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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MICHAEL CARCAMO et al.,

Defendants and Appellants.

D058587

(Super. Ct. No. RIF137980)

APPEALS from judgments of the Superior Court of Riverside County, J. Richard Couzens, Judge. Affirmed in part; reversed in part.

In a joint trial with separate juries, defendants Anthony Michael Carcamo (Anthony) and Salvador Becerra, Jr. (Salvador), were convicted of multiple offenses which occurred during an ongoing gang related feud. In addition to a number of principal offenses, Anthony and Salvador were found subject to firearm use, bodily injury and gang enhancements. They now appeal their convictions and assert several claims of error. We discuss each claim below and affirm the guilty verdicts returned by their

respective juries; however, with respect to Anthony's conviction, we reverse and remand for resentencing.

FACTUAL BACKGROUND

The events leading to Anthony and Salvador's convictions began as a feud between two formerly friendly families in Moreno Valley. Salvador and his brother Daniel Becerra (Daniel) claimed affiliation with Logan Heights Red Steps (Logan), a powerful and established San Diego gang with decades of violent activity far from its south San Diego base. The Pena brothers, Louie, Tommy and Bobby, aligned with the Brown Pride Crew (BPC), an upstart but homegrown gang eager to carve out its own territory in Moreno Valley. Anthony knew both the Becerras and the Penas and allied himself with the Becerras.

The rift initially consisted of verbal jabs between the two groups, but soon intensified. In the early morning hours of July 28, 2007, Anthony returned home. As he entered his house, a white Nissan pulled up in front of the house. Two pistols quickly emerged from the passenger windows, with the front passenger firing at the Carcamo house. Anthony recognized the car as belonging to the Pena clan.

Logan's retaliation was immediate. Anthony armed himself with a .22 caliber handgun and left his house with the two Becerra brothers. The group drove to the Pena apartment, where they encountered Louie, Tommy and Bobby standing outside. Anthony fired at Bobby, striking him in the inner thigh. Bobby was also struck in the thigh by a 9

millimeter bullet of unknown origin. Bobby's mother, Rosalinda Pena (Rosalinda), took him to the hospital. He was released later that morning.

Six hours after Bobby was shot, BPC struck back. The Logan belligerents were gathered inside the Becerra residence, a customary hangout covered with Logan identifying marks. Salvador and Daniel were present, along with Anthony, his brother Eddie Carcamo (Eddie), and their friend Aaron Guevara. The group heard a loud noise outside and looked out to see Louie and Tommy in a blue truck. Louie was armed with a baseball bat, which he was using to smash the windshield of Eddie's Dodge Neon. Tommy fired a handgun in an unknown direction. After vandalizing Eddie's car, the pair sped off.

Once again, the Logan gang elected to escalate the violence. The group piled into two vehicles, with the Becerras driving their red truck and the Carcamos and Guevara driving Eddie's damaged Neon. They went to the Pena apartment building, where Louie, Tommy and their cousin Rudy were sitting on the tailgate of the blue truck. Rosalinda was standing next to the truck, chatting with the boys. As the Logan convoy pulled up, Salvador stepped out of his red truck and fired an assault rifle multiple times at them. He hit the truck and an apartment in the small complex, but missed the Penas.

Anthony and the two Becerra brothers were charged with: (1) attempted murder of Bobby; (2) assault with a firearm on Bobby; (3) active participation in a criminal street gang; (4) attempted murder of Rosalinda; (5) assault on Rosalinda; and (6) discharging a firearm at an inhabited dwelling, occupied building, or occupied motor vehicle. They

were further charged with enhancements on the above crimes as follows: on counts 1 and 2, personal use and discharge of a firearm, personal infliction of great bodily harm on Bobby, and commission of the attack for the benefit of, at the direction of, or in association with a criminal street gang; on counts 4 through 6, personal use and discharge of a firearm and commission of the attack for the benefit of, at the direction of, or in association with a criminal street gang. Counts 1 through 3 were based on the early morning shooting of Bobby, while counts 4 through 6 were based on the later shooting of the blue truck.

The three defendants were tried together, but with separate juries. At trial, the juries heard conflicting testimony about the circumstances in and around the blue truck at the time Salvador was shooting towards it. Rosalinda testified she was standing next to the truck and her sons were sitting on the tailgate. However, in prior police interviews she never mentioned Tommy, Louie and Rudy sitting on the tailgate. At trial, Rosalinda further testified she recognized Salvador and saw him get out of his truck and aim his rifle towards the blue truck before she heard gunfire. Guevara, the Carcamos' friend, also testified about the shooting. Guevara stated he did not see anybody in the vicinity when Salvador opened fire.

Anthony was acquitted of attempted murder on count 1, but convicted of the lesser included offense of attempted voluntary manslaughter. He was also convicted on count 2 and counts 4 through 6. Anthony's jury found true each of the alleged enhancements on all counts, except for commission of attempted murder for the benefit of a criminal street

gang. He was sentenced as follows: on count 4, the principal count, to indeterminate life with the possibility of parole, a consecutive 25 years to life for personal discharge of a firearm, and a consecutive 10-year term for the gang enhancement; on count 2, three years for the offense, plus three years for bodily injury (Pen. Code,¹ § 12022.7, subd. (a)), four years for use of a firearm (§ 12022.5, subd. (a)) and ten years on the gang enhancement (§ 186.22, subd. (b)(1)(C)), all served consecutively to count 4. Thus, Anthony's sentence consisted of an indeterminate life sentence plus consecutive 25 year to life and 30-year determinate sentences. Sentences on counts 3, 5 and 6 were stayed under section 654.

Salvador, meanwhile, was convicted of counts 5, 6 and a separate gang participation charge and acquitted on the remaining counts. He was sentenced to three years, plus indeterminate 15 years to life to run consecutively.

Daniel was acquitted of all charges.

¹ All further statutory references are to the Penal Code.

DISCUSSION

I

Anthony's Appeal

A. Assault with a Deadly Weapon of Bobby—Gang Enhancement

Anthony's first claim of error is that insufficient evidence was presented at trial to prove his assault with a deadly weapon upon Bobby was committed for the benefit of, at the direction of, or in association with a criminal street gang. We disagree.

We review claims of insufficient evidence by viewing the record as a whole in the light most favorable to the judgment below. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) We may not set aside a verdict unless it is clear "that on no hypothesis whatever is there sufficient substantial evidence to support [the judgment]." (*Ibid.*) If, on the other hand, the record reflects evidence which may "reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding." (*Id.* at p. 755; *People v. Robillard* (1960) 55 Cal.2d 88, 93 (revd. on other grounds by *People v. Morse* (1960) 60 Cal.2d 631).)

As a whole, the record shows ample evidence supporting the inference Anthony committed the assault for the benefit, at the direction of, or in association with a criminal street gang. Although Anthony was not himself a Logan member, a point he relies upon heavily in his argument, the overwhelming weight of testimony implied all involved acted in the larger context of a gang feud. The jury heard witnesses claim Anthony

actively associated with the Logan gang, routinely spending time with admitted Logan member Salvador and Logan member Daniel in a "clubhouse" decked out with Logan graffiti and identifying marks. The jury heard witness testimony describing how Anthony knew Bobby was a member of the rival BPC. It heard testimony that the original gunshots aimed at Anthony's house by the Penas were the result of an ongoing fight between Logan and BPC, and that Anthony's shooting of Bobby was in direct retaliation for the incident. The jury heard testimony the Becerras drove Anthony to the Pena house to commit the shooting, and may have been directly involved.² Finally, the jury heard a gang expert testify that committing a violent crime against BPC would protect Logan's territory and could serve to elevate Anthony from mere association with Logan to full membership.

While we acknowledge the record contains evidence suggesting Anthony shot Pena in imperfect self-defense or the heat of passion rather than in a gang war, this possible contrary resolution is insufficient to set aside the verdict. Anthony's jury found such an explanation to be outweighed by the evidence the shooting was committed for the benefit of, at the direction of, or in association with a criminal street gang. Substantial evidence exists to support the finding.

² Both Becerra brothers were acquitted by their own jury on all counts related to Bobby's shooting. However, their verdict has no bearing on any findings by Anthony's jury. (See *People v. Abilez* (2007) 41 Cal.4th 472, 512-513; *People v. Panah* (2005) 35 Cal.4th 395, 490.)

B. *Attempted Murder of Rosalinda—Jury Instructions*

Anthony argues the trial court erred in instructing the jury on the elements of attempted murder, thus requiring the reversal of his conviction on the charge. He claims the instruction, which allowed the jury to return a guilty verdict upon a finding Salvador intended to kill everybody present within a "kill zone" but did not require an explicit finding Rosalinda was within that kill zone, improperly removed from juror consideration a necessary element of the offense. We disagree with Anthony's contention on the merits and conclude that, in any event, any error which may have occurred was harmless.

Generally, a defendant forfeits appellate complaints that "an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218.) However, an instruction which misstates or omits an element of the crime is not correct in law, and "is not of the type that must be preserved by objection." (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

As Anthony did not challenge the instruction at trial, the question of whether he may seek relief here hinges on whether "presence in the kill zone" is an element of attempted murder. Our Supreme Court has made clear that it is not. The kill zone, or concurrent intent, is "not a legal doctrine requiring special jury instructions" but "simply a reasonable inference the jury may draw in a given case." (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. 6.) In other words, the kill zone is merely a theory to describe a

defendant's intent relative to the victim in an attempted murder case, not an element of the offense itself.

Had Anthony requested a pinpoint instruction with respect to his theory Rosalinda was not in the kill zone, he would have been entitled to it. A " 'defendant upon proper request has a right to an instruction that directs attention to specific evidence from which the jury could infer a reasonable doubt' " (*People v. Adrian* (1982) 135 Cal.App.3d 335, 338; see also *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Granados* (1957) 49 Cal.2d 490, 496.) His failure to do so eliminates his right to pursue redress on appeal. (*People v. Jennings* (2010) 50 Cal.4th 616, 675.)

Nonetheless, it is clear beyond a reasonable doubt that the absence of a pinpoint kill zone jury instruction did not prejudice Anthony, and he would have been convicted had he received one. The jury heard two conflicting versions of the events of the shooting: Rosalinda's and Guevara's. Rosalinda claimed she was standing next to the truck when Salvador exited his vehicle and fired, while Guevara testified *nobody* was in the vicinity. No testimony allowed for the possibility the Pena males were in the kill zone while Rosalinda was elsewhere. The competing narratives presented a simple dichotomy: either nobody was present, and thus the kill zone did not exist, or all members identified by Rosalinda were present, placing Rosalinda within the kill zone. No other evidence presented suggested a further alternative. Given that the jury convicted Anthony of attempted murder, the jury clearly found Rosalinda's testimony credible and adopted the latter version of events. Once the jury accepted the presence of

people in the targeted area, the only corroborating evidence they heard located Rosalinda in the area as well. It follows that an explicit instruction requiring that the jury find Rosalinda within the kill zone would have had no bearing on the jury's verdict.

C. Attempted Murder of Rosalinda—Derivative Liability

Anthony next claims his conviction for the attempted murder of Rosalinda must be reversed as it rested solely on a derivative theory of liability based on Salvador's commission of the actual underlying offense. Anthony argues that because Salvador was acquitted of the underlying offense of attempted murder, the elements of the predicate offense were not committed, and thus no derivative liability could attach.

Anthony's reasoning is unpersuasive. He is correct to note that his derivative liability for attempted murder rests upon Salvador's commission of the principal offense. (*People v. Perez* (2005) 35 Cal. 4th 1219, 1225.) However, his argument ignores the fact that *his own* empanelled jury found Salvador committed the offense. Thus, the element Anthony claims is absent—Salvador's principal liability—was, in fact, proven in his own trial.

The fact Salvador's jury came to a different verdict is of no consequence to Anthony's conviction. It is settled that nonmutual collateral estoppel does not apply against the government in the criminal sphere, and that inconsistent verdicts regarding the same participants will stand. (*Standefer v. United States* (1980) 447 U.S. 10, 25–26 [100 S. Ct. 1999] (*Standefer*); *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 5; *People v. Palmer* (2001) 24 Cal.4th 856, 860; *People v. Wilkins* (1994) 26 Cal.App.4th

1089.) Thus, Anthony may not use Salvador's acquittal for attempted murder to absolve himself from derivative liability for the same offense.

D. Sentence Enhancements on Count 4—Attempted Murder of Rosalinda

Anthony argues the trial court erred when it calculated his sentence on count 4. First, he claims section 12022.53, subdivisions (d) and (e) only permitted imposition of a 20-year enhancement for discharge of a firearm by a principal where no bodily injury occurred, rather than the 25-years-to-life sentence Anthony received. The Attorney General agrees with this contention, as do we.

Second, Anthony argues that in light of section 12022.53, subdivision (e)(2), no additional enhancement or other penalty under section 186.22 could be imposed on him on count 4. We agree with Anthony and part company with the Attorney General, who concedes that section 12022.53, subdivision (e)(2) limits imposition of an additional prison term under section 186.22, subdivision (b)(1) but maintains Anthony is nonetheless subject to the 15-year minimum term otherwise required by section 186.22, (b)(5).

1. Section 12022.53, Subdivisions (c) and (d)

As Anthony did not personally wield or discharge a firearm in the commission of count 4, his culpability for the imposed firearm enhancements stems from section 12022.53, subdivision (e)(1), which provides in relevant part: "The enhancements provided in this section shall apply to any person who is a principal in the commission of an offense if both of the following are pled and proved:

"(A) The person violated subdivision (b) of Section 186.22.

"(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)." (§ 12022.53, subd. (e)(1).)

In this case, Salvador discharged a firearm at the Penas. The jury found both Salvador and Anthony to be principals in the offense, and that the offense was a violation of section 186.22, subdivision (b). Thus, Anthony properly received a discharge of a firearm enhancement for Salvador's discharge, despite not personally firing a gun. (§ 12022.53, subdivision (e)(1).)

However, the trial court imposed the wrong enhancement. Anthony was sentenced to an additional 25-years-to-life term, which only applies when a person or principal "discharges a firearm and proximately causes great bodily injury." (§ 12022.53, subd. (d).) Because no one was injured by Salvador's conduct, the court was only permitted to impose a 20-year enhancement under section 12022.53, subdivision (c), which penalizes the intentional discharge of a firearm *without* injury.

2. Section 12022.53, Subdivision (e)(2)

Because Anthony did not personally discharge a firearm in the commission of count 4, the trial court also erred when it imposed *both* a 10-year gang enhancement under section 186.22 and the firearm discharge enhancement under section 12022.53.

Section 12022.53, subdivision (e)(2) expressly provides that an "enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to this subdivision, unless the person personally used

or personally discharged a firearm in the commission of the offense." (§ 12022.563, subd. (e)(2).) Significantly, as used in section 12022.53, subdivision (e)(2), the term "enhancement" includes not only "an additional term of imprisonment," but also any alternate penalty provision of section 186.22. (*People v. Brookfield* (2009) 47 Cal.4th 583, 594-595.) Thus, contrary to the Attorney General's argument, in light of the 20-year enhancement Anthony is subject to under section 12022.53, subdivision (c), Anthony is not subject to *any* additional penalty under section 186.22, whether in the form of an additional term of imprisonment as provided in section 186.22, subdivision (b)(1) or the alternative 15-year minimum prison term provided by section 186.22, subdivision (b)(5) where a life sentence could be imposed on the underlying offense. (*Ibid.*)

In short, Anthony's total sentence on count 4 should be modified to an indeterminate life sentence, plus a consecutive 20-year term.

E. *Sentence Enhancements on Count 2—Assault With A Firearm on Bobby*

Anthony claims the trial court erred in imposing a 10-year gang enhancement on count 2 in addition to enhancements for great bodily injury and use of a firearm. Again, we agree.

Section 1170.1 is a determinate sentencing statute which "seeks to achieve greater uniformity in sentencing by providing a limited range of sentencing options for each offense." (*People v. Black* (2005) 35 Cal.4th 1238, 1246, judgment vacated and cause remanded on other grounds in light of *Cunningham v. California* (2007) 549 U.S. 270

[127 S. Ct. 856].) It describes various sentencing schemes, including imposition of sentence for more than one crime.

Section 1170.1, subdivision (f) pertains to sentence enhancements for firearm use, while subdivision (g) controls enhancements for great bodily injury. Each limits the imposition of multiple enhancements for the same conduct. Subdivision (f) provides: "When two or more enhancements may be imposed for being armed with or using a dangerous or deadly weapon or a firearm in the commission of a single offense, *only the greatest of those enhancements shall be imposed for that offense*. This subdivision shall not limit the imposition of any other enhancements applicable to that offense, including an enhancement for the infliction of great bodily injury." (Italics added.) Subdivision (g) mirrors subdivision (f), allowing "only the greatest of those enhancements" for great bodily injury to be imposed for that offense.

At issue here are the three sentence enhancements imposed upon Anthony for his assault on Bobby under sections 12022.5, subdivision (a), 12022.7, subdivision (a), and 186.22, subdivision (b)(1)(C). The first two are easily reconciled under the plain language of section 1170.1, subdivisions (f) and (g), which permit the imposition of both a firearm use and great bodily harm enhancement for the same act. (*People v. Ahmed* (2012) 53 Cal.4th 156, 168.)

The imposition of a 10-year gang enhancement under section 186.22, subdivision (b)(1)(C) is more problematic. Although section 186.22 penalizes committing a felony to benefit a street gang rather than either firearm use or great bodily injury, subdivision (b)

contains multiple possible terms for that offense. The standard additional punishment for committing a felony to benefit a street gang is two, three or four years' imprisonment. (§ 186.22, subd. (b)(1)(A).) The 10-year term is only applicable where a defendant commits a *violent* felony to benefit a criminal street gang under the terms of section 667.5. (§ 186.22, subd. (b)(1)(C), italics added.)

Here, Anthony committed a violent felony within the meaning of section 667.5 under one of two circumstances: either his use of a firearm or his infliction of great bodily injury upon Bobby. (§ 667.5, subd. (c)(8).) Thus, either the firearm use or infliction of great bodily injury had the effect of enhancing Anthony's sentence by a minimum of six years—the difference between the "standard" punishment provisions of section 186.22, subdivision (b)(1)(A) and the violent felony punishment provisions of subdivision (b)(1)(C).

As Anthony received separate sentence enhancements for use of a firearm and infliction of great bodily injury under sections 12022.5 and 12022.7, respectively, sentencing him to these additional six, seven or eight years under section 186.22, subdivision (b)(1)(C) was improper. To do so in effect punished Anthony twice for at least one of the two violent felony circumstances. Either Anthony received both a firearm enhancement plus a violent felony gang enhancement due to his use of a firearm, or he received a great bodily injury enhancement plus a violent felony gang enhancement due to his infliction of great bodily injury. Either sentencing choice violated section

1170.1. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 509; *People v. Gonzalez* (2009) 178 Cal. App. 4th 1325, 1331-1332.)

We reject the Attorney General's contention that because the violent felony gang enhancement rests upon *both* the firearm and infliction of great bodily harm enhancements, it specifically depends upon neither and should thus stand. Essentially, the Attorney General's argument boils down to this: section 1170.1 does not ban the simultaneous application of a section 12022.5 firearm enhancement and a section 186.22, subdivision (b)(1)(C) violent felony gang enhancement due to great bodily harm. Nor does it ban the simultaneous application of a section 12022.7 great bodily harm enhancement and a section 186.22, subdivision (b)(1)(C) violent felony gang enhancement due to firearm use. Here, the trial court did not find which of the two circumstances—firearm use or great bodily harm—it rested its decision to impose the violent felony gang enhancement upon. Therefore, the Attorney General argues, we should treat Anthony's violent felony gang enhancement as imposed for great bodily harm when comparing it to his separate firearm enhancement, and vice versa.

Section 1170.1 does not allow for such judicial "double-dipping." In imposing the "violent penalty" gang enhancement, the trial court was required to find that one of the two circumstances—firearm use or great bodily injury—occurred. Had neither circumstance occurred, the court would have lacked the power to impose the violent felony gang enhancement. On this record, Anthony was eligible for the violent felony gang enhancement only because of circumstances which also gave rise to the two

enhancements imposed under section 12022.5 or 12022.7. That undeniable fact brings his case within the limitations of section 1170.1, subdivisions (f) and (g). (See *People v. Rodriguez, supra*, 47 Cal.4th at pp. 509-510.)

Thus, we reverse the trial court's judgment as it pertains to sentencing under count 2 and remand the matter to "give the trial court an opportunity to restructure its sentencing choices in light of our conclusion that the sentence imposed here violated section 1170.1" (*People v. Rodriguez, supra*, 47 Cal. 4th at p. 509.)

II

*Salvador's Appeal*³

A. Occupied Vehicle

Salvador first claims the trial court erred in allowing him to be charged with shooting at an occupied vehicle, as a magistrate had previously found no evidence the vehicle was occupied. We disagree.

1. Preliminary Hearing

At the preliminary hearing, a great deal of evidence was presented with respect to the shooting of the Penas' truck and apartment building. However, no testimony stated that any of the Penas were sitting on the tailgate of the truck at the time of the shooting. In fact, Rosalinda did not mention her sons and nephew's presence until trial.

³ Carcamo joined in the issues raised by codefendant Becerra in his separate appeal.

The magistrate noted the absence of testimony demonstrating the blue truck was occupied, and bound over the defendants for purposes of trial on count 6 specifically as to an inhabited dwelling rather than an occupied motor vehicle. However, the magistrate did not make a factual finding that the vehicle was unoccupied. The prosecutor subsequently filed an information charging the defendants under count 6 with shooting at an inhabited dwelling, occupied building and occupied motor vehicle. Both defendants joined a section 995 motion to dismiss the occupied motor vehicle charge, which was denied.

2. *Legal Principle*

A prosecutor may not "ignore the magistrate's findings of *fact* and charge the defendant with an offense or offenses which the magistrate has expressly found never took place." (*Jones v. Superior Court* (1971) 4 Cal.3d 660, 666.) The prosecutor may, on the other hand, file the charge in the absence of such a finding, provided the offense was " 'shown by the evidence taken before the magistrate to have been committed.' " (*People v. Brice* (1982) 130 Cal.App.3d 201, 206.) The prosecutor may file this charge even if "the magistrate concluded, impliedly or otherwise, that the evidence did not show probable cause that such offense had been committed." (*People v. Encerti* (1982) 130 Cal.App.3d 791, 799; *Parks v. Superior Court* (1952) 38 Cal.2d 609, 613-614; *People v. Eitzen* (1974) 43 Cal.App.3d 253, 260.)

3. *Analysis*

In this case, the magistrate did not make a factual finding the truck was unoccupied, but merely noted the lack of testimony supporting a finding. The prosecution was free to disagree with the magistrate's ruling and reinstate the charges in superior court so long as the evidence actually brought in the preliminary hearing adduced a reasonable inference the offense occurred. (*People v. Encerti, supra*, 130 Cal.App.3d at p. 799.)

Here, enough evidence was presented to the magistrate to support the inference the truck was occupied by the Penas. There was ample testimony the gunfire was part of an escalating gang war in which the antagonists attempted to shoot each other. Indeed, the magistrate conceded the blue truck was not by itself Salvador's target. These circumstances support the inference the Penas, who had previously shot at Salvador, were Salvador's intended target and hence were in all likelihood on the tailgate of the truck when Salvador fired his gun at the truck.

B. *Discovery*

In the alternative, Salvador claims he was denied his rights to reciprocal discovery under section 1054.1, subdivision (f) when Rosalinda testified at trial that the truck was occupied. Anthony argues the district attorney "must have known" of the substantive content of Rosalinda's testimony, despite the fact she never previously told the district attorney, law enforcement officers or defense investigators the boys were occupying the

truck. This statement is pure conjecture, and nothing in the record supports the argument the district attorney's office knew about Rosalinda's trial testimony and failed to disclose it to defense counsel.

C. *Rosalinda's Credibility*

Salvador further claims Rosalinda's testimony lacked credibility, and unfairly prejudiced him. Issues of witness credibility, however, are the province of the jury. (*People v. Hovarter* (2008) 44 Cal.4th 983, 996; *People v. Mayfield* (1997) 14 Cal.4th 668, 735; *People v. Cudjo* (1993) 6 Cal.4th 585, 609.) In the absence of their clear and demonstrated falsity " ' ' 'apparent without resorting to inferences or deductions,' " ' " witness statements will not be summarily rejected by an appellate court. (*People v. Thompson* (2010) 49 Cal.4th 79, 124; *People v. Barnes* (1986) 42 Cal.3d 284, 306.) " '[I]t is not a proper appellate function to reassess the credibility of the witnesses.' " (*People v. Thompson, supra*, 49 Cal.4th at P. 125, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314-315.) As nothing in Rosalinda's testimony is so patently false as to be immediately apparent, we reject the claim.

D. *Section 1118.1*

Salvador next argues there was insufficient evidence to support his conviction on count 6, firing into an inhabited dwelling.. Anthony claims no evidence existed the apartment struck by gunfire was inhabited. At trial, Anthony moved for dismissal of count 6 on these grounds pursuant to section 1118.1 and now appeals the court's denial of that motion.

We review denial of a section 1118.1 motion on a sufficiency of evidence standard and review the trial court's ruling in the light most favorable to the judgment. (*People v. Harris* (2008) 43 Cal.4th 1269, 1286; *People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213.)

Taken in the light most favorable to the judgment, sufficient evidence was adduced at trial to support count 6 and deny Anthony's motion. Detective Lance Colmer, who investigated the scene of the shooting, testified that the apartment struck by gunfire was not vacant, and that he witnessed another deputy interviewing the occupant. As buildings are considered inhabited under section 246 "if there are permanent residents thereof, even if [they are] temporarily unoccupied[.]" a reasonable jury could have concluded from Detective Colmer's testimony the building was currently inhabited for dwelling purposes under the statute. (*People v. White* (1992) 4 Cal.App.4th 1299, 1302–1303; *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1018.)

Salvador contends Detective Colmer's testimony constituted inadmissible hearsay, was unsupported by any lease documents, and contradicted Rosalinda's testimony that the apartment was empty. We find these arguments meritless. Detective Colmer's testimony that he observed another officer interviewing an occupant did not present an out of court statement for the truth of the matter asserted within. (Evid. Code, § 1200, subd. (a).) As to any potential contradiction with other testimony, such issues of credibility were for the jury to decide.

E. Sufficient Evidence

Salvador's final claim is that his conviction on count 6 must be reversed as the jury was instructed on the acts of shooting at an inhabited dwelling and at an occupied motor vehicle, while neither was factually supported by the evidence. In the alternative, Anthony argues if only one act was supported by substantial evidence, it would be impossible to determine which scenario the jury relied on, rendering his conviction unsustainable. As we find both acts supported by sufficient evidence, we reject Anthony's claim.

DISPOSITION

Anthony's conviction is reversed and remanded for resentencing only as set forth in DISCUSSION part I, D & E. In all other respects, his conviction is affirmed. Salvador's conviction is affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.