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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTINO ESTRADA,

Defendant and Appellant.

B267634

(Los Angeles County
Super. Ct. No. SA086426)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elden S. Fox, Judge. Remanded with directions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Justino Estrada lay in wait and opened fire upon a group of pedestrians, killing one. Estrada challenges his convictions for first degree murder and two counts of attempted murder, and also alleges errors in his sentence and abstract of judgment. We remand the matter for resentencing but otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Estrada was charged with the murder of Brandon Grayson (Pen. Code,¹ § 187), the attempted premeditated murder of Kerian Wynter, and the attempted premeditated murder of Marcel Santa Cruz (§ 664/187). The offenses were alleged to have been committed for the benefit of, at the direction of, and in association with a criminal street gang within the meaning of section 186.22, subdivision (b)(1)(C). Additionally, it was alleged as to all charged offenses that Estrada personally and intentionally discharged a firearm, causing great bodily harm and injury to the victims within the meaning of section 12022.53, subdivision (d). Estrada was tried by a jury.

I. The Shooting

Lawndale 13 is a predominantly Hispanic gang based in the city of Lawndale. Two of the gangs in nearby Hawthorne are the Hawthorne Thug Family, a mostly Black gang, and the Hawthorne Little Watts, a primarily Hispanic gang. Both the Hawthorne Thug Family and Hawthorne Little Watts claim Jim Thorpe Park and an adjacent street, Prairie Avenue, as their territory. Jim Thorpe Park is bounded on one side by Prairie Avenue and on the other side by Cordary Avenue.

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

Both Lawndale 13 and the Hawthorne Little Watts are rivals of the Hawthorne Thug Family. The conflict between Lawndale 13 and the Hawthorne Thug Family is based on race.

Walter Velasco² was a member of Lawndale 13 who sold drugs and carried a nine-millimeter Glock handgun. On March 9, 2011, Velasco was selling drugs in the Hawthorne area. Estrada, another member of Lawndale 13, called him in the evening to arrange a transaction.

Velasco and Estrada met at a convenience store, where Estrada exchanged money for marijuana. He asked Velasco if he had his “strap,” or gun, with him. Velasco said that he did, and Estrada told him to wait for him while he gave the drugs to his companions.

Estrada handed off the drugs and then returned to Velasco’s car, asking Velasco to take him up the block to “check something out.” Estrada asked for Velasco’s gun, and Velasco gave it to him. The gun was loaded with fewer than 10 bullets. As they drove past a “little crowd” of Black people walking toward Jim Thorpe Park, Estrada pointed out the “tuna fishes,” meaning members of the rival Hawthorne Thug Family gang. Velasco did not recall how many people were in the group, and when asked if the group was made out of males, females, or both, he said, “I seen many males.” Estrada directed Velasco to turn around and go back, saying “I am going to light them up,” meaning to shoot at them. Velasco asked if he really meant that, and Estrada said, “Yeah. Let’s go back.” Velasco made a series of

² Velasco pleaded guilty to manslaughter in connection with the shooting and received a 15-year sentence in exchange for his testimony.

turns around the park, and they saw the group again, now walking past a drugstore in the direction of the park.

Velasco did not want Estrada to shoot from his car because he did not want his car to be at the scene. Estrada suggested that Velasco drop him off and then wait for him on Cordary Avenue on the other side of the park. Velasco stopped the car on Prairie Avenue about half a block away from the group of pedestrians. Velasco drove away immediately after Estrada left the car. He waited on Cordary Avenue with the car's headlights off.

Kerian Wynter was walking on Prairie Avenue on her way to a drugstore when she approached a group of men walking toward the park. As she passed them, she recognized one of the men as "Nani," Anthony Cabasas.³ She turned so that she was walking backwards and spoke with Cabasas, who asked if she wanted to hang out at the park. Wynter said no, and then felt a burning sensation in her stomach area. Cabasas yelled, "Run, run. You're shot. You need to run." She and Cabasas ran toward the drugstore, where they saw an ambulance. She was taken to the hospital with five or six gunshot wounds to her abdomen and chest. She remained in the hospital for 45 days and underwent numerous surgeries. Wynter was identified by police as affiliated with the Hawthorne Thug Family, although she denied knowing any members of that gang.

³ Cabasas was identified by the police as a member of the Hawthorne Thug Family.

Marcel Santa Cruz was walking down Prairie Avenue that night with Brandon Grayson.⁴ He was shot once in the shoulder. He did not see the shooter, hear the shots, or see Grayson being shot. Santa Cruz was identified by the police as a member of the Hawthorne Thug Family, but he denied this at trial. According to the police, Grayson had previously admitted to being a Hawthorne Thug Family member.

Jean Fifita-Lautaha was sitting in her car in a parking lot on Prairie Avenue, across from the park, when she heard screaming. She turned and saw what she described as “a group” of “African American kids” running away from the park. There were five or more young people, both male and female, but primarily male. She also saw a person she described to the police as male and Hispanic stepping off the curb, extending his hand with a gun, and firing toward the group. Fifita-Lautaha was not sure how many shots she heard, but thought there were three to five. She ducked down in the car so that she would not be seen. She heard someone scream, “Call 911,” and she used her mobile phone to call emergency services. She stayed reclined in her car until she heard the police arrive. When she sat up, she saw someone lying on the sidewalk.

Velasco heard approximately five gunshots coming from the area where he had left Estrada, and he believed that those

⁴ At trial, Santa Cruz initially testified that he was walking with some other people, but when questioned about who those people were he first claimed to have no recollection of anyone other than Grayson, then said he was not walking with anyone, and finally said he was walking with Grayson only. When asked if a girl walked up to the group and talked with Cabasas, Santa Cruz said that he believed “somebody was walking up towards me.”

gunshots were connected with Estrada. About a minute to a minute and a half after the shots, Estrada came running to the car from the direction of the park. Holding the gun in his hand, Estrada entered the passenger side of the car.

As they drove away Estrada described to Velasco what had occurred. He said that after Velasco dropped him off he waited by some bushes for the group to approach. Estrada said he had called out, "Fuck tuna fishes" before he started shooting. Estrada told Velasco that he thought he "laid one out," or shot one man. Velasco could see that the gun's slide was stuck open, and he knew that when all the rounds in the gun had been fired, the top slide would stick in the back.

Police found Brandon Grayson lying on the sidewalk, bleeding profusely. Paramedics pronounced him dead on the scene. Grayson was killed by a gunshot wound to his neck.

Meanwhile, Velasco did not want the gun in his car because of what had just happened, so he and Estrada decided to hide it at the home of fellow Lawndale 13 member Alex Pech. At Pech's home, Pech and his girlfriend Katrina Castanon came outside. Estrada left the car with the gun and spoke with Pech. He returned to Velasco's car a few minutes later without the weapon.

Velasco and Estrada went to Velasco's home. There, as they sat in the car, Estrada began sending text messages to others telling them to avoid the area where the shooting occurred. Subsequently, various members of Lawndale 13 arrived at the home. They seemed to know what had happened, and they told Velasco he should leave Hawthorne. They told Velasco that the scene had been cordoned off and that someone had been killed. Velasco consulted his brother-in-law, Emilio

Garcia. Garcia spoke with Estrada, who said he shot someone at the park.

Estrada, Velasco, and Garcia got into Garcia's truck and drove toward the park, stopping at a gas station across the street. Velasco saw police officers, an ambulance, and crime scene tape. They left the gas station, but on the way back to Velasco's home, Estrada received a telephone call. When he finished the call, Estrada said that they had to go to pick up the gun right away because Pech said they could no longer store the gun there.

Velasco and Estrada retrieved the gun from Pech, then went to Lancaster and stayed the night. Estrada told Velasco more about the shooting. He said that after Velasco dropped him off, he waited by some bushes for the people to approach; and once they were there he shot at them. He said he had shot a man.

The following day, Velasco, Estrada, and Garcia broke the gun into pieces and disposed of them. The men returned to Hawthorne.

Some days later, Estrada told Velasco that what had occurred was very serious because he believed that a woman was injured in addition to the man who died. Estrada wanted to leave the area, and Garcia suggested they go to Arizona and stay with a friend. The three men drove to Arizona, but Estrada then chose to return to California with the others.

II. Additional Evidence

The police observed bushes and a low wall, approximately three and one-half feet high, in the area of the shooting. They also recovered six nine-millimeter shell casings and a bullet at the scene. The casings and bullet, as well as a bullet recovered

from Grayson's neck, were all fired from the same nine-millimeter caliber firearm. The bullets exhibited characteristics indicative of having been fired from a Glock.

Exterior surveillance video taken at a nearby business at the time of the shooting showed a car driving slowly down Cordary Avenue, then stopping. The headlights were then extinguished. The video showed that shortly thereafter, a person entered the passenger side of the car, and the car drove off.

A. The Marquez Family and Castanon

In April 2011, the month after the shooting, Daniel Marquez⁵ asked to speak with investigators while he was in custody. Daniel, a relative of Estrada and a member of Hawthorne Little Watts, told police that not long before the shooting, Estrada had a dispute with two members of the Hawthorne Thug Family at a courthouse. Estrada felt that the men were disrespectful of his recently deceased father, and they were about to fight when others intervened.

Daniel told police that he saw Estrada the night of the shooting because Estrada went to see Daniel's grandfather, Richard Marquez, and he told Daniel and Richard about what had occurred. Estrada was wearing a dark hooded sweatshirt and dark jeans. Daniel reported that Estrada, who was putting in work⁶ for Lawndale 13, said that he was out looking for Hawthorne Little Watts members when he saw the group of pedestrians. According to Daniel, Estrada said that "he went

⁵ As witnesses Daniel and Richard Marquez share a surname, we refer to them by their first names for clarity.

⁶ To "put in work" is to commit crimes of escalating seriousness so that one will be promoted within the gang.

down the street a little bit, home boy, his home boy pulled over, he went in the bushes, waited in some little bushes.” “[W]hen they walked by him he just popped out and started shooting at them.” Estrada said he “lit them mother fuckers up,” and indicated that he killed one and wounded some.

Two years later, in May 2013, Richard, Daniel’s grandfather and Estrada’s cousin, spoke with a detective while in custody. In a recorded interview, Richard stated that Estrada was the shooter. Richard said that on the night of the shooting Estrada came to the door and asked to shower. Estrada said that he was riding in the car of one of his “homies” when they saw some “black guys that he had had a problem with in the court house.” They turned around. Estrada “masked up and hid behind some, like, bushes, or by a wall, squatted down. It was dark and he [unintelligible] and he popped out at them.” When they walked by he jumped out and fired. He thought he shot two males who died and a female who did not. Richard described Estrada as having “put in work” with a gang and expressed certainty that if Estrada learned about this “he wouldn’t hesitate to come and blow me away.”

In September 2013, Castanon was in custody and told the jail staff that she had information regarding a homicide. In a recorded interview, Castanon disclosed that Estrada committed the shooting. Castanon had seen Estrada the day after the shooting. “[H]e was bragging about it the next day,” she said. Estrada said that it was the first time he had actually shot someone, and that he thought he killed him but he was not sure. Estrada said that “he ran up on them in the park.” “I think he told us that there was three black guys there but I think he only hit one, but I’m not, um, I can’t tell you for sure.” Estrada

thought they were from the Hawthorne Thug Family. She recalled that Estrada said that he was “the only person that’s . . . laid somebody down.” Castanon told the police that Velasco drove and Estrada committed the shooting.

The prosecution presented evidence that by 2014 Estrada had obtained copies of the police reports, including reports of the statements Castanon, Daniel, and Richard had made to the police. Richard contacted the police with his concerns for Daniel’s safety in county custody, and the police had Daniel moved to protective custody.

In August 2015, Daniel spoke to his mother and to Richard in a recorded telephone call. Daniel told Richard that he had spoken with Estrada’s attorney that day and that the attorney said he was going to speak with Richard. Daniel said that he had told the attorney that if he testified he would say that Hawthorne Little Watts was responsible for the shooting. Richard advised Daniel, “It started with your homeboys—in Lil Watts. You don’t tell [th]em a name. Tell [th]em I don’t know.” Richard also told Daniel, “[D]on’t say too much,” and reminded Daniel that he would be questioned about why his account had changed. Richard advised Daniel to testify that he was “loaded” on drugs and would have said anything.

Daniel related to his grandfather that he and Estrada had spoken briefly. Richard asked if Estrada knew that Richard was going to try to help him when he testified. He asked Daniel, “He knows that I ain’t gonna go up there and say nothing bad[,] right?” Daniel told Richard that when he testified, “You gotta make sure you say Lil Watts did it though.” Richard asked Daniel to ask Estrada to tell his family to “quit running their mouth” because he (Richard) was going to testify just as he had

in the preliminary hearing except that now he was going to say that a detective had told him certain things. Richard also said he wanted to talk to Estrada's attorney about something the prosecutor said in an attempt to "put a doubt in the jury's mind."

During Estrada's trial, Richard told law enforcement that he would appear in court, but that he planned to testify that he did not remember anything. Richard said that he did not want it to become known that he was a "snitch,"⁷ explaining that he had been marked for attack in the past and did not want that to happen again. When Richard testified, he asserted that he had been under the influence of heroin when he met with the police and had no recollection of statements being made concerning a murder; and if there were statements that were made, he had fabricated them. He testified, "I pulled out the oldest trick in the penal system, which is say what you got to say to get [out] and worry about [it] later. That's basically what I did. I regret it now because I lied, and it's bad on him. But no, I had no firsthand nothing." As Richard left the courtroom after testifying, he and Estrada winked at each other, and Estrada made "a thumbs up" gesture.

During the trial Castanon told the police that she was afraid for her safety because it was becoming known that she had spoken with the police about the shooting. She recognized Lawndale 13 members in the courtroom audience, and she did not want to testify in front of them. When she testified, Castanon declared that she would not answer "questions about other people," and was instructed that she would have to answer such questions or be held in contempt. Castanon then answered the

⁷ A snitch is a gang member who informed on another gang member.

majority of the questions on direct examination with “I don’t remember” or “I don’t know.” She claimed not to remember speaking with the detective, being in custody, identifying Estrada as the shooter, or making the various statements from her 2013 interview, and she testified she did not know whether the voice on the recording of the interview was hers.

Daniel also recanted at trial. He testified that everything he told the police about the night of the shooting was made up to cover for the Hawthorne Little Watts gang, which had actually committed the shooting. Daniel also claimed to have solicited Castanon in 2011 to tell a similar story to cover for his fellow gang members. In a recording of a call between Daniel and his mother, Daniel’s mother criticized Daniel’s description of his testimony and told him, “If you’re gonna lie, you gotta learn how to lie right.”

The prosecution presented testimony that cooperation with the police could be fatal. One police officer testified, “If you’re a gang member and you snitch, and the Mexican Maf[ia] [is] in the jail, the representatives [of the Mafia], they ask for . . . police reports, they ask for anything that corroborates saying that John Doe is snitching or cooperating with the police. And once they get that paperwork, that’s confirmation that Jane Doe or John Doe snitched, and that places them on the list [of people to be targeted]. And that list is distributed, it’s updated, and it is an amazing network, but it gets around, and you will get killed in jail or out of jail.”

B. Undercover Operation Involving Estrada

While in custody in January 2014, Estrada was placed in a monitored holding cell with two undercover deputies who were dressed as inmates.

Deputy Anthony Castro, one of the undercover officers, testified at trial that Estrada expressed shock that he was being questioned about a homicide because no one had questioned him in all the time since the shooting. He told the deputies that he was the shooter, and that he shot an enemy, "this Thug family." Estrada said he saw the group walking, and he hid behind a small wall. Estrada demonstrated crouching down and then standing up to shoot. He knew a woman had been shot and had expected repercussions because there was a female victim.

Castro testified that Estrada told them that Velasco was the driver. Estrada said that he knew there was a video recording, but he said he had a hooded sweatshirt on and demonstrated how it covered his face. Estrada confirmed that he had used a Glock, and he was not concerned about DNA because he had not touched the shell casings. Estrada indicated that he had told a lot of people what he had done because he was proud of it, and because "he was trying to make a name" for himself. Estrada said he went to Arizona after the shooting.

Detective Antonio Robles testified that he had listened to the conversation between the undercover deputies and Estrada as it occurred. He testified that Estrada told the deputies that he knew why he was there, that some time ago he had committed a murder, and he had told a lot of people about it. Estrada said that he had been in the area of Prairie Avenue and Rosecrans Avenue when he saw some of his enemies there, and he called his "homeboy" to pick him up. Estrada identified his homeboy as "Walter." Once Walter arrived, he asked for and took Walter's gun. Estrada told the deputies that he had shot Black people. Estrada said that at the time, he was excited about the shooting and "messed up" by telling a lot of people about it. He bragged

about it because he was excited and because it was the first murder he had ever committed. The deputies asked Estrada if he was worried about his DNA being on the casings from the shooting, and Estrada replied that he was not concerned because he did not load the firearm himself. He also disclosed that his “homeboys” had chopped up the gun after the shooting and that the pieces had been scattered in different places.

Detective Brandt House also listened to the holding cell operation as it took place. He testified that he heard the same things that the other two detectives testified to have heard, and he further recalled that Estrada talked about jumping out from behind a wall and firing several rounds at the victims. House testified that Estrada said that he had used a Glock nine-millimeter pistol and that he watched as it was cut up after the shooting. Estrada had discussed Velasco, and he also said that he had committed the shooting on foot but then fled in a vehicle. House testified that he had spoken with Estrada before the holding cell operation, and that he had not mentioned Velasco, the weapon, or jumping out of bushes.

C. Estrada’s Testimony

Estrada testified on his own behalf. He testified that he did not associate with Richard and Daniel and that he had no contact with them in 2011. Estrada denied spending time with Velasco because they “associated with different crowds and we associated with different activities of the way we lived our life.” Velasco, Estrada testified, was involved in drug sales, but he was not, although he did buy drugs from Velasco.

Estrada said he was out driving his new car on the night of the shooting when he heard sirens and helicopters. Concerned about the welfare of his fellow gang members, he went to a fast

food restaurant near the shooting to find out what had happened. When he learned the deceased victim was Black, he knew “it had nothing to do with my friends or my people or, I mean, my gang, so I left it alone and I left.”

Estrada denied that Lawndale 13 had conflict with any Black gangs, and he denied that there had been any incident in which a gang member was disrespectful about his deceased father. Estrada denied knowing the victims of the shooting. He did not have any reason to be angry with anyone from the Hawthorne Thug Family at the time of the shooting.

Estrada described his encounter with the undercover officers in the holding cell. He explained that he understood the men to be gang members, and that younger gang members were required to answer the questions of older gang members. He brought up Velasco only because the undercover officers said they had overheard detectives talking about Estrada and his case, and he was trying to figure out why he was being interviewed about a murder. Estrada mentioned a Glock only because his other criminal case involved a stolen gun that he believed was a Glock. He acknowledged that he told the officers that he would accept a 15-year sentence, and said he was showing off and trying to be cool. Estrada denied taking credit for the shooting, but said that “it’s like they were interrogating me and me trying to play cool. Yes, there was inferences.”

Estrada testified that he did not know why Daniel, Richard, and Castanon identified him as the shooter. He testified that Velasco lied when he testified. Estrada also stated that the three officers who testified about the undercover operation were wrong about what happened.

III. Conviction and Sentence

Estrada was found guilty of first degree murder and two counts of attempted premeditated murder, with the gang enhancement allegations and firearm enhancement allegations found true. For the murder conviction, count 1, the trial court sentenced Estrada to a term of 25 years to life, plus a consecutive 25 years to life for the firearm enhancement. For each attempted murder conviction (counts 2 and 3), the court imposed a life sentence with a minimum parole eligibility period of 15 years plus terms of 25 years to life for the firearm enhancement, both designated to run consecutively to the sentence on count 1. Estrada appeals.

DISCUSSION

I. Ineffective Assistance of Counsel

Estrada contends that his attorney's failure to object to testimony by Robles concerning Estrada's other crimes pursuant to Evidence Code sections 1101 and 352 constituted ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*). To establish ineffective assistance of counsel, Estrada must demonstrate that "(1) counsel's representation was deficient in falling below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation subjected the petitioner to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the petitioner." (*In re Neely* (1993) 6 Cal.4th 901, 908 (*Neely*).)

Here, the jury first heard opinion testimony from gang expert Deputy Ramon Munoz that a large gang tattoo was

something that gang members have to earn and signified that the gang member with the tattoo had been “putting in work. He’s working. He’s doing crimes to earn these tattoos. You have to earn your ink.” Subsequently, gang expert and percipient witness Robles testified that the increase in both size and number of tattoos that Estrada had obtained since the shooting signified his gang allegiance. He opined that the increased number of tattoos showed Estrada’s dedication, loyalty, and commitment to the gang because they were in larger font size and in more visible locations on his body. He testified that Estrada was a known member of Lawndale 13 at the time of the shooting who, in Robles’s opinion, was “known to be out committing crimes,” was “putting in work,” and was “an up-and-comer, someone trying to gain status.” Robles stated that the basis of his belief that Estrada was putting in work to gain status within the gang was that “[t]here was an incident before the homicide where he was arrested for a pretty bold crime.”

Estrada argues that the expert testimony asserting that his numerous tattoos meant he had committed numerous crimes, that he was known by police to be out committing crimes, and that he was previously arrested “for a pretty bold crime” was prejudicial and inadmissible other crimes evidence prohibited by Evidence Code sections 1101, subdivision (a) and 352. Although ineffective assistance of counsel claims are more suited to petitions for habeas corpus, Estrada claims that this issue is properly raised on appeal because there could be no reasonable tactical or strategic reason for not objecting to this evidence. (See *People v. Ray* (1996) 13 Cal.4th 313, 349 [“In order to prevail on [an ineffectiveness] claim on direct appeal, the record must

affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission”].)

We need not determine whether the failure to object to this testimony constituted objectively unreasonable conduct on the part of Estrada’s counsel, because under the particular facts of this case Estrada cannot demonstrate a reasonable probability that the result would have been different had his counsel objected to the gang experts’ testimony. Estrada testified to his other crimes and his bad character: his own testimony established that he had committed multiple felonies, that he was a highly committed gang member, and that he was “not a good” person. He testified that he had been a member of Lawndale 13 since 2006, when he had just turned 14 years old. He testified that after he joined the gang he had been arrested and convicted of felonies, including arson and possession of a firearm. He described having been released from a juvenile camp facility and placed on house arrest from December 2010 to February 2011. He also testified that at the time of the undercover operation, he was in custody on a “new case” involving charges of receiving stolen property, namely a tablet computer, car keys, and two firearms. Estrada said that two months after the shooting he was arrested and then served a prison term. On cross-examination, he testified that he had been out committing crimes right before he was arrested. He testified that he was not “against what the Mexican Mafia stands for.” Estrada testified, “I’m not a good, nice guy.” He agreed with the prosecutor’s statements that he was tattooed, proud of his gang, and “very entrenched.” He confirmed that he was “committed to [his] gang.”

Other evidence was similar. Estrada bragged at the time of the shooting about killing Grayson, calling it his first murder. Years later, he recounted the shooting to undercover officers and described how proud he had been of what he did, even reenacting his shooting pose for them. Daniel told the police that although they were relatives Estrada had shot at him before. The jury heard the recording of Richard's interview with the police, in which Richard said that Estrada was a "gunner"⁸ who had put in work for his gang and "wouldn't hesitate to come and blow me away" if he learned that Richard was cooperating with law enforcement. Richard expressed concern for his safety and the safety of his family members if Estrada learned that he was informing on him. Given this evidence, Estrada cannot demonstrate a reasonable probability that the result would have been different if his counsel had objected to the gang experts' testimony.

II. Failure to Instruct with CALJIC No. 8.31

Estrada argues that the jury should have been instructed on second degree implied malice murder with CALJIC No. 8.31, which defines second degree murder as: "the unlawful killing of a human being when: [¶] 1. The killing resulted from an intentional act; [¶] 2. The natural and probable consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life." Although Estrada did not

⁸ A gunner is a person who either likes or is not afraid to shoot others.

request this instruction at trial, he argues that the court had a sua sponte obligation to give it.

Although the court did not give CALJIC No. 8.31, its exact definition of second degree implied malice murder is also included in the definition of “malice aforethought” on which the jury was instructed. Our Supreme Court in *People v. Chun* (2009) 45 Cal.4th 1172 concluded that the “malice aforethought” instruction in CALJIC No. 8.11, which the court gave in this case, was sufficient to instruct on the crime of second-degree murder without CALJIC No. 8.31. (*Id.* at pp. 1201-1203.) As the Supreme Court explained, “CALJIC No. 8.11[] contains everything necessary to fully instruct the jury on this form of malice as a possible theory of second degree murder.” (*Id.* at p. 1202.) The only language from CALJIC No. 8.31 that is not included in CALJIC No. 8.11 “is the last sentence of CALJIC No. 8.31: ‘When the killing is the direct result of such an act [an act committed with implied malice], it is not necessary to prove that the defendant intended that the act would result in the death of a human being.’ But omission of this sentence, favorable to the prosecution, could neither have prejudiced defendant nor prevented the jury from finding implied malice.” (*Ibid.*) Estrada has not established any error here.

III. The Kill Zone Theory of Liability for Attempted Murder

The trial court instructed the jury with CALJIC 8.66, concerning attempted murder, and former CALJIC No. 8.66.1, about the kill zone theory of attempted murder. As given, former CALJIC No. 8.66.1 provided, “A person who primarily intends to kill one person, may also concurrently intend to kill other persons

within a particular zone of risk. This zone of risk is termed the ‘kill zone.’ The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim’s vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ‘kill zone’ is an issue to be decided by you.”

Estrada contends that the trial court should not have instructed the jury on the kill zone theory of liability for attempted murder⁹ because it was inapplicable to the evidence and because it was likely to confuse the jury and relieve it from making findings on relevant issues. He also contends that the prosecutor affirmatively misstated the law on the kill zone theory of liability. Finally, he argues that to the extent that his counsel’s failure to object to the instruction or argument forfeited these issues on appeal, counsel rendered ineffective assistance.

We agree with Estrada that the evidence presented to the jury did not show there was a primary target of the shooting. Accordingly, it was error to instruct the jury with former CALJIC No. 8.66.1. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [error to give an instruction which, while correctly stating a principle of law, has no application to the evidence presented].) The error, however, was harmless because no reasonable jury applying the instruction could have found Estrada liable for attempted murder on a primary target kill zone theory. (*Id.* at p. 1129-1131.) Because there was no evidence that Estrada had a primary

⁹ The kill zone theory of liability for attempted murder is currently being considered by the California Supreme Court in *People v. Canizales*, review granted Nov. 19, 2014, S221958.

target, by its own terms former CALJIC No. 8.66.1 was inapplicable. Moreover, in closing argument the prosecutor did not argue that there was a primary target, but instead argued that Estrada had the intent to kill everyone in the group at which he was shooting.

Finally, even though former CALJIC No. 8.66.1 was improperly given here, the jury was properly instructed on the charged offense of attempted murder with CALJIC No. 8.66. Because the trial court properly instructed the jury on attempted murder and the prosecutor did not rely upon the primary target theory, it is not reasonably probable that any error in instructing the jury with former CALJIC No. 8.66.1 misled the jury to Estrada's prejudice.

Estrada contends, however, that the prosecutor misstated the law in closing argument. The prosecutor argued that the jury should convict Estrada of the attempted murders of Wynter and Santa Cruz: "You have a second charge of attempted murder, counts 2 and 3. . . . You know what the elements of murder are, and he didn't succeed. It's a direct but ineffective act towards killing a person. He fired at them multiple rounds. They collected six casings and a projectile on the street and another projectile in the body of Brandon Grayson. [¶] So he was trying to kill everybody, but he only got one of them. He shot two more. So that would be direct but ineffective. He didn't kill Marcel. He didn't kill Kerian. And he had the specific intent to kill that person. [¶] Now, you can say, well, did he mean to hit Kerian? Did he mean to hit Marcel? So we have another instruction. It's the intent to kill anyone in the kill zone, and you'll get an instruction on this. [¶] When you fire at a group and you don't care, you're trying to kill, that's the kill zone. You're firing in it.

You have the intent to kill. And there's an example. I only want to kill the one person. And again, we don't even know if it was intended for Brandon Grayson. Again, it doesn't matter. He's firing at all of them. He wanted to kill them all if he could. He didn't care. But if I kill all the others, that's okay." Estrada claims that the prosecutor misstated the law concerning the kill zone theory by suggesting that (1) an intent to kill anyone was sufficient and (2) even if the defendant only intended to kill one person the kill zone theory applied.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*)).

To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*Hill, supra*, 17 Cal.4th at p. 820.) Estrada neither objected to the prosecutor's argument about the kill zone nor requested a jury admonition, and he therefore has waived any error in its admission. We address the merits of the issue, however, because Estrada argues that his trial counsel's failure to object constituted ineffective assistance of counsel within the meaning of *Strickland, supra*, 466 U.S. 668 because there could be no valid

tactical reason for failing to object. (See *People v. Nation* (1980) 26 Cal.3d 169, 179.)

In evaluating claims of prosecutorial misconduct based on arguments made before the jury, we determine whether there is a reasonable likelihood the jury construed the remarks in an objectionable fashion. (*People v. Edwards* (2013) 57 Cal.4th 658, 734.) We conclude that it is not reasonably possible that the jury understood the prosecutor's statements in the manner suggested by Estrada. While it is true that the prosecutor used the word "anyone" rather than "everyone" to describe the intent to kill those in the kill zone, the California Supreme Court has observed that "[i]n 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 who happens to be in the kill zone, i.e., *everyone* in the kill zone." (*People v. Stone* (2009) 46 Cal.4th 131, 138 fn. 3.) Here, the prosecutor reinforced that understanding by arguing, "He's firing at all of them. He wanted to kill them all if he could." Moreover, given the prosecutor's argument that Estrada was firing with the intent to kill all the people in the group, it is not reasonably possible that the jury understood the prosecutor's argument as suggesting that even if Estrada "only intended to kill one person the kill zone theory applied, . . . suggesting it did not matter who appellant intended to kill, [or] . . . suggesting that an indifference to the possibility of other potential victims was sufficient for attempted murder." Estrada has not established misconduct.

Our conclusion that no reasonable jury could have concluded that there was a primary victim on the evidence presented disposes of Estrada's remaining arguments challenging the language of former CALJIC No. 8.66.1. Additionally, because

the error in instructing the jury with former CALJIC No. 8.66.1 was harmless, and because the prosecutor did not misstate the law, Estrada has not established that his counsel's failure to object to the instruction and/or closing argument constituted representation that fell below an objective standard of reasonableness under prevailing professional norms. (See *Neely*, *supra*, 6 Cal.4th at p. 908.)

IV. Cumulative Error

We reject Estrada's final contention that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Because we have found none of the claimed errors to constitute individual errors, they cannot as a group constitute cumulative error. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.)

V. Consecutive Sentencing

At sentencing, the court ordered that Estrada's sentences for attempted murder be run consecutively to the sentence for the murder, noting with respect to one of the counts that the sentence was ordered to run consecutively "as required by statute." Evidence Code section 669, however, gave the trial court discretion to impose consecutive or concurrent sentences on the attempted murder convictions. Because the trial court mistakenly believed that it had no discretion to impose concurrent sentences on the attempted murder convictions, the case must be remanded to allow the trial court to exercise its discretion in determining whether the sentence on counts 2 and 3 should be served concurrently or consecutively to the sentence on count 1. (See *People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263.)

VI. Errors on Abstract of Judgment

Estrada correctly asserts, and the People agree, that although the trial court did not orally impose, and could not impose, a fine pursuant to section 1202.5 at the sentencing hearing, the abstract of judgment lists a \$41 fine under that statute. Also, in our review of the record, we observed that although the court imposed a sentence of 25 years to life for the murder (prior to adding additional years for the firearm enhancement), the abstract of judgment states that the term of imprisonment for the murder was 15 years to life. While we need not correct the abstract of judgment because we remand the matter for resentencing, we note these items so that they may be addressed when the subsequent abstract of judgment is prepared.

DISPOSITION

The matter is remanded to the trial court for resentencing. The superior court is then directed to prepare a corrected abstract of judgment and to forward a certified copy of the abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SMALL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.