Filed 10/2/19 P. v. Guardado CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MANUEL GUARDADO, Defendant and Appellant.	B284144 (Los Angeles County Super. Ct. No. VA128458

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger T. Ito, Judge. Reversed in part, affirmed in part and remanded in part.

Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

In December 2012, a man in a white Toyota Camry fired three gunshots at a bicyclist in Norwalk, who suffered a serious wound to his abdomen. Approximately three weeks later, in January 2013, a man in a white Toyota Camry fired two or three gunshots at three men riding in a pickup truck on a busy street in Norwalk. One shot struck the truck, and another struck a nearby car occupied by a woman and her toddler. No one was hurt in that incident.

Eighteen-year-old defendant Manuel Guardado, a Norwalk resident whose mother owned a white Toyota Camry, was charged with the attempted premeditated murders of the bicyclist and the three men in the pickup truck. He was also charged with other related crimes and enhancements, including personal use of a firearm and gang allegations.

At defendant's trial, the prosecutor argued that defendant intended to create a kill zone when he shot at the pickup truck, because it was foreseeable that all three men would be struck by his fire. The court instructed the jury on the kill zone theory of concurrent intent. It also instructed on defendant's theory of self-defense, though not in the exact way he requested. The jury found defendant guilty of all charges and allegations pertaining to the pickup truck shooting, but acquitted him of the bicycle shooting. The court sentenced defendant to a total term of 140 years to life; defense counsel did not present any evidence pertaining to defendant's youth at his sentencing hearing.

Defendant raises several challenges to his convictions and sentence. We agree with his contention that the evidence did not support application of the kill zone theory and accordingly reverse his attempted murder convictions as to two of the men in the pickup truck. *People v. Canizales* (2019) 7 Cal.5th 591, 609

(*Canizales*) held that the kill zone theory is applicable, and the related jury instruction should be given, only in the "relatively few cases" in which "there [is] substantial evidence in the record that, if believed by the jury, would support a reasonable inference that defendant[] intended to kill everyone within the 'kill zone.'" (*Id.* at pp. 608, 609.) This case is not one of those rare cases, and instructing the jury on the kill zone theory was not harmless beyond a reasonable doubt. Because we conclude the kill zone instruction was improperly given here, we do not address defendant's related contentions about the adequacy of the instruction or the sufficiency of the evidence as to his direct intent to kill two of the three victims.

We reject defendant's contention that the evidence did not support the jury's finding that he acted with premeditation and deliberation in shooting at the truck passenger he directly targeted. We also conclude that the court properly instructed on self-defense, and that defendant was not prejudiced by any error in the court's self-defense instructions. We further conclude that defendant was not denied the opportunity to make a record for a youth offender parole hearing; we are not persuaded that his counsel was ineffective in failing to make such a record.

We accept defendant's contentions, also accepted by respondent, that the matter must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements and to correct errors in the abstract of judgment. We also grant defendant's unopposed request to independently review the sealed *Pitchess*[1] transcript. Having reviewed it, we find no error.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

PROCEDURAL HISTORY

An information filed June 27, 2014 charged defendant with seven counts relating to two separate shooting incidents. Counts one through five related to the January 2013 incident involving the pickup truck. Counts one, two, and three alleged that defendant attempted to murder the truck's occupants, Raymond S. (count 1), Christopher A. (count 2), and Ruben C. (count 3) (Pen. Code, §§ 187, subd. (a), 664),[2] and did so willfully, deliberately, and with premeditation (§ 664, subd. (a)). Counts four and five alleged that defendant shot at an occupied motor vehicle (§ 246). The information further alleged that defendant personally and intentionally used and discharged a firearm in connection with counts one through five (§ 12022.53, subds. (b) & (c)).

Counts seven and eight related to the December 2012 incident involving the bicyclist. Count seven alleged that defendant attempted to murder the bicyclist (§§ 187, subd. (a), 664) and did so willfully, deliberately, and with premeditation (§ 664, subd. (a)). Count eight alleged that defendant shot from a motor vehicle at the bicyclist, who was not in a motor vehicle at the time (§ 26100, subd. (c)). The information alleged as to both counts seven and eight that defendant personally and intentionally used and discharged a firearm, causing great bodily injury to the bicyclist (§ 12022.53, subds. (b), (c), (d)). The information alleged that all of the counts were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subds.

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

(b)(1)(C), (b)(4), (b)(5)).

A jury acquitted defendant of counts seven and eight. It found him guilty as charged in counts one through five, however, and found true the gang and firearm enhancements. The court sentenced defendant to a total sentence of 140 years to life. On counts one, two, and three, the court imposed consecutive terms of 15 years to life for the attempted murder and gang allegation, plus an additional 20 years on each count for the firearm enhancement. The court also imposed a sentence of 15 years to life on count five, plus an additional 20 years for the firearm enhancement on that count. The court stayed sentence on count four pursuant to section 654.[3]

Defendant timely appealed.

FACTUAL BACKGROUND[4]

I. Prosecution Evidence

A. Gang Affiliations and Rivalries

Los Angeles County Sheriff's Department (LASD) detective Ivania Farias testified as the prosecution's gang expert. Farias was assigned to the Norwalk gang unit from 2009 to 2016. During that time, she became familiar with area gangs, including rivals Carmelas Varrio Locos (Carmelas) and Varrio La Mirada (VLM) Farias testified that 2012 to 2013 was "a very busy time"

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[3] The court did not impose a sentence on count four during the sentencing hearing. The abstract of judgment reflects this, indicating only that the sentence on count four is stayed. However, the minute order documenting the sentencing hearing states, "Court selects the low term of 3 years as to Count 04." Respondent adopts the minute order's characterization in its brief.

[4] We omit discussion of evidence not relevant to this appeal, most notably that concerning the shooting of the bicyclist.

in terms of incidents involving Norwalk gangs.

Farias opined that defendant was a member of Carmelas. Farias opined that pickup truck shooting victim Raymond was a member of a "tagging crew" affiliated with VLM. Raymond denied any gang or tagging crew association during trial, but confirmed his association with the tagging crew during an interview with other detectives. Farias testified that Christopher and Ruben, the other victims of the pickup truck shooting, were not associated with VLM or the related tagging crew. Ruben also denied being a member of any criminal street gang. In a search warrant affidavit, however, Farias asserted that Christopher and Ruben were admitted VLM members and tagging crew associates.

B. The Garage Shooting

In September 2012, a Carmelas member fired shots at Raymond and his younger brothers while they were in their neighbor's garage. The shooter initially shot on foot, and then continued shooting as he fled the scene as a passenger in a maroon or burgundy Camaro.

Shortly after the garage shooting, Raymond gave an LASD deputy a description of the shooter and the burgundy Camaro. Raymond did not say anything about the driver of the Camaro at that time. In a subsequent interview after the January 2013 pickup truck shooting, Raymond told detectives he was "110% sure" that the man who had driven the Camaro during the September 2012 garage shooting was the same person who shot at the pickup truck—defendant. Raymond recognized defendant because they attended continuation high school together, and he believed defendant had a "personal vendetta" against him.

C. The Shooting of Defendant

The LASD investigated a shooting that occurred in Norwalk on or about October 18, 2012. Deputy David Contreras responded to Norwalk Hospital, where he found defendant with a gunshot wound to his back "right flank area." Defendant told Contreras that he had been shot in front of his house but otherwise refused to cooperate with the investigation. Defendant acted "disrespectful" and "extremely upset" with Contreras.

D. The Pickup Truck Shooting

1. Pickup Truck Passengers

Raymond testified that he, Christopher, Ruben, and Ruben's young son, Jeremy, were riding in Christopher's pickup truck on the morning of January 16, 2013. Christopher was driving, Ruben was seated in the front passenger seat, Raymond was seated behind him, and Jeremy was in a car seat behind Christopher.

After they left a t-shirt store in Carmelas territory, Christopher made a U-turn to head east on Rosecrans. In a partially (and surreptitiously) recorded interview that was played for the jury and admitted into evidence, Raymond told LASD detectives that the pickup truck passed a white Camry driven by defendant, whom he recognized from continuation school and the garage shooting. Raymond and defendant made eye contact.

Shortly after passing defendant, Christopher stopped the pickup truck at a traffic light at the intersection of Rosecrans and Carmenita. While the truck was stopped, Raymond and Ruben heard gunshots. Raymond ducked down to cover his head, and Ruben turned toward the back of the truck and grabbed Jeremy toward him. A bullet struck the back of the truck near where Jeremy was seated.

Christopher drove away as the shots were fired, clipping a

few cars. He drove over the center divider, into opposing traffic, and then to Ruben's house nearby.

2. Other Victims and Witnesses

Christine M. and her two-year-old daughter were driving eastbound on Rosecrans. They were stopped at the intersection of Rosecrans and Carmenita when Christine heard "multiple pops." Unsure what had happened, Christine pulled into a nearby gas station, where she and her daughter got out of her SUV. She observed a bullet hole in the rear window and damage to the backseat. Neither Christine nor her daughter was struck or injured, but the daughter had "shavings from, like the top of the car maybe" in her hair.

Robert Ely testified that he was stopped near the intersection of Rosecrans and Carmenita when he heard three gunshots. He also saw three puffs of smoke coming from a car about three or four cars ahead of him, and saw a pickup truck drive over the median and into opposing traffic. Renato Cabugao testified that he saw a white Camry stopped outside his workplace at the corner of Rosecrans and Marilla, about one block west of Rosecrans and Carmenita. Cabugao saw the driver of the Camry open the door, stand up, and draw a gun from his hip. The driver fired the gun three times up Rosecrans toward Carmenita before driving away down Marilla. Cabugao told an LASD deputy that the last three digits of the Camry's license plate were 950. Caroline Pacheco was also at Cabugao's workplace at the time of the shooting. She heard "at least two to three gunshots" and ran outside to see if anyone had been hurt. She saw a light-colored Camry with a nine and a zero on its license plate "screeching at a high speed down Marilla."

E. Investigation of the Pickup Truck Shooting

LASD deputy Dennis Pogodayev responded to the scene of the pickup truck shooting. He found two casings on the ground near Rosecrans and Marilla, and a bullet "about two businesses east." Detective Farias used "law enforcement resources" to learn that a white Camry with a license plate containing the digits 950 was registered to defendant's mother. Farias determined that defendant was "going to be our suspect" and placed his photograph in a six-pack photo array.

LASD deputy Silvia Moreno went to Ruben's house, where she observed a bullet hole in the pickup truck; she had to remove Jeremy's car seat to take a picture of where the bullet was lodged. Moreno separately interviewed Raymond, Christopher, and Ruben about the incident. She testified that Raymond told her that the same person who had driven the "purple car" in the garage shooting shot at them from a Toyota Camry.

During his interview, Raymond identified a photo of the white Camry, selected defendant's photo from a six-pack photo array, and said he was "110%" sure that defendant shot at the pickup truck and drove the Camaro during the garage shooting. He refused to circle defendant's photo, however, because he did not want his identification "on paper."[5] Deputy Contreras testified that Ruben also identified defendant's photo as the pickup truck shooter during his interview, though Ruben was only "80% sure" about the identification. Ruben, also a reluctant

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[5] Raymond also was a reluctant witness at trial. He testified that he was not at trial voluntarily, repeatedly testified that he did not remember various details about the shootings or his interview, and denied making numerous statements captured on the interview recording, which was played for the jury after his testimony. (See *People v. Ledesma* (2006) 39 Cal.4th 641, 711.)

witness, testified at trial that he did not recall making the identification.

On January 18, 2013, the LASD received information that defendant was staying at a Long Beach motel. Deputies responding to the motel found and impounded the white Camry, which was found to have gunshot residue on the "headliner" above the driver's seat. Deputies arrested defendant and another Carmelas member at the motel.

Farias interviewed defendant after his arrest. The recording of the interview was played for the jury and admitted into evidence at trial. Defendant initially told Farias that he was near Lancaster buying marijuana at the time of the pickup truck shooting. After Farias told defendant that his car had been photographed in the area of Rosecrans and Carmenita, defendant said that he was in the area but "took off" when he heard a "commotion" on Rosecrans. Defendant denied involvement in the pickup truck shooting.

While defendant was in jail awaiting trial, he made phone calls to various Carmelas gang members; these calls were recorded, and some of the recordings were played for the jury and admitted into evidence. During one of the calls, defendant complained that "no one wants to do nothing" in the neighborhood now that he is not there; "you hear crickets in the streets now."

II. Defense Evidence

A. Defendant's Testimony

Defendant opened his testimony by admitting that he was a Carmelas member. He also testified that he refused to cooperate with sheriff's deputies when he was shot because "straight up you can get killed" if you "snitch" or cooperate with law enforcement.

Defendant believed a rival gang was responsible for that shooting, which left him with a bullet lodged on a nerve in his back.

After defendant was shot in October 2012, he became "more alert" and "paranoid." He began carrying a nine-millimeter gun with him for protection from a gang war that was ongoing at the time.

On January 16, 2013, defendant took the white Camry to get gas. Even though the gas station on Rosecrans was within Carmelas territory, and he did not expect to see anyone who posed a threat to him, defendant armed himself. While he was driving on Rosecrans, defendant saw a pickup truck containing three rival gang members make a U-turn; he did not see a child in the truck. Defendant recognized Raymond from school but did not know him or the other men "specifically." Nevertheless, all three gang members in the truck "broke their neck" to "mad dog" at him. Even as they drove past him, "their stare kept going." Defendant saw "them reaching for something," which he thought was a weapon they might use against him.

Defendant explained that although he did not know any of the gang members personally, he had previously encountered the pickup truck. At some point in September or October 2012, he was at a marijuana dispensary in Orange County when a man leaning on the back of the pickup truck stared at him. Someone else then jumped out of the pickup truck and pulled a knife on defendant. Defendant was not hurt in that incident, which he thought was perpetrated by a rival gang.

In the wake of the dispensary incident, and the incident in which he was shot, defendant felt the men who had just passed him in the pickup truck had placed his life in danger. Defendant

therefore slowed down, grabbed his nine-millimeter gun from the center console of the Camry, and disengaged the safety. He then fired two of the 15 shots in the weapon, in an effort to scare the rival gang members away.[6] The pickup truck was about three car lengths away from him at the time. Defendant then turned onto Marilla and left the area. He ultimately went to a motel in Long Beach because he feared the men in the truck would return to the neighborhood. Defendant estimated that the whole incident, from when he spotted the pickup truck to when he shot at it, took approximately 15 to 20 seconds.

Defendant conceded that he never actually saw a gun, and that no shots were fired at him. He also admitted that he did not tell Farias that he acted in self-defense and lied to her during his interview, but explained that was because he did not trust her. Defendant further acknowledged that he had reviewed the police reports, jail calls, and Raymond's interview prior to taking the stand.

B. Expert Testimony

Dr. Robert Shomer testified as an expert on eyewitness identification. He opined that a delay in disclosing familiarity with a suspect is a "major danger signal" in the reliability of eyewitness identification.

Martin Flores, a gang expert, testified that anyone from a rival gang can become a potential target during a gang war and members are therefore on high alert. Flores further testified that it is very likely for a gang member to carry a gun when he or she travels into rival territory. If a gang member saw a rival in his or her territory, the gang member would be likely to think the rival

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[6] Defendant testified he "never would have shot" if he had known there was a child in the truck.

was looking for trouble. Even "mad dogging," or giving someone a dirty look, "can be interpreted as a challenge or disrespectful," or a threat.

DISCUSSION

I. Kill Zone

Defendant argues that the trial court erred in instructing the jury on the kill zone theory of liability "because the theory was inapplicable and the instruction provided was fatally flawed." He further argues that the evidence was insufficient to support the jury's findings that he specifically intended to kill Christopher and Ruben (he does not make this challenge as to Raymond). Respondent contends that the jury was properly instructed, that any instructional error was harmless, and that substantial evidence supported the jury's specific intent findings as to Christopher and Ruben.[7]

A. Legal Principles

To prove the crime of attempted murder, the prosecution must prove two things: the defendant had the specific intent to kill the alleged victim and took a direct but ineffectual act toward accomplishing the intended killing. (*Canizales*, *supra*, 7 Cal.5th at p. 602.) The intent requirement is more stringent than that necessary to prove a completed murder. "Murder does not

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[7] After we took this matter under submission, the Supreme Court provided extensive guidance on the proper application of the kill zone theory in *Canizales*, *supra*, 7 Cal.5th 591. We vacated submission of the cause to provide the parties with an opportunity to address *Canizales* in supplemental briefs. Both parties filed supplemental briefs regarding the application of *Canizales* to this case, which we consider in conjunction with their initial arguments on these issues.

require the intent to kill. Implied malice—a conscious disregard for life—suffices." (*People v. Bland* (2002) 28 Cal.4th 313, 327 (*Bland*).) Implied malice is not sufficient to support a conviction of attempted murder, however. As the Supreme Court explained as long ago as 1889, "'[t]he wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder.'" (*People v. Mize* (1889) 80 Cal. 41, 43.) In other words, the defendant must specifically intend to kill each of his or her victims.

In addition, the intent element "must be examined independently as to each alleged attempted murder victim; an intent to kill cannot be 'transferred' from one attempted murder victim to another under the transferred intent doctrine." (*Canizales*, *supra*, 7 Cal.5th at p. 602.) "To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. . . . 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." (*Bland*, *supra*, 28 Cal.4th at p. 328.)

While a defendant's intent to kill may not be transferred among victims, it may exist as to several victims simultaneously. This doctrine of concurrent intent is typically referred to as the kill zone theory. (*Canizales*, *supra*, 7 Cal.5th at p. 603.)

Under the kill zone theory, the nature and scope of an attack directed at a primary or targeted victim "may raise an inference that the defendant '"intended to ensure harm to the primary victim by harming everyone in that victim's vicinity."'" (*Canizales*, *supra*, 7 Cal.5th at p. 602.) The kill zone theory

allows the factfinder to "'infer that, whether or not the defendant succeeded in killing [targeted victim] A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A. 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.'" (*Bland*, *supra*, 28 Cal.4th at p. 330.) The *Bland* court indicated such an inference would be appropriate where a defendant places a bomb on a commercial aircraft on which her target is a passenger, or attacks a group containing his target with "'automatic weapon fire or an explosive device devastating enough to kill everyone in the group.'" (*Id.* at pp. 329-330.)

In *Canizales*, the Supreme Court further clarified—and limited— the circumstances under which a prosecutor may use the kill zone theory. It held that the kill zone theory "may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target[;] and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm." (*Canizales*, *supra*, 7 Cal.5th at p. 607.) Under this standard, the kill zone theory is

not applicable where "'the defendant merely subjected persons near the primary target to lethal risk'"; conscious disregard of persons proximate to the intended target is insufficient to support application of the theory. (*Ibid.*) In an appropriate kill zone case, "'the defendant has a primary target and reasons [that] he cannot miss that intended target if he kills everyone in the area in which the target is located. In the absence of such evidence, the kill zone instruction should not be given.'" (*Ibid.*) Factors relevant to the defendant's intent to create a kill zone and the scope of such a zone include "the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target." (*Ibid.*)

Canizales cautioned that "there will be relatively few cases in which the theory will be applicable and an instruction appropriate." (*Canizales*, *supra*, 7 Cal.5th at p. 608.) It advised trial courts to instruct on the kill zone theory "only if there [is] substantial evidence in the record that, if believed by the jury, would support a reasonable inference that defendant[] intended to kill everyone within the 'kill zone.'" (*Id.* at p. 609.) *Canizales* also reiterated that "[t]he use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*Id.* at p. 608.) We independently review the record to determine whether it contained substantial evidence to support the instruction. (See *People v. Kerley* (2018) 23 Cal.App.5th 513, 565.)

B. Use in this Case

During closing arguments, the prosecutor argued two theories of defendant's intent to kill during the pickup truck

shooting. He first argued defendant had direct intent to kill all three alleged victims. "[T]here is gang motive and intent and that he used [Raymond] and that he was trying to kill not only [Raymond] but the occupants of those in [*sic*] the truck." Later in closing argument and again in rebuttal, the prosecutor contended that defendant specifically intended to kill Raymond. In closing, he said, "the evidence may very well be that he tried to kill Raymond and only Raymond," while in rebuttal he argued, "you have the defendant, who sees at the right moment, the right time, someone that he believes to be a rival gang member. . . . [H]e's got a loaded gun; and he takes his time, his opportunity to send a message and to try to kill Raymond."

The prosecutor also argued the kill zone theory of intent, as to Christopher and Ruben. "So you ask, hey, D.A., how is it possible is [*sic*] that he shoots one or two rounds and there's four or five victims in the car? How can we get an attempted murder for each person? What if he only attempted to kill Raymond? Well, within the instruction of attempted murder, there is a legal doctrine, an explanation of kill zone. It is like an umbrella. And when the defendant shot toward the direction of the car, and even though, let's say, that he shot only one, that there's three or four occupants in the car, because within their - - they're within the kill zone, within the same area, it is reasonable, it is foreseeable that people in the car might get struck. Hence, you have the attempted murder charges to the other occupants of the car."[8] The prosecutor continued, "Now, the evidence may very well be

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[8] This statement applied to the other *adult* occupants of the pickup truck. Defendant was not charged with the attempted murder of Ruben's son Jeremy, who was also in the truck at the time of the shooting.

that he tried to kill Raymond and only Raymond, but the fact that they were in the car within the kill zone hold [*sic*] the defendant responsible for the attempted murders of the other occupants of the car."

The court instructed the jury on the kill zone theory of intent using CALCRIM No. 600, which included the following: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Christopher A[.] and/or Ruben C[.], the People must prove that the defendant not only intended to kill Raymond S[.] but also either intended to kill Christopher A[.] and/or Ruben C[.], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Christopher A[.] and/or Ruben C[.] or intended to kill Raymond S[.] by killing everyone within the kill zone, then you must find the defendant not guilty of the attempted murder of Christopher A[.] and or [*sic*] Ruben C[.]."

C. Analysis

1. The evidence did not support the kill zone instruction

A jury may be instructed that it may draw a particular inference only where substantial evidence in the record, if believed by the jury, would support the suggested inference. (*Canizales*, *supra*, 7 Cal.5th at p. 609.) Here, that means the kill zone instruction would have been warranted only if there was substantial evidence regarding the circumstances of defendant's attack on Raymond, who all parties agree was the primary target, supporting the reasonable inference that defendant created a zone of fatal harm around him, and that Christopher

and Ruben were within that zone of harm. Without such evidence, it would not apply even if defendant attacked Raymond "in a manner that subjected other nearby individuals to a risk of fatal injury," or even if he "was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual." (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798.)

Heeding the Supreme Court's directive that the kill zone theory should apply in "relatively few cases," we conclude the evidence here does not support the requisite inference. Defendant, from his car, shot at most three bullets from a nine-millimeter gun into stopped or stopping traffic. His target, Raymond, was in a pickup truck that had just been alongside him. However, when defendant shot, the truck was approximately three car lengths ahead of him and contained two other men (and a child). Although all three alleged victims were inside the truck, Christopher's evasive actions demonstrated that the truck was not trapped without a means of escape. The evidence here shows, at best, that defendant fired three shots from a significant distance toward a truck containing gang (and possibly personal) rival Raymond. This does not reasonably support an inference that defendant intended to create a fatal zone of harm around Raymond.

This case is analogous to *Canizales*, in which the Supreme Court concluded the kill zone instruction should not have been given. In *Canizales*, the defendant "attacked his target by firing five bullets from a nine-millimeter handgun at a distance of either 100 or 160 feet away." (*Canizales*, *supra*, 7 Cal.5th at p. 611.) The targeted victim was at a crowded block party, with ample opportunity to escape, and neither he nor the other alleged

attempted murder victim was struck. (*Ibid.*)

Respondent contends *Canizales* is "readily distinguishable." Respondent points out that Christopher and Ruben "were trapped in the cab of a truck," the "prototypical example of a kill zone," and were physically closer to intended target Raymond than was the victim in *Canizales*. Respondent also emphasizes that defendant fired from closer range than the 100 or 160 feet in *Canizales*, and used a firearm loaded with 15 rounds. We are not persuaded.

As noted above, Christopher promptly and effectively, as respondent puts it, "took extreme evasive action" by driving away from the scene. Ruben and Raymond were both able to duck. The alleged victims were close together, in the truck, but the sole case respondent cites in support of his victim proximity argument, *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*), "declined to analyze the defendant's sufficiency of the evidence claims under the kill zone rationale." (*Canizales*, *supra*, 7 Cal.5th at p. 603.) Moreover, neither *Smith* nor *Bland*, a seminal kill zone case, "stands for the proposition that to the extent shooting a single bullet at a group of persons endangers them all, the shooter may be found guilty of the attempted murder of every individual in the group on that basis alone." (*People v. Perez* (2010) 50 Cal.4th 222, 231.) We also note that defendant was not charged with the attempted murder of the fourth person in the pickup truck, Ruben's young son, who was equally close to Raymond and was confined in a car seat.

Defendant's firing distance of several car lengths, while closer than the 100 or 160 feet in *Canizales*, is substantially greater than the defendant's distance away from the car targeted in *Bland*, *supra*, 28 Cal.4th at p. 318, in which the defendant shot

from immediately next to the victims' car. It was also further than the distance in non-kill-zone case *People v. Smith*, *supra*, 37 Cal.4th at pp. 742-743, in which the defendant shot his friend or ex-girlfriend's car "with a powerful .38-caliber handgun" from approximately one car-length away. Defendant fired at the truck only once it was appreciably in front of him, rather than firing immediately when it was next to him and the occupants were "mad-dogging" him. He discharged at most three of the 15 rounds his weapon was capable of firing, fewer even than the five fired at the two alleged victims in *Canizales*. On this evidence, it would not have been reasonable to infer that defendant intended to create a fatal zone of harm around Raymond. Thus, it was error to instruct the jury on the kill zone theory.

2. The instructional error was prejudicial

Respondent argues that any instructional error relating to the kill zone theory was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). He points to the jury's findings that defendant acted with premeditation and deliberation as to Christopher and Ruben, and further argues that there was "overwhelming" evidence of defendant's direct intent to kill Christopher and Ruben, namely defendant's admitted recognition of them and the truck as affiliated with a rival gang, their presence in his gang's territory, and the "mad-dogging" incident. Defendant argues that the error was prejudicial under either *Watson* or *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) and therefore requires reversal of his convictions for the attempted murders of Christopher and Ruben. We conclude that the *Chapman* standard applies, and that the error was not harmless beyond a reasonable doubt.

Canizales is again instructive and analogous. After

determining that the jury should not have been instructed on the kill zone theory, the Supreme Court considered whether the error was prejudicial. The court noted that the jury was instructed with CALCRIM No. 600, the same instruction that was given here. (*Canizales*, *supra*, 7 Cal.5th at p. 609.) The court further noted that the instruction did not define the term "kill zone," and did not direct the jury to consider the circumstances of the defendant's attack when determining whether to apply the theory. (*Id.* at p. 613.) In addition, the court noted that the prosecutor's "description of the kill zone theory given during closing argument substantially aggravated the potential for confusion." (*Ibid.*) Specifically, the prosecutor described the kill zone as a "zone of fire" in which "people 'can get killed,'" which the court held was "significantly broader than a proper understanding of the theory permits," inasmuch as it "essentially equated attempted murder with implied malice murder." (*Id.* at p. 614.) The court observed that the jury could have been misled by this argument, and as a result "might well have found factual support for what was effectively an 'implied malice' theory of attempted murder without detecting the legal error." (*Ibid.*)

The circumstances of the instant case are indistinguishable. The jury was instructed with CALCRIM No. 600. The prosecutor gave a similarly overbroad description of the kill zone theory during his closing argument, analogizing the kill zone to "an umbrella" that surrounds the targeted victim and covers an area in which "it is reasonable, it is foreseeable that people in the car might get struck." As in *Canizales*, "[t]he court's error in instructing on the factually unsupported kill zone theory, combined with the lack of any clear definition of the theory in the jury instruction as well as the prosecutor's misleading argument,

could reasonably have led the jury to believe that it could find that defendant[] intended to kill [Christopher and Ruben] based on a legally inaccurate version of the kill zone theory." (*Canizales*, *supra*, 7 Cal.5th at p. 614.)

In *Canizales,* the court concluded the error was one of federal constitutional magnitude. (*Canizales*, *supra*, 7 Cal.5th at p. 615.) It noted that it had not yet determined the appropriate standard of review for such a case, which it was considering in then-pending *People v. Aledamat* (2019) ___Cal.5th ___, ___ P.3d ___ (2019 WL 4009139) (*Aledamat*). The court did not resolve the issue because it determined that the error was prejudicial even under the *Chapman* standard. (*Canizales*, *supra*, 7 Cal.5th at pp. 615-616.) The court observed that there was substantial evidence from which the jury could have found that the defendants specifically intended to kill the attempted murder victim. (*Id.* at p. 616.) But it concluded it was not clear beyond a reasonable doubt that a reasonable jury would have reached that conclusion, because the evidence was controverted and the jury instruction and prosecutor's argument created "the potential for confusion." (*Ibid.*)

The court has since decided *Aledamat*, in which it held that the "beyond a reasonable doubt" *Chapman* standard applies where a trial court instructs a jury with both a valid and invalid theory. Under that standard, we "must reverse the conviction unless, after examining the entire cause, including the evidence, and considering all relevant circumstances, [we] determine[] the error was harmless beyond a reasonable doubt." (*Aledamat*, *supra*, ___Cal.5th at p. ___.)

Like the *Canizales* court, we conclude that reversal is required. In light of the conflicting evidence regarding

Christopher's and Ruben's gang affiliations and familiarity to defendant, the faulty instruction, and the prosecutor's overbroad definition of kill zone during his argument, we cannot say beyond a reasonable doubt that the jury would have concluded defendant specifically intended to kill either man. We are not persuaded otherwise by the jury's findings on premeditation and the gang enhancements. As *Canizales* observes, incorrect application of the kill zone theory would have allowed the jury to conclude premeditation toward Raymond concurrently reached Christopher and Ruben, and the gang findings "could also suggest that, relying on the kill zone theory, the jury found that defendant[] created a zone of fatal harm in which [he] intended all persons would be killed for the benefit of the gang." (*Canizales*, *supra*, 7 Cal.5th at p. 618.) We accordingly order the reversal of the attempted murder convictions as to Christopher and Ruben.

3. We need not reach defendant's other arguments

In light of our conclusion that the instructional error requires reversal of the attempted murder convictions for Christopher and Ruben, we need not and do not address defendant's remaining kill zone arguments. *Canizales* suggests that CALCRIM No. 600 "should be revised to better describe the contours and limits of the kill zone theory" (*Canizales*, *supra*, 7 Cal.5th at p. 606), but whether the instruction is, as defendant asserts, "fatally flawed," need not be resolved in this case. We likewise need not decide whether sufficient evidence supported a finding of direct intent as to Christopher or Ruben. Even if it did, the erroneous instruction renders us unable to conclude beyond a reasonable doubt that the jury applied that appropriate theory to

reach the verdicts.

II. Premeditation and Deliberation

Defendant next argues there was insufficient evidence to support the jury's finding that he acted with premeditation and deliberation when attempting to kill Raymond. We agree with respondent that "the prosecution presented not only sufficient, but overwhelming" evidence of premeditation and deliberation.

A. Legal Principles

"An intentional killing is premeditated and deliberate if it occurred as a result of preexisting thought and reflection rather than unconsidered or rash impulse." (*People v. Stitely* (2005) 35 Cal.4th 514, 543 (*Stitely*).) Premeditation means thought over in advance, while deliberation refers to the careful weighing of consideration before taking a course of action. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]'" (*Ibid.*) To determine whether a defendant acted with premeditation and deliberation, we typically rely on three types of evidence: "motive, planning activity, and manner of [attempted] killing." (*Stitely, supra*, 35 Cal.4th at p. 543.) These factors, known as the "*Anderson* factors,"[9] "need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*Ibid.*) Indeed, they are not elements that must be proven. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1021.) The *Anderson* factors "merely set forth a standard of appellate review by identifying the type of evidence that [the

[9] *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.

Supreme Court] has found sufficient to sustain a finding of premeditation and deliberation." (*Ibid.*) However, as a general matter, the finding will be sustained if supported by evidence in all three of the categories. (*Stitely*, *supra*, 35 Cal.4th at p. 543.)

We review the record for substantial evidence and draw all reasonable inferences to support the judgment. (*Stitely*, *supra*, 35 Cal.4th at p. 543.)

B. Analysis

Substantial evidence supported the jury's finding that defendant acted with premeditation and deliberation when he attempted to murder Raymond. All three *Anderson* factors support this conclusion. As elaborated below, the jury reasonably could have found (1) defendant was motivated to kill Raymond as part of the ongoing drug war; (2) defendant planned to kill any rival gang members he encountered within his gang's territory; and (3) defendant's use of a large-capacity gun in stopped traffic reflected a deliberate decision to kill Raymond.

The record contains ample evidence relevant to the first *Anderson* factor, motive. The prosecution—and the defense—presented evidence that defendant was a gang member whose gang was in the midst of an ongoing war with local rivals. Evidence showed that defendant recognized the pickup truck and its occupants as associated with those rivals, and also recognized Raymond from school. Raymond "mad-dogged," or at the very least, locked eyes with defendant within territory claimed by defendant's gang. Raymond also testified that defendant had a personal vendetta against him and participated in the garage shooting, and defendant testified that he too had been shot in the gang war. The jury reasonably could infer from this evidence that defendant had a strong motive to attack Raymond.

Defendant disagrees, contending that the facts preceding the shooting indicate nothing more than "an impulsive or rash offense." He emphasizes that the entire incident took approximately 15-20 seconds, and arose from a chance encounter rather than a planned foray into rival territory. Defendant relies on *People v. Boatman* (2013) 221 Cal.App.4th 1253 (*Boatman*) and *People v. Gonzales* (2011) 52 Cal.4th 254 (*Gonzales*) but those cases are not on point. In *Boatman*, the court found there was "little or no relevant motive evidence," but that case was not a gang case; at best, the evidence in *Boatman* showed that the defendant was "in a bad mood" or angry at the victim. (*Boatman*, *supra*, 221 Cal.4th at pp. 1267-1268.) *Gonzales* was a gang case, but it did not, as defendant suggests, hold that the desire for retaliation and the affirmative seeking out of gang rivals are essential to demonstrate premeditation and deliberation. The defendants in *Gonzales* did those things, see *Gonzales*, *supra*, 52 Cal.4th at p. 295, but such actions are not necessary to a finding of reflection. Here, defendant testified that he assessed the situation before grabbing his gun, removing the safety, and taking aim. Moreover, defendant took a gun with him on a morning errand to a gas station within his own gang territory. The jury could conclude that act alone was indicative of premeditation and deliberation to use the gun should a situation like the one here arise.

The second *Anderson* factor, planning activity, also is established by the evidence here. Although defendant again points to the short lapse of time between his initial encounter with Raymond and the shooting and relies on *Boatman*, the record shows that defendant did not rashly draw his gun and

shoot when the Camry and pickup truck were side-by-side. Instead, by his own testimony, he took the gun with him on a routine errand, retrieved the gun from the center console after seeing gang rivals, deactivated the safety, and slowed down prior to firing. It is reasonable to infer from this evidence that defendant "'considered the possibility of murder in advance'" and decided to shoot to kill. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

Finally, the record contains evidence related to the third *Anderson* factor, the manner of the attempted killing. By slowing down his car before shooting, defendant was able to focus more attention on the target. Waiting until the pickup truck passed him also potentially reduced the risk of injury from return fire. Defendant used a gun that he testified contained 15 bullets, while in his own gang territory. Defendant suggests more is needed, and cites as an example *People v. Cartier* (1960) 54 Cal.2d 300, where evidence showed the defendant struck his wife "over the head with a blunt instrument, procured various knives from the kitchen, brought them to the room where his wife's body was found, and, on the basis of his knowledge as a butcher, made superficial cuts on her body to locate the heart and vagina and then murdered her by severing them from her body" (*Anderson*, *supra*, 70 Cal.2d at p. 28), and then set fire to the couple's home. (See *People v. Cartier*, *supra*, 54 Cal.2d at pp. 303-305.) We are not persuaded that such extreme measures are necessary to support an inference that a defendant deliberated before he or she acted. In short, the jury reasonably could infer that defendant premeditated and deliberated before attacking Raymond. We accordingly affirm the jury's finding to that effect.

III. Self-Defense

Defendant contends the trial court erred by refusing to instruct the jury that he was entitled to respond more quickly and take greater self-defense measures because he had been shot outside his home and threatened at the dispensary. We conclude that the requested addition to the instruction was not supported by substantial evidence. Even if it was, any error in the court's failure to include the requested language was harmless.

A. Background

During the jury instructions conference, defendant asked the court to modify CALCRIM No. 604 ("Attempted Voluntary Manslaughter: Imperfect Self-Defense—Lesser Included Offense") by adding bracketed language from CALCRIM No. 505 ("Justifiable Homicide: Self-Defense or Defense of Another"). The requested language stated, "Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person." The court denied the request, explaining that the bracketed language it planned to give from CALCRIM No. 604 "covers it," by informing the jury that it could consider defendant's previous interactions with the pickup truck and rival gang members. The court further explained, "If they believe the knife-pulling incident, th[en] he is entitled to a higher level of vigilance, but it's not part of the actual attempt[ed] vol[untary manslaughter] instruction unless there's a nexus. In fact, the defendant did testify to the nexus so that's why I included that component of the instruction." In response to defendant's objection, the court noted that CALCRIM No. 604 "does indicate, 'In evaluating the defendant's beliefs, consider all the circumstances as they were known to and appeared to the defendant,' which I think carries that particular argument." The court added, "He can still argue

he's a gang member. He's afraid he is going to get shot at. He did get shot at. That's fair game as part of the instruction. But I don't think I need to include that in the context of [Raymond] in that the PTSD type victim or defendant . . . is fully empowered to use a firearm whenever he sees fit."

Defendant again objected, arguing that his testimony about recognizing all three men as rival gang members, recognizing the truck from the dispensary, and the mad-dogging "entitled" him to the requested language. The court again disagreed, emphasizing that defendant was welcome to argue that he acted in self-defense due to the threats. "[E]ven if he was entitled to a heightened level or fear or a quicker trigger, so to speak, he still can't shoot at them as they're driving away unless they have a machine gun . . . in the back of their vehicle or they're pointing a firearm back; and I didn't hear anything along those lines. He says he was afraid. That's fair. He says he pulled his gun out because it looked like they were drawing. That's fair. But all the bullet strikes are on the back of the vehicle. . . . He didn't testify, 'I saw them pointing back at me,' 'I saw the firearm was pointed in my direction,' or 'they were all mad dogging me as I was shooting at them,' nothing along those lines. So, no, I'm not going to give that instruction."

Using CALCRIM No. 604, the court ultimately instructed, "In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant." It also included the modified bracketed language, "If you find that the defendant received a threat from someone else that he reasonably associated with Raymond S[.], Christopher A[.], or Ruben C[.], you may consider that threat in evaluating the defendant's beliefs." In related instruction CALCRIM No.

3470 ("Right to Self-Defense or Defense of Another (Non-Homicide)"), the court instructed, "When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed." The court also included the following bracketed language: "The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true." "If you find that the defendant received a threat from someone else that he reasonably associated with Raymond S[.], Christopher A[.], and or Ruben C[.], you may consider that threat in deciding whether the defendant was justified in acting in self-defense."[10]

B. Legal Principles

The trial court has a sua sponte duty to instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Anderson* (2011) 51 Cal.4th 989, 996.) That duty extends to instructions on the defendant's theory of the case and defenses, if they are supported by substantial evidence. (*Ibid.*) The court has no sua sponte duty to provide so-called "pinpoint instructions,"

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[10] CALCRIM No. 3470 has the same bracketed language from CALCRIM No. 505 that defendant requested be added to CALCRIM No. 604—"Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person." Defendant did not request that language be included in CALCRIM No. 3470.

which relate particular facts to elements of an offense charged, or clarifying instructions. (*People v. Garvin* (2003) 110 Cal.App.4th 484, 489.) "An instruction on the topic of antecedent assaults is analogous to a clarifying instruction."[11] (*Ibid.*) However, there is "a line of authority holding that it is erroneous to refuse a request for instruction on the effects of the victim's antecedent threats or assaults against the defendant on the reasonableness of the defendant's conduct." (*Id.* at p. 488.)

We review claims of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.'" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) ""'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*)

C. Analysis

Here, defendant repeatedly requested that the court instruct the jury that "Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person." No evidence showed, however, that Raymond, Christopher, or Ruben

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[11] Thus, to the extent defendant failed to request such an instruction in connection with CALCRIM No. 3470, that issue is now forfeited.

had threatened or harmed defendant. At most, the evidence showed that individuals associated with Raymond, Christopher, or Ruben and their rival gangs had threatened or harmed defendant. An instruction that defendant was entitled to take hasty or disproportionate defensive action against these three individuals because of past altercations was not supported by substantial evidence, and defendant did not request that the language be modified to encompass threats by related parties. Defendant testified that the pickup truck itself had been involved in the dispensary incident, but a pickup truck is not a person, and defendant does not argue otherwise.

The court instructed the jury that it could consider threats defendant received from someone he "reasonably associated" with Raymond, Christopher, or Ruben, i.e., other members of any gangs to which they belonged. It more broadly instructed the jury to consider "all the circumstances as they were known to and appeared to the defendant." Such circumstances would include the ongoing gang war, the garage shooting, the shooting of defendant, and the dispensary incident, all of which defense counsel argued in closing. The instructions as given adequately apprised the jury of defendant's self-defense theory and the legal principles governing it.

Even if the court's refusal to provide the requested instruction was in error, the error was harmless under any standard. (See *People v. Watt* (2014) 229 Cal.App.4th 1215, 1219-1220.) As discussed above, the evidence that defendant acted with premeditation and deliberation was strong. The evidence that he acted in self-defense, after the pickup truck had passed him and any threat had significantly dissipated, was comparatively weak. Defendant shot from 40 feet away, at the

back of the retreating truck. He did not see any weapon and was not fired at, and testified that he would not have fired at all if he had known there was a child in the pickup truck. The jury was instructed to consider all of the circumstances as they were known or appeared to defendant, including the gang war and previous history defendant had with the pickup truck and associates of its occupants. We are persuaded beyond a reasonable doubt that it appropriately did so.

IV. *Pitchess*

Defendant filed a *Pitchess* motion seeking information relating to allegations against Detective Farias of "illegal or false arrest, improper tactics, dishonesty, lying, filing false or misleading or incomplete police reports, any illegal search and seizure, planting evidence, or the fabrication of charges and/or evidence," as well as acts "involving morally lax character." The trial court granted his motion as to the planting of evidence, fabrication of evidence, and filing false reports. It held an in camera hearing on July 28, 2016 and concluded there were no discoverable records in Farias's personnel file.

Defendant now requests, pursuant to *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221 & fn. 10 and *People v. Mooc* (2001) 26 Cal.4th 1216, that we independently review the sealed transcript of the in camera hearing to determine whether the trial court complied with the procedural requirements of a *Pitchess* hearing and provided all discoverable material to him. Respondent agrees with defendant's request that we should independently review the sealed transcript. We review the trial court's ruling for abuse of discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.)

Our review reveals no error. The trial court complied with

the procedural requirements of a *Pitchess* hearing, including placing the custodian of records under oath and providing an adequate description of the documents reviewed. (See *People v. Mooc*, *supra*, 26 Cal.4th at p. 1229 & fn. 4; *People v. Myles* (2012) 53 Cal.4th 1181, 1209.) Its rulings on the discoverability of documents were not an abuse of its discretion.

V. Youth Evidence

Defendant, who was 18 years old at the time of the pickup truck shooting, contends that his case should be remanded for resentencing under section 3051 and *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*) to provide him with an opportunity to make a record of mitigating evidence for use in a future youth offender parole hearing. We disagree.

Section 3051, which became effective January 1, 2014, was enacted to "'establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity.'" (*Franklin*, *supra*, 63 Cal.4th at pp. 276, 277.) Originally aimed only at juveniles under the age of 18, section 3051 currently requires the parole board to conduct a "youth offender parole hearing" during the 25th year of incarceration for offenders who were sentenced to 25 years to life or greater for crimes they committed when they were 25 years old or younger. (§ 3051, subds. (a) & (b)(3).) It "thus reflects the Legislature's judgment that 25 years is the maximum amount of time that a juvenile offender may serve before becoming eligible for parole." (*Franklin*, *supra*, 63 Cal.4th at p. 278.) At a youth offender parole hearing, "the board, in reviewing a prisoner's suitability for parole . . . shall give great weight to the diminished

culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

Our Supreme Court held in *Franklin* that section 3051 necessarily contemplates that "information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration." (*Franklin*, *supra*, 63 Cal.4th at p. 283.) Such evidence may include statements from family, friends, school personnel, and community members. (*Ibid.*) The court recognized in *Franklin* that assembling these sorts of statements and other relevant evidence about a defendant prior to his or her commission of the crime "is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away." (*Id.* at pp. 283-284.) Moreover, the board's consideration of growth and maturity necessarily requires that it have a baseline of information "about the offender when he was a juvenile." (*Id.* at p. 284.)

The Supreme Court recognized that the defendant in *Franklin*, who was 16 at the time of his crime and sentenced before section 3051 took effect, may not have had the opportunity to assemble this type of information prior to his incarceration. (See *Franklin*, *supra*, 63 Cal.4th at p. 284.) The court accordingly ordered a limited remand "for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid.*) The court further held that if the trial court

concluded Franklin lacked such an opportunity, Franklin "may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Ibid.*) The court emphasized that the "goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to "give great weight to" youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" (*Ibid.*)

In the present case, defendant was sentenced in July 2017, roughly three-and-a-half years after section 3051 took effect and approximately 14 months after *Franklin* was decided. Nevertheless, he requests that we remand his case so that he, like Franklin, may be afforded the opportunity to assemble and place on the record evidence relevant to his youth at the time of his offense. He contends that "neither his attorney, nor the prosecutor, nor the court seemed to be aware" of section 3051 or *Franklin*.

We are not persuaded that defendant is entitled to the requested relief. His failure to avail himself of the opportunity to assemble and present such evidence is not a reasonable basis to conclude the trial court erred. The prosecutor submitted a sentencing memorandum, which suggests defendant had the opportunity to do the same. He did not do so, nor did he or his

counsel make any mention of his youth at the sentencing hearing. The sentencing hearing was brief, but there is no indication that defendant was denied any opportunity to present mitigating evidence for future use by the parole board.

This case is similar to *People v. Woods* (2018) 19 Cal.App.5th 1080 (*Woods*). There, the defendant was 19 years old at the time of his offense "and thus he was not subjected to a sentence that violated constitutional principles prohibiting a minor from being sentenced to the functional equivalent of life without parole without considering how minors are different from adults and how those differences counsel against irrevocably sentencing a minor to a lifetime in prison." (*Woods*, *supra*, 19 Cal.App.5th at p. 1088.) Defendant here was 18, younger than Woods but still a legal adult. Also like the defendant in *Woods*, who was sentenced after the enactment and extension of section 3051 but prior to *Franklin*, he "was not sentenced at a time when youth offender parole hearings were not yet part of California law" (*ibid.*): section 3051 had been enacted, and even extended to youthful offenders older than 18. "Thus unlike the defendant in *Franklin*, defendant had both the opportunity and incentive to put information on the record related to a future youth offender parole hearing." (*Id*. at pp. 1088-1089.)

Defendant contends that even if there was a theoretical opportunity for him to present relevant evidence, his trial counsel was ineffective in failing to request a *Franklin* hearing. A defendant claiming ineffective assistance of counsel must establish both that his or her representation fell below an objective standard of reasonableness and that he or she suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "When examining an ineffective assistance claim,

a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner challenged [the defendant asserts counsel should have acted], defendant must show that there was ""no conceivable tactical purpose"' for counsel's act or omission."' (*People v. Centeno* (2014) 60 Cal.4th 659, 675.)

Defendant has not made the requisite showing here. The record does not disclose the absence of a reasonable tactical purpose for counsel's silence regarding defendant's youth, and defendant merely asserts that there simply could not have been such a purpose. Moreover, it is unclear how defendant has been prejudiced by any error. He is currently only two years into his lengthy sentence, and only six years removed from the crime. He has pointed to no reason why his counsel or other representative cannot assemble the necessary evidence while memories and records remain fresh. We accordingly decline his request to remand for purposes of holding a *Franklin* hearing.

VI. Firearm Enhancements

The jury found true allegations that defendant personally and intentionally used and discharged a firearm in connection with all of the charges related to the pickup truck shooting: three counts of attempted murder and two counts of shooting at an occupied vehicle. (§ 12022.53, subds. (b) & (c)). As it was required to do at the time of defendant's 2017 sentencing, the trial court imposed an additional sentence of 20 years on four of those counts pursuant to section 12022.53, subdivision (c).[12]

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[12] As previously noted, the court did not impose a sentence

Senate Bill 620, effective January 1, 2018, amended section 12022.53, subdivision (h) to give the trial court, for the first time, discretion to strike or dismiss a section 12022.53 enhancement. Defendant argues that we should remand the matter for resentencing so the trial court may exercise its discretion under section 12022.53, subdivision (h). Respondent agrees that a remand is appropriate.

We agree. The amended version of section 12022.53, subdivision (h) applies to all cases not yet final on appeal when the amendment took effect. (See *People v. Chavez* (2018) 21 Cal.App.5th 971, 1020; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) Defendant's case meets that requirement, and there is nothing in the record clearly indicating that the court would not have exercised its discretion to strike the allegations. (See *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896.) We accordingly order a limited remand so that the court may hold a new sentencing hearing and consider whether to strike or dismiss the firearm enhancements pursuant to section 12022.53, subdivision (h).

VII. Abstract of Judgment

Defendant and respondent agree that the abstract of judgment contains clerical errors and that we should remand the matter so that they may be corrected. We are authorized to order correction of an abstract of judgment that does not accurately reflect the sentence imposed orally by the trial court. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

The abstract erroneously states that the 20-year enhancements the court imposed pursuant to section 12022.53,

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on one of the counts for shooting at an occupied vehicle; it simply stated that sentence was stayed pursuant to section 654.

subdivision (c) were imposed pursuant to section 186.22, subdivision (b)(1)(C). It also states that defendant received sentences of "15 yrs-lif con" [*sic*] for the firearm enhancements on the three attempted murder counts, for total sentences of 35 years to life on each of those counts. The parties agree that the abstract should be corrected to show that defendant was sentenced to life on the attempted murder counts, with a notation on Line 12 that there is a minimum parole eligibility term of 15 years for each count pursuant to section 186.22, subdivision (b)(5). They further agree that the "15 yrs-lif con" should be deleted, and that the only enhancements that should be listed in the "Enhancements" section of the abstract are the firearm enhancements.

Because we are reversing two of the attempted murder convictions and remanding for resentencing pursuant to section 12022.53, subdivision (h), the erroneous abstract of judgment necessarily will be superseded by a new one. We accordingly do not order revision of the current abstract of judgment, but direct the trial court to ensure that the new abstract of judgment accurately reflects defendant's new sentence, including any enhancement(s) it chooses to impose.

DISPOSITION

The judgment is reversed in part, as to the attempted murder convictions pertaining to Christopher A. and Ruben C. The judgment is otherwise affirmed. The matter is remanded to the trial court to hold a sentencing hearing at which it considers its discretion under section 12022.53, subdivision (h). The court is directed to prepare an abstract of judgment reflecting the sentence it imposes at that hearing and correcting the errors described herein.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.