he was held by police. Quoting the trial court, the court stated, "'The incident the juror was attempting to replicate is not subject to experimentation because of the inability to accurately duplicate critical factors such as the size, strength and height of the individuals, the amount of force

involved, and the specific or unusual physical characteristic of each individual involved.'" (*Id.* at p. 932.)

Defendant also relies upon *People v. Castro* (1986) 184 Cal.App.3d 849. In that case, the evidence showed that a correctional officer, standing 50 to 100 yards away, used binoculars to identify the defendant as a participant in an arson. During deliberations, a juror went home and used binoculars in an attempt to determine what the officer could have seen and reported his findings to the other jurors. (*Id.* at p. 852.) The court reversed the trial court's denial of defendant's motion for new trial, stating, "there is no showing . . . that [the juror's] binoculars were 'similar' to the binoculars used by [the correctional officer] . . . or that the light conditions and distances used at the time of [the juror's] personal experiment were similar to the conditions at the time [the correctional officer] identified [the defendant]." (*Id.* at p. 854.) The court concluded that the juror's experiment "enabled [him] to receive evidence outside the presence and knowledge of [the defendant] going to the crucial element in the . . . case, the identity of the [defendant]." (*Ibid.*)

Both cases upon which defendant relies are inapposite because unlike in those cases, the jurors in this case were not trying to replicate physically the events or recreate events by use of items outside of the evidence. The jurors were merely using a watch and "verbally" discussing the evidence presented to them. Generally, jurors cannot discuss a disputed incident emulating the precise conditions that existed at the actual incident itself. In this case, the jurors could not in their oral discussions have recreated the scene of the accident in all of its aspects.

During closing argument, defense counsel argued that the witnesses testified to different time periods between the initial impact with the pedestrians and defendant's act of backing his vehicle over Santee. According to defense counsel, there was insufficient time for defendant to act in conscious disregard for human life. Defendant's trial counsel, in essence, invited the jury to examine the various time estimates provided by the different witnesses. Accordingly, the jury merely reviewed the testimony about what occurred at the accident scene while checking it against the reported time lapse of 30

seconds. The 30-second time period was evidence introduced at trial and argued by defendant's counsel. By comparing the passage of 30 seconds on a watch with the evidence of the events, the jury applied a natural phenomenon—the passage of time.

Defendant also relies on *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co*. (1991) 234 Cal.App.3d 1724 (*Smoketree*), but that case is also inapplicable to the facts of this case. In *Smoketree*, a condominium association sued the complex's developers for damages arising from faulty concrete and grading work in the complex, and the developers cross-complained against various subcontractors. (*Id*. at pp. 1730-1731.) Evidence was presented during trial that certain concrete slabs were improperly constructed. (*Id*. at p. 1731.) During deliberations, a juror created a model of forms used to create concrete slabs using a small box, "kitty litter," and some crayons she brought into the deliberation room to demonstrate how concrete was poured. (*Id*. at p. 1745.) In conducting this demonstration, the juror told fellow jurors that she was knowledgeable about concrete construction, and explained that the defects in the concrete could have been caused by persons walking across the building pad and leaving foot impressions before the concrete was poured. (*Id*. at pp. 1745-1746 & fn. 16.)

The court in *Smoketree, supra*, 234 Cal.App.3d 1724 concluded that the demonstration constituted misconduct because it brought new evidence into the deliberations. The court said that the juror "presented a new demonstration (i.e., there was no kitty litter and crayola demonstration conducted by any of the experts in the case). . . . Further, when [the juror] conducted the demonstration, she represented she had special knowledge about concrete practices . . . . [The juror] additionally presented new evidence that inconsistencies in the sand on top of which the concrete is placed can be caused by the footprints of people walking back and forth across the building pad before the concrete is poured. [The developer] had no opportunity to challenge the accuracy of [the juror's] demonstration nor her representations of special knowledge about concrete practices." (*Id*. at p. 1749.)

Defendant argues that, as in *Smoketree*, *supra*, 234 Cal.App.3d 1724, the jurors' timing "experiment" included new elements of the incident—the calmness and quietness

of the jury room and the lack of a head injury—and thereby introduced new evidence into the deliberation room. The timing "experiment," however, did not constitute the introduction of new evidence into the deliberations. The passage of time is not dependent on the conditions at the time of the accident, which could not be replicated.

As stated in *People v. Collins*, *supra*, 49 Cal.4th at page 249, "Not every jury experiment constitutes misconduct. Improper experiments are those that allow the jury to discover *new* evidence by delving into areas not examined during trial. The distinction between proper and improper jury conduct turns on this difference. The jury may weigh and evaluate the evidence it has received. It is entitled to scrutinize that evidence, subjecting it to careful consideration by testing all reasonable inferences. It may reexamine the evidence in a slightly different context as long as that evaluation is within the '"scope and purview of the evidence."' [Citation.] What the jury cannot do is conduct a new investigation going beyond the evidence admitted."

Here, as stated by one juror, the jurors "verbally construct[ed] what happened." Defendant has failed to establish juror misconduct because he did not establish that the so called timing "experiment" went beyond the admitted evidence. Moreover, what allegedly occurred was not "of such a character as is likely to have influenced the verdict improperly." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 554.) The trial court did not err in denying defendant's motion for new trial.

E. Sentencing Issues

After the matter was fully briefed, we raised certain sentencing issues and requested the parties to submit letter briefs addressing them. We have reviewed the parties letter briefs and conclude that the sentencing in this case must be modified.

1. Stay of Execution of Sentence on Substantive Crimes

(a) Introduction

The jury found defendant guilty on all counts. The trial court imposed and stayed execution of sentence on all counts except count 9. As discussed below, the trial did not err in staying execution of sentence on count 2, but should not have stayed execution of sentence on counts 1, 3, 7, and 8. As to counts 3, 7, and 8, the trial court should select one count on which to impose and execute a sentence and dismiss the other two.

(b) Stay of Execution of Sentence on Count 1—The Gross Vehicular Manslaughter of Rocha

Pursuant to section 654, subdivision (a), the trial court stayed execution of sentence on count 1, the gross vehicular manslaughter of Rocha. In doing so, the trial court erred.

Section 654, subdivision (a) provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (See *People v. Jones* (2012) 54 Cal.4th 350,. 357; *People v. Mesa* (2012) 54 Cal.4th 191, 195.) The California Supreme Court has stated, "We have long held that 'the limitations of section 654 do not apply to crimes of violence against multiple victims.' [Citation.] As we have explained: 'The purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person. For example, a defendant who chooses a means of murder that places a planeload of passengers in danger, or results in injury to many persons, is properly subject to greater punishment than a defendant who chooses a means that harms only a single person. This distinction between an act of violence against the person that violates

more than one statute and such an act that harms more than one person is well settled. Section 654 is not ". . . applicable where . . . one act has two results each of which is an act of violence against the person of a separate individual." [Citations.]' [Citation.]" (*People v. Oates* (2004) 32 Cal.4th 1048, 1063; see *People v. Shaw* (2004) 122 Cal.App.4th 453, 459; *People v. Pantoja* (2004) 122 Cal.App.4th 1, 16.)

Gross vehicular manslaughter is a crime of violence. (*People v. McFarland* (1989) 47 Cal.3d 798, 803-804.) The court in *People v. Thompson* (2009) 180 Cal.App.4th 974 stated, "In *People v. McFarland* (1989) 47 Cal.3d 798 [254 Cal.Rptr. 331, 765 P.2d 493], our California Supreme Court concluded that section 654 does not prohibit separate punishment where a drunk driver kills one victim (vehicular manslaughter) and injures another (causing bodily injury while driving under the influence of alcohol (Veh. Code, § 23153, subd. (a)) because 'vehicular manslaughter with gross negligence constitutes a crime of violence against the person' and thus 'where, as here, a defendant commits vehicular manslaughter with gross negligence—an act of violence against the person—he may properly be punished for injury to a separate individual that results from the same incident.' (*People v. McFarland*, *supra*, at pp. 803-804, fn. omitted.)" (*People v. Thompson*, *supra*, 180 Cal.App.4th at p. 978.)

As a result of the impact, Rocha's body was thrown to the ground and there was a one foot diameter pool of blood emanating from his head. Rocha sustained massive skull and other fractures, a partially severed brain stem, and ruptured internal organs. Rocha died at the scene from the severe and multiple injuries he sustained. Accordingly, the crime against Rocha was a crime of violence—to which section 654 does not apply—and the trial court erred in staying execution of sentence on count 1.

(c) Stay of Execution of Sentence on Count 2—The Gross Vehicular Manslaughter of Santee

Pursuant to section 654, subdivision (a), the trial court stayed execution of sentence on count 2, the gross vehicular manslaughter of Santee, based on the imposition and execution of sentence on count 9, the second degree murder of Santee. Defendant

may not be punished twice for causing the death of Santee. (§ 654, subd. (a).) Accordingly, the trial court did not err in staying execution of sentence on count 2.

(d) Stay Execution of Sentence on Counts 3, 7, and 8—Leaving the Scene of an Accident

Pursuant to section 654, subdivision (a), the trial court stayed execution of sentence on counts 3, 7, and 8 for leaving the scene of an accident (Veh. Code, § 20001, subd. (a)), each of which names a different victim upon whom great bodily injury was inflicted: Medina in count 3, Santee in count 7, and Rocha in count 8. The trial court erred because section 654, subdivision (a) does not apply to counts for leaving the scene of an accident because they are separate acts from causing the accident, with separate objectives. (*People v. Butler* (1986) 184 Cal.App.3d 469, 471-474; *People v. Steinbach* (1958) 166 Cal.App.2d 307, 312-313; see *People v. McGuire* (1993) 14 Cal.App.4th 687, 699.) Here, no improper punishment within the meaning of section 654, subdivision (a) can occur when defendant is punished for leaving the scene of the accident.

But there can be only one conviction for leaving the scene of an accident. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1002.) Upon remand, the trial court is to select one leaving the scene of the accident count and consider defendant's sentence for that crime, including whether any sentence term should be imposed consecutively or concurrently. The trial court should dismiss the remaining two leaving the scene of the accident counts pursuant to section 1385, subdivision (a).

2. Enhancements

(a) Introduction

The sentences in this case were subject to enhancements based on defendant leaving the scene of the crime (Veh. Code, § 20001, subd. (c)) and on his infliction of great bodily injury (§ 12022.7, subd. (a)). The imposition of these enhancements raises

an issue of whether execution of sentence on one or more of them should be stayed by virtue of section 654.

Our Supreme Court discussed the application of section 654 to enhancements in *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*). Prior to that case, the Supreme Court had not determined whether section 654 applies to enhancements. In *Ahmed*, the Supreme Court outlined the method for determining whether a trial court can impose and execute multiple sentence enhancements for the same offense. Under that opinion, a court should examine the specific sentencing statutes. If they provide the answer as to whether the trial court may impose and execute multiple sentence enhancements, the court need not consider the more general provisions of section 654, because a specific statute prevails over a more general one. (*Ahmed, supra,* 53 Cal.4th at pp. 160-161, 162, 164.)

If the specific sentencing statutes do not resolve the issue, section 654 *does* apply to enhancements (*Ahmed, supra,* 53 Cal.4th at pp. 161, 164), although it applies differently to enhancements than to substantive crimes (*id.* at pp. 161, 164-165). Provisions defining substantive crimes generally define criminal acts; enhancement provisions increase the punishment for those acts by "focus[ing] on *aspects* of the criminal act that are not always present and that warrant additional punishment." (*Id.* at p. 163.) "[W]hen applied to multiple enhancements for a single crime, section 654 bars multiple punishment for the same *aspect* of a criminal act." (*Id.* at p. 164.)

In *Ahmed, supra,* 53 Cal.4th 156, the Supreme Court concluded that a specific sentencing statute, section 1170.1, permitted imposition and execution of sentence on both a weapon enhancement and a great bodily injury enhancement for the same offense. (*Ahmed, supra,* 53 Cal.4th at pp. 165-167.) In the instant case, unlike in *Ahmed*, there are no specific sentencing statutes that address whether the sentencing enhancements may be imposed and executed. The question here is whether there can be a sentencing enhancement imposed on one count, when that enhancement is based on the same facts for which defendant was convicted on a different count, without execution of the

sentence being stayed under section 654, and whether defendant's sentence enhancement for the act same alleged in multiple counts may be imposed without applying section 654.

In *Ahmed, supra*, 53 Cal.4th 156, 162-163, the court said, "As we noted in *People v. Coronado* [(1995)] 12 Cal.4th [145,] at page 157, 'the appellate courts have disagreed on whether section 654 applies to enhancements.' The disagreement persists, although the modern trend has been for courts to hold, or at least assume, that section 654 does apply to enhancements that go to the nature of the offense, and then either to apply that section or find that the specific statutes provide an exception to it. (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1218-1221 [109 Cal.Rptr.3d 457] [holding that § 654 precludes imposing the specific enhancement at issue and not deciding the broader question of § 654's application to enhancements in general]; *People v. Chaffer* (2003) 111 Cal.App.4th 1037, 1044-1046 [4 Cal.Rptr.3d 441] [the specific statute operates as an implied exception to § 654]; *People v. Reeves* (2001) 91 Cal.App.4th 14, 54-57 [109 Cal.Rptr.2d 728] [§ 654 does apply to enhancements]; *People v. Arndt* (1999) 76 Cal.App.4th 387, 394-396 [90 Cal.Rptr.2d 415] [§ 654 does apply to enhancements]; *People v. Douglas* (1995) 39 Cal.App.4th 1385 [46 Cal.Rptr.2d 534] [§ 654 does apply to enhancements].)"

In *People v. Douglas, supra*, 39 Cal.App.4th 1385, one of the cases cited by the court in *Ahmed, supra*, 53 Cal.4th at pages 162 through 163, the defendant was sentenced, inter alia, for the crimes of kidnapping to commit robbery (§ 209, subd. (b)) (count 1), forcible oral copulation (§ 288a, subd. (c)) (count 3), and forcible rape (§ 261, subd. (a)(2)) (count 4). (*People v. Douglas, supra*, 39 Cal.App.4th at p. 1391.) On counts 3 and 4, the trial court imposed sentence on enhancements for kidnapping for the purpose of committing sexual offenses (§ 667.8, subd. (a)), but did not stay execution of sentence on them. In holding that execution of kidnapping sentence enhancements should be stayed pursuant to section 654 based upon the defendant's sentencing for the substantive crimes, the court stated, "[T]he trial court had no grounds to punish defendant again for the identical kidnapping. [¶] . . . [¶] There was only one kidnapping; the kidnapping for robbery was the same as the kidnapping which gave rise to the two

enhancements." (*Id*. at pp. 1394-1395.) We believe that under the "modern trend" (*Ahmed, supra,* 53 Cal.4th at p. 162), section 654 applies to various enhancements imposed here.

(b) Count 1 Enhancements Based on Defendant Inflicting Great Bodily Injury on Medina and Santee

The jury found true the allegations in count 1 that defendant inflicted great bodily injury on both Medina and Santee in the commission of the gross vehicular manslaughter of Rocha. Section 12022.7, subdivision (a) provides that, "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

Substantial evidence supports the jury's findings that defendant inflicted great bodily injury on others in the commission of the gross vehicular manslaughter of Rocha (see discussion in part (d), *post*). Both Rocha and Medina were struck by defendant's vehicle upon the initial impact, and Santee was twice struck by defendant's vehicle—upon initial impact and when defendant left the scene of the accident.

On count 1, the trial court imposed two three-year sentence enhancements pursuant to section 12022.7, subdivision (a), but stayed execution of sentence on that count, including the sentence enhancements. Although, as noted above, the trial court erred in staying execution of sentence on count 1, execution on the great bodily injury sentence enhancements must be stayed. As to Santee's injuries, defendant was sentenced on count 9 (the second degree murder of Santee) for defendant's acts causing those injuries—a homicide victim "obviously . . . suffer[s] great bodily injury" (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1168). As to Medina, as discussed below, the trial court did not err by enhancing the sentence on count 9 based on great bodily injury to him and, therefore, defendant has already been sentenced for his conduct causing

Medina's injury. (§ 654, subd. (a); see *Ahmed*, *supra*, 53 Cal.4th at p. 162; *People v. Julian* (2011) 198 Cal.App.4th 1524, 1531.)

(c) Count 7 Enhancement Based on Defendant Inflicting Great Bodily Injury on Santee

The jury found true the allegations that defendant inflicted great bodily injury on Santee in the commission of the crime of leaving the scene of an accident alleged in count 7. Substantial evidence supports the jury's findings that defendant inflicted great bodily injury on Santee in the commission of leaving the scene of an accident (see discussion in part (d), *post*). Santee was struck by defendant's vehicle when defendant left the scene of the accident.

On count 7, the trial court imposed a three-year sentence enhancement pursuant to section 12022.7, subdivision (a), but stayed execution of sentence on that count, including the sentence enhancement. If the trial court selects count 7, instead of counts 3 or 8, as the one leaving the scene of the accident count upon which it is to impose sentence (discussed above), execution of the section 12022.7, subdivision (a) sentence enhancement for that count must be stayed. Defendant had been sentenced under count 9—the second degree murder of Santee—for those injuries. (§ 654, subd. (a); see *Ahmed*, *supra*, 53 Cal.4th at p. 162; *People v. Julian*, *supra*, 198 Cal.App.4th at p. 1531; *People v. Verlinde*, *supra*, 100 Cal.App.4th at p. 1168.)

(d) Counts 2, 3, 8, and 9 Enhancements Based on Defendant Inflicting Great Bodily Injury on Medina and Rocha

The trial court enhanced defendant's sentence three years on count 9—the murder of Santee—based on the jury's true finding on the allegation that defendant inflicted great bodily injury on Medina and Rocha in violation of section 12022.7, subdivision (a). The jury also found true the allegations that defendant inflicted great bodily injury on Medina

and Rocha in the commission of the gross vehicular manslaughter of Santee in count 2, and leaving the scene of an accident in counts 3 and 8.

Defendant contends that the great bodily injury inflicted on Medina and Rocha did not occur "in the commission" of the crimes specified in counts 2, 3, 8, and 9 because there is insufficient evidence that Medina and Rocha were struck when defendant left the scene of the accident and killed Santee. We disagree.

In *People v. Jones* (2001) 25 Cal.4th 98, the court held that the use of a deadly weapon within the meaning of section 12022.3 occurs "in the commission of" a specified sex offense "if it occurred *before, during, or after* the technical completion of the felonious sex act." (*Id.* at p. 110.) The court analogized the felony murder statutes with a weapons-use enhancement in that case, and stated, "We long ago rejected the assumption 'that to bring a homicide within the terms of section 189 . . . , the killing must have occurred "while committing," "while engaged in," or "in pursuance" of the named felonies, and that the killing must have been "a part of" the felony or attempted felony "in an actual and material sense."' [Citation.]" (*Id.* at pp. 108-109.) Determining whether a killing occurred during the commission of a felony "is not '"a matter of semantics or simple chronology."' Instead, 'the focus is on the relationship between the underlying felony and the killing.' [Citation.]" (*Id.* at p. 109.)

The court in *People v. Alvarado* (2001) 87 Cal.App.4th 178, in discussing "in the perpetration of" a crime, drew an analogy to felony-murder statutes and stated that the California Supreme Court "has repeatedly rejected interpretations that would place technical limits on the scope of the phrase or require a strict causal relationship between the underlying felony and the homicide. Instead, the court has consistently held that a homicide is committed *in the perpetration of* a felony if the killing and felony are parts of 'one continuous transaction,' and this transaction may include flight after the felony to a place of temporary safety. [Citations.]" (*Id.* at pp. 187-189; see *People v. Masbruch* (1996) 13 Cal.4th 1001, 1006-1014 [section 12022.3, subd. (a) enhancement upheld where the accused only displayed a handgun one hour before the rape]; *People v. Frausto* (2009) 180 Cal.App.4th 890, 903 [section 12022.53, subd. (d) enhancement upheld where

shooting of two witnesses aided in the escape from the commission of a murder]; *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1488 [potential section 12022.7 liability arises even for injuries sustained after the victim is removed from her residence after a burglary].)

"'[I]n the commission of" has been given an expansive, not a tailored meaning." (*People v. Frausto, supra*, 180 Cal.App.4th at p. 900.) ""[I]n the commission of' is not the same as 'while committing,' 'while engaged in,' or 'in pursuance.' Temporal niceties are not determinative and the discharge of a gun before, during, or after the felonious act may be sufficient if it can fairly be said that is was a part of a continuous transaction." (*Id*. at p. 902.) Here, a reasonable trier of fact could find that the infliction of great bodily injury on Medina and Rocha and defendant's act of leaving the scene of the accident and running over Santee were part of one continuous transaction. All three victims were simultaneously struck—no doubt within a fraction of a second—by the initial impact of defendant's vehicle. The entire scenario, from the initial impact to defendant leaving the scene of the accident and thereby running over Santee[7] occurred over a period of no more than a few minutes.

Defendant's reliance on *People v. Arzate* (2003) 114 Cal.App.4th 390 is unavailing. There, the defendant shot and seriously injured a sheriff's deputy. The court held that "it is logically inconsistent to inflict great bodily injury and use a gun 'in the commission' of the offense of carrying a concealed firearm in a vehicle." (*Id*. at p. 392.) The court reasoned that the offense of carrying the concealed firearm ended when defendant displayed and used the gun. (*Ibid*.) The court distinguished crimes that are committed by a single passive act with those that involve affirmative acts, stating "the offense of carrying a concealed firearm in a vehicle is committed with the single passive act of carrying the firearm in a concealed fashion in a vehicle. In contrast, crimes such as felony murder, burglary, robbery and kidnapping involve affirmative actions, even

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[7] The prosecutor argued at trial that defendant killed Santee after the initial impact with defendant's vehicle, when defendant backed his vehicle over Santee while leaving the scene of the accident.

beyond the initial physical act of entry or taking." (*Id*. at pp. 400-401, fn. omitted.) Unlike the act of carrying a concealed firearm in a vehicle, here the act of inflicting great bodily injury was an affirmative act.

Based on those authorities, there is sufficient evidence to support the jury's true finding that the great bodily injury that defendant inflicted on Medina was in the commission of the offenses alleged in count 2 (the gross vehicular manslaughter of Santee), count 3 (leaving the scene of an accident), and count 9 (the second degree murder of Santee). There is also sufficient evidence to support the jury's true finding that the great bodily injury inflicted on Rocha was in the commission of the offenses alleged in count 2 (the gross vehicular manslaughter of Santee), count 8 (leaving the scene of an accident), and count 9 (the second degree murder of Santee). The trial court did not err by enhancing the sentence on count 9 (the second degree murder of Santee) based on great bodily injury to Medina, but erred in not staying the sentence enhancement on that count as to Rocha's great bodily injury.

As to Medina, on counts 2 and 3, the trial court imposed a three-year sentence enhancement pursuant to section 12022.7, subdivision (a) based on great bodily injury suffered by him, but stayed execution of those counts, including the sentence enhancements. Execution on the great bodily injury sentence enhancement on count 2 was properly stayed because, as stated *ante*, the trial court properly stayed execution of sentence on count 2. When the base term of a sentence is stayed under section 654, the attendant enhancements must also be stayed. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.) In addition, the trial court enhanced defendant's sentence on count 9 based on the great bodily injury to Medina. Defendant, therefore, had already been punished for his act that caused Medina's injury. (§ 654, subd. (a); see *Ahmed*, *supra*, 53 Cal.4th at p. 162; *People v. Julian*, *supra*, 198 Cal.App.4th at p. 1531.) Because the trial court enhanced defendant's sentence on count 9 based on great bodily injury to Medina, if the trial court selects count 3, instead of counts 7 or 8, as the one leaving the scene of the accident count upon which it is to impose sentence (discussed above), execution on the section 12022.7, subdivision (a) sentence enhancement for that count must be stayed.

As to Rocha, on each of counts 2, 8, and 9, the trial court imposed a three-year sentence enhancement pursuant to section 12022.7, subdivision (a) based on great bodily injury suffered by him. The trial court stayed execution of sentence on counts 2 and 8, including the sentence enhancements, and executed sentence on count 9, including the sentence enhancement.

Execution on the great bodily injury sentence enhancement on count 2 based on Rocha's injury was properly stayed because, as stated *ante*, the trial court properly stayed execution of sentence on count 2. (*People v. Guilford, supra,* 151 Cal.App.3d at p. 411.) If the trial court selects count 8, instead of counts 3 or 7, as the one leaving the scene of the accident count upon which it is to impose sentence (discussed above), execution on the section 12022.7, subdivision (a) sentence enhancement for that count must be stayed. As discussed above, execution of the sentence on count 1, the gross vehicular manslaughter of Rocha, should not be stayed, and as such defendant will be sentenced for his act in causing Rocha's great bodily injury. (§ 654, subd. (a); see *Ahmed*, *supra,* 53 Cal.4th at p. 162; *People v. Julian, supra,* 198 Cal.App.4th at p. 1531; *People v. Verlinde*, *supra,* 100 Cal.App.4th at p. 1168.) For this same reason, the trial court erred in not staying the sentence enhancement on count 9 as to Rocha's great bodily injury.

(e) Counts 1 and 2 Enhancements Based on Defendant Leaving the Scene of the Crime

The jury found true the enhancement allegations as to counts 1 and 2 that defendant left the scene of a crime pursuant to Vehicle Code section 20001, subdivision (c). Vehicle Code section 20001, subdivision (c) provides in relevant part, "A person who flees the scene of the crime after committing a violation of . . . Section 192 of the Penal Code, upon conviction of [that section], in addition and consecutive to the punishment prescribed, shall be punished by an additional term of imprisonment of five years in the state prison." There is substantial evidence to support the jury's true findings.

On each of counts 1 and 2, the trial court imposed a five-year sentence enhancement pursuant to Vehicle Code section 20001, subdivision (c), but stayed execution of sentence on those counts, including the sentence enhancements. Execution of sentence on the Vehicle Code section 20001, subdivision (c) enhancement on count 2 was stayed properly because, as stated *ante*, the trial court properly stayed execution of sentence on count 2 (*People v. Guilford*, *supra*, 151 Cal.App.3d at p. 411), and in any event, defendant is to be sentenced under a count for this same act—leaving the scene of an accident (count 3, 7, or 8). (§ 654, subd. (a); see *Ahmed*, *supra*, 53 Cal.4th at p. 162; *People v. Julian*, *supra*, 198 Cal.App.4th at p. 1531; *People v. Verlinde*, *supra*, 100 Cal.App.4th at p. 1168. Because defendant is to be sentenced under a count for leaving the scene of an accident (count 3, 7, or 8), execution on the leaving the scene of a crime enhancement as to count 1 must also be stayed. (*Ibid*.)

(f) Count 9 Enhancement Based on Defendant Leaving the Scene of the Accident

The trial court enhanced defendant's sentence five years on count 9 for the second degree murder of Santee based on defendant leaving the scene of a crime in violation of Vehicle Code section 20001, subdivision (c). The trial court erred.

Vehicle Code section 20001, subdivision (c) imposes a five-year enhancement if a defendant is convicted of a violation of sections 191.5 (gross vehicular manslaughter while intoxicated) or 192, subdivision (c)(1) (gross vehicular manslaughter). Defendant's conviction on count 9 was for a violation of section 187, subdivision (a) (murder), not for violations of sections 191.5 or 192, subdivision (c)(1). In addition, it was not alleged in count 9 that defendant left the scene of a crime in violation of Vehicle Code section 20001, subdivision (c). The enhancement allegation of leaving the scene of the accident was only charged in counts 1 and 2.

3. Presentence Conduct Credits

The trial court erred in crediting defendant with 855 days of custody credit consisting of 744 days of actual custody credit and 111 days of conduct credit. Section 2933.2 provides in relevant part: "(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933 or Section 2933.05. [¶] . . . [¶] (c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)." (See *People v. Moon* (2011) 193 Cal.App.4th 1246, 1249-1253; *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366.) Because defendant was convicted of murder pursuant to section 187, the trial court erred in awarding him 111 days of presentence conduct credits.

4. Criminal Conviction Assessment

The trial court was required to v impose a $30 criminal conviction assessment as to each count on which defendant was convicted. (*People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415, fn. 3; Gov. Code, § 70373, subd. (a)(1); see *People v. Lopez* (2010) 188 Cal.App.4th 474, 480.) The trial court orally imposed such an assessment on each of the counts on which defendant was convicted, for a total amount of $180, but the abstract of judgment incorrectly reflects only a $30 criminal conviction assessment. Accordingly, the abstract of judgment is ordered modified to reflect a criminal conviction assessment of $180.

DISPOSITION

We reverse the judgment as to the stay of execution of sentence on counts 1, 3, 7, and 8; the imposition of the Vehicle Code section 20001, subdivision (c) enhancement on count 9; the failure to stay execution of the section 12022.7, subdivision (c) sentence enhancement for Rocha's great bodily injury on count 9; and defendant's award of 111 days of presentence conduct credit. The matter is remanded to the trial court for resentencing, considering all sentencing choices consistent with this opinion. Upon remand, the trial court is to impose sentence on count 1, and stay execution of the section 12022.7, subdivision (c) and Vehicle Code section 20001, subdivision (c) sentence enhancements on that count; select one leaving the scene of the accident count from counts 3, 7, and 8, impose the appropriate sentence on that count, stay execution of the section 12022.7, subdivision (c) sentence enhancement on that count, and dismiss the remaining two leaving the scene of the accident counts pursuant to section 1385, subdivision (a); and stay execution of the section 12022.7, subdivision (c) sentence enhancement for Rocha's great bodily injury on count 9. The abstract of judgment is ordered modified to reflect a criminal conviction assessment of $180. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.