Filed 12/27/12 P. v. Chinchilla CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BYRON CHRISTOPHER CHINCHILLA et al., Defendants and Appellants.	G045111 (Super. Ct. No. 08CF3485) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant, Byron Christopher Chinchilla.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant, Jorge David Sotelo.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

Byron Christopher Chinchilla and Jorge David Sotelo appeal from judgments after a jury convicted them of four counts of attempted murder, shooting at an occupied motor vehicle, four counts of assault with a semiautomatic firearm, second degree robbery, street terrorism, being an active participant in a criminal street gang and having a concealed firearm in the vehicle, and receiving stolen property, and found true street terrorism and firearm enhancements. Chinchilla argues: (1) insufficient evidence supports his conviction for receiving stolen property; (2) the natural and probable consequence jury instruction was erroneous; and (3) there were sentencing errors. Sotelo contends: (1) insufficient evidence supports his convictions for premeditated and deliberate attempted murder; (2) the trial court erred in failing to instruct the jury on imperfect self-defense and his defense counsel was ineffective for failing to request the instruction; and (3) there were sentencing errors. They join in each other's argument to the extent they accrue to their benefit. As we explain below, we agree with Sotelo's jury instruction claim but conclude he was not prejudiced. We also agree with their sentencing claims. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Angel Huitron Novoa (Angel), Efrain Novoa Huitron (Efrain), Michael Ponce, and Jonathan De La Torre arrived at a house party in Efrain's red Dodge Charger. Their friend, Jose Gonzales, and three others arrived in a gray Honda Accord. After the police ended the party, the men stood in the street deciding what to do next. Chinchilla and Sotelo approached the men. Chinchilla punched Gonzales and demanded his cellular telephone. Gonzales refused. When Angel stepped forward to intervene, Sotelo pulled a black semi-automatic handgun from his waistband and chambered a round. Sotelo ordered the victims to "'get back[,]'" which they did. While Sotelo held the gun on the victims, Chinchilla searched all the victims' pockets. Chinchilla manhandled the victims and forced Angel's keychain from his pocket.

Chinchilla grabbed De La Torre's baseball cap from his head and put it on. As Sotelo and Chinchilla left, Sotelo said, "You bitches just got smacked up" by the "Playboy[s]."

As Chinchilla and Sotelo walked away, Angel, Efrain, Ponce, and De La Torre got into Efrain's car and followed them because they did not want them to get away. Efrain remained about 65 feet behind them while driving about five to 10 miles per hour. Sotelo turned around and fired four shots at Efrain's car. Efrain made a U-turn and drove back to the area of the party because he knew there was a police officer nearby.

Officer Sergio Gutierrez heard the four gun shots. Moments later, Gutierrez saw the victims pull up in their car, which had bullet holes in it. There was a bullet hole above the driver's side windshield and in the tire. The victims gave Gutierrez descriptions and the location of their attackers. Gutierrez went to the location and with other officers stopped a blue Toyota Camry. Gutierrez saw a gun, later determined to have been stolen, fall from the rear passenger door where Chinchilla was sitting. Chinchilla was wearing De La Torre's baseball hat.

When Gutierrez told Chinchilla he had been implicated in a crime, Chinchilla responded he "didn't know what [Gutierrez] was talking about." Gutierrez asked Chinchilla how he obtained the baseball hat, and Chinchilla responded, "he couldn't remember." When Gutierrez told Chinchilla he saw him drop the gun from the car, Chinchilla said, "he didn't know what [Gutierrez] was talking about." Forensic analysis revealed Sotelo but not Chinchilla had gunshot residue on his hands. The four bullet casings recovered from the scene matched the gun Sotelo fired.

A second amended information charged Chinchilla and Sotelo with the following offenses: (1) four counts of willful premeditated and deliberate attempted murder (Pen. Code, §§ 664, subd. (a), 187, subd. (a))[1] (count 1-Efrain H.,

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

count 2-Angel H., count 3-Michael P., and count 4-Jonathan D.); (2) shooting at an occupied motor vehicle (§ 246) (count 5); (3) four counts of assault with a semiautomatic firearm (§ 245, subd. (b)) (count 6-Efrain H., count 7-Angel H., count 8-Michael P., and count 9-Jonathan D.); (4) two counts of second degree robbery (§§ 211, 212.5, subd. (c)) (count 10-Angel H. & count 11-Jonathan D.); (5) street terrorism (§ 186.22, subd. (a)) (count 12); (6) being an active participant in a criminal street gang and having a concealed firearm in the vehicle (§ 12025, subds. (a)(1), (b)(3)) (count 13); and (7) receiving stolen property (§ 496, subd. (a)) (count 14). The information alleged they committed all but count 12 for the benefit of a criminal street gang (§ 186.22, subd. (b)). The information alleged Chinchilla was a gang member who vicariously used and discharged a firearm as to counts 1, 2, 3, 4, 10, and 11 (§§ 12022.53, subds. (b), (c) & (e)(1)). The information alleged Sotelo personally discharged a firearm as to counts 1, 2, 3, 4, 10, and 11 (§ 12022.53, subd. (c)), and personally used a firearm as to counts 5, 6, 7, 8, and 9 (§ 12022.5, subd. (a)).

At trial, the prosecutor offered the testimony of gang expert, Clinton Achziger. After detailing his background, training, and experience, Achziger testified concerning the culture and habits of traditional, turf-oriented Hispanic criminal street gangs, including the concept of respect within gangs, the importance of guns, and committing violent acts to instill fear and intimidate.[2] As relevant here, Achziger stated that if a gang member gets into a car with a gun, the gang member will let the other gang members in the car know he is armed so anyone can access the gun. He said these guns are obtained on the "black market" or by theft. Achziger testified that at the time of the offenses, Playboys was an ongoing organization with more than three members. He described its allies and rivals, its common signs or symbols, its colors, and its turf. He

[2] Because neither Chinchilla nor Sotelo dispute the sufficiency of the evidence as to the gang charges, we provide only a brief summary of the gang evidence.

opined its primary activities were robbery and firearm violations. He also testified concerning the statutorily required predicate offenses. Based on background investigation and review of the case, Achziger opined Chinchilla and Sotelo were active participants in Playboys criminal street gang at the time of the offenses. Based on hypothetical questions mirroring the facts of the case, Achziger opined the offenses were committed for the benefit of, in association with, or at the direction of a criminal street gang. He also opined the offenses furthered, promoted, or assisted a criminal street gang.

An independent witness testified Efrain was driving slowly. The driver was following the men who were walking.

Sotelo testified to the following facts. Sotelo, Chinchilla, and two friends went to Santa Ana for a party. He brought a loaded gun because he was unfamiliar with the area. When they left the party, they were "hit up" by a group of angry men. Sotelo's group told the men they were from the "L.A. Playboys." One of the men tried to grab or touch Chinchilla so Sotelo pulled out his gun and the men backed away. Sotelo was in control of the situation but he did not rob anyone. Chinchilla did not hit anyone, reach into anyone's pockets, or try to take a cell phone, although Chinchilla did take the baseball hat. Sotelo said "Playboys" as they left. As Sotelo and Chinchilla first walked and then ran away, Sotelo noticed the group following them in a car pretty fast, about 20 to 25 miles per hour. Sotelo was scared and he turned and fired four rounds at the car. Sotelo testified that although he shot at the "[car full] of people," he was not aiming at the occupants, but he was aiming at the car. Sotelo later testified he was scared the men were trying to kill him so when he fired his gun, he intended to kill the men. He admitted to joining the Playboys when he was 14 years old. He denied telling any of his friends he had a gun.

With the exception of count 10, the jury convicted Chinchilla and Sotelo of all counts and found true all the enhancements. Both Chinchilla and Sotelo represented by new defense counsel filed new trial motions.

As relevant here, in his new trial motion Sotelo argued the trial court erred in failing to instruct the jury on imperfect self-defense along with the self-defense instruction it did give the jury and defense counsel was ineffective for failing to request it. After considering the moving papers and hearing counsel's argument, the trial court denied Chinchilla's and Sotelo's new trial motions. The court explained there was an off the record discussion concerning jury instructions and in what appeared to the court to be an afterthought, Sotelo's trial counsel requested a self-defense instruction. The court stated the prosecutor smirked and agreed to the instruction. The court admitted it was erroneous and the court stated it should not have instructed the jury on self-defense. The court reasoned therefore the imperfect self-defense instruction was similarly inappropriate. The court explained it was not supported by the evidence and it did not find compelling the argument that because the court gave the self-defense instruction it should have also instructed on imperfect self-defense. The court denied the new trial motions.

The trial court sentenced Chinchilla to prison for four consecutive life terms with the possibility of parole plus 80 years as follows: on counts 1 through 4-life in prison with the possibility of parole plus 10 years on the street terrorism and vicarious use of a firearm enhancements; count 5-imposed and stayed; counts 6 through 9-six years plus 10 years on the street terrorism enhancements, which the court stayed (§ 654); count 11-three years plus 10 years on the street terrorism and vicarious use of a firearm enhancements, which the court ran concurrently to count 1; and counts 12 through 14-sentences imposed concurrently with count 1.

The trial court sentenced Sotelo to prison for four consecutive life terms with the possibility of parole plus 120 years as follows: on counts 1 through 4-life in prison with the possibility of parole plus 10 years on the street terrorism enhancements and 20 years on the personal discharge of a firearm enhancements; count 5-imposed and

stayed; counts 6 through 9-six years plus 10 years on the street terrorism enhancements and four years on the personal use of a firearm enhancements, which the court stayed (§ 654); count 11-three years plus 10 years on the street terrorism and personal discharge of a firearm enhancements, which the court run concurrently to count 1; and counts 12 through 14-sentences imposed to run concurrently with count 1.

DISCUSSION

I. Sufficiency of the Evidence

A. Willful, Deliberate, and Premeditated Attempted Murder

Sotelo argues there was insufficient evidence of premeditation and deliberation. We disagree.

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

Attempted murder "requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time. '"'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'"' [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*).)

In *People v. Anderson* (1968) 70 Cal.2d 15, the California Supreme Court formulated a framework to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation. Three types of evidence are typically relied upon to support an inference of premeditation and deliberation: "(1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing--what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim [and] . . . ; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2)." (*Id.* at pp. 26-27.) Courts will sustain findings of premeditation and deliberation where there is evidence of all three types. Otherwise, courts require "at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*Id.* at p. 27.)

Here there was sufficient evidence for the jury to reasonably conclude Sotelo acted with premeditation and deliberation when he fired the gun four times at the victims in the car. We agree with Sotelo that his testimony recalling his intent to kill the

victims is insufficient by itself to prove he acted with premeditation and deliberation. But there is other evidence from which the jury could reasonably conclude Sotelo acted with the requisite preexisting thought and reflection. Sotelo also testified he took a loaded gun with him to the party because he was unfamiliar with the area. When Chinchilla attempted to rob Gonzales and Angel intervened, Sotelo brandished his firearm. This evidence negates Sotelo's claim he carried the gun for protection and evinces he planned to use the gun to carry out a criminal purpose. (*People v. Romero* (2008) 44 Cal.4th 386, 401 [defendant's bringing of weapon to crime location demonstrates planning activity].) Although Sotelo shot at them later, premeditation and deliberation can occur in a brief interval: "'"[t]he test is not time, but reflection,"'" as "'"'[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.'"'" (*People v. Osband* (1996) 13 Cal.4th 622, 697.)

There was also evidence from which the jury could reasonably conclude Sotelo had a motive to kill the victims. Achziger testified that attempting to kill a car full of people enhances a gang member's status because it demonstrates he is "'putting in work for the gang.'" He also said it enhances the gang's status in the community because citizens grow to fear the gang because the gang members will murder people for no apparent reason. There was no dispute Sotelo was an active member of the Playboys, and Sotelo and Chinchilla claimed gang membership before they fled. This evidence supports the finding Sotelo's motive for shooting at the four victims was to enhance his and his gang's status by instilling fear in the community. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412-413 [premeditation and deliberation found where motive was gang related].)

The evidence demonstrated Sotelo fired the weapon four times, one bullet for each member of the car. One of the bullets struck just above the driver's side windshield. Although Sotelo claimed Efrain was following them "pretty fast," the jury

could reasonably conclude Sotelo had a preconceived design to kill each of the members of the car when he fired four times at the car. (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 588 [manner of killing demonstrated by three quick shots at relatively close range].)

Finally, assuming a reasonable jury could have found the evidence did not support premeditation and deliberation and returned a verdict of second degree murder, defendants' convictions must stand because, as we have stated, "[i]f the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.) Thus, the record includes evidence supporting all three *Anderson* factors.

Sotelo's reliance on cases such as *People v. Chance* (2006) 141 Cal.App.4th 618, which he characterizes as having evidence of premeditation that appears stronger than here, and *People v. Munoz* (1984) 157 Cal.App.3d 999, where the evidence of premeditation appears weaker, is of no avail. In addition to the fact the California Supreme Court granted review in *Chance* and it is no longer good law,[3] the question we must resolve is whether the evidence in *this* case was sufficient to convince a rational trier of fact beyond a reasonable doubt that the attempted murders were premeditated and deliberate. Based on the evidence outlined above, we conclude it was. Chinchilla joins in this argument, but as he provides no additional analysis specific to his mens rea, we reject his claim.

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[3] *People v. Chance*, *supra*, 141 Cal.App.4th 618, review granted Nov. 1, 2006, S145458.

B. Receiving Stolen Property

Chinchilla contends insufficient evidence supports his conviction for count 14, receiving stolen property, because there was no evidence he knew the gun was stolen. Not so.

"'[P]roof of the crime of receiving stolen property requires establishing that the property in question was stolen, that the defendant was in possession of it, and that the defendant knew the property to be stolen.'" (*People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. omitted; see § 496, subd. (a).) "Knowledge that property was stolen can seldom be proved by direct evidence and resort must often be made to circumstantial evidence." (*People v. Vann* (1974) 12 Cal.3d 220, 224.) "Although guilty knowledge may be proven by circumstantial evidence [citations][,] when challenged on appeal those circumstances must be shown to constitute substantial evidence." (*People v. Kunkin* (1973) 9 Cal.3d 245, 254.) "In routine circumstances, the knowledge element is inferred from the defendant's failure to explain how he came to possess a stolen item or his offer of an unsatisfactory explanation or from suspicious circumstances attendant upon his possession of the item." (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1019-1020 [affirming conviction based on no explanation from defendant and recovery of gun with other stolen property].)

Here, the record includes sufficient evidence from which the jury could reasonably conclude Chinchilla knew the gun was stolen. The evidence demonstrated that when Gutierrez discovered Chinchilla and his confederates, Chinchilla opened the car's rear passenger door, the stolen gun fell to the ground. When Gutierrez asked Chinchilla about the gun, Chinchilla replied he "didn't know what [he] was talking about." Achziger testified gang members purchase guns on the "black market" or steal them and gang members know which gang member is armed. Finally, Chinchilla and Sotelo had just finished robbing the victims—Chinchilla was wearing De La Torre's baseball cap. Based on testimony concerning gang culture, and Chinchilla's suspicious

behavior and propensity to relieve people of their property, we conclude the record includes sufficient evidence from which the jury could conclude Chinchilla knew the gun was stolen.

Chinchilla's reliance on *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*), is misplaced. *Sifuentes* was a case about constructive possession, and not knowledge the property was stolen. Thus, there was sufficient evidence supporting Chinchilla's conviction for receiving stolen property. Sotelo joins in this argument, but as he is situated in a different factual scenario and provides no additional argument, we reject his claim.

II. Jury Instructions

A. Natural and Probable Consequences

Chinchilla asserts the trial court erred in not instructing the jury that it had to find premeditated attempted murder was a natural and probable consequence of robbery. After briefing was complete, we invited the parties to file supplemental letter briefing on the effect of *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*). The Attorney General contends that based on *Favor*, there was no instructional error. Chinchilla concedes *Favor* disapproved of *People v. Hart* (2009) 176 Cal.App.4th 662, the case he relied on to argue there was instructional error.

In *Favor*, the California Supreme Court held the trial court is not required to instruct the jury a premeditated attempt to murder must have been a natural and probable consequence of the target offense of robbery. The majority reasoned section 664, subdivision (a), "'requires only that the attempted murder itself was willful, deliberate, and premeditated'" and "it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.'" (*Favor, supra,* 54 Cal.4th at p. 879.) We are bound by *Favor*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) We conclude the trial court did not err by failing to

instruct the jury to determine whether attempted premeditated murder was a natural and probable consequence of robbery.

B. Imperfect Self-Defense

Sotelo argues the trial court erred in not instructing the jury on imperfect self-defense because there was substantial evidence supporting the defense and because the trial court instructed the jury on self-defense it was required to instruct the jury on imperfect self-defense. We agree but conclude the error was harmless.

In *People v. Flannel* (1979) 25 Cal.3d 668 (*Flannel*), the court explained the difference between murder and manslaughter. Murder is defined as the unlawful killing of a human being with malice aforethought, and manslaughter is defined as the unlawful killing of a human being without malice aforethought. (See §§ 187, subd. (a), 192.) The court stated the honest belief of imminent peril negates malice in a case of self-defense, and the reasonableness of the belief goes to the justification for the killing. (*Flannel*, *supra*, 25 Cal.3d at p. 679.) The court further explained: "An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." (*Id.* at p. 674, italics omitted.) Regarding the duty to give requested instructions, the court held the trial court is required to instruct if the defendant presents substantial evidence to support a theory of defense, i.e., enough to deserve consideration by the jury. "If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect." (*Id*. at p. 684.)

In *In re Christian S.* (1994) 7 Cal.4th 768, 783 (*Christian S.*), the court held statutory changes in the law had not affected the vitality of the *Flannel* defense. The court, however, provided the following caveat: "We caution, however, that the doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief

in the need for self-defense. We also emphasize what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. '"[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An *imminent peril is one that, from appearances, must be instantly dealt with*.' . . . [¶] This definition of imminence reflects the great value our society places on human life." [Citation.] Put simply, the trier of fact must find an *actual* fear of an *imminen*t harm. Without this finding, imperfect self-defense is no defense. The court concluded: "Finally, we reiterate that, just as with . . . self-defense or any defense, "[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense*.' [Citation.]" (*Ibid*.)

There is disagreement as to whether a trial court should instruct the jury on imperfect self-defense when the court instructs on self-defense. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1231 [just because the court permitted instructions on self-defense does not mean that substantial evidence supported the giving of an imperfect self-defense instruction]; *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1270, 1275 [same] (*Rodriguez*); but see *People v. Ceja* (1994) 26 Cal.App.4th 78, 88-91 (conc. opn. of Johnson, J.) & *People v. De Leon* (1992) 10 Cal.App.4th 815, 826 (conc. opn. of Johnson, J.).) In *Christian S., supra,* 7 Cal.4th at page 783, the California Supreme Court stated: "Finally, we reiterate that, just as with perfect self-defense or any defense, '[a] trial court need give a requested instruction concerning a defense *only if there is substantial evidence to support the defense*.' [Citation.]" We agree. As the court reasoned in *Rodriguez, supra,* 53 Cal.App.4th at page 1275, imperfect self-defense is fact specific. The court explained an instruction on imperfect self-defense would be inappropriate where a defendant's statements, if believed, could only lead to an acquittal

based on justifiable homicide and the prosecution's evidence would not support an actual belief in the need for self-defense. (*Ibid*.)

Although unnecessary for resolution of this case, we disagree with the trial court's ex post facto determination at the new trial motion hearing that it erred in instructing the jury on self-defense. Sotelo's defense was self-defense. At trial, Sotelo testified he brandished his gun after one of the men attacked Chinchilla, and he denied either he or Chinchilla robbed them. He admitted Chinchilla took the baseball hat as they left. He also testified that when he and Chinchilla walked away, the car was coming at them pretty fast and he was scared and fired the gun. Needless to say, a car could be a deadly weapon. Thus, based on this evidence a jury could have concluded Sotelo fired the gun at the car to stop the driver who Sotelo thought was going to run them down. The jury could have concluded Sotelo actually and reasonably believed in the necessity of defending himself from imminent danger of death or great bodily injury. Although at the hearing on the new trial motion the court indicated this story was unbelievable, that was for the jury to decide, not the trial court.

Based on this evidence, the jury could have also concluded Sotelo actually believed he had to defend himself from imminent danger of death or great bodily injury but that his belief was unreasonable. There was evidence from which the jury could conclude he believed he had to defend himself but his belief that firing a gun at a car that was slowly following him was unreasonable. Thus, based on the record before us, we conclude the trial court properly instructed the jury on self-defense and erred in failing to instruct the jury on imperfect self-defense.

Relying on *Christian S., supra,* 7 Cal.4th at page 773, footnote 1, the Attorney General argues Sotelo could not assert imperfect self-defense as a defense because he committed a robbery. Whether Sotelo and Chinchilla robbed the alleged victims was in dispute. Sotelo denied they robbed the victims and claimed he brandished the gun when one of the victims attacked Chinchilla. Thus, whether the victims were

justified in pursuing them was a question for the jury to decide and it could only do so if the trial court instructed the jury on self-defense and imperfect self-defense. We must now determine whether Sotelo was prejudiced by this error. We conclude he was not.

Any error in failing to instruct on imperfect self-defense is subject to the harmless error test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Blakeley* (2000) 23 Cal.4th 82, 93.) Under this test, we may reverse a conviction for failing to instruct only if after an examination of the record it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred. (*Ibid*.) We conclude it was not reasonably probable the result would have been different had the trial court instructed the jury on imperfect self-defense.

The jury clearly rejected Sotelo's claim of self-defense. The jury concluded Sotelo and Chinchilla robbed and assaulted the victims. Additionally, the jury concluded that when Sotelo fired the gun at the car, he did so with premeditation and deliberation. This finding is inconsistent with a finding Sotelo believed, reasonably or unreasonably, he needed to defend himself from the car. Therefore, the factual question posed by the omitted instruction was necessarily resolved adversely to Sotelo under other, properly given instructions. (*People v. Edwards* (1985) 39 Cal.3d 107, 116.)

Alternatively Sotelo claims his defense counsel was ineffective for failing to request an imperfect self-defense instruction. If defendant fails to show that he was prejudiced by counsel's performance, we may reject his ineffective assistance claim without determining whether counsel's performance was inadequate. (*People v. Sanchez* (1995) 12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) As we explain above, Sotelo was not prejudiced by the trial court's failure to instruct the jury on imperfect self-defense.

Thus, although the trial court erred in failing to instruct the jury on imperfect self-defense, we conclude Sotelo was not prejudiced. Chinchilla joins in this argument, but again as he provides no further argument, we reject his claim.

III. Sentencing

A. Section 186.22, subdivision (a)

Relying on *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*), Sotelo and Chinchilla argue their sentences on count 12, street terrorism, must be stayed because they cannot be punished for committing street terrorism and the underlying felonies in the case used to establish the felonious criminal conduct element of street terrorism. The Attorney General agrees that based on *Mesa*, where the California Supreme Court held that section 654 precludes separate punishment for both street terrorism and the underlying felony used to prove the "'felonious criminal conduct'" element of that offense (*id*. at pp. 197-198), their sentences must be stayed. Thus, on remand the trial court must stay the sentences on count 12 for both Sotelo and Chinchilla.

B. Section 186.22, subdivision (b)(1)

1. Chinchilla

With respect to counts 1 through 4 and 11, Chinchilla contends the trial court erred in imposing 10-year enhancements for vicarious use of a firearm and 10-year enhancements for street terrorism. The Attorney General again concedes the error.

Section 12022.53, subdivision (e)(2), provides: "An enhancement for participation in a criminal street gang" pursuant to section 186.22 "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." (Italics added.) We accept the Attorney General's concession section 186.22, subdivision (b), does not apply because Chinchilla did not personally use a firearm during the commission of the attempted murders or robbery. (*People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282; accord *People v. Gonzalez* (2010) 180 Cal.App.4th 1420; see also *People v. Brookfield* (2009) 47 Cal.4th 583, 588.)

As to counts 6 through 9, Chinchilla asserts the trial court erred in imposing 10-year terms on the street terrorism enhancements. The Attorney General concedes the error.

Section 186.22, subdivision (b)(1), provides enhanced penalties for gang-related offenses as follows: "(A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of [s]ection 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of [s]ection 667.5, the person shall be punished by an additional term of 10 years."

Section 1192.7, subdivision (c)(31), lists assault with a semiautomatic firearm as a serious felony (§ 245). Section 667.5, subdivision (c), does not list section 245 as a violent felony, although it does list other firearm-related offenses (§ 667.5, subd. (c)(8)). We accept the Attorney General's concession the trial court should have imposed five-year enhancements pursuant to section 186.22, subdivision (b)(1)(B), on counts 6, 7, 8, and 9. We remand the matters for resentencing. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1256 [remand for resentencing proper where unauthorized sentence].)

2. Sotelo

Relying on *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), Sotelo contends the trial court erred in imposing 10-year enhancements on counts 1 through 4 pursuant to section 186.22, subdivision (b)(1)(C), because murder is punishable by life in prison. The Attorney General concedes the error.

In *Lopez, supra,* 34 Cal.4th at page 1004, the California Supreme Court held that "first degree murder is a violent felony that is punishable by imprisonment in the state prison for life and therefore is not subject to a 10-year enhancement under

section 186.22[, subdivision] (b)(1)(C)." Instead, the court found the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5), applies. (*Lopez, supra,* 34 Cal.4th at pp. 1006-1007.)

Here, the trial court sentenced Sotelo to life in prison with the possibility of parole on counts 1 through 4. Therefore, on remand the trial court must strike 10-year street terrorism enhancements on counts 1, 2, 3, and 4.

DISPOSITION

The judgments are reversed in part, affirmed in part, and remanded for resentencing consistent with this opinion.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.