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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS JUAREZ,

Defendant and Appellant.

D059376

(Super. Ct. No. RIF120874)

APPEAL from a judgment of the Superior Court of Riverside County, Paul E. Zellerbach, Judge. Affirmed in part, reversed in part and remanded with directions.

A jury convicted Jose Luis Juarez of nonpremeditated attempted murder of Antonio Saucedo (Pen. Code,<sup>1</sup> §§ 664, 187, subd. (a), count 1); premeditated and deliberate attempted murder of Jose Perez (§§ 664, 187, subd. (a), count 2); shooting a firearm at an occupied vehicle (§ 246, count 3); and shooting a firearm from a vehicle (§ 12034, subd. (d), count 4). As to all of the counts, it found Juarez committed the

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

crimes for the benefit and direction of, and in association with, a criminal street gang (§ 186.22, subd. (b)), and that he personally and intentionally discharged a firearm (§§ 12022.53, subd. (c), 1197, subd. (c)(8)). As to counts 1 and 2, the jury additionally found Juarez personally used a firearm within the meaning of section 12022.5, subdivision (a), and as to count 1, found he was a principal and personally discharged a firearm, proximately causing great bodily injury to another within the meaning of section 12022.53, subdivision (d). Juarez's codefendant, Hugo Cesar Garcia, was convicted of attempted premeditated murder in count 2, with true findings on gun and gang enhancement allegations.<sup>2</sup>

On count 1, the trial court sentenced Juarez to a midterm of seven years, plus a consecutive 25-year-to-life term for the section 12022.53, subdivision (d) gun use enhancement plus a consecutive ten years for the gang enhancement. On count 2, it sentenced Juarez to a consecutive term of life with a minimum parole eligibility date of 15 years, plus a consecutive 20-year gun use enhancement under section 12022.53, subdivision (c). As to count 3, Juarez was sentenced to a term of life with a minimum parole eligibility date of 15 years, plus 20 years for the section 12022.53, subdivision (c) gun use enhancement, all of which were stayed under section 654. On count 4, Juarez received the midterm of five years, plus a consecutive 20-year gun use enhancement under section 12022.53, subdivisions (c) and (e), all of which were stayed under section

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<sup>2</sup> This court reversed Garcia's conviction on grounds of prejudicial instructional error. (*People v. Garcia* (Mar. 21, 2011, D056283) [nonpub. opn.] )

654. The court granted Juarez certain custody credits and ordered him to pay various fees, fines and restitution.

On appeal, Juarez contends (1) as to the count 1 attempted murder of Saucedo, the so-called "kill zone" theory is not supported by substantial evidence, and the trial court prejudicially erred by instructing the jury as to that theory; (2) the jury's true findings on the section 186.22 gang enhancements lack sufficient evidence; and (3) the court prejudicially erred by refusing to instruct the jury with CALCRIM No. 360. We conclude the evidence is insufficient as a matter of law to support a finding that Juarez harbored the specific intent to kill Saucedo under a kill zone theory, and thus reverse Juarez's count 1 conviction for attempted murder. We otherwise affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Juarez is a self-admitted member of the Pecan Street gang, a criminal street gang originating from Moreno Valley. The Pecan Street gang is rivals with some subjects of Florencia 13, a large criminal street gang from Los Angeles.

Juarez went to high school with Jose Perez, and he and Perez were friends at that time. However, after Perez left school, their friendship ended over Perez's associations with the Florencia 13 gang and the disputes between Pecan Street and Florencia 13.

In September and October 2004, Juarez was involved in several incidents in which Florencia gang members either pointed a gun at him or accosted him with a gun in front of his girlfriend's house with his child present. On one occasion, the individuals drove up in a green car. At about 7:30 p.m. on October 26, 2004, Juarez was in front of his

girlfriend's house when three men drove up, got out with guns and fired at him from 15 to 20 feet away.

That evening, Juarez got a weapon and he and Hugo Garcia drove around in Garcia's black Honda when they came upon Perez, who was driving his green Toyota after dropping off a friend. Perez was heading home that evening when he noticed the black Honda with its headlights off pass him on his driver's side, make a U-turn, and then get behind him. Juarez and Garcia began to tailgate Perez. It was about 11:00 p.m. and raining. Perez entered the freeway to try to get away, exited the freeway at Indian Street southbound, and then heard gunshots and shattering glass. He saw someone shooting from the sunroof of the black car, felt the bullets passing him and, at the intersection of Indian and Sunnymead Street, ducked his upper body down below the steering wheel to avoid getting shot. About two blocks later, close to the intersection of Indian and Fir Street, Perez's car struck the vehicle of Antonio Saucedo, who was at the time driving about 25 miles an hour northbound on Indian Street on his way to work. Saucedo did not see any vehicle come at him; when he regained consciousness, he found himself on his back in the street. Saucedo suffered injuries requiring hip surgery, and he was left with a permanent limp.

Investigating detectives found four 9-millimeter Lugar shell casings and two bullet fragments on the street and in the gutter on Indian Street. The bullets were spread out in a progression in the two street blocks from Perez's car.

On October 31, 2004, police searched Juarez's vehicle and found the 9-millimeter handgun that had been used to fire at Perez. In a police interview, Juarez admitted

shooting at Perez because he was driving the green car that had been at Juarez's girlfriend's house earlier that day.

At trial, the People called Riverside County Sheriff's Deputy George Reyes to testify concerning the nature and activities of the Pecan Street gang. Deputy Reyes was then assigned to the Moreno Valley Regional Gang Task Force. In connection with that assignment he went into the field on routine patrol and viewed incidents possibly leading to arrest; reviewed reports and gathered information from patrol officers; and put together operations on subjects who might be gang related including probation checks, parole checks and search warrants. The deputy described his training and experience in gang investigations, explaining he had worked in the area for five and one-half years, received instruction concerning specific gangs, and was also a member of the Riverside County Gang Officers' Association, which shared intelligence and experience about gang trends. Deputy Reyes testified he had many consensual contacts with both gang members and community members during which he asked questions to determine the gang status of particular individuals. He talked about the significance of respect, gang turf, and recognition by graffiti, tattoos and monikers. Deputy Reyes explained that he had a lot of dealings with the Pecan Street gang, also known as Varrio Pecan, which was a younger gang in 2004 with 10 to 15 members. He testified the gang is primarily involved in vehicle theft, burglaries, marijuana cultivation, and shootings, which included the present attempted murder of Perez. According to the deputy, these were the "kinds of activities that members of Pecan Street repeatedly and consistently engage[d] in." Deputy Reyes testified he was familiar with Juarez and had contacts with him before the October 2004

incident, and was aware that Juarez was convicted of burglary and a vehicle theft in January 2003 when he was a minor, resulting in juvenile convictions in both cases. But because Pecan Street was a younger gang, Deputy Reyes explained there were not many cases that had been filed in court, and he was aware that Pecan Street members had committed crimes for which arrests were not made.

On cross-examination, Deputy Reyes was asked what the primary activities of the Pecan Street gang were before October 26, 2004. He responded that those primary activities included the thefts, residential burglary and cultivation, and "as far as crimes—well, calls for service that were initially investigated by patrol officers, shootings as well." The deputy explained that before that date, the shootings were reported but not formally documented, though he knew they had occurred. Later, when asked whether he could point to specific instances of shootings before October 26, 2004, Deputy Reyes explained he could not give specifics such as a reporting person and actual victim, but he could point to "conversations with other gang members of—[Pecan Street] gang members who alluded to the fact that the war has been going on, it's been going back and forth and shootings been [*sic*] occurring." Deputy Reyes agreed that the crimes for which he had "articulable and verifiable facts" were the auto theft, burglary, marijuana cultivation, and the present attempted murder case. He confirmed that when he testified about those thefts and burglaries, he was referring to the theft and burglary that Juarez had committed with another Pecan Street gang member, Sergio Gutierrez, in January 2003.

## DISCUSSION

### I. *Kill Zone Theory*

Juarez contends the trial court erred by instructing the jury on the so-called "kill zone" theory as to the count 1 charge of attempted murder on Anthony Saucedo. He maintains the theory is not supported by the evidence, and the trial court's use of the word "anyone" in the instructions and its answers to jury questions was confusing and lowered the prosecution's burden of proof by parsing the existence of a kill zone from the question of his intent.<sup>3</sup> Juarez argues the error was prejudicial and requires reversal of count 1 in view of the jury notes on the question, the prosecutor's argument, and the instruction.

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<sup>3</sup> Over defense counsel's objections and argument that the kill zone theory of attempted murder did not apply, the trial court instructed the jury on the count 1 and 2 offenses of attempted murder using CALCRIM No. 600 as follows: "The defendant is charged in Counts 1 and 2 with having committed the crime of attempted murder. To prove that the defendant is guilty of attempted murder, the People must prove that: One, the defendant took at least one direct but ineffective step towards killing another person; and, two, 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 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 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 Antonio Saucedo—he is the named victim in Count 1—the People must prove that the defendant not only intended to kill Jose Perez, the named victim in Count 2, but also either intended to kill Antonio Saucedo, or intended to kill anyone within the kill zone. [¶] If you have reasonable doubt about whether the defendant intended to kill Antonio Saucedo, or intended to kill Jose Perez by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Antonio Saucedo."

As we will explain, we agree the evidence is insufficient to support a finding of Juarez's specific intent to kill Saucedo under a kill zone theory, and thus reverse Juarez's count 1 conviction for attempted murder.

A. *Background*

With respect to the charge of Saucedo's attempted murder, the prosecutor argued to the jury that Juarez had created a "kill zone" that was "traveling" and "moving" in "the area around Jose Perez's car." She stated: "Jose Juarez intended to kill the specific target being Jose Perez. And at the same time, he intended to kill anybody who was in that zone of danger. And within that 'anybody' is Antonio Saucedo, just driving along that night, having the misfortune of being on the same road at the same time that pathway of the firing vehicles is coming. And so there he is. . . . Juarez intended to kill Jose Perez and anyone who was within that zone of danger. [¶] . . . [A]ll three cars that night are in motion. Everybody is going down the same road. And so as Jose Juarez is firing from that black Honda at the green car, that zone of danger is moving. It's traveling along. And it's the area around Jose Perez's car, because . . . that's what's being shot at; right?" She continued: "And the law says this. When you create that zone of danger, when you do something as dangerous as firing an automatic weapon multiple times on a public street where other cars travel, you are liable for that. You are liable for that zone, that area that you have created."

B. *Legal Principles*

In *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), the California Supreme Court examined the intent element of attempted murder: "To be guilty of attempted murder, the

defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at p. 328.) The issue in *Bland* was whether the doctrine of "transferred intent" could be applied to the crime of attempted murder. The court concluded it could not (*id.* at pp. 326-329), but emphasized that while intent to kill a primary target does not transfer to a survivor, "the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. For example, . . . consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. . . . Where the means employed to commit the crime against a primary victim

create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Id.* at pp. 329-330.)

Thus, in *Bland*, the court upheld convictions of one count of murder and two counts of attempted murder where the defendant fired numerous rounds into a car at close range, killing one occupant (the apparent target, Wilson) and injuring the other two.

(*Bland, supra*, 28 Cal.4th at pp. 318, 330-331.) The court said, "Even if the jury found that defendant primarily wanted to kill Wilson rather than Wilson's passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant and his cohort fired a flurry of bullets at the fleeing car and thereby created a kill zone."

(*Id.* at pp. 330-331.) The court further noted that its concurrent intent theory was not a legal doctrine requiring special jury instruction, but "simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Id.* at p. 331, fn. 6; see also *People v. Smith* (2005) 37 Cal.4th 733, 746.)

Thereafter, in *People v. Adams* (2008) 169 Cal.App.4th 1009, the Fifth District Court of Appeal upheld a murder conviction and convictions for attempted murder of three individuals stemming from the defendant's act in setting fires at the front porch and back door of the residence in which they were present. (*Adams*, at pp. 1014, 1019-1023.)

The defendant claimed the kill zone instruction given by the trial court misstated the law and the prosecutor likewise misstated the law in closing argument by telling the jury the defendant did not have to know of the presence of the three individuals. (*Id.* at pp. 1020-1021.) The Court of Appeal rejected the arguments: "[T]he concurrent intent doctrine

permits a rational jury to infer the required express malice from the facts that (1) the defendant targeted a primary victim by intentionally creating a zone of harm, and (2) the attempted murder victims were within that zone of harm. The concurrent intent theory recognizes that the defendant acted with the specific intent to kill anyone in the zone of harm with the objective of killing a specific person or persons. The theory imposes attempted murder liability where the defendant intentionally created a kill zone in order to ensure the defendant's primary objective of killing a specific person or persons despite the recognition, or with acceptance of the fact, that a natural and probable consequence of that act would be that anyone within that zone could or would die. Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm." (*Id.* at p. 1023.)

The *Adams* court cited as an example a case in which sufficient evidence was held to support convictions for 11 counts of attempted murder of residents of two inhabited residences, at which the defendants sprayed wall-piercing bullets from high-powered assault weapons. (*Ibid.*, citing *People v. Vang* (2001) 87 Cal.App.4th 554, 563-565.) In *Vang*, that evidence, including the placement and number of shots, was sufficient for the jury to conclude the defendants harbored the specific intent to kill every person within the targeted residences. (*Vang*, 87 Cal.App.4th at pp. 563-564.)

In *People v. Stone* (2009) 46 Cal.4th 131, the California Supreme Court clarified that the existence of an identifiable primary victim is not necessary for the kill zone theory to apply as "[t]he mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*Id.* at pp. 134, 140.) Thus, a person can be

guilty of attempted murder if the person purposely creates a kill zone intending to kill not a specific target, but anyone present within the kill zone. (*Id.* at p. 140 [describing a terrorist who places a bomb on a commercial airliner intended to kill as many people as possible without knowing or caring who they are].) *Stone* involved a defendant who was charged with and convicted of a single count of attempted murder for firing a single shot at a group of ten people. (*Id.* at p. 136.) The Court of Appeal ruled the trial court had erred by giving a modified version of the kill zone instruction and the California Supreme Court agreed: "The kill zone theory simply [did] not fit the charge or facts of [that] case" because, as the appellate court stated, "There was no 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.'" (*Id.* at p. 138.)

The following year, the California Supreme Court considered whether there was sufficient evidence to support multiple counts of attempted murder in a case involving a defendant who fired a single bullet at a distance of 60 feet, from a car travelling 10 to 15 miles per hour, at a group of seven uniformed police officers and a civilian who were standing less than 15 feet apart from one another. (*People v. Perez* (2010) 50 Cal.4th 222, 224.) The bullet injured one of the officers. (*Ibid.*) As a result, the defendant was convicted of eight counts of premeditated attempted murder. (*Ibid.*) The California Supreme Court held on those facts, the evidence was sufficient to sustain only a single count of premeditated attempted murder of a peace officer: "Here, defendant fired the single shot at the group intending to kill *someone*, but without targeting any particular individual, and without using a means of force calculated to kill everyone in the group."

(*Id.* at p. 225.) The court observed "there is no evidence that defendant knew or specifically targeted any particular individual or individuals in the group of officers he fired upon. Nor is there evidence that he specifically intended to kill two or more persons with the single shot. Finally, there is no evidence defendant specifically intended to kill two or more persons in the group but was only thwarted from firing off the required additional shots by circumstances beyond his control. Without more, this record will not support conviction of eight counts of premeditated attempted murder." (*Id.* at pp. 230-231.)

*C. The Evidence is Insufficient to Support Juarez's Conviction for the Attempted Murder of Antonio Saucedo*

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Perez, supra*, 50 Cal.4th at p. 229.)

Here, the People acknowledge that the kill zone theory will not apply where there is no evidence that the defendant used a means to kill that inevitably would result in the death of other victims within a zone of danger. However, they maintain Juarez's act of shooting at least four shots into Perez's speeding vehicle while it was on a "roadway that was reasonably used by other motorists" supports an inference that Juarez "created a kill zone around Perez as he tried to kill him." The People reason: "[A]lthough Saucedo may

not have been in the immediate vicinity of Perez when [Juarez] first opened fire, he was in Perez's immediate vicinity by the time [Juarez] fired his last shots. Despite Saucedo's presence within Perez's immediate vicinity, [Juarez] continued to fire his weapon at Perez without any regard for the danger this posed to everyone around Perez. Appellant did not care because he intended to kill whomever was driving the green car, without any regard to the driver and he did so in a manner that showed his intent to anyone [*sic*] present around the car." They conclude: "[B]ecause [Juarez] repeatedly fired his gun at Perez's car even when Perez collided with Saucedo, substantial evidence supported the kill zone theory for the attempted murder of Saucedo."

We are not persuaded. As stated above, whether a defendant will be deemed to harbor concurrent intent to kill via creation of a kill zone is "necessarily defined by the nature and scope of the attack." (*Perez, supra*, 50 Cal.4th at p. 232.) The evidence must establish that the lethal force was "designed and intended to kill everyone in an area around the targeted victim . . . as the means of accomplishing the killing of that victim." (*People v. Smith, supra*, 37 Cal.4th at pp. 745-746.) Thus, as the above summary of the case law demonstrates, the theory typically applies where a defendant uses a means of lethal force that is designed to kill not only the target, but *necessarily or inevitably* another individual or group of individuals around the target. (E.g., *Bland, supra*, 28 Cal.4th at pp. 330-331 [firing a "flurry of bullets" at a fleeing car containing the driver and passengers]; *Smith*, at pp. 736-737 [firing a single bullet through the rear windshield at two individuals in the car within the direct line of fire]; see also *People v. Leon* (2010) 181 Cal.App.4th 452, 464 [upholding two counts of attempted murder convictions of

defendant who fired into the rear taillight of a vehicle with two victims both seated directly in his line of fire].)

Here, Juarez fired at least four shots from a semiautomatic firearm at Perez's vehicle while it was travelling on Indian Street. However, Juarez was targeting only Perez, it was after 11:00 p.m. and raining, and there is no evidence there was heavy traffic or that pedestrians were present in the vicinity of Perez's vehicle during the shooting. Certainly, if Perez were struck or killed by a bullet, it was possible his car would careen into another vehicle, pedestrian, or home. But the mere act of shooting from one moving vehicle at the driver of another moving vehicle on a roadway, particularly late at night when there is no evidence of other vehicles or people present in the vicinity, does not *inevitably*, or even *naturally and probably*, lead to the death of others who may be near the target vehicle. Though the People state Juarez continued to shoot at Perez *after* the collision and that Saucedo was in Perez's immediate vicinity "by the time [Juarez] fired his last shots," Juarez's statements to police are to the contrary, and the record otherwise does not support that assertion.<sup>4</sup>

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<sup>4</sup> The People state that Juarez's admission to police shows "he kept firing his gun until he saw Perez's car flip, which happened after the collision." They argue that "although Saucedo may not have been in the immediate vicinity of Perez when [Juarez] first opened fire, he was in Perez's immediate vicinity by the time [Juarez] fired his last shots." For this proposition, the People cite to Juarez's police interview, in which he told the deputies he fired only two shots at Perez. Deputy Reyes asked: "Did you shoot when the car already flipped or did you shoot before at it." [¶] Juarez: Before it flipped. [¶] [Riverside County Sheriff's Deputy] Decker: You shot before the flip? Did you see him? Could you see him with your headlights in the light? [¶] Juarez: Yes. [Deputy] Decker: What did you see, what was he doing? [¶] Juarez: Driving." Deputy Decker then asked: "[W]hat made you stop shooting? [¶] Juarez: Because the car flipped over." Further,

Under these circumstances, we cannot say Juarez's actions in directing fire toward Perez's vehicle while he was driving it was a method of attack that "'ensure[d] harm to [Perez] by harming everyone in [Perez's] vicinity.'" (*Bland, supra*, 28 Cal.4th at p. 329.) This case does not present "the equivalent of using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill everyone fired upon." (*People v. Perez, supra*, 50 Cal.4th at p. 232.) As in *Perez*, "The holding in *Bland* is not controlling on these facts." (*Perez*, at p. 232.) As a result, the evidence does not support the jury's finding that Juarez harbored the specific intent to kill as to count 1. The count 1 conviction must be reversed.

Having reached that conclusion, we need not address Juarez's claims of instructional error.

## II. *Sufficiency of Evidence Supporting the Gang Enhancements*

Juarez contends the evidence is insufficient to support the jury's true findings on the 10-year gang enhancements under section 186.22. Specifically, he maintains Deputy Reyes's testimony concerning Pecan Street's primary activities was based on unreliable hearsay and thus his opinion lacked foundation. Juarez further argues Deputy Reyes only testified concerning the isolated burglary and theft committed by him in January 2003,

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Riverside County Sheriff's Deputy Christopher Gastinger testified that the 9-millimeter shell casings were found in various places along Indian Street, "one just north of . . . Webster" and "the rest of them were south of Webster in kind of a progression southbound towards where the vehicle was on its roof." The record does not support the conclusion, or even an inference, that Juarez continued to shoot at Perez and Saucedo after their cars collided.

and could not say whether he was a Pecan Street gang member at that time, and thus the deputy's conclusions do not constitute substantial evidence that members of the Pecan Street gang consistently and repeatedly committed specified crimes. As we explain, the contentions are unavailing.

#### A. *Standard of Review*

We review the sufficiency of the evidence to support enhancement allegations under the same standard we apply to a conviction. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Duran* (2002) 97 Cal.App.4th 1448, 1456-1457.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) We review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Id.* at p. 60.) We neither reweigh the evidence nor reevaluate a witness's credibility. (*Ibid.*)

#### B. *Legal Principles*

A gang enhancement requires that the defendant commit the underlying felony "for the benefit of, at the direction of, or in association with any criminal street gang . . . ." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined in terms of four elements: It must be "[1] any ongoing organization, association, or group of three or more persons, whether formal or informal, [2] having as one of its primary activities the commission of one or more [specified] criminal acts . . . , [3] having a common name or

common identifying sign or symbol, and [4] whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f).)

"The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323 (*Sengpadychith*)). The *Sengpadychith* court explained: "That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s]. . . . Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the primary activities of the group was the commission of one of the . . . enumerated crimes found within the statute.' " (*Sengpadychith, supra*, 26 Cal.4th at pp. 323-324, citation omitted.) "Past offenses, as well as the circumstances of the charged crime, have some tendency in reason to prove the group's primary activities, and thus both may be considered by the jury on the issue of the group's primary activities." (*People v. Duran, supra*, 97 Cal.App.4th at p. 1465; accord, *Sengpadychith*, at p. 323 ["Nothing in [the] statutory language [of § 186.22] prohibits the trier of fact from considering the circumstances of the *present* or charged offense in deciding whether the group has as one of its primary activities the commission of one or more of the statutorily listed crimes"].)

The primary activities element of a criminal street gang is a proper subject for expert opinion. (*In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1005 (*Nathaniel C.*)) "An expert may generally base his opinion on any 'matter' known to him, including hearsay not otherwise admissible, which may 'reasonably . . . be relied upon' for that purpose." (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) Thus, "[t]he testimony of a gang expert, founded on his or her conversations with gang members, personal investigation of crimes committed by gang members, and information obtained from colleagues in his or her own and other law enforcement agencies, may be sufficient to prove a gang's primary activities." (*People v. Duran, supra*, 97 Cal.App.4th at p. 1465; see also *Sengpadychith, supra*, 26 Cal.4th at p. 324.)

### C. Analysis

In advancing his foundational challenge, Juarez relies in part on *In re Alexander L.* (2007) 149 Cal.App.4th 605 (*Alexander L.*) and *Nathaniel C., supra*, 228 Cal.App.3d 990. In *Alexander L.*, the gang expert's entire testimony as to the primary activities element was as follows: " 'I know they've committed quite a few assaults with a deadly weapon, several assaults. I know they've been involved in murders. [¶] I know they've been involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotic[s] violations.' " (*Alexander L.*, 149 Cal.App.4th at p. 611.) No evidence was "elicited as to the circumstances of these crimes, or where, when, or how [the expert] had obtained the information." (*Id.* at pp. 611-612.)

The appellant in *Alexander L.* had objected to the expert's answer on the ground that it lacked foundation and had moved to strike the testimony. (*Alexander L.*, 149

Cal.App.4th at p. 612, fn. 4.) The expert did not indicate that he had any basis for his testimony and he "did not directly testify that criminal activities constituted [that gang's] primary activities." (*Id.* at p. 612.) The appellate court noted the objection should have been sustained and the motion should have been granted. (*Id.* at p. 612, fn. 4.) It concluded that the gang expert's "conclusory testimony [could not] be considered substantial evidence as to the nature of the gang's primary activities." (*Id.* at p. 612.)

In *Nathaniel C.*, *supra*, 228 Cal.App.3d 990, the appellate court found that the evidence was insufficient to show that a primary activity of a particular gang (the Family) was the commission of any of statutorily specified offenses. (*Id.* at p. 1004.) The expert testified that "the primary activity of all of the gangs in his area [was] criminal" and "gave a general list of the crimes he had in mind, only one of which—assault with a deadly weapon—[was] included among the . . . offenses specified in the statute" but "did not identify the Family as one of the gangs in his area" and instead "made a point of stating that the Family's base is in San Bruno rather than his jurisdiction, South San Francisco." (*Id.* at pp. 1004-1005.) Although its opinion does not reflect that a hearsay objection was ever made in that case, the appellate court stated: "Such vague, secondhand testimony cannot constitute substantial evidence that the required predicate offense by a gang member occurred. [Citation.] While experts may offer opinions and the reasons for their opinions, they may not under the guise of reasons bring before the trier of fact incompetent hearsay evidence." (*Id.* at pp. 1003-1004.) The Court of Appeal reasoned: "While we consider this element to be a proper subject of expert opinion, here the opinion did not relate specifically to the Family and its activities. Thus, the evidence

failed to establish that a primary activity of the Family is commission of one or more of the offenses specified by the statute." (*Id.* at p. 1005.)

Unlike the *Alexander L.* expert or the expert in *Nathaniel C.*, Deputy Reyes testified to crimes and incidents that were specific to the Pecan Street gang, and he directly testified as to its primary activities.<sup>5</sup> His testimony was based on his training, which he described to the jury; five and one-half years of experience in gang investigations, including those involving the Pecan Street gang; reports and information gathered from other officers; conversations and numerous dealings with the Pecan Street gang members; and verifiable information concerning not only the prior burglary and theft committed by Juarez and Gutierrez, but the present crimes including Perez's attempted murder. This kind of foundation has been found sufficient to support the primary activities requirement of section 186.22. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 620 [testimony from gang expert who expressed an opinion that a gang's primary activity was the sale of narcotics and witness intimidation, and based that opinion on "conversations with the defendants and with other [gang] members, his personal investigations of hundreds of crimes committed by gang members, as well as information from his colleagues and various law enforcement agencies," satisfied the primary activities requirement of section 186.22]; *People v. Hill* (2011) 191 Cal.App.4th 1104, 1124 [gang expert officers may rely on the hearsay statements of gang members

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<sup>5</sup> Other than the deputy's reference to unspecified shootings, Juarez makes no claim that the crimes identified by Deputy Reyes are not among the criminal activities enumerated in section 186.22, subdivision (e).

even though " 'the credibility of those sources may not be beyond reproach . . . ' " because the officers did not simply recite what they were told but gave an opinion with reference to other information].) "A gang expert's overall opinion is typically based on information drawn from many sources and on years of experience, which in sum may be reliable." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 949, citing *Gardeley*, at p. 620.)

Juarez maintains nevertheless that Deputy Reyes's testimony concerning the shootings by Pecan Street did not establish his opinion was based on reliable material. Juarez points out that the deputy could not point to specific incidents or provide identifying information, his information was taken from some gang members, and the deputy acknowledged that some of this information is not accurate. But section 186.22 merely requires the "commission of *one or more* of the criminal acts enumerated" as a principal activity. (§ 186.22, subd. (f), italics added.) Thus, any weakness in Deputy Reyes's testimony concerning the shootings committed by Pecan Street gang members does not impact the jury's true finding based on the gang's other described criminal activities. And, as we have stated, it was permissible for Deputy Reyes to rely on his conversations with gang members as a basis for his opinion, and he also relied upon the instant attempted murder of Perez, a shooting for which he had verifiable information. Under *Gardeley*, no more is required. On this record, we conclude Deputy Reyes had

sufficient foundation for his opinion concerning the Pecan Street gang's primary activities.<sup>6</sup>

Juarez further challenges Deputy Reyes's testimony on grounds it does not demonstrate the offenses he described were committed "consistently and repeatedly" by Pecan Street gang members at the relevant time. He maintains the only vehicle theft and burglary the deputy referenced were those committed in January 2003 by Juarez and Gutierrez, and he asserts Deputy Reyes could not say the men were gang members at that time. But the evidence is not that Pecan Street did not exist at the time of those offenses. When asked whether his testimony meant that Pecan Street was actually only formed in 2004, Deputy Reyes disagreed, explaining: "[W]hen gangs are formed, it's something that could be in a year span from 2004 even to 2003. It's still a new gang. Even a three-year gang is a new gang, a newly formed gang." He agreed the date the gang was in fact formed was something that needed to be established. The jury was entitled to conclude based on the above statement that the burglary and theft at issue were committed by gang

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<sup>6</sup> We note too that Juarez has not pointed to any objection in the record to Deputy Reyes's testimony or opinions as conclusory, lacking foundation, or based on inadmissible hearsay. While evidence of the matters on which an expert has relied is admissible only to show the basis of the opinion and not substantively for the truth of the matter (see *People v. Coleman* (1985) 38 Cal.3d 69, 92; Evid. Code, § 1200), a hearsay objection may be forfeited by the failure to timely raise it. (Evid. Code, § 353, subd. (a).) Hearsay that is not objected to may constitute substantial evidence. (See *People v. Panah* (2005) 35 Cal.4th 395, 476 [" ' "[i]t is settled law that incompetent testimony, such as hearsay or conclusion, if received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding" ' "]; see also Cal. Law Revision Com. com, 29B Pt.1A West's Ann. Evid. Code (2011 ed.) foll. § 140, p. 27 ["when inadmissible hearsay or opinion testimony is admitted without objection, this definition makes it clear that it constitutes evidence that may be considered by the trier of fact"].)

members; this is not a situation where " 'upon no hypothesis whatever is there sufficient substantial evidence' " (*People v. Bolin* (1998) 18 Cal.4th 297, 331; *People v. Augborne* (2002) 104 Cal.App.4th 362, 371) that Juarez and Gutierrez were not Pecan Street gang members in January of 2003.

The People were not required to introduce a multitude of discrete incidents to prove the Pecan Street gang consistently and repeatedly committed predicate gang offenses, but they instead could rely on the expert's testimony based on information from colleagues and gang members in forming his opinion. (*Sengpadychith, supra*, 26 Cal.4th at p. 324; *People v. Gardeley, supra*, 14 Cal.4th at p. 620.) Deputy Reyes relied upon such information to testify about the "war" and "back and forth" shooting incidents between Florencia 13 and Pecan Street. We presume based on its true finding, the jury drew the reasonable inference from this evidence that Pecan Street gang members regularly committed assaults with a deadly weapon or drive-by shootings, which are enumerated offenses. (See *Albillar, supra*, 51 Cal.4th at p. 60; § 186.22, subd. (e).)

### III. *Refusal to Instruct with CALCRIM No. 360*

Juarez contends the trial court prejudicially erred when it refused to instruct the jury with CALCRIM No 360, which states: " \_\_\_\_\_ <Insert name> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement [s] made by \_\_\_\_\_ <insert name>. [I am referring only to the statement[s] \_\_\_\_\_ <insert or describe statements admitted for this limited purpose>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider

(that/those) statement[s] as proof that the information contained in the statement[s] is true."

Juarez maintains CALCRIM No. 360 would have limited the jury's consideration of inadmissible hearsay relied upon by Deputy Reyes in giving his opinions concerning the Pecan Street gang's primary activities. Specifically, Juarez points to Deputy Reyes's testimony that he was aware of crimes by Pecan Street members for which no arrests were made, and also of incidents in which firearms were discharged. He argues the jury was not entitled to consider such inadmissible hearsay as evidence such shootings had actually occurred, but it was "likely that evidence figured prominently" in the jury's consideration of the primary activities given the emphasis on the unspecified shootings during the deputy's trial testimony. Juarez asserts that given the "paucity" of evidence of Pecan Street's primary activities, it is reasonably probable a more favorable result would have been reached on the gang enhancements if the jury had been instructed with CALCRIM No. 360.

We disagree. Defense counsel requested the instruction be given to limit the jury's consideration of Juarez's own statement admitting gang membership, which, as the People point out, is admissible hearsay. (See *People v. Monteil*, *supra*, 5 Cal.4th at p. 919; Evid. Code, §§ 1220 [party admission]; 1230 [admission against interest]; CALCRIM No. 360, Bench Notes ["This instruction should not be given if all of the statements relied on by the expert were admitted under applicable hearsay exceptions"].) Counsel did not seek the instruction in relation to Deputy Reyes's accounts of shootings involving Pecan Street gang members, which were not limited to specific statements from

individuals as contemplated by the instruction. In any event, without a request by defense counsel to give the instruction with respect to Deputy Reyes's testimony, the trial court had no sua sponte duty to give it as to those specific points. (Evid. Code, § 355; *People v. Murtishaw* (2011) 51 Cal.4th 574, 590.)

Even assuming error in refusing CALCRIM No. 360, we conclude there is no reasonable likelihood the result would have changed, that is, there is no reasonable likelihood the jury would have decided differently on the gang enhancements. (*People v. Breverman* (1998) 19 Cal.4th 142, 172-174.) First, we have already rejected Juarez's contentions that the gang enhancements were supported by weak or insufficient evidence, which provides the premise for his claim of instructional error. He argues based on that premise it is "likely that evidence figured prominently in the jury's consideration of the primary activities" element. But there is no indication from the record the jury placed undue weight on that particular testimony of Deputy Reyes. And even under that instruction, the jury would still have been permitted to consider the hearsay statements in evaluating Deputy Reyes's credibility. In this regard, the jury was instructed with CALCRIM No. 332 in part: "Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide

whether information on which the expert relied was true and accurate. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence."

Though Juarez argues the giving of this instruction would not cure any harm because it does not limit the use of evidence for a particular purpose, the instruction nevertheless guided the jury in assessing Deputy Reyes's opinion and focused its attention on the accuracy of the information underlying it, a proper function for the jury. Instructing jurors to evaluate the reliability and accuracy of information conveyed in a statement relied upon by an expert for his opinion is not synonymous with instructing that the statement itself can be considered proof the information is true. Because the record contains no indication that the information on which Deputy Reyes relied to support his opinion was untrue or inaccurate, Juarez has not shown the court's failure to give CALCRIM No. 360 made any difference in the outcome of the case.

DISPOSITION

The count 1 conviction of attempted murder of Saucedo is reversed. In all other respects, the judgment is affirmed. We remand and direct the trial court to amend the abstract of judgment to reflect reversal of count 1 and for such further proceedings as may be appropriate. The court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

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O'ROURKE, J.

WE CONCUR:

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McCONNELL, P. J.

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McINTYRE, J.