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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW MAGALLENEZ,

Defendant and Appellant.

E052841

(Super.Ct.No. FSB901134)

**OPINION**

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed in part and reversed in part with directions.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gary W. Schons, Assistant Attorney General, Heidi T. Salerno and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Andrew Magallenez’s friend and fellow gang member started a fight in a crowded bar. Defendant fired nine shots into the crowd, killing one victim and wounding a second.

A jury found defendant guilty on one count of first degree murder (Pen. Code, § 187, subd. (a)) and one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664, subd. (a)). On each of these two counts, the jury found true a gang enhancement (Pen. Code, § 186.22, subd. (b)(1)) and an enhancement for personally discharging a firearm and causing death or great bodily injury (Pen. Code, § 12022.53, subd. (d)).<sup>1</sup> The jury also found defendant guilty on one count of unlawful possession of a firearm. (Pen. Code, § 12021, subd. (a)(1).) Three “strike” priors (Pen. Code, § 667, subs. (b)-(i), 1170.12), two prior serious felony conviction enhancements (Pen. Code, § 667, subd. (a)), and two 1-year prior prison term enhancements (Pen. Code, § 667.5, subd. (b)) were all found true.<sup>2</sup>

Defendant was sentenced to a total of 187 years to life (a determinate term of 12 years and an indeterminate term of 175 years to life), plus the usual fines and fees.

In this appeal, defendant contends:

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<sup>1</sup> Lesser firearm enhancements (Pen. Code, § 12022.53, subs. (b), (c)) were also found true, but the trial court ultimately stayed them. (See Pen. Code, § 12022.53, subd. (f).)

<sup>2</sup> A 3-year prior prison term enhancement (Pen. Code, § 667.5, subd. (a)) was also found true, but the trial court ultimately stayed this enhancement. (See *People v. Jones* (1993) 5 Cal.4th 1142.)

1. The trial court erred by failing to instruct on the lesser included offenses of manslaughter and attempted voluntary manslaughter, on an imperfect self-defense theory.

2. The trial court erred by failing to state reasons for running the sentence on count 3 (unlawful possession of a firearm) consecutively, rather than concurrently.

We will hold that the failure to instruct on imperfect self-defense, if error at all, was harmless. The People concede that we should remand for resentencing; hence, we will do so.

## I

### FACTUAL BACKGROUND

On the night of March 6-7, 2009, defendant was at La Villa Sports Bar and Grill in Colton. At the time, his head was shaved, and he had numerous tattoos, including one across the top of his head reading, “Angel Negro.”

Several witnesses saw defendant sitting with Albert Montoya and Juan Diaz. Both defendant and Diaz were members of the Black Angels gang; Montoya was an associate of the gang.

The restaurant was busy and crowded. Around 1:00 a.m., a fight broke out in an outside patio area. Montoya and Diaz were among those involved in the fight. Anthony Dunn, a security guard, helped break it up.

When the fight was over, Montoya was bleeding from a nasty cut to his cheek — apparently inflicted by Diaz, who was armed with a razor blade. Montoya went inside

and into the restroom. A few minutes later, he went back out. Dunn noticed that he was holding a knife.

A second fight broke out. According to some witnesses, Montoya confronted or “took a swing” at a customer, Robert Chavez. Chavez just put his hands up and backed away. Dunn, the security guard, then grabbed Montoya in an effort to break it up.

According to Dunn himself, however, Montoya tried to stab a second security guard. That was when Dunn intervened, kicking Montoya in the chest and trying to push the two apart.

Another customer joined in trying to break up the fight. Yet another man grabbed an empty beer bottle and hit somebody with it.

At that point, a man pulled out a gun, pointed it in the direction of the fight, and fired multiple shots. He then left. One witness told police that he heard someone yell, “Black Angels” (though he denied this at trial).

Dunn was hit by two bullets, one in the forearm and one in the back. He was seriously injured, but he survived.

Chavez was hit by three bullets; one merely grazed his chest, but two entered his back. One of the latter was fatal. He also sustained a number of superficial, nonfatal knife wounds. He died at the scene.

Most descriptions of the shooter consistently included some or all of the following characteristics: a Hispanic male, approximately five feet seven inches tall, about 150 to

160 pounds, with a mustache; his head was bald or shaved, and he had a tattoo with letters across the top of his head.

Accounts differed considerably, however, with respect to what the shooter was wearing: a beige plaid shirt, a red or brown Pendleton, a white shirt, a black and white checked shirt, or a black shirt with a white logo.

One eyewitness — a waitress — identified defendant as the shooter. She was familiar with him, having waited on him four or five times before.

A second eyewitness — the disk jockey (DJ) — also identified defendant as the shooter. Initially, however, he had told police that the shooter had very short hair, and that “the guy that had tattoos all over his head” (i.e., defendant) was *not* the shooter. When shown a photo lineup, he identified defendant as being present, but he said once again that defendant was *not* the shooter.

In a second interview, the DJ did identify defendant as the shooter. He added that the shooter had the word “negro” or “niger” tattooed on his head. (In the earlier photo lineup, however, a tattoo reading “negro” had been visible on defendant’s head.)

Two eyewitnesses failed to pick defendant out of a photo lineup.

A police officer responding to a “shots fired” call saw Montoya running away and detained him. Montoya had a bloody knife in his pocket.

Nine .22-caliber cartridge cases were recovered, all fired from the same gun.

Defendant took the stand on his own behalf. He claimed that he was merely a former member of the Black Angels.

Defendant admitted that he was at La Villa, but he claimed that he went there alone and that he did not know that Montoya and Diaz were there. However, he did run into his cousin, Eric Rios. Rios, defendant testified, was a member of the Black Angels. Rios was about the same age, height, and weight as defendant, and he had similar tattoos, including on top of his head. As defendant was leaving, after the shooting, he saw Rios in the parking lot with a gun in his hand.

Rios was murdered before trial. However, defendant's aunt (who was also Rios's aunt) testified that Rios phoned her and said that defendant had just been arrested for something that he (Rios) had done. She admitted that she had not come forward with this information before trial. She also admitted that she tried to avoid Rios; she had seen him only once in 2006 and once in 2009. Nevertheless, she agreed, he "randomly called [her] on the phone and admitted to a murder[.]"

## II

### FAILURE TO INSTRUCT ON IMPERFECT SELF-DEFENSE

Defendant contends that the trial court erred by failing to instruct sua sponte on the lesser included offenses of manslaughter and attempted voluntary manslaughter, on an imperfect self-defense theory.

“[I]t is the “court’s duty to instruct the jury not only on the crime with which the defendant is charged, but also on any lesser offense that is both included in the offense charged and shown by the evidence to have been committed.” [Citation.]’ [Citations.] ‘Conversely, even on request, the court “has no duty to instruct on any lesser offense

unless there is substantial evidence to support such instruction[.]” [Citation.]’ [Citation.] Substantial evidence “is not merely “any evidence . . . no matter how weak” [citation], but rather ““evidence from which a jury composed of reasonable [persons] could . . . conclude[.]”” that the lesser offense, but not the greater, was committed. [Citations.]’ [Citation.] ““On appeal, we review independently the question whether the court failed to instruct on a lesser included offense.” [Citation.]’ [Citation.]” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1327-1328.)

“Voluntary manslaughter is a lesser included offense of murder. [Citation.]” (*People v. Booker* (2011) 51 Cal.4th 141, 181.) “One who kills in imperfect self-defense — in the actual but unreasonable belief he must defend himself from imminent death or great bodily injury — is guilty of manslaughter, not murder, because he lacks the malice required for murder. [Citations.] For the same reason, one who kills in imperfect defense of others — in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury — is guilty only of manslaughter.” (*People v. Randle* (2005) 35 Cal.4th 987, 996-997, italics omitted, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

Defendant argues that one scenario consistent with the evidence is that he saw Montoya, bleeding from a slash to the face, in a fight with strangers. There was no evidence that he had seen the earlier fight outside on the patio. Moreover, there is no evidence that he saw Montoya start the later fight, or that he knew that Montoya had a

knife. Thus, defendant may have genuinely, though unreasonably, believed that Montoya was in imminent danger of death or great bodily injury.

As the People point out, this scenario is inconsistent with defendant's own testimony. Nevertheless, "the sua sponte duty to instruct on lesser included offenses . . . arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.)

The question of whether, on these facts, the trial court should have instructed on imperfect defense of another is a close and difficult one. (See generally *People v. Moyer* (2009) 47 Cal.4th 537, 553-555; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1018-1022.) Hence, we choose not to decide it; we will assume for the sake of argument that the trial court erred. By contrast, the question of whether the asserted error was prejudicial is not difficult at all — plainly the error was harmless.

"The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836–837 [299 P.2d 243]. Reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of. [Citations.]' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1257.)

Even if the jury had been instructed on imperfect self-defense, defendant's total denial that he was the shooter made it extremely unlikely that the jury would have accepted an imperfect self-defense theory. The prosecution's evidence showed that Montoya was spoiling for a fight. Without any provocation whatsoever, he attacked

victim Chavez and a security guard with a knife. Defendant not only backed up his fellow gang member but did so with massive overkill, firing nine shots into the scrum.

The possibility that this was imperfect self-defense was highly speculative. It arose not so much from the evidence but from the *lack* of evidence one way or the other. What did defendant see or hear regarding the earlier fight on the patio? Regarding Montoya's initiation of the second fight? Was he really reckless enough to fire nine shots into a crowded bar on the bare assumption that Montoya was actually the victim? And most important, what was his subjective state of mind?<sup>3</sup> Because he flatly denied being the shooter, the jury was left with no direct evidence on these points.

Significantly, it did not even occur to the trial court or to defense counsel that imperfect self-defense was a viable theory. Even if given the instruction, the jury would have felt that the evidence required it to choose between the prosecution's version of events and defendant's. It is not reasonably likely that it would have put bits and pieces of evidence together the way defendant now claims that it might.

The error was also harmless for a separate, alternative reason. "It is well established that '[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted

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<sup>3</sup> The People argue that the asserted error was harmless because there was "overwhelming" evidence of defendant's *identity* as the shooter. However, this is beside the point. An imperfect self-defense theory *presumes* that defendant was the shooter; it turns on *why* he shot.

instructions adversely to defendant under other properly given instructions.’ [Citations.]”  
(*People v. Lancaster* (2007) 41 Cal.4th 50, 85.)

In connection with both counts 1 and 2, the jury found a gang enhancement true. As it was instructed, this enhancement requires, among other things, that the defendant commit the charged crime “with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” (Pen. Code, § 186.22, subd. (b)(1).) If defendant genuinely believed — reasonably or unreasonably — that Montoya was under attack and was not the aggressor, then he could not possibly have intended to assist any criminal conduct. Conversely, if he *did* intend to assist in criminal conduct, then he necessarily knew that he was not privileged to defend Montoya.

Defendant acknowledges that the state law “reasonably probable” standard of harmless error applies. He argues, however, that this is illogical and that the federal “beyond a reasonable doubt” standard should apply. We are bound by controlling California Supreme Court precedent to reject this contention. We note, however, that even if defendant were correct, we would still find that the error was harmless beyond a reasonable doubt, again because the jury found the gang enhancement true and hence found that defendant had the intent to assist in criminal conduct.

### III

#### CONSECUTIVE SENTENCING ON COUNT 3

#### (UNLAWFUL POSSESSION OF A FIREARM)

Defendant contends that the trial court erred by failing to state reasons for running the sentence on count 3 (unlawful possession of a firearm) consecutively, rather than concurrently. Indeed, he argues, the trial court may not have even realized that it had discretion to run the sentence concurrently. If and to the extent that defense counsel forfeited this contention by failing to raise it below, defendant asserts ineffective assistance.

The People “concede[] that the case should be remanded to the trial court . . . to exercise its discretion and determine whether appellant’s sentence on count 3 should be consecutive or concurrent.”

There is a certain “Alice in Wonderland” quality to even discussing whether a term should be concurrent or consecutive to an aggregate term that is already 162 years to life. Nevertheless, we accept the People’s concession. We will reverse the judgment, solely on this point, and remand.

### IV

#### DISPOSITION

The judgment is reversed, solely with respect to whether the sentence on count 3 should be concurrent or consecutive. The matter is remanded to the trial court with directions to decide this question in the exercise of its discretion, to state reasons for its

decision, and to resentence defendant accordingly. In all other respects, the judgment is affirmed.

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RICHLI  
J.

We concur:

RAMIREZ  
P.J.

MILLER  
J.