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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MARTINEZ, Defendant and Appellant.	B230795 (Los Angeles County Super. Ct. No. BA352322)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed with directions.

Meredith J. Watts, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, and Taylor Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Ruben Martinez of four counts of attempted voluntary manslaughter and shooting at an occupied motor vehicle, and found true related firearm allegations. Martinez appeals. We affirm and order the trial court to correct the abstract of judgment.

BACKGROUND

An amended information filed August 25, 2009 charged Martinez and Guillermo Rangel with five counts of attempted murder in violation of Penal Code[1] sections 664 and 187, subdivision (a) (counts 1–5) and one count of shooting at an occupied motor vehicle in violation of section 246 (count 6). Each of those counts also alleged that Martinez personally used a firearm within the meaning of section 12022.5, subdivision (a). Count 8 charged Rangel and Martinez with unlawful assault weapon activity (an AK-47) in violation of former section 12280, subdivision (a)(1) (now § 30600; subd. (a)).[2]

Rangel and Martinez were tried together. We take the following statement of facts from our opinion affirming Rangel's convictions, *People v. Rangel* (June 28, 2012, B229403 [nonpub. opn.]).

At trial, Raul Stewart testified that around 1:00 a.m. on January 31, 2009, he was returning home from the races in his Volvo with two of his cousins, Reynaldo and Esther Mendez, with Reynaldo driving.[3] As they drove north on Hoover towards 59th Street, Stewart saw a pickup truck in the middle of the road blocking his lane. The Volvo drove on the wrong side of the street around the pickup truck, and the occupants of the truck put their hands out the window. Thinking he might know them, Stewart told Reynaldo to turn around and try to meet up with the truck.

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[1] All subsequent statutory references are to the Penal Code, unless otherwise indicated.

[2] Count 7 charged Martinez with possession of heroin in violation of Health and Safety Code section 11350, subdivision (a). During trial, Martinez pleaded guilty to count 7.

[3] For ease of reference, we use the first names of Reynaldo and Esther Mendez. No disrespect is intended.

On 62d Street near Hoover, the pickup truck stopped behind the Volvo, and Stewart got out of the car. Stewart approached the passenger side of the pickup truck and saw Rangel and Martinez inside, with Rangel driving; he did not recognize them. They said, "I thought you were somebody else," and Stewart said, "All right" and shook hands with Martinez. When Stewart reached across Martinez to shake hands with Rangel, Rangel said something angry and reached down for something. Believing "I am going to get stabbed or shot or something," Stewart punched Rangel in the head. Stewart then pulled his head out of the pickup truck, and Rangel and Martinez drove away.

Stewart, Reynaldo, and Esther drove to Stewart's home, where Stewart's pregnant girlfriend Jessica Pacheco put his year-old son into his car seat in the back seat of the Volvo. They all left in the Volvo to take Reynaldo and Esther home, with Pacheco driving. As the Volvo turned onto 62d Street and drove toward Hoover, Stewart saw Martinez standing on the sidewalk "like a soldier," holding what looked like a big rifle. He then heard around ten shots in rapid succession, like an assault rifle, and heard the bullets hit glass and metal and a bullet whizzing past his head; there was glass in the front seat. The bullets hit the car, broke windows and mirrors, and punctured two tires. Pacheco drove the Volvo home and everyone got out of the car.

Stewart got back in the car and tried to drive back to the location of the shooting, but the Volvo died. He got out of the car and called Pacheco, and then as he walked down 62d Street the police stopped him. Thirty minutes later, as Stewart was in the police car and Pacheco was standing outside talking to the officers, Rangel and Martinez walked by, and Stewart told the police that was them.

Jessica Pacheco testified that as she was driving the Volvo on the day of the shooting, Stewart and his cousins mentioned that there had been a problem on 62d Street, and then screamed, "'drive fast.'" At the same time, Pacheco heard more than six gunshots and the back window of her car shattered. She drove straight home, finding it hard to turn the car, because both right side tires were flat. Stewart then drove away in the Volvo. After he called Pacheco from 62d and Figueroa, she walked over.

Stewart's cousin Esther testified that as Pacheco drove the Volvo from Stewart's house and turned onto 62d Street, Esther saw two men walking on the sidewalk. She saw flashing lights, heard Pacheco screaming, and saw the same two men, one shooting a long weapon, and the other standing an arm's length away. She recognized them as the men who had been in the truck. Esther identified Rangel in a photographic lineup, and in court, as the man standing next to the shooter.

Los Angeles Police Department (LAPD) Officer Jonathan Kincaid testified that he responded to a radio call regarding a shooting at 62d and Hoover in the early morning hours of January 31, 2009. Stewart flagged him down, and said two Hispanic men had shot at him and his family with an AK-47 rifle. Officer Kincaid found 10 spent bullet casings on the sidewalk, of a type commonly used with an AK-47 assault rifle. While he was at the scene, Officer Kincaid saw two Hispanic men fitting the description given by Stewart walking towards them on the sidewalk. Stewart said, "'that's them,'" and Officer Kincaid detained Martinez and Rangel, who were later placed under arrest.

Officer Kincaid then went to Rangel's residence, where he saw a pickup truck in the driveway with the windows rolled down. Officer Kincaid shone his flashlight in the window and saw a handgun on the floorboard, between the passenger seat and the door of the car. Rangel's mother answered the door. They went to the rear of the house, with Officer Kincaid's supervisor and three other officers. One of the other officers told Officer Kincaid he saw a gun case protruding from the crawl space of the residence. Officer Kincaid saw the crawl space, which was about 18 inches high by two feet long, below the house and up next to the patio, and saw a hard gun case protruding in plain view. The gun case was pulled out and opened, and inside was an AK-47 rifle with a magazine and live ammunition, as well as a soft gun case containing a hunting rifle and rounds of ammunition. The gun case and the AK-47 were in evidence, and Officer Kincaid identified them as the items found in the crawl space. The AK-47 was unregistered.

LAPD Criminalist Allison Manfreda testified that the AK-47 was classified as an assault weapon in California. The 10 bullet casings found at the scene had been fired by the AK-47.

LAPD Detective Sheryl Reynolds testified that she was the investigating officer. Esther had told her that she recognized Rangel as the driver of the pickup truck.

At the close of the prosecution's case, Rangel's counsel made a motion under section 1118.1 to dismiss count 8 for insufficient evidence.[4] The court denied the motion, concluding that there was sufficient evidence that Rangel transported the AK-47 by walking around with it, or lent it to Martinez.

The first defense witness was Rangel. He testified that at 1:00 a.m. on January 31, 2009, he was driving home in his truck from Martinez's house to his home on 62d Street, with Martinez in the passenger seat. Rangel saw a white Volvo stopped in the middle of 62d Street with its emergency flashers on. Stewart was crouched down next to the tire, and stood up and beckoned with his hand; Rangel thought he had a flat tire or needed a jump start. Rangel pulled up a house or two away, and Stewart came up to the truck window, shook Martinez's hand, and said, "'you're just messed up'" or "'we're just messed up.'" Rangel did not have a gun in the car. Stewart then tried to open the door, and Rangel put the truck in gear to drive away; Stewart struck him in the head with a hard object, likely metal, and said, "'Fuck you, levas'" (Spanish slang for sissy). Rangel, dizzy, stunned, and in pain, hit the gas without steering. Martinez grabbed the steering wheel and managed to turn corners to get the truck around the block to Rangel's house, where the truck hit the post of Rangel's front gate. Rangel hit his head on the steering wheel. He was not sure what damage was done to his truck.

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[4] Defense counsel made a section 1118.1 motion as to all counts and both defendants at the close of the prosecution's case, and the court first denied the motion as to Rangel and Martinez on all counts except count 8, which the court took under submission. The court later granted the motion to dismiss count 8 as to Martinez and denied the motion as to Rangel.

Rangel got out of the truck and staggered around, with Martinez trying to get him inside the gate. Rangel saw car lights and the white Volvo approaching, with Stewart hanging out the car window pointing a gun in Rangel's direction and screaming, "Fuck you chavalas" (also Spanish slang for sissy). Martinez said, "'Get down, they're trying to kill . . . us."' Rangel lay down on his stomach to hide, and the Volvo drove by again more slowly, with Stewart still aiming the gun and yelling obscenities. Rangel heard four or five gunshots down the street. He stayed frozen on the ground, had no idea that Martinez was the shooter, and did not see Martinez pick up the AK-47, walk down the street, fire the gun, or put it away. Martinez continued to yell at Rangel to get inside. The truck was still leaned up against the pole with the doors open and the interior light on. Rangel could see a gun in the middle of the street four or five houses away, under a streetlight. Rangel ran down the street and grabbed the gun in case the people in the Volvo might come back for it, and threw the gun into the truck. Rangel then backed his truck up and put it in the driveway, turned off the lights, and tried to close the gate.

When Rangel was in his yard, he saw flashing lights and heard police helicopters. He and Martinez decided to walk over to the police, thinking they had pulled over a random motorist to give him a ticket. He saw the Volvo and Stewart pointing at him and Martinez, and they were arrested. Martinez then told Rangel he had fired the AK-47, and said he was sorry. Rangel and Martinez both believed their lives were in danger, and Rangel believed Martinez had saved his life. Rangel sought medical treatment for his head injury while in jail.

Rangel lived with his girlfriend and his daughter. His mother and his grandfather lived in the front of the house, and his younger brother lived in the back of the house. Earlier that day, Rangel's uncle called and asked if Rangel could keep something for him, and Rangel told him to drop it off without asking what it was. His uncle's wife would not let him keep the gun in the house. When his uncle came by, Rangel wasn't there but Martinez was present. When Rangel got home around noon, there was a hard case in the living room; Rangel opened it and saw a soft case (which he did not open), a ziplock bag full of cartridges, and the AK-47 with a clip inserted. He and Martinez both saw the

weapon, and "[w]e knew it was the real thing." Rangel's mother got upset and told him he could not keep it there, so Rangel put the hard case in the crawl space in the back of the house, next to where his daughter had her toys. Martinez was outside and saw Rangel put the gun in the crawl space. Rangel never told Martinez to take the AK-47, and never gave him permission or encouraged him to use the gun. Rangel had not owned any guns except BB guns, and no one in the household owned guns. He had seen ammunition belonging to his grandfather around the house.

Julia Denoso testified that in November 2007, she was double-parked in front of her house waiting for a parking space to open. Stewart banged on her car door yelling obscenities, made a punching gesture, reached in and opened the door, dragged her out, and kicked her as she lay on the pavement. Stewart then got into her car and drove away. A psychologist who had examined Stewart in connection with another case testified that Stewart described experiencing blackouts when he was stressed, "mind buzzing," and auditory and visual hallucinations. Character witnesses testified that Rangel was honest, soft-spoken, and peaceful.

In rebuttal, the prosecution called Rangel, who admitted he pulled his girlfriend's hair and pushed her during two incidents in March and April 2008. Andrea Galdamez testified that she was the mother of Rangel's child. In March 2008, when they were dating and living together, they had an argument about disciplining their daughter, during which she started to push, slap, and shove Rangel, and he struck her with a closed fist on the right side of her face. In April 2008, Galdamez again began to push, slap, and shove, and Rangel pulled her hair to get her out of the house.

In surrebuttal, the prosecution called Rangel's uncle, who had been subpoenaed to testify and felt intimidated by calls from Rangel's family. Rangel's uncle testified that he had not been in touch with Rangel for several years since divorcing Rangel's aunt, and he never called Rangel and asked him to keep any item at Rangel's house, including the AK-47.

In closing, Martinez argued that he had fired at the Volvo in self-defense and in defense of another and should be acquitted of all charges. He also argued that the jury

should not convict him of attempted voluntary manslaughter on an imperfect self-defense theory, because he had not acted unreasonably when he fired at the car.

The jury acquitted Martinez of count 1 (attempted murder of Stewart), and convicted Martinez of the lesser-included offense of attempted voluntary manslaughter of the others in the vehicle in counts 2, 3, 4, and 5. The jury also convicted Martinez of count 6, shooting at an occupied vehicle. In all the counts of which the jury convicted Martinez, it found true the principal use of a firearm and personal firearm use allegations.[5]

The trial court sentenced Martinez to a total sentence of 17 years in state prison.[6] Martinez filed this timely appeal.

DISCUSSION

I. The verdict of not guilty on count 1 does not require reversal of the convictions on counts 2, 3, 4, and 5.

Martinez argues that the jury found him not guilty of the attempted murder of Stewart (count 1), and that he therefore could not be found guilty of attempted voluntary manslaughter as to any of the others in the Volvo, Jessica Pacheco (count 2), Reynaldo Mendez (count 3), Esther Mendez (count 4), and Raul Pacheco (count 5). He reasons that the jury must have concluded that he acted in complete self-defense as to Stewart so that his shooting at Stewart with the AK-47 was justifiable. He does not argue that he shot at the Volvo by accident. Instead, Martinez argues that because the jury found that his shooting at *Stewart* was justifiable as self-defense, that "justified intent" transfers to the other counts of attempted murder, and negates any criminal liability for his shooting at the other four occupants of the car.

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[5] The jury convicted Rangel of unlawful transporting, giving or lending an assault weapon in violation of former section 12280, subdivision (a)(1) (count 8), and acquitted him on the charges of attempted murder and shooting at unoccupied vehicle.

[6] As we conclude below, the abstract of judgment incorrectly states that Martinez's sentence is 18 years and four months, and must be corrected.

"'To be exculpated on a theory of self-defense one must have an honest *and* reasonable belief in the need to defend. [Citations.] A bare fear is not enough; "the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." [Citation.]' [Citation.]" (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227.) "'When the amount of force used is justifiable under the circumstances, it is not willful and the actor may escape liability for intentionally injurious conduct that is otherwise actionable.'" (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 18.)

In *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), the court acknowledged that it was "universally accepted" that "the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target is deemed to transfer to the unintended victim so that the defendant is guilty of murder." (*Id*. at p. 317.) Martinez seizes on this general principle to argue that his lack of criminal intent to kill Stewart similarly must transfer to the four other victims in the car, making him necessarily innocent of any crime, including attempted voluntary manslaughter. In *Bland*, however, the court refused to apply the "transferred intent" doctrine to "an inchoate crime like *attempted* murder." (*Ibid.*, italics added.) This is because "[t]he mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices." (*Id.* at p. 327.) By contrast, for an act to constitute attempted murder, intent to kill must exist: "'[t]he wrong-doer must specifically contemplate taking life.'" (*Id.* at p. 328.) Therefore, "[T]he defendant's mental state must be examined as to each alleged attempted murder victim." (*Ibid.*)

Martinez was charged with five counts of attempted murder, and the jury was properly instructed that as to that offense, a specific intent to kill was required. The jury convicted Martinez of four counts of the lesser included offense of attempted voluntary manslaughter. "Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense." (*People v.*

Gutierrez (2003) 112 Cal.App.4th 704, 708.) As the jury was also properly instructed, attempted voluntary manslaughter similarly requires a specific intent to kill. (*People v Montes* (2003) 112 Cal.App.4th 1543, 1546–1547.) Martinez's intent as to Stewart does not transfer to the other occupants of the car.

"We also explained [in *Bland*, *supra*, 28 Cal.4th at p. 329], however, that if a person targets one particular person, under some facts a jury could find the person *also*, concurrently, intended to kill—and thus was guilty of the attempted murder of—other, nontargeted persons." (*People v. Stone* (2009) 46 Cal.4th 131, 137 (*Stone*).) "'[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the "kill zone."' [Citation.]." (*Ibid.*) As the *Bland* court stated, "[e]ven if the jury found that defendant primarily wanted to kill [a driver] rather than [the] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when defendant . . . fired a flurry of bullets at the fleeing car and thereby created a kill zone. Such a finding fully supports attempted murder convictions as to the passengers." (*Bland*, at pp. 330–331; *Stone*, at p. 137.) The concurrent intent or kill zone theory is "simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland*, p. 331, fn.6.) As such, it does not require special jury instructions, although "current pattern jury instructions discuss the kill zone theory," including CALCRIM No. 600 (attempted murder), which provides that the kill zone language may be used in the court's discretion. (*Stone*, at p. 137–138 & fn. 2.)

The jury was instructed with CALCRIM No. 600, including the following: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Jessica Pacheco, Reynaldo Mendez, Esther Mendez and [Pacheco's son] Raul Pacheco, the People must prove that the defendant not only intended to kill Raul Stewart but also intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Raul Stewart by harming

everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Jessica Pacheco, Reynaldo Mendez, Esther Mendez and Raul Pacheco."

Following that instruction, the jury could have concluded that Martinez sprayed the Volvo with bullets, intending to kill Stewart and everyone else in the car, thus creating a kill zone. The jury could also have concluded that Martinez believed that Stewart, who was waving a gun and yelling while hanging out the car window, posed a threat to Martinez's life, that Martinez's belief as to Stewart was reasonable, and that Martinez therefore fired the AK-47 at Stewart in self-defense, making him not guilty of attempted murder as to Stewart. At the same time, the jury could have found that Martinez did not have the same reasonable belief as to the other occupants of the Volvo. "'Imperfect self-defense is the killing of another human being under the actual but *unreasonable* belief that the killer was in imminent danger of death or great bodily injury. [Citation.] Such a killing is deemed to be without malice and thus cannot be murder. [Citation.]' [Citation.] . . . [¶] The court's duty to instruct on voluntary manslaughter under an imperfect self-defense theory arises '"whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense."' [Citation.]" (*People v. Valenzuela*, *supra*, 199 Cal.App.4th at p. 1227.)

The jury could consistently have concluded that Martinez actually believed that everyone in the Volvo posed a threat to his life, *but Martinez's belief as to anyone other than Stewart was unreasonable*, and therefore as to the others in the car Martinez acted only in imperfect self-defense and was guilty of attempted voluntary manslaughter as to Pacheco, her son Raul, Reynaldo, and Esther. Whether Martinez had the specific intent to kill must be judged separately as to each alleged victim, and "'[t]his is true whether the alleged victim was particularly targeted or randomly chosen.' [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 230.)

The jury verdicts finding Martinez guilty of attempted voluntary manslaughter of four of the occupants of the car are not inconsistent with the not guilty verdict as to Stewart.

II. There was no instructional error requiring reversal.

Martinez argues that it was error to instruct the jury on attempted voluntary manslaughter, either as imperfect self-defense or as heat of passion, because there was no evidence to support such an instruction. As should be clear from our discussion above, however, we disagree.

"'"[E]ven in an absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.]"'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The court is also required to give "'instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.'" (*People v. Souza* (2012) 54 Cal.4th 90, 116.) Attempted voluntary manslaughter is a lesser included offense of attempted murder. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 11.) There was evidence in the record that, if accepted by the jury, would justify finding Martinez guilty of attempted voluntary manslaughter on either theory. The jury could have concluded that Martinez fired at the Volvo in either a heat of passion following his confrontation with Stewart, or in a genuine but unreasonable belief that the Volvo's inhabitants posed a threat to Martinez's life. Although Martinez states that "[n]o party argued imperfect self-defense," the parties' trial theories or tactics do not affect the trial court's duty to instruct on lesser-included offenses. (*Breverman*, at p. 162; *People v. Barton* (1995) 12 Cal.4th 186, 198, fn. 7.)

Martinez further argues that there was no evidence to justify an instruction describing a kill zone. As is also clear from our discussion above, there was substantial evidence that Martinez created a kill zone using an automatic weapon to fire a spray of bullets at the Volvo.

Martinez also argues that the jury was confused by the language of the kill zone portion of CALCRIM No. 600. We note that a defendant generally "'"may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."'" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1236.) Martinez neither

objected to giving CALCRIM No. 600 nor requested any alteration or clarification to the instruction. Even if he had not thereby forfeited this objection on appeal, and even if the instruction was ambiguous, there was no prejudice.

The 2008 version of CALCRIM No. 600 provided that the kill zone theory applied when a person "'intend[ed] to kill *anyone* in a particular zone of harm or "kill zone,"'" using the word "anyone" three times. (*Stone*, *supra*, 46 Cal.4th at p. 137, fn. 2, italics added.) The 2009–2010 version at the time of trial substituted the word "everyone" for "anyone."[7] The trial court's written instruction, as quoted above, used "anyone" twice, and "everyone" once. When the court read the instruction out loud to the jury, the court used the word "anyone" three times. Further, the court's instruction, both oral and written, stated that the jury must acquit Martinez if it had a reasonable doubt whether Martinez intended to kill Stewart by "harming" everyone in the kill zone, while the current and the 2009–2010 version both use "killing."

These variations are not prejudicial. Although the court in *Stone* concluded that "everyone" was preferable to "anyone", and using "kill" consistently would be better than "harm," "[t]he error is not necessarily prejudicial by itself." (*Stone*, *supra*, 46 Cal.4th at p. 138 & fn. 3.) "In context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person

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[7] The current version of CALCRIM No. 600, and the 2009–2010 version at the time of trial, both provide: "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 ___<*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>, the People must prove that the defendant not only intended to kill ___<*insert name of primary target alleged*> but also either intended to kill ___<*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill ___<*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*> or intended to kill ___<*insert name or description of primary target alleged*> by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of ___<*insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory*>." (Boldface omitted.)

who happens to be in the kill zone, i.e., *everyone* in the kill zone.'" (*Id.* at p. 138, fn. 3.) Similarly, "[n]o reasonable juror could have failed to understand from the instructions as a whole that, to the extent the court occasionally used the word 'harm' or the phrase 'zone of harm,' the harm to which the court referred was the ultimate harm of death and that the law required that defendant had to have intended to kill the victims." (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396.) In *Stone*, the court found the instruction should not have been given by the trial court: the kill zone theory was inapplicable, as the case involved only one count of attempted murder. (*Stone*, at p. 138.) The court noted that the defendant "was not charged with 10 attempted murders, one for each member of the group at which he shot." (*Ibid.*) Here, however, Martinez was charged with attempted murder for each member of the group in the car at which he shot the AK-47, so that the kill zone theory applied.

Martinez points to questions asked by the jury during deliberations as evidence that the jury was confused by the instructions. The jury sent the following request: "1. Several members of the jury request clarification of the 'kill zone' concept as it relates to Attempted Vol[untary] Manslaughter. Does this concept only apply to Attempted Murder? 2. In considering the 'kill zone' concept, must Raul Pacheco, Esther & Raul [sic] Mendez & Jessica Pacheco be considered <u>together</u> or can some be in the 'kill zone' and some or one not?" The court referred the jury back to the attempted murder instruction. The jury then asked, "We (think we) understand kill zone as it relates to Attempted Murder. Does 'kill zone' apply to the Attempted Voluntary Manslaughter also. This is not addressed in the instructions." The court replied: "The 'kill zone' theory can apply to attempted voluntary manslaughter as well as attempted murder. It is for you to decide if either, or both, defendants harbored a specific intent to kill and if, or to what extent, the 'kill zone' theory may apply." These questions do not show jury confusion or misunderstanding. Instead, they show the jury's effort to apply the instructions to the facts of the case. The court properly responded that the kill zone theory applied to attempted voluntary manslaughter because, like attempted murder, it required a specific intent to kill.

The instructions were not improper or prejudicially confusing to the jury.

III. The abstract of judgment must be corrected.

Respondent concedes that the abstract of judgment incorrectly states that the court imposed a consecutive term of one year and four months on count 7 (possession of heroin, to which Martinez pleaded guilty) and that the total prison term is 18 years and 4 months. As the court stated at the sentencing hearing, however, the sentence on count 7 was to be served concurrently, resulting in a total sentence of 17 years. The abstract must be corrected to reflect the sentence imposed.

DISPOSITION

The trial court is ordered to correct the abstract of judgment to reflect that the one year and four month sentence on count 7 is to be served concurrently, resulting in a total sentence of 17 years, and to forward a corrected certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.