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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. DAVID DEANDRE LEWIS, Defendant and Appellant.	C056876 (Super. Ct. No. SF093367A)

After a birthday celebration began to deteriorate, the host attempted to shut down the party. Gang rivalry escalated and shooting broke out, leaving a teenaged boy dead and several others wounded. An information charged defendant David Deandre Lewis with murder, attempted murder, and participation in a criminal street gang. (Pen. Code, §§ 187, 664/187, 186.22, subd. (a).)[1] A jury found defendant guilty of all charges. The court sentenced defendant to life in prison without the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

possibility of parole, plus a consecutive determinate term of 142 years 4 months. Defendant appeals, contending (1) the court erred in admitting the preliminary hearing testimony of a fellow gang member, (2) instructional error, (3) ineffective assistance of counsel, (4) cumulative error, and (5) sentencing error. We shall direct the trial court to amend the abstract of judgment as discussed herein. In all other respects, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2004 members of rival gangs attended a backyard birthday party. When tensions arose, the host attempted to end the party. Gunfire erupted, leaving one person dead and three injured.

An information charged defendant with one count of murder, three counts of attempted murder, and participation in a criminal street gang. The information also alleged the special circumstance of murder committed to benefit a criminal street gang as well as the personal and intentional discharge of a firearm during the commission of a felony; the personal and intentional discharge of a firearm during the commission of a felony, causing great bodily injury or death; participation in an offense where a principal personally and intentionally discharged a firearm, causing great bodily injury or death; the personal use of a firearm during the commission of a felony; and the commission of an offense to benefit a criminal street gang. (§§ 190.2, subd. (a)(22), 12022.53, subd. (c), 12022.53,

subd. (d), 12022.53, subds. (d)-(e), 12022.5, subd. (a), 186.22, subd. (b)(1).)

A jury trial followed. The evidence revealed the following.

The Party

Billy Ray Garner and his wife Tanya held a birthday party for their two teenaged sons. Since the Garners had previously resided in the Bay Area, some guests from the Bay Area attended.

The Garners' sons advertised the party with a flier circulated in Stockton, including at a mall and a local park. The fliers announced an "EPA-ESO Party." EPA (East Palo Alto) and ESO (East Side Oakland) are gangs and rivals of the North Side Gangster Crips. The sons also invited friends from Oakland, Palo Alto, and Stockton. Defendant is a member of the North Side Gangster Crips.

The party took place in the Garners' backyard, complete with stereo speakers. The party progressed without incident until a rap song was played that encouraged people to call out their hometowns or neighborhoods. Guests started yelling out towns and neighborhoods, including East Oakland, East Palo Alto, and Stockton. Other partygoers yelled "North Side Stockton Crips," "Gangster Crip," "NSGC," "North Side Crip," and expletives about Stockton. The yells sparked tension among the partygoers.

Defendant, nicknamed Tidy Whitey, attended the party with fellow gang members Jimmy Lee Benson, Dawayne McDonald, Jesse Zamora, Eddie Ortiz, Terrance Murray, and Andrew Thompson.

During the party defendant yelled, “Fuck Oakland” and “North Side.” Benson carried a gun with a clip, and during the party he rejected Zamora’s advice to conceal the weapon.

The Garners decided to end the party, turned off the music, and told the partygoers to leave. Billy Ray Garner testified it was time to close the party down and he yelled loudly, “The party’s over. That’s it. The party’s over.”

Some of defendant’s fellow gang members retrieved guns from their cars, passed them out, and gathered in the street. As tensions mounted, McDonald gave defendant a gun.

As the guests began to leave, some partygoers from the Bay Area waited across the street for rides. Words were exchanged between the two groups. A friend of Billy Ray Garner drove up and told him one of the boys in the street had a gun. Garner saw a boy putting a gun in his waistband and told his wife to call the police. The gunman was in the group gathered down the street from the Garners’ home.

Billy Ray Garner approached the young man with the gun and said: “Hey, man, you don’t have to do this. This is not that type of party. You know. I know what you guys are about. These are high school kids. You know, you don’t have to do this, man.” The person with the gun said, “We hear you, OG.” Garner believed “OG” was short for “old gangster.”

According to Billy Ray Garner, Benson said, “Fuck that nigger, he ain’t nobody.” Garner testified: “At that point I knew that I was in the wrong place. [¶] . . . [¶] I started walking backwards.”

The Shooting

Billy Ray Garner took about six steps backward and then turned around. He saw his wife's friend and told her to run. Suddenly Garner heard "a pop," and gunfire hit him in the arm. He started running and then was shot in the back. Garner's injuries resulted in a hospital stay and follow-up surgery.

Partygoers estimated six to nine shots were fired. Fourteen-year-old Eric Castillo was struck in the head, foot, and abdomen. The head wound proved fatal, and Castillo was pronounced dead at the scene.

The Garners' 14-year-old daughter was hit by a bullet in the foot. A 17-year-old partygoer was hit in the calf and a bullet grazed his nose.

Other bullets were fired into the Garner home. Officers found evidence that at least 12 rounds were fired. Police found no evidence that other partygoers, such as those from the Bay Area, or the Garners were armed or fired weapons.

The Aftermath

Officers arrived to find about 120 hostile people either walking away from the Garners' house or in their driveway. About a mile away, officers found defendant and four others, a group that caught their attention because one of them matched the description of the shooter. Officers found a .22-caliber revolver with six spent bullets and two unspent bullets in nearby bushes. Defendant told police he threw it when he saw them coming. The prosecution's expert could not determine

whether the bullet recovered from Castillo's stomach was fired from that gun.

Defendant's Arrest and Interview

Defendant was born in 1989 and was 15 years old at the time of the 2004 shooting. Officers detained and interviewed defendant after the shooting. The interview was played for the jury.

A gunshot residue test found residue on defendant. Defendant told officers his fingerprints would be on the gun because someone had handed it to him. He ran with the gun and threw it when he saw the officers. According to defendant, McDonald gave him the gun after the party got out of control. McDonald also had a gun and fired six shots after a "Mexican dude" started firing first.

According to defendant, a dispute broke out in the backyard when a "gangster song" was played. People from Oakland and Stockton began cursing one another, yelling out epithets, throwing gang signs, and fighting. Partygoers from Oakland, including a big bald-headed man and a person with dreadlocks, confronted defendant's friend Murray and one of them said, "bitch meet me outside." Defendant said, "then some big dude said, let's take this outside again right now."

People gathered out front as the party shut down. Members of defendant's group got into a dispute with the person with dreadlocks and the bald man. Other people "came out."

Defendant told officers people from both sides were shooting. He began shooting toward people at the house.

Defendant shot more than five times and told police, “I was just shooting. I shot like that.” According to a detective, defendant held his arm out perpendicular to his body to demonstrate how he fired the gun. An officer repeated the demonstration by holding his hand straight out and saying “you’re aiming right at them.” Defendant agreed. Defendant told the officer, “I thought I got shot. [¶] . . . [¶] Because I was hearing them bullets . . . [¶] . . . [¶] [j]ust weezing [*sic*]. I heard em weezing like tschhhhh, tschhhhh.”

Dawayne McDonald

Dawayne McDonald, one of the other men detained, exercised his Fifth Amendment right against self-incrimination and refused to testify at trial. (U.S. Const., 5th Amend.) McDonald’s preliminary hearing testimony was read to the jury. During the preliminary hearing, McDonald could not recall any details of the shooting at the party or any previous statements to police.

The prosecution then played for the jurors a videotape recording of a prior police interview of McDonald. McDonald told officers that partygoers from Oakland and Stockton clashed, yelling and passing out guns. McDonald stated defendant fired six shots. Benson, Zamora, “Lamont,” and Thompson also fired. McDonald said defendant fired into the crowd and must have hit someone.

Defendant’s Testimony

Defendant testified he shot a gun the night of the party but did not fire into the crowd or aim at anybody. Defendant admitted he told officers he shot a gun “in the sky” and

admitted saying “Fuck Oakland” the night of the shooting. According to defendant: “I wasn’t shooting at nobody. [¶] . . . [¶] . . . I just shot to clear a way, man.” Anyone who said defendant fired into the crowd was lying.

Jesse Zamora

Jesse Zamora, also detained at the scene, testified he is a North Side Gangster Crip, or NSGC, as was his friend, Eddie Ortiz.[2] Zamora testified defendant was hanging out with gang members the night of the party, but was not a gang member himself. Zamora saw defendant at the party, but did not “know him on the streets.”

Zamora learned of the party from a flier he saw at a Stockton mall. He thought it was a Bay Area party. Zamora called Benson and Ortiz and told them about the party. He and Ortiz brought guns to the party. Zamora left his gun in the car. After the party was shut down and tensions escalated, Zamora got his gun from the car and hung out with defendant, Ortiz, Benson, and maybe McDonald. Some people on their side were shouting where they were from, while others yelled out “Oakland.” Zamora suggested they leave, but defendant called him stupid and told Zamora, “[W]e need to do it now.” Zamora guessed defendant meant shooting. Defendant said, “This is our hood. We ain’t leaving.”

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[2] According to Zamora’s testimony, Ortiz was deceased by the time of trial.

An “older” black man, about 40 years of age, approached the Stockton group and asked them to leave. At trial, Zamora testified he heard no response. However, in an earlier interview with police, Zamora said that defendant replied, “[W]e ain’t going nowhere.” Zamora also previously told officers the man approached defendant, not the entire group. People began shooting as the man walked back toward the house.

Zamora testified he saw defendant point a gun at the crowd and fire once or twice. Zamora admitted he fired his gun twice in the air but said he only fired to get others to stop shooting.

The jury also heard two statements Zamora gave to the police. Zamora heard about the party at the mall. Benson, Ortiz, and McDonald talked about going to the party. Zamora told police defendant fired at the crowd gathered in front of the Garner residence.

Benson’s Testimony

Benson admitted knowing North Side Gangster Crips members, such as McDonald, Ortiz, and Zamora. However, he denied belonging to the gang. Benson learned of the party from some girls just prior to the party. During the party, he went out front to smoke, and when he returned to the backyard everyone was told to leave. Partygoers gathered in front of the house and began exchanging words.

As members of the Stockton group gathered, Benson walked over to them “[t]o see what they was [*sic*] doing next, to see if there was another party that night.” As he spoke with a friend

from high school about going to another party, Benson heard shots ring out behind him. Benson did not see anyone with a gun, and he did not have a gun. However, previously Benson told officers defendant and Zamora had guns, which they fired.

Other Partygoers

McDonald's cousin testified the party ended shortly after she arrived. She walked to the corner when she left and then heard gunshots coming from "right by the house."

Jasmine Farley also arrived shortly before the party broke up. As she walked home, she "kind of" remembered two groups yelling at each other, with members of each group reaching into their waistbands as if they had guns. After she went around the corner, she heard gunshots ring out from near the house.

Maria Farley testified that the party broke up after people began arguing. As she left, two groups stood on opposite sides of the street arguing, but it did not look like they were going to fight. As she walked away, she heard shots fired.

Gang Evidence

Gang expert Detective Michael George testified that Benson, Zamora, Thompson, and Jonathan Brooks were documented members of the North Side Gangster Crips. George believed defendant was a member because he yelled "North Side" and "44 Townhome Crips" at the party and in juvenile hall. Zamora also stated defendant was a member. In October 2004 defendant admitted belonging to the gang.

In his postarrest interview, defendant denied belonging to the gang but admitted hanging out with gang members. At trial, defendant testified he no longer belonged to the gang.

Verdict and Sentencing

The jury found defendant guilty of all charges and found the alleged special circumstance and enhancements to be true. The court sentenced defendant to consecutive sentences of life in prison without the possibility of parole, plus four indeterminate terms of 25 years to life, plus a determinate term of 42 years 4 months. Defendant filed a timely notice of appeal.

DISCUSSION

DAWAYNE MCDONALD'S STATEMENT

Defendant argues the trial court erred in allowing the jury to hear a reading of the transcript of McDonald's preliminary hearing and to view a videotape of McDonald's statement to police. The court's actions, defendant contends, deprived him of his right under the Sixth Amendment to the United States Constitution to confront and cross-examine a witness. The People concede playing the tape was error, but argue it was harmless.

Background

McDonald, when called as a witness at trial, invoked his constitutional privilege against self-incrimination. (U.S. Const., 5th Amend.) The prosecution did not offer McDonald immunity from prosecution.

The trial court ruled that McDonald was unavailable to testify, and it would not order the prosecution to offer immunity; the jury would not be told why McDonald was unavailable; the prosecution could use McDonald's preliminary hearing testimony; and that McDonald could be impeached with his statement to police.

The preliminary hearing transcript was read to the jury, and a videotape of a police interview with McDonald was played for the jury.

During the preliminary hearing, McDonald testified that he did not know who was shooting after the party. He also stated he did not tell officers that defendant and other partygoers had guns. All McDonald could remember about the melee was the sound of gunshots.

During the preliminary hearing, Detective Rodriguez discussed McDonald's statement to police. McDonald told officers that six people, including defendant, fired shots at the party.

The trial court ruled that McDonald's preliminary hearing testimony could be impeached with his statement to officers. The court cited Evidence Code section 770 and determined that evidence of McDonald's prior inconsistent statements was admissible. The court found the statements admissible even though McDonald "may not have been presented with those statements" or been given an "opportunity to address them in some fashion while on the stand during the preliminary hearing."

McDonald's preliminary hearing testimony was impeached with his statement to police. In the taped interview, played for the jury, McDonald told officers that defendant was one of the people who fired a weapon.

Discussion

The People concede the trial court erred by permitting impeachment of McDonald's preliminary hearing testimony with the videotape of his earlier police interview. However, the People argue the error was harmless.

Evidence Code section 1294 allows the statement of a person who is unavailable as a witness to be introduced as evidence in court if the statement was previously introduced at a hearing or trial as a prior inconsistent statement of the witness. This section is designed to overcome the admissibility problems associated with out-of-court statements that are inconsistent with an unavailable witness's former testimony, but it requires that the evidence of the statements be introduced at the prior hearing when the witness actually testified. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 408-409.)

In *People v. Williams* (1976) 16 Cal.3d 663, the Supreme Court considered a factual scenario similar to the present case. In *Williams*, a suspect gave a statement to officers implicating the defendant in a robbery. During the preliminary hearing, the suspect denied making the statement. A detective testified that the suspect had made the statement. (*Id*. at p. 665.) Although the suspect was not available to testify at trial, the court admitted his preliminary hearing testimony under Evidence Code

section 1291, subdivision (a)(2). The detective repeated his earlier testimony about the prior inconsistent statement, which was admitted at trial as an inconsistent statement under Evidence Code section 1235. (*Williams*, at p. 666.) Without reaching the question of a defendant's right to confrontation, the Supreme Court held that the prior inconsistent statement was not admissible under section 1235 because the hearsay exception was intended to apply only to the prior inconsistent statement of a witness who testifies at trial. (*Williams*, at pp. 666-669.)

Here, neither the transcript nor the videotape of the police interview was introduced into evidence at the preliminary hearing. Instead, during the preliminary hearing McDonald was asked if he recalled what he told officers. McDonald testified he could not recall the events surrounding the shooting or his interview with police. Detective Rodriquez then testified that McDonald told officers in the interview that six people fired guns after the party, including defendant.

Under Evidence Code section 1294, McDonald's videotaped statement was not admissible at trial, since the taped statement was not introduced into evidence at the preliminary hearing. We agree with both parties that the trial court erred in allowing the tape to be played.

However, we must determine whether the admission of the taped interview was reversible error. If the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the

error will be deemed harmless. (*People v. Schmaus* (2003) 109 Cal.App.4th 846, 860.)

Defendant argues several factors point to prejudice in the admission of McDonald's statements. Defendant concedes there was "more than ample evidence" defendant fired a gun, but he argues the evidence of his intent to kill was "hardly 'overwhelming.'" In addition, defendant argues the evidence was sufficient to support reasonable doubt as to whether he acted in imperfect self-defense. However, according to defendant, only McDonald accused defendant of firing six bullets into the crowd.

We disagree. Defendant admitted firing at least five shots. The shots were not fired into the sky. He described to the police how he held the gun -- perpendicular to his body, straight out, and "aiming right at em." During his interview with the police, defendant agreed with the officer's description of his shooting into the crowd. At trial, Zamora testified he saw defendant point a revolver at the crowd and fire once or twice. In a prior statement to police, Zamora also stated defendant fired at the crowd in front of the Garners' residence. In addition, Benson told officers both defendant and Zamora fired guns that night.

Defendant argues his admission of firing five times did not resolve the issue of intent "unless merely firing a gun is itself overwhelming evidence of intent to kill. But it isn't." Despite defendant's best efforts to minimize his actions, we are not persuaded. Defendant did not "merely" fire a gun; he fired

a gun at least five times and “probably . . . more” either at or above a crowd of people, many of whom were innocent bystanders.

Defendant’s efforts to undercut Zamora’s statements that defendant fired into the crowd are unavailing. Neither Zamora’s prior criminal record nor his differing accounts of the incident render incredible his testimony at trial and to police that defendant shot at the crowd.

According to defendant, McDonald’s testimony that defendant belonged to the Northside gang “carried some significance for the jury” and therefore was prejudicial. But Detective George also testified defendant belonged to the NSGC and that the shooting was for the benefit of the gang. McDonald’s statements buttressed the detective’s testimony.

Defendant argues McDonald’s accusations about defendant’s actions the night of the murder were cumulative of Zamora’s, but “only to a limited extent.” Zamora, defendant theorizes, only recalled seeing defendant shoot; he did not see defendant hit anyone. McDonald claimed defendant fired into the crowd “and clearly must have hit someone.” However, Zamora testified defendant fired into the crowd; the fact that defendant hit someone was clearly implied, if not stated.

Defendant also argues McDonald’s statements were not cumulative, citing the prosecution’s closing argument that Zamora “corroborated” McDonald, not the other way around. Defendant contends the prosecution’s comment runs afoul of *Arizona v. Fulminante* (1991) 499 U.S. 279, 299 [113 L.Ed.2d 302]. In *Fulminante*, a defendant confessed twice: once to a

fellow inmate and the second time to the inmate's wife. (*Id*. at pp. 283-284.) The court found the first confession coerced and found the error in admitting the confession was not harmless beyond a reasonable doubt. The court noted a successful prosecution depended upon the jury's believing both confessions, each confession reinforcing and corroborating the other. In addition, although some of the details of the noncoerced confession were corroborated by circumstantial evidence, many, including specific details of the crime, were not. The only corroborating evidence as to the defendant's motive and state of mind was the first coerced confession. Therefore, one confession was not merely cumulative of the other. (*Id*. at pp. 289, 297-299.)

Here, in contrast, McDonald told officers six people, including defendant, fired shots at the party. However, defendant himself admitted firing shots after the party broke up, and Zamora testified defendant fired into the crowd. McDonald's statements corroborated those of defendant and Zamora.

Given the overwhelming evidence before the jury, the improperly admitted statements by McDonald were merely cumulative of the other evidence. The error in the admission of McDonald's videotaped statements was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705].)

INSTRUCTIONAL ERROR

Defendant posits several instructional errors on the part of the trial court. He contends the court erred in instructing on the issues of malice, intent, the natural and probable consequence theory, aider and abettor liability, and attempted murder.

Malice

Defendant challenges the court's instructions for failing to identify the absence of provocation and absence of imperfect self-defense as necessary elements of murder and attempted murder. According to defendant, the jury was able to reach verdicts on murder and attempted murder without considering key elements of those crimes.

Background

The court instructed the jury pursuant to CALCRIM No. 500 that if "a person kills with a legally valid excuse or justification, the killing is lawful and he or she has not committed a crime. If there is no legally valid excuse or justification, the killing is unlawful and, depending on the circumstances, the person is guilty of either murder or manslaughter." In addition, the court instructed the jury: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." (CALCRIM No. 521.)

The court instructed the jury on provocation: “A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

“The defendant killed someone because of a sudden quarrel or in the heat of passion if:

“1. The defendant was provoked;

“2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;

“And

“3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

“Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

“In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

“It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the

provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts.

"The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 570.)

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self[-]defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury;

"And

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

"But

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

“In evaluating the defendant’s beliefs, consider all the circumstances as they were known and appeared to the defendant.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

“The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect selfdefense [*sic*]. If the People have not met this burden, you must find the defendant not guilty of murder.” (CALCRIM No. 571.) The court also instructed in a similar vein as to reducing attempted murder to attempted voluntary manslaughter. (CALCRIM Nos. 603, 604.)

The court instructed the jury that if defendant reasonably believed the use of deadly force was necessary, then he was not guilty of either murder or manslaughter because the killing was justified. The court instructed: “The defendant is not guilty of murder or manslaughter, or attempted murder, if he was justified in killing someone in selfdefense [*sic*]. The defendant acted in lawful self-defense if:

“1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury;

“2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

“And

“3. The defendant used no more force than was reasonably necessary to defend against the danger.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. Defendant’s belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

“When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed.

“The defendant’s belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

“A defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death/or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

“The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder/or manslaughter or attempted murder.” (CALCRIM No. 505.)

The court instructed the jurors that they “must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.

“Pay careful attention to all of these instructions and consider them together.” (CALCRIM No. 200.)

Discussion

The People argue defendant failed to object at trial to the purported instructional errors, thereby forfeiting the issue. However, we may review any instruction given even though no objection was made in the trial court “if the substantial rights of the defendant were affected thereby.” (§ 1259; see *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028.) Defendant argues his rights were so affected, since he contends the trial court did not instruct accurately on the elements of the offense.

In determining whether a court properly instructed on the elements of the offense, we consider whether there is a reasonable likelihood the jury applied the challenged instruction in a way that violated the Constitution. We evaluate the challenged instruction in the context of the instructions in their entirety. (*Boyde v. California* (1990) 494 U.S. 370, 378, 380 [108 L.Ed.2d 316].) We reverse only if it is reasonably likely that the jury instructions as a whole

provided the jury with an inaccurate understanding of the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.)

Defendant challenges the court's instructions for failing to "identify absence of provocation and absence of imperfect defense as elements of murder and attempted murder." In a labored argument, defendant contends the CALCRIM instructions on absence of provocation and absence of imperfect self-defense misled the jury. Under defendant's analysis, the instructions as given "suggest[] jurors must first determine whether the defendant committed murder, based on an incomplete explanation of malice; only then *might* they *lower* the crime to manslaughter, based on additional findings. This approach is affirmatively misleading."

When the issue is presented in a murder case, the prosecution must prove the absence of heat of passion. However, the absence of heat of passion is not an element of the offense, but heat of passion negates or excuses malice, which is an element of murder. "[T]he absence of imperfect self-defense or voluntary intoxication is not an *element* of the offense of murder to be proved by the People. Instead, these doctrines are 'mitigating circumstances,' which may reduce murder to manslaughter by negating malice. [Citation.] The defendant is obliged to 'proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder.'" (*People v. Martinez* (2003) 31 Cal.4th 673, 685; see *People v. Rios* (2000) 23 Cal.4th 450, 461-462 (*Rios*).)

The court’s instructions informed the jury of the elements of first and second degree murder, involuntary manslaughter, and voluntary manslaughter. The court further instructed the jury that if defendant acted under sufficient provocation he was not guilty of murder, but of voluntary manslaughter. In addition, the jury understood the People bore the burden of proving beyond a reasonable doubt that defendant did not kill as a result of provocation.

Given the court’s instructions, there is no reasonable likelihood the jury, as defendant claims, “understood it could properly find defendant guilty of murder and attempted murder based only on their listed elements, without necessarily considering elements of lesser offenses.” The instructions given in the present case are similar to those approved by the Supreme Court in *Rios*, *supra*, 23 Cal.4th at p. 462. The court’s instructions prohibited the jury from finding defendant guilty of murder if they found he acted out of sufficient provocation.

Defendant also contends provocation should not be included in the definition of voluntary manslaughter. The instructions, according to defendant, misled the jury and “deemphasized imperfect defense and passion/quarrel as required determinations,” and reasonably suggested imperfect defense and passion were not necessary issues. According to defendant, the instructions allowed the jury to find him guilty without considering provocation and the manslaughter count.

We assume jurors are intelligent people capable of understanding and following all the instructions given by the court. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.) Given this standard, we cannot find the jurors only read and applied a portion of the given instructions as defendant suggests.

Defendant contends "instructions should not be cagey in identifying the *elements* that must be proved in order to reach a guilty verdict." Our review of the instructions given does not support this characterization; the instructions were not "cagey." They clearly informed the jury on the interplay between provocation, imperfect self-defense, and a conviction for murder.

Nor do we find the court's instructions run afoul of *People v. Dewberry* (1959) 51 Cal.2d 548, as defendant suggests. In *Dewberry*, the court held: "[W]hen the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty only of the lesser offense." (*Id.* at p. 555.)

Here, the court instructed with CALCRIM No. 3517 of the various greater and lesser charges to the murder count: voluntary manslaughter, assault with a firearm, negligent discharge of a firearm, and brandishing a firearm. The court instructed the jury to "consider each of these greater crimes and decide whether the defendant is guilty or not guilty of each one." The jury was instructed it could "only accept a guilty

verdict on a lesser crime if you all agree that the defendant is not guilty of the greater crime." The court also instructed with CALCRIM No. 220, informing the jury that the People must prove defendant's guilt beyond a reasonable doubt. These instructions satisfied the *Dewberry* requirements. (*People v. Barajas* (2004) 120 CalApp.4th 787, 793-794.)[3]

Aiding and Abetting Instructions

Defendant mounts several challenges to the court's instructions regarding the People's aiding and abetting theory of guilt. Defendant argues the court erred in (1) instructing the jury that a person who aids and abets is equally guilty of the crime committed by the perpetrator; (2) instructing the jury on the nature of self-defense in connection with the natural and probable consequences theory; and (3) directing the jury to find that if defendant was an aider and abettor, the murder was in the first degree.

"Equally Guilty" Instruction

Defendant argues the trial court erred in instructing pursuant to CALCRIM No. 400 that a person who aids and abets is "equally guilty" of the crime committed by the perpetrator. According to defendant, the jury could conclude that defendant's mens rea "effectively *became* that of all other principals for legal purposes."

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[3] Our finding obviates the need for a harmless error analysis.

Background

The court instructed on aiding and abetting pursuant to CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. Two, he or she may have aided and abetted someone else, who committed the crime. In these instructions, I will call that other person the 'perpetrator.' *A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it.* [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime." (Italics added.)

The court also instructed with CALCRIM No. 401, which states, in part: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] And [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

The court then instructed on the natural and probable consequences doctrine: "Before you may decide whether the defendant is guilty of Murder and Attempted Murders, you must decide whether he is guilty of Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner. [¶] To prove that the defendant is guilty of Murder and Attempted Murders, the People must prove that: [¶] 1. The defendant is guilty of Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner; [¶] 2. During the commission of the Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner, the crime of Murder and Attempted Murders was committed; [¶] And [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the Murder and Attempted Murders was a natural and probable consequence of the commission of the Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the Murder and Attempted Murders was [*sic*] committed for a reason independent of the common plan to commit the Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner, then the commission of Murder and Attempted Murders was not a natural and probable consequence of Assault with a firearm Or Shooting a Firearm in a Grossly negligent manner. [¶] To decide whether [the] crime of Murder and

Attempted Murders was committed, please refer to the separate instructions that I will give you on those crimes." (CALCRIM No. 403.)

The court instructed on the elements of shooting a firearm in a grossly negligent manner, assault with a firearm, murder, voluntary manslaughter, attempted murder, and attempted voluntary manslaughter. On murder, the court instructed: "The defendants are charged in Count 1 with murder. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] And [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] 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 defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] And [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the 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. [¶] An act causes death if the death is the direct, natural, and probable

consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence." (CALCRIM No. 520.)

Discussion

Defendant argues the "equally guilty" instruction, in combination with the natural and probable consequences doctrine, allowed the jury to find that by "aiding negligent firearm discharge, defendant could be guilty, not only of murder (CALCRIM No. 403), but of first degree murder — simply because of the perpetrator's premeditation and deliberation, and regardless of defendant's own mens rea."

However, the instructions as a whole would not allow the jury to make such a determination. The court instructed the jury on the basic principle that both direct perpetrators and those who aid and abet the crime are principals under the law. CALCRIM No. 400 does not inform the jury that the requirements for being guilty as a perpetrator and for being guilty as an aider and abettor are identical. CALCRIM No. 401 sets out the requirements for the jury to find a defendant guilty as an aider and abettor. It told the jury it must find defendant knew of the perpetrator's unlawful purpose and specifically intended to aid the perpetrator in the commission of the offense.

The court further instructed the jury that only if a reasonable person would have known that the commission of the

murder and attempted murder was a natural and probable consequence of the commission of the assault with a firearm or shooting a firearm in a grossly negligent manner, then defendant was guilty of murder and attempted murder. "[A] reasonable person would know is likely to happen if nothing unusual intervenes." (CALCRIM No. 403.)

These instructions, which provided the jury with definitions for the required mental states, instructed the jury to evaluate defendant's culpability based on the acts of the participants and defendant's own mens rea. The "equally guilty" language in CALCRIM No. 400 does not negate or undermine these instructions as defendant suggests.

Defendant relies on *People v. Samaniego* (2009) 172 Cal.App.4th 1148, which criticized the "equally guilty" language of CALCRIM No. 400. In *Samaniego*, the People argued the defendant and his codefendants drove to a location to kill an individual. However, the person was not there, so they killed a different person instead. (*Samaniego*, at p. 1162.) The court found that because there was no evidence of the roles of the three defendants in the murder, CALCRIM No. 400 misled the jury. The instruction eliminated the People's need to prove the aider and abettor intent, willfulness, premeditation, and deliberation, the mental states required for murder. (*Samaniego*, at p. 1165.) The court found the instruction, "while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*Ibid.*)

No such “exceptional circumstances” requiring modification appear in the present case. The prosecution established defendant’s role in the shooting. Defendant and Zamora told officers McDonald gave defendant his gun as the shooting started. Defendant urged others to shoot, telling Zamora, “[D]o it now. This is our hood. We ain’t leaving.” Defendant began shooting, as Zamora described it, into the crowd. Defendant admitted shooting and other witnesses saw him shoot. Under these circumstances, CALCRIM No. 400 did not mislead the jury.

Self-Defense, and Natural and Probable Consequences

Defendant argues the trial court erred in instructing the jury on the nature of self-defense in connection with the doctrine of natural and probable consequences. According to defendant, the court erred in failing to give self-defense instructions as to the nonhomicide target crimes.

Background

The court instructed the jury on the natural and probable consequences doctrine. Under these instructions, if the jury determined defendant was guilty of assault with a firearm or the shooting of a firearm in a grossly dangerous manner, the jury must decide whether under all the circumstances, “a reasonable person in the defendant’s position would have known that the commission of Murder and Attempted Murders was a natural and probable consequence” of those offenses.

The court instructed on the elements of shooting a firearm in a grossly negligent manner and assault with a firearm. In

each instruction, the court included absence of self-defense as an element of the crime.

In addition, the court instructed on self-defense: "The defendant is not guilty of murder or manslaughter or attempted murder if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if: [¶] 1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury; [¶] 2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against the danger; [¶] And [¶] 3. The defendant used no more force than was reasonably necessary to defend against that danger. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. Defendant's belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the attempted killing was not justified. When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed. [¶] The defendant's belief that he was

threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the attempted killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter or attempted murder." (CALCRIM No. 505.)

Discussion

A trial court has a duty to instruct on a defense only if the defense is supported by substantial evidence. (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) Self-defense requires that the defendant show he was in actual fear of his life or serious bodily injury and that the conduct of the other party was such as to produce that state of mind in a reasonable person. (*People v. Watie* (2002) 100 Cal.App.4th 866, 877.) Defendant faults the trial court for failing to instruct on self-defense for the nonhomicidal crimes.

The evidence revealed defendant and his fellow gang members arrived at the party armed and, without provocation, opened fire on partygoers. There was no evidence that the victims or anyone else provoked the attacks or opened fire on defendant and his fellow gang members. The jury found the murder and attempted murders to be for the benefit of a criminal street gang, and found defendant personally used and intentionally discharged a firearm, and intentionally killed Castillo. Even if the court had instructed as defendant suggests, there is no reasonable

likelihood the jury would have found he fired in self-defense, as there is no evidence to support such a finding. (*People v. Salas* (2006) 37 Cal.4th 967, 984.)

Aider and Abettor and First Degree Murder

Defendant argues the trial court made an "inexplicable" modification of the standard instructions to state the jury could find defendant guilty of first degree murder if it found he was an aider and abettor. According to defendant, the trial court identified two theories of first degree murder: premeditation and deliberation, and aider and abettor. The latter violated defendant's constitutional rights.

Background

The court instructed the jury that defendant "has been prosecuted for first degree murder under two theories: the murder was willful, deliberate, and premeditated and (2) Mr. Lewis was an aider and abettor. The defendant Jimmy Benson has been prosecuted for first degree murder under the theory of aider and abettor only. [¶] Each theory of first degree murder has different requirements, and I will instruct you on all. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory as to Mr. Lewis. [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation."

Discussion

Defendant reads the court's instruction as dividing first degree murder into "premeditation" and "aiding and abetting" theories of liability. Since aiding and abetting is not a theory of first degree murder, but an overall theory of criminal culpability, the instruction was erroneous.

Defendant disputes that, as the People suggest, the instruction was merely introductory. However, the court further instructed the jury: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before committing the act that caused death."

Defendant claims "the trial court mistakenly mixed the two concepts together, so the jury learned that 'deliberation and premeditation' and 'aiding and abetting' were equivalent, alternative legal theories elevating murder to first degree." In fact, although the trial court mentioned both in its introductory remarks, the totality of the instructions informed the jurors that to find defendant guilty of first degree murder they must find premeditation and deliberation. The instructions did not offer a similar explanation or definition of aiding and abetting as a basis for first degree murder.

We presume jurors are able to follow, correlate, and understand the instructions, and we presume they are capable of applying them to the facts of the case. (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190; *People v. Carey* (2007) 41 Cal.4th 109, 130.) We presume the jurors understood the instructions and did not simply take out of context an introductory instruction. (*People v. Smith* (2007) 40 Cal.4th 483, 517-518.)

"Kill Zone" Instruction

Defendant argues the trial court's "kill zone" instruction and the prosecution's argument on the kill zone instruction were both erroneous and provided the jury with a legally invalid theory of attempted murder.

Background

The court instructed the jury pursuant to CALCRIM No. 600: "The defendant is charged in Counts two, three and four with attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] And [¶] 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is a direct movement toward the commission of the crime after

preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt. [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Billy Garner, Jr., Craig Roy Jr, and Lecre[a]sha Grigsby, the People must prove that the defendant not only intended to kill Billy Garner, Jr., Craig Roy Jr, and Lecre[a]sha Grigsby, or intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Billy Garner, Jr., Craig Roy Jr, and Lecre[a]sha Grigsby by harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Billy Garner, Jr., Craig Roy Jr, and Lecre[a]sha Grigsby."

During closing argument, the prosecution stated: "And the reason he's guilty of all these attempted murders is something called the kill zone. And the judge explained that to you and I'm going to talk a little bit more about that. Technically, we could have charged every single individual that was standing in that kill zone as a victim of attempted murder. But we didn't. We limited it down to those people that were actually struck by bullets from the defendant and his fellow gang members."

The prosecution also stated it did not need to prove defendant intended to kill the specific individuals named as victims of the attempted murder: "We just need to show they intended to kill everybody within that kill zone. And that's

obvious. Why is that obvious? It's obvious, cause they're all standing down here, shooting this direction, and everybody who's hit and all the buildings and cars and everything else are hit in this general area right there (indicating). That's the kill zone. They wanted to shoot into that crowd and that crowd became a kill zone once they started firing their guns. They don't even need to decide -- you don't even have to find that they intended to kill a specific person, just that they were shooting into that kill zone, they were creating that as a kill zone and they were trying to hurt people within that zone."

Discussion

Defendant contends the foregoing instruction was inappropriate under the facts of this case. According to defendant, the instruction only required the prosecution to prove intent to kill "'anyone'" in the kill zone, and referred to defendant as "'harming everyone in the kill zone.'" Defendant also argues the prosecution's closing argument reinforced the error.

In *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), the California Supreme Court rejected use of a transferred intent theory in a prosecution for attempted murder. The court stated that while intent to kill a specific victim may transfer to other victims who are in fact killed, "this rationale does not apply to persons not killed." (*Id.* at p. 327.) According to the court, "[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." (*Ibid.*) As the court

theorized: “The world contains many people a murderous assailant does not intend to kill. Obviously, intent to kill one person cannot transfer to the entire world. But how can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent theory?” (*Id.* at p. 329.)

However, while the court recognized that transferred intent is not appropriate for attempted murder, a defendant who shoots into a group of people within a “kill zone” may be held liable for attempting to kill all of them on a concurrent intent theory. (*Bland*, *supra*, 28 Cal.4th at p. 329.) The court stated the intent is concurrent when the nature and scope of the attack, while directed at one victim, reveal that the perpetrator intended to harm that victim by harming everyone in that victim’s vicinity. (*Ibid.*)

The “kill zone” construct was further refined in *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*). In *Stone*, the defendant was charged with and convicted of a single count of attempted murder of a specific victim after he fired a single shot at a group of 10 people including the victim. (*Id.* at p. 135.) The trial court instructed the jury on a defendant’s intent to kill anyone in a particular zone of harm or “kill zone.” The Supreme Court concluded the court erred in so instructing because the kill zone theory did not fit the facts. The Court reasoned: “That theory addresses the question of whether a defendant charged with the murder or attempted murder of an intended target can *also* be convicted of attempting to murder other,

nontargeted, persons. Here, defendant was charged with but a single count of attempted murder. He was not charged with 10 attempted murders, one for each member of the group at which he shot." (*Id.* at p. 138.) Nor was there any evidence that the defendant used a means to kill the named victim that inevitably would result in the death of other victims within a zone of danger. (*Ibid.*)

However, the court also determined a person who intends to kill may be found guilty of attempted murder even if he does not have a particular victim in mind. (*Stone*, *supra*, 46 Cal.4th at p. 140.) In *Stone*, the defendant was charged with attempting to kill a specific victim. According to the court: "This allegation was problematic given that the prosecution ultimately could not prove that defendant targeted a specific person rather than simply someone within the group. In hindsight, it would no doubt have been better had the case been charged differently. In a case like this, the information does not necessarily have to name a specific victim." (*Id*. at p. 141.)

In the present case, defendant was charged with three counts of attempted murder of three specific victims based on numerous shots fired at a group of people. However, unlike the defendant in *Stone*, defendant here fired into a group of people under circumstances under which a reasonable jury could conclude he intended to kill any of them, including the named victims.

Despite defendant's claims to the contrary, the kill zone instruction did not eliminate the requirement of specific intent to kill the named victims. Rather, it gave the jury two options

for finding intent to kill. Either defendant intended to kill the three named victims, or he intended to kill people in the group that included the named victims. (See *People v. Anzalone* (2006) 141 Cal.App.4th 380, 392-393.)

Defendant argues the instruction permitted the jury to convict him of attempted murder on a transferred intent theory. He relies specifically on the use of the word "anyone" in the instruction. The court instructed: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.'" In *Stone*, the Supreme Court indicated the word "anyone" in the standard jury instruction on the kill zone theory should be replaced with "everyone." (*Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.) However, the Court also noted that "[i]n context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone." (*Ibid.*) The last sentence of the instruction refers to a reasonable doubt whether defendant intended to kill the three named victims by harming *everyone* in the kill zone.

Defendant also argues the last sentence of the instruction erroneously used the word "harm" rather than "kill." The prosecution compounded the error by stating the jury did not have to find defendant intended to kill a specific person, just that he was trying to "hurt" people within the kill zone.

In *Stone*, the Supreme Court also noted that "[b]ecause the intent required for attempted murder is to kill rather than

merely harm, it would be better for the instruction to use the word ‘kill’ consistently rather than the word ‘harm.’” (*Stone*, *supra*, 46 Cal.4th at p. 138, fn. 3.) However, as we stated in *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396: “No reasonable juror could have failed to understand from the instructions as a whole that, to the extent the court occasionally used the word ‘harm’ or the phrase ‘zone of harm,’ the harm to which the court referred was the ultimate harm of death and that the law required that defendant had to have intended to kill the victims.”

Defendant argues the prosecution’s comments during closing argument misled the jury into believing “it was the *kill zone* that drove the intent to kill finding, not vice-versa. Thus, defendant was guilty of attempted murder not because he intended to kill, but ‘because he shot into . . . the kill zone.’” In evaluating a claim that the jury could have misconstrued an instruction, we consider whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. (*People v. Raley* (1992) 2 Cal.4th 870, 901.)

Here, we find no reasonable likelihood that the jury would have understood the instruction to mean it could find defendant guilty of attempted murder if it concluded he shot into a group of people without any intent to kill. The court instructed the jury that it must find defendant either intended to kill the named victims or he intended to kill anyone within the kill zone. In addition, as to the prosecution’s comments, the court

instructed the jury: "If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." We find no error.

Ineffective Assistance of Counsel

Defendant claims his counsel performed ineffectively in failing to object to improper jury instructions and failing to object to the prosecution's misstatements of law during closing argument. Defendant also faults counsel for countering the prosecution's argument with assertions contradicted by the record and sacrificing his own credibility during closing argument.

To establish ineffective assistance of counsel, defendant must show counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and the deficient performance prejudiced defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*).) We accord trial counsel's tactical decisions substantial deference and do not second guess counsel's reasonable tactical decisions. (*People v. Maldonado* (2009) 172 Cal.App.4th 89, 97.)

We will not reverse on appeal if the record does not affirmatively show why counsel failed to object and the circumstances suggest counsel had a valid tactical reason for not objecting. If the record sheds no light on why counsel acted or failed to act, we affirm unless there could be no satisfactory explanation for the act or omission. (*People v.*

Mendoza Tello (1997) 15 Cal.4th 264, 266-267; *Lesdema*, *supra*, 43 Cal.3d at p. 218.)

Defense counsel performed ineffectively, defendant claims, in failing to ensure the instructions were correct and failing to object to the prosecution's misstatements of the law, and made factual errors. According to defendant, "In arguing for acquittal, defense counsel did not identify, let alone discuss, any legal principles. Instead, he broadly criticized the prosecutor's discussion of the law and its application as 'wrong,' 'clearly erroneous,' and consisting of 'theories that don't work, they don't apply, they simply don't fit,' while reminding jurors to follow the court's instructions. [Citations.] As for counsel's factual theories, he argued defendant was not a gang member [citations], and during the post-party incident he became frightened and simply shot into the sky [citations]."

We have considered defendant's argument that the instructions were incorrect, *ante*, and found no merit in the claim. Therefore, counsel did not perform ineffectively in failing to object to the instructions.

Defendant also argues counsel failed to object to the prosecution's statements and PowerPoint presentation that stated defendant assumed the intent of the perpetrators if he joined them in shooting. The prosecution stated: "The defendant shot as well and therefore he is a principal and assumes the intent of all other perpetrators. Here he's doing the same action they are." In addition, the prosecution stated defendant's intent

was to shoot at the crowd of people from the Bay Area and "as a principal his intent transfers to Eric Castillo. And as an aider and abetter you assume the intent of all other shooters. [¶] Even if -- and I say this just to prove a point -- he's shooting into the air, straight up into the air, like he testifies, . . . [he is] still guilty as an aider and abetter because their intent transfers to Eric Castillo, because by them shooting in the air they assume the intent of the other shooters, because they're right there with 'em, they're right there doing the same thing."

The prosecution's PowerPoint presentation display stated: "Defendant along with Jesse Zamora, Eddie Ortiz, Jimmy Benson, Andrew Thompson and other NSGC gang members intended to shoot into that crowd. [¶] The defendant shot as well and therefore, he is a principal & assumes the intent of all other perpetrators. [¶] And is guilty of murder. [¶] The defendant not only aided and abetted in the intended crime of murder of rival gang members (transferred intent to Eric Castillo), but this crime was premeditated. [¶] He is guilty of murder."

Defendant argues the prosecution's repeated statement that a defendant assumes the intent of the perpetrators is a material misstatement of the law. According to defendant, while an aider and abettor may become criminally culpable because of a perpetrator's action and intent, the law does not assign the perpetrator's intent to the aider and abettor. The aider and abettor is liable for his own mens rea, not the perpetrator's mens rea.

However, the prosecution argued defendant intended to shoot into the crowd of rival gang members, making him liable for the death of Eric Castillo under the transferred intent doctrine. The prosecution stated defendant "shot as well" into the crowd and "therefore he is a principal and assumes the intent of all other perpetrators," a statement supported by the evidence at trial. The prosecution did not incorrectly state that an aider and abettor automatically assumes the intent of the perpetrators; instead, the prosecution argued that based on the facts of the case defendant assumed the intent of the other perpetrators, all of whom fired shots at the crowd.

Defendant also contends the prosecution erroneously argued that if defendant or other principals simply "shot into something called the kill zone" and "were trying to hurt people within that zone," this was an exception to the intent-to-kill element. According to defendant, this argument, coupled with the incorrect instruction, was error and defense counsel should have objected. As we have discussed, *ante*, the court's instruction regarding the kill zone was not in error.
In addition, the trial court instructed the jurors that they "must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions. [¶] Pay careful attention to all of these instructions and consider them together." Defense counsel questioned the prosecution's legal argument, telling the jury,

“Half the things he told you about, his interpretation of the law, are clearly erroneous.”

Defendant also contends counsel performed ineffectively during closing argument because he made a factual error, denigrated a witness, implied gang members did not know each other that well, and failed to object to misstatements by the prosecution.

As the prosecution concedes, defense counsel mistakenly argued that a ballistic expert could not state with certainty the caliber of the bullet removed from Castillo’s stomach. Defense counsel argued: “[W]e don’t even know, by the way, what caliber bullet was pulled out of the stomach of little Eric Castillo. And the reason we don’t is because unless you’re going to help the government convict David Lewis just because you want to then you have to go back and ask [the] court reporter to give you the testimony of the ballistics expert who said -- and I asked him repeatedly ‘You can’t say with absolutely certain [*sic*] that that bullet came from a .22?’ ‘No.’” Counsel also stated: “They’ve tried to ignore the lack of physical evidence of any .22 bullets, and they’ve tried to convict a kid who was 15 and get this jury today to convict a 17-year-old of murder by saying he’s a gang member when he is not.”

The prosecution also incorrectly summarized the evidence in stating: “[T]he evidence has shown the defendant actually fired his gun six times into a crowd and that the bullet from Eric Castillo’s stomach came from the defendant’s gun.” The

prosecution repeated this assertion: “Defendant Lewis shot his gun and his bullet was removed from Eric Castillo’s stomach. We know that. And that was an act that led to his death, which was determined to be a fatal wound even by itself without the wound to his head.”

Despite defense counsel’s statements, two criminalists testified the bullet removed from Castillo was a .22. During cross-examination, defense counsel asked one of the criminalists: “Now, you cannot say with absolute scientific certainty that [exhibit] 223 was fired from that .22, can you? [¶] A. No. [¶] Q. All right. You can’t even say with reasonable scientific certainty it was fired [from] that gun, can you? [¶] A. No. As I said, I -- I don’t know whether it was or wasn’t. [¶] . . . [¶] Q. There is no way you can sit here and tell the jury, is there, that you can say that that item, [exhibit] 223, was fired from the gun that you have in front of you, can you?” The court sustained the prosecution’s objection as asked and answered.

Although defense counsel misspoke when he stated the ballistics expert could not definitely identify the caliber of the bullet, the thrust of his argument was that the ballistics expert could not link the bullet recovered from Castillo to defendant’s gun. Under defense counsel’s theory, if defendant fired six shots from the gun found after the shooting, why could the prosecution not link any of the bullets to the gun? Defense counsel’s misstatement does not amount to ineffective assistance of counsel.

Defendant also criticizes defense counsel's treatment of witness Garner during cross-examination. According to defendant, counsel "went overboard in gratuitously praising" the witness, and then attacked the witness's credibility in closing argument. The prosecution commented on the abrupt turnaround during closing argument.

Defense counsel referred to Garner as an "outstanding family man" and complimented him on raising his seven children. During closing argument defense counsel described one of Garner's children as a "gang banger" and stated Garner was aware of this.

Defense counsel's treatment of Garner does not amount to ineffective assistance. Counsel argued the party fliers and clothing officers recovered after the party revealed the party was a gang party. In initially addressing Garner, defense counsel treated him respectfully as if to put the witness at ease. Notwithstanding this show of respect, defense counsel sought to convince the jury the shooting took place during a gang dispute, and that one of Garner's children was a gang member.

Defendant faults counsel with arguing defendant and Benson were not friends. Counsel argued "the key to the whole case, is the relationship of the parties who committed the murder, versus their lack of relationship to [defendant]."

Defendant and Benson both testified and told police they had not known each other prior to the shooting. However, Detective Rodriquez testified, in response to defense counsel's

questioning, that he understood defendant and Benson were friends based on what other partygoers told him. According to defendant, defense counsel performed ineffectively in not objecting to Rodriquez's hearsay testimony. We disagree. The jury had before it conflicting testimony about whether or not defendant and Benson knew one another prior to the incident. Defense counsel's failure to object to Rodriquez's statement was not dispositive of the issue and could not have affected the outcome.

SENTENCING ERROR

Life Without Possibility of Parole

Defendant contends the trial court erred in imposing a term of life in prison without possibility of parole for his conviction of first degree murder with the special circumstance that he acted intentionally as an active participant in a criminal street gang. The People concede the court erred in imposing the sentence.

Under section 190, first degree murder is punishable by death, life in prison without possibility of parole, or 25 years to life in prison. Subdivision (b) of section 190.5 provides: "The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25 has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court,

25 years to life." Under California law, life without parole applies only to persons 16 years of age or older, not for juveniles under the age of 16. (*People v. Demirdjian* (2006) 144 Cal.App.4th 10, 17.)

Defendant was 15 years old at the time of the offenses. Therefore, the court must revise his sentence on the murder count to a term of 25 years to life with the possibility of parole.

Gang Enhancements

The jury convicted defendant of first degree murder with the special circumstance that he acted intentionally as an active participant in a criminal street gang. The jury also found true the gang and weapon enhancements. In addition to life in prison without the possibility of parole, the court imposed but stayed under section 654 a two-year term for the gang enhancement pursuant to section 186.22, subdivision (b)(1). Defendant argues the court incorrectly imposed the stayed gang enhancement term, since he was convicted of an underlying felony punishable by imprisonment for life. The People concede defendant's sentence should be modified.

Section 186.22, subdivision (b) establishes alternative methods for sentencing defendants convicted of crimes committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) imposes a 10-year enhancement when a defendant commits a violent felony. This section does not apply where the violent felony is "punishable by imprisonment in the state prison for life." (§ 186.22, subd. (b)(5).) Instead,

section 186.22, subdivision (b)(5) applies and imposes a minimum term of 15 years before the defendant may be considered for parole. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004-1007 (*Lopez*).)

Defendant was sentenced to life in prison without the possibility of parole, but he should have been sentenced to a term of 25 years to life with the possibility of parole. Therefore, the gang enhancement's 15-year minimum parole eligibility term applied, not the additional determinate term. (*Lopez*, *supra,* 34 Cal.4th at pp. 1006-1007, 1011.) We shall direct the trial court to delete the enhancement term.

Enhancements on Subordinate Counts

Defendant argues the trial court improperly imposed full-term gang enhancements on two subordinate counts. The People concede defendant's sentence should be modified.

The jury convicted defendant of three counts of attempted murder. The attempted murder counts included enhancements for participation in a criminal street gang. The court sentenced defendant to one-third the midterm on two of the attempted murder counts, but imposed a full term sentence for the criminal street gang enhancements.

Under section 1170.1, subdivision (a), when a defendant is convicted of multiple felonies and a consecutive term of imprisonment is imposed, the term for the subordinate offenses is one-third the midterm "and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." Section 1170.11 provides: "As used in

Section 1170.1, the term ‘specific enhancement’ means an enhancement that relates to the circumstances of the crime. . . .”

Therefore, the trial court should have imposed a one-third term of three years four months instead of the consecutive 10-year terms appended to counts 3 and 4. (*People v. Williams* (2009) 170 Cal.App.4th 587, 642-643.) We shall direct the trial court to amend the abstract of judgment accordingly.

Suspended Fine

Defendant contends the trial court erred in imposing a suspended parole revocation fine under section 1202.45 because he was sentenced to a term of life in prison without parole. However, defendant was also sentenced to a determinate term. Section 3000, subdivision (a)(1) provides that such a term includes a period of parole. Section 1202.45 requires imposition of a parole revocation fine in “every case where a person is convicted of a crime and whose sentence includes a period of parole.” The court did not err in imposing the suspended parole revocation fine.

DISPOSITION

The trial court is directed to amend the abstract of judgment to impose a sentence of 25 years to life in state prison with the possibility of parole on the murder count, to delete the stayed gang enhancement term attached to the murder count, and to impose the one-third term of three years four months on counts 3 and 4. The court is further directed to send a certified copy of the amended abstract to the Department of

Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

BUTZ, J.