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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSE FRANCISCO ARNAUD, Defendant and Appellant.	B225348 (Los Angeles County Super. Ct. No. GA075509)

APPEAL from a judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed.

Judith Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jose Francisco Arnaud appeals from the judgment entered following a jury trial in which he was convicted of first degree murder; attempted willful, deliberate, and premeditated murder; and mayhem. Defendant contends the trial court committed instructional error. We affirm.

BACKGROUND

A little before 2:30 a.m. on December 28, 2008, Rodolfo Macias was fatally shot four times from behind, with three of the shots entering the back of his head and one entering his upper back. (Undesignated date references are to 2008.) Raymond Salcedo was also shot in the head. The bullet entered behind his left ear and exited through his left eye. He lost his left eye, could no longer drive, and had difficulty walking at the time of trial, nearly two years later. He had no memory of what happened to him. Macias and Salcedo were shot at the conclusion of a confrontation with members of the Pasadena Latin Kings gang.

Salcedo lived with Edwin Galvez on Mar Vista in Pasadena. On the evening of December 27, Galvez held a barbecue attended by Salcedo, Macias, and Adrian Nava, who lived down the street. None of the four were gang members, but Salcedo and Macias had shaved heads and may have looked like gang members. Nava arrived around midnight. Nava was "obviously intoxicated" and promptly went out and purchased two 12-packs of beer, which he took back to Galvez's house. He testified he had been drinking at another party he attended that night and continued to drink after arriving at Galvez's home. He was not counting, but estimated he consumed 13 to 16 beers over the course of the night, and he admitted he was feeling the effects of the alcohol. Galvez testified he had consumed only four or five beers over the course of the night and he stopped drinking around midnight.

Sometime between 2:00 and 2:30 a.m. Macias and Salcedo walked five or six houses down the block to meet Macias's girlfriend. About 15 minutes later, Nava and Galvez walked out to the sidewalk at the end of the driveway of Galvez's home because Nava wanted to get his cell phone back from Macias, who had borrowed it. A dark green

Jeep Liberty pulled up and parked in front of Galvez's driveway. At trial and from photographic arrays, Galvez and Nava identified codefendant Tomas Ramirez as the driver of the Jeep and defendant as the Jeep's backseat passenger. At the preliminary hearing, they also identified Tomas's cousin Dario Ramirez as the Jeep's front seat passenger. (Dario was not jointly tried with defendant and Tomas.) Tomas and Dario both had goatees and looked very similar to one another, whereas defendant had no facial hair and looked younger than his companions.

Tomas and Dario asked Galvez and Nava where they were from, which Galvez and Nava understood as an inquiry regarding gang affiliation. Galvez replied, "From nowhere," and Nava said, "Let it be," and "I ain't from nowhere. Just leave it at that. You can leave now." Tomas became agitated and said, "You think I'm going to leave this like that?" Tomas and Dario got out of the Jeep and approached Galvez and Nava, and again asked where they were from. Galvez and Nava said, "Nowhere." Tomas and Dario said, "Pasadena Latin Kings" and "P.L.K."

Salcedo and Macias then approached Tomas, Dario, Galvez, and Nava. Nava testified that Salcedo and Macias walked, not ran toward them, while Galvez alternated between testifying that Salcedo and Macias ran and testifying that they walked. Dario and Tomas then walked or ran up to Salcedo and Macias and asked them where they were from. Salcedo responded by shrugging his shoulders, as if to say "nowhere." Salcedo also removed his hands from the pockets of his sweatshirt and held them in front of his stomach, but neither Salcedo nor anyone else lifted his shirt or opened his jacket to show his waistband.

Galvez testified defendant got out of the Jeep on the driver's side, walked around the back of the Jeep, and walked up behind Salcedo and Macias. Defendant pointed a gun at the back of Salcedo's head and fired. Salcedo fell to the ground. Tomas and Dario were holding Macias by his arms or shoulders. Galvez turned and ran back toward his house. He heard additional gunshots as he fled.

Nava testified that Tomas pressed a gun against Salcedo's eye and shot him. Dario grabbed Macias and pushed him back while Tomas shot him. Then Nava and Galvez ran back toward Galvez's house.

Pasadena Police Detective Keith Gomez began surveillance of Tomas's home on the morning of December 28. At about 11:30 a.m., Tomas walked to a blue Jeep Liberty parked on the street. He sat in the front passenger seat and reached into the rear seat, where he grabbed a dark plaid Pendleton-type shirt. He then stood between the car and the open passenger-side door and picked items up off the floor. He put some of the items in his trouser pockets, closed the door, and walked back to the house carrying two beer cans. About 11:45 a.m., Tomas again emerged from the house. After looking up and down the street, he walked around to the side of the porch. Dario came outside and handed Tomas a clear plastic bag containing dark clothing. Tomas took the bag and threw it next to some garbage. The police detained Tomas and Dario and searched the house. They found no guns, ammunition, or drugs. They recovered the clear plastic bag, inside of which was a plaid Pendleton-type shirt that appeared to be the same one Gomez saw Tomas remove from the Jeep.

Galvez identified the blue plaid Pendleton-type shirt or jacket recovered from the trash bag at Tomas's house as the one defendant wore during the shooting. Nava also identified this shirt, but alternated between testifying that the front seat passenger (whom he had identified as Dario) wore the shirt and testifying that the shooter (whom he had identified as Tomas) wore the shirt. Nava testified that defendant was wearing a hooded gray sweatshirt. Defendant's girlfriend, Frances Kono, identified the blue plaid shirt as belonging to defendant, but she told the police that she thought Dario or possibly Tomas borrowed the shirt on the night of the shootings. The shirt had a bloodstain on it that contained a mixture of two contributors' DNA. The major contributor matched Macias's profile, and defendant was a possible minor contributor. Tomas and Salcedo were excluded as the minor contributor, but Dario could neither be included nor excluded. A swab of the shirt's collar had a mixture of three contributors. Defendant and Macias were

possible contributors, Tomas and Salcedo were excluded as the minor contributor, but Dario could neither be included nor excluded.

Kono testified and made a statement to the police, a recording of which was played at trial. She testified that on the night of December 27 she and defendant had gone to a party, at which someone stabbed defendant's friend "Cricket" in the hand. After they got home from the party, Tomas and Dario came over around 1:00 a.m. with beer. Tomas had a gun in his hands. Kono did not like Tomas and Dario because they were gang members and "tweakers." She went into another room to sleep. Kono told the police that defendant was "pretty drunk." Kono overheard Tomas or Dario urging defendant to go out with them, saying, "Let's go put in some work," or ,"You need to like, put in some work." Kono did not realize that defendant had left with them. The next morning, Kono saw defendant with a gun that looked exactly like the one Tomas had had the night before. She asked him why he had a gun in the house. Defendant replied, "Stupid Little G." Little G. was Dario's moniker. A detective testified that Kono told him she saw defendant hide the gun inside the air conditioner. The police did not find the gun when they searched the home, and Kono testified that she later gave it to one of defendant's friends.

The prosecution's gang expert, Officer Andrea Perez, testified that Latino gangs in Pasadena do not have fixed territories, but in December of 2008, Galvez's home was in an area claimed by the Villa Boys gang, which was a rival of the Pasadena Latin Kings gang. Perez had had contact with defendant more than 20 times, and he had often admitted to her that he was a member of the Pasadena Latin Kings gang. Defendant had an "LK" gang tattoo on the back of his head and "Latin" and "Kings" tattoos on his forearms. Tomas and Dario were also members of the Pasadena Latin Kings gang. Defendant had been a member since at least June of 2002, Dario had been a member since at least 2003, and Tomas had been a member since at least 2004. At the time of the charged offenses, defendant was 21, Dario was 26, and Tomas was 28.

Perez testified that gang members "put in work" by committing crimes for the gang, and they do so to prove their allegiance to their gang and rise within its ranks. In response to the prosecutor's hypothetical question based on the prosecution's evidence at trial, Perez opined that the shootings described in the question would be an example of putting in work and would have been committed for the benefit of, in association with, and in furtherance of a criminal street gang. In response to defendant's variation on the same hypothetical question, Perez testified that two Pasadena Latin Kings gang members who had stopped in Villa Boy territory to confront two other male Hispanics might become concerned for their own safety if they saw two other male Hispanics running toward them. But shrugging shoulders and putting hands up would tend to show the person was not armed and would not be seen as a threatening gesture.

Tomas testified in his defense that he had not been an active member of the gang for years. He was married, had children, and had moved to Minnesota and Texas for work. He was in Pasadena to visit his family at the time of the charged offenses. On the night of December 27, Dario slapped Tomas while he was sleeping, pointed a gun at his face, and persuaded him to drive Dario to a friend's house. There, Dario passed his gun around. Tomas removed the ammunition from the gun. Dario called defendant repeatedly, then Tomas and Dario went to defendant's house around 10:00 or 11:00 p.m. Dario and defendant wanted to speak privately. Tomas watched television with Kono and defendant's sisters for awhile, then told Dario he wanted to leave. Dario wanted additional time to talk to defendant, so Tomas went for a drive with "Little Cricket." When he returned to defendant's house, he watched television for a little longer, then told Dario he was leaving. Dario and defendant wanted to borrow Tomas's car. He refused. They asked for a ride, and he agreed. When they got in the Jeep, Tomas saw the gun in Dario's pocket. Dario sat in the front passenger seat and defendant sat in the backseat. Defendant was wearing the checkered Pendleton-type jacket depicted in the prosecutor's exhibit, Tomas was wearing a blue cotton jacket with a zipper, and Dario was wearing a

black sweater. Defendant and Dario told Tomas where to turn, then told him to stop on Mar Vista near Galvez and Nava.

Tomas testified that Dario made a Latin Kings gang hand sign and asked Galvez and Nava where they were from. Tomas had told the police that he also asked where they were from, but at trial he denied doing so. Galvez and Nava responded, "Nowhere." Dario got out of the Jeep, and Tomas followed to prevent a fight. As Dario was talking to Galvez and Nava, two other men came jogging up the street. This did not cause Tomas any concern. As the two men got closer, they slowed to a walk. Defendant got out of the Jeep on the driver's side, walked around the back of the Jeep, approached the victims, and shot them with Dario's gun. Defendant fired another shot into the head of the second victim after he fell. Tomas screamed, "What the fuck are you guys doing?" He denied playing any role in the shooting, including grabbing one of the victims. Everyone ran back to the Jeep and got in. Tomas drove to defendant's house and told him to get out, then drove home. The next morning, he was removing beer cans from the Jeep and found defendant's Pendleton jacket. Fearing it had gunshot residue on it, he threw it away. Tomas decided to tell the police the truth after they played him a recording of defendant stating that Dario was the shooter.

Galvez did not identify defendant in a field show-up conducted on the afternoon of December 28, but he said defendant looked like the assailant without facial hair, but was not as tall as that man.

Defendant and Tomas were tried together, but with separate juries. The jury convicted defendant of first degree murder, attempted murder, and mayhem, and found that the attempted murder was willful, deliberate, and premeditated. The jury further found that each offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members; and a principal fired a gun, causing death or great bodily injury in the commission of each offense (Pen. Code, § 12022.53, subds. (b)–

(e); undesignated statutory references are to the Penal Code). The court sentenced defendant to prison for 75 years to life.

DISCUSSION

1. Refusal to instruct upon voluntary manslaughter, attempted voluntary manslaughter, and unreasonable self-defense

Codefendant Tomas asked the court to instruct upon self-defense, unreasonable self-defense, voluntary manslaughter, and attempted voluntary manslaughter, arguing that Perez had testified that the victims' approach "could be perceived as a threat." Defendant joined in the request, citing testimony that the two victims ran toward Tomas and Dario. The court refused to so instruct on the ground the instruction was not supported by the evidence because Perez merely said that perception was possible, but she "can't testify and she didn't testify what was in your client's mind." The court noted, "I have insufficient evidence at this point to warrant the instruction. Should your client testify that that's what he was thinking, you get those instructions." The court continued, "There is conflicting evidence as to whether or not they are seen running. I'm saying assuming, for the sake of argument, the jury finds that the testimony shows they are running, there is no testimony in this record to support a state of mind or a belief, honest but unreasonable, or honest and actual and reasonable belief in the necessity to defend at this point. [¶] All I have is a hypothetical question posed to the expert where the expert says, yes, that is one way that one could interpret that conduct. And based on that, there is insufficient evidence at this point to warrant the lesser instructions and the self-defense and unreasonable self-defense instructions. [¶] You can renew it after the defense case." Neither defendant renewed his request for these instructions.

Defendant contends that the trial court erred by refusing to instruct on voluntary manslaughter based upon unreasonable self-defense or defense of others and erred by failing to instruct sua sponte on attempted voluntary manslaughter based upon unreasonable self-defense or defense of others. Because all of these instructions were

requested and refused, we need not address the trial court's obligation to instruct sua sponte.

One who kills or attempts to kill another person because he or she actually, but unreasonably, believed in the need to defend himself or herself from imminent death or great bodily injury is deemed to have acted without malice. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116 (*McCoy*).) Under such an "unreasonable self-defense" theory, the crime committed is manslaughter or attempted manslaughter, not murder or attempted murder. (*Ibid*.) The same is true where the defendant kills from an actual but unreasonable belief in the need to defend another person from imminent death or great bodily injury. (*People v. Randle* (2005) 35 Cal.4th 987, 997 (*Randle*), overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201.)

A defendant charged with murder has the burden of producing sufficient evidence on unreasonable self-defense or defense of others to raise a reasonable doubt of his guilt of murder or attempted murder, unless the prosecution's own evidence suggests one of these mitigating theories. (*People v. Rios* (2000) 23 Cal.4th 450, 461–462.) If neither heat of passion nor unreasonable self-defense or defense of others applies, voluntary manslaughter and attempted voluntary manslaughter are unavailable as lesser included offenses to murder and attempted murder. (*People v. Hines* (1997) 15 Cal.4th 997, 1052–1053.)

A trial court must instruct on lesser included offenses whenever substantial evidence raises a question as to whether all of the elements of the charged offense are present. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) In this context, substantial evidence means evidence from which a reasonable jury "could conclude 'that the lesser offense, but not the greater, was committed.'" (*Ibid*.) The "substantial evidence requirement is not satisfied by '"*any* evidence . . . no matter how weak."'" (*Ibid*.)

There was no substantial evidence in the record to show defendant actually believed that he needed to shoot the victims to defend himself or his companions from imminent death or great bodily injury. Neither the victims running toward Tomas and

Dario (if indeed they ran) nor Salcedo shrugging his shoulders and displaying his hands, nor the combined effect of these acts was so threatening to support an inference that defendant actually believed he needed to defend himself or his companions from imminent death or great bodily injury. In addition, defendant was safely ensconced in the Jeep, yet he got out as the victims approached the other people on the sidewalk. Defendant's exit from the Jeep was completely inconsistent with a fear that the victims were going to kill him or inflict great bodily injury upon him. Defendant also relies upon his own purported intoxication, plus a large measure of speculation, to argue that he misperceived Salcedo's conduct as threatening. Absent testimony revealing what, if any, effect defendant's consumption of alcohol actually had on his mental state, Kono's statement to the police that defendant was very drunk on the night of December 27 is insufficient to constitute substantial evidence that defendant actually believed he needed to defend himself or his companions from imminent death or great bodily injury.

Defendant's claim also ignores the forensic and testimonial evidence showing that he shot the victims from behind, testimony that Macias was being restrained by at least Dario and perhaps both Tomas and Dario when defendant shot him, and forensic and testimonial evidence that defendant shot Macias four times, including a shot fired after Macias he fell to the ground. This evidence is inconsistent with an inference that defendant believed that he needed to defend himself or his companions from imminent death or great bodily injury.

Of course, if Tomas were the shooter, as Nava testified and defendant contended, Tomas's own testimony that he was not concerned by the victims' approach negated any possible basis for instructing upon unreasonable self-defense or defense of others.

Accordingly, the trial court was not required to instruct on voluntary manslaughter, as substantial evidence did not support a theory of unreasonable self-defense or defense of others.

Even if we were to find that the trial court erred, it is not reasonably probable that defendant would have obtained a more favorable result if his jury had been instructed

upon voluntary manslaughter and attempted voluntary manslaughter on the basis of unreasonable self-defense or defense of others, given the nonexistent factual basis for finding defendant actually believed that he needed to defend himself or his companions from imminent death or great bodily injury; his conduct of waiting in the Jeep, then approaching the victims and shooting them from behind and in the head; his conduct in shooting Macias four times, including one shot after Macias had fallen to the ground; the jury's rejection of second degree murder based on provocation, which is how defense counsel urged they could apply the "threat" created by the victims' approach; and the jury's finding with respect to the gang enhancement allegation that defendant specifically intended to promote, further, or assist in criminal conduct by gang members, which is inconsistent with a belief he shot the victims because he actually believed he needed to use deadly force to defend himself or his companions from a threat of imminent death or great bodily injury. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Randle*, *supra*, 35 Cal.4th at p. 1003.)

Defendant relies upon notes sent by his jury and Tomas's separate jury to argue that the refusal to instruct was prejudicial. The note from Tomas's jury has no relevance whatsoever to defendant's case. We address only the note sent by defendant's jury.

At 11:45 a.m. on April 29, 2010, after three hours and 13 minutes of deliberation, defendant's jury sent the court a note stating, "We need clarification whether we the jury need to decide whether the defendant (i.e. Jose Arnaud) was the shooter or not. The verdict forms do not have a place to designate this." The court conferred with counsel, and the court and the prosecutor agreed that the jury was asking about whether they needed to mark such a finding on the verdict forms. Defendant disagreed and objected to the court's proposed response. At 1:50 p.m., the court brought defendant's jury into the courtroom, read the jury's question, and responded as follows: "Correct. The verdict forms do not have a place to designate that because you are not being asked to make a special finding in that regard. I hope that answers your question. And I will ask you all to go back in the jury room. And if you have any other questions that I could answer, or I

may be able to answer, please just give them to me in writing. Okay?" At 2:20 p.m., the jury informed the court it had reached a verdict.

Defendant argues that this note "reflected that jurors were uncertain about [defendant's] state of mind and whether the evidence was sufficient to show he harbored express or implied malice." We disagree. The jury had been told repeatedly by the prosecutor and counsel for defendant that it had to decide whether defendant was the shooter. In the prosecutor's opening statement, she said, "You'll be asked at the end of trial to make findings, if you're able to determine who personally used the weapon, you'll be asked to make that finding. [¶] But even if you can or you can't, you will be asked on [*sic*] make an additional finding that one of the principals—and a principal will be defined to you later—a principal player in this case that they used the weapon. [¶] So even if you are not able to determine who the actual shooter is, you'll be asked to determine [whether] one of the principals did fire a weapon in the case causing great bodily injury and death."

In the prosecutor's closing argument to both juries, she told Tomas's jury it would first need to determine whether someone committed the crimes, then whether Tomas aided and abetted their commission. She then stated, "For Mr. Arnaud's jury, I think it will be a different path. You are going to first determine whether or not Mr. Arnaud was the shooter, was he the perpetrator. And you're going to just go through the initial instructions for the crime. But even if you are not able to conclude that he was the shooter, you can then follow the other path of deciding did somebody—was there a perpetrator from that car that committed these crimes and did Mr. Arnaud aid and abet." Defendant's attorney then told the jury in his argument, "So let's take one last look then at what you're going to have to do in order to make a finding of guilt about anything with regard to my client. First and foremost, you are going to have to make a decision about who was the shooter if you can." And in her rebuttal argument, the prosecutor again told defendant's jury it had to decide if defendant was the shooter: "But you have two issues

in front of you: Was Mr. Arnaud the shooter? And somebody might sit here and say I think he was the shooter and some of you might not."

Notwithstanding the numerous times counsel told the jury it had to decide whether defendant was the shooter, the verdict forms only addressed guilt of the charges, the truth of the gang enhancement allegation, and the truth of the section 12022.53, subdivision (b) through (e) allegations that *a principal* fired and used a gun. Thus, counsels' exhortations to the jury, the wording of the note, and the timing of the note (30 minutes before the jury informed the court it had reached a verdict) indicate that the jury took the prosecutor and defense counsel literally about being required to decide whether defendant was the shooter and wondered where on the verdict forms it was supposed to indicate that finding. The wording and timing of the question are not consistent with defendant's contention that "jurors believed the evidence was equivocal as to whether [defendant] actually thought about killing anyone that night and whether his actions were consistent with knowing the Ramirez brothers [*sic*] intended to kill and helping to facilitate this intent."

2. Instruction with CALCRIM No. 400

The trial court instructed on aiding and abetting principles using CALCRIM Nos. 400 and 401. CALCRIM No. 400 stated, "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." The court gave the following modified version of CALCRIM No. 401: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrator's

unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] An aider and abettor shares the specific intent of the perpetrator when he knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor."

Defendant contends that CALCRIM No. 400 "was misleading in this case because the evidence was susceptible to a finding that Tomas and Arnaud had different *mentes rea* because [defendant] was drunk and Tomas was not and Tomas initiated the gang confrontation and threw gang signs and made threats while Arnaud remained passively inside the car, doing nothing." Defendant also cites his own youth and a purported absence of field identification cards pertaining to him and argues the jury's note shows it "'was considering an outcome other than' murder for [defendant]."

A party 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 modification or amplification. (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

The language used in CALCRIM No. 400 is generally an accurate statement of law, but exceptional circumstances in an individual case may warrant modification of the instruction to accommodate a greater or lesser degree of liability for an aider and abettor. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 (*Lopez*); *People v. Canizalez* (2011) 197 Cal.App.4th 832, 849; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165 (*Samaniego*).)

Thus, the burden was on defendant to request modification of CALCRIM No. 400, but neither defendant nor Tomas requested modification or objected to the instruction. Tomas proposed an instruction as an alternative to CALCRIM No. 401, which ultimately

led the court to modify CALCRIM No. 401 with the express consent of all parties. Tomas objected to language contained in CALCRIM No. 601. Counsel for defendant did not expressly join in the objection, but at one point he stated, "This is why there is that current debate about whether or not an aider and abetter [*sic*] can be convicted of a higher charge than the perpetrator because of *this instruction*." (Italics added.) Defendant erroneously claims in his reply brief that this remark constituted "a specific objection to instructing the jury under CALCRIM No. 400." A review of the record reveals neither defendant objected to or sought modification or clarification of CALCRIM No. 400. Accordingly, defendant forfeited his appellate claim. (*Lopez*, *supra*, 198 Cal.App.4th at pp. 1118–1119.)

Even if we concluded that defendant had not forfeited his claim, we would not find instructional error because this is not a case presenting exceptional circumstances supporting a finding of a lesser degree of culpability for defendant. Nothing in the record indicates Tomas made any threats. Although Tomas and Dario initiated the confrontation, defendant was either an innocent bystander or he completed the confrontation by shooting the victims from behind. The record contradicts defendant's claim that "gang officers had no [field identification] cards on him," as Perez testified that she reviewed about 19 field identification cards pertaining to defendant. In addition, the uncontradicted evidence established that defendant was a member of the Pasadena Latin Kings gang who had on numerous occasions admitted his membership in the gang to Perez and had tattoos signifying his gang allegiance. Defendant's youth relative to his companions is irrelevant, as all were adults and the evidence showed defendant had been a member of the gang for six years at the time of the crimes. Defendant's argument that his mental state was less culpable because he was intoxicated is premised upon speculation regarding the effect of alcohol upon his mental state. As previously noted, nothing in the record showed what, if any, effect the consumption of alcohol had on defendant's state of mind. Accordingly, no inference can be drawn that defendant's

mental state was less culpable than that of his companions. Also as previously noted, the circumstances do not support defendant's interpretation of the jury's note.

If the jury had found that defendant had remained passively inside the car during the entire sequence of events, as defendant argues, it would have had to acquit him on all charges because there would be no evidence supporting a finding that he aided and abetted the commission of the offenses. Nothing in the record showed he said anything to promote, encourage, or instigate the crime, and if the jury did not believe he got out of the car, there would be no basis for finding defendant aided and abetted the offense. The jury's verdicts thus demonstrate that it rejected any theory that defendant did not physically participate in the crimes.

The jury's rejection of any theory that defendant was a passive bystander is also shown by its findings under other unchallenged instructions that defendant committed the murder, attempted murder, and mayhem with the specific intent to promote, further, and assist criminal conduct by gang members (CALCRIM No. 1401).

Even if the jury believed Tomas was the shooter and defendant was an aider and abettor, it necessarily found the following regarding defendant in order to find that he aided and abetted the crimes: defendant knew Tomas intended to murder or attempt to murder the victims; defendant intended to aid, facilitate, promote, encourage, or instigate Tomas in his commission of murder and attempted murder; and defendant did something that in fact aided, facilitated, promoted, encouraged, or instigated Tomas's commission of murder and attempted murder (CALCRIM No. 401). Thus, the jury necessarily found that defendant must have intended that the victims be killed, which means he shared the intent to kill them. "Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice." (*McCoy*, *supra*, 25 Cal.4th at p. 1123.) Here, as previously addressed, the record was insufficient to supported any finding that would negate malice, that is, unreasonable self-defense, unreasonable defense of others, or heat of passion. And, "[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in

accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required" for first degree murder. (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1166.) Accordingly, had defendant not forfeited his appellate claim, we would conclude that any error in the use of the "equally guilty" language in CALCRIM No. 400 was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 22.)

Finally, we note that *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), upon which defendant principally relies, is distinguishable. There, Nero and his sister Brown were both convicted of second degree murder. The evidence established that Nero stabbed the victim, and Brown may have either been an innocent bystander or she may have handed Nero a knife. The evidence also supported theories that Brown may have acted under the heat of passion or from a belief that Nero needed to defend himself—mental states that would negate malice, self-defense and heat of passion. (*Id.* at pp. 508–509, 519.) The jury was instructed with CALJIC No. 3.00, which included the same "'equally guilty'" language then found in CALCRIM No. 400. (*Id.* at p. 510, italics omitted.)

Division Three of this court reversed Brown's conviction not because CALJIC No. 3.00 was an erroneous instruction, but because the trial court improperly answered questions by the jury during deliberations. Through a series of questions, the jury asked if it could convict Brown of a lesser offense than Nero, eventually becoming quite specific: "*[G]iven that the defendant would be guilty of aiding and abetting the crime, do they have to have the same—does it have to be of the same level, murder two or manslaughter, or could they be at a lower level?*" (*Nero*, *supra*, 181 Cal.App.4th at pp. 511–512.) The trial court—without the consent of counsel—told the jury it could acquit, then reread the aiding and abetting instructions to the jury, repeating the "'equally guilty'" language in CALJIC No. 3.00. (*Ibid.*) The appellate court broadly stated that it believed "that even in unexceptional circumstances CALJIC No. 3.00 and CALCRIM No. 400 can be misleading" (*id.* at p. 518), but it reversed because "where, as here, the jury asks the

specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is 'yes,' she can be. The trial court, however, by twice rereading CALJIC No. 3.00 in response to the jury's question, misinstructed the jury." (*Ibid.*)

Here, the jury did not ask a question indicating that it was considering a lesser degree of culpability for defendant, and the trial court did not misinstruct in response to such a question. In addition, unlike the circumstances in *Nero*, no evidence in this case supported an inference that defendant's mental state was less culpable than that of any other principal.

3. Instruction with CALCRIM No. 521

The trial court also instructed the jury, without objection, with CALCRIM No. 521, which informed the jury, in pertinent part, that "[t]he defendant is guilty of first degree murder if the People have proved that (he/) acted willfully, deliberately, and with premeditation. The defendant acted willfully if (he/) intended to kill. The defendant acted deliberately if (he/) carefully weighed the considerations for and against (his/) choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if (he/) decided to kill before completing the act that caused death."

Defendant contends that the trial court should have modified this instruction to inform the jury that in order to convict him of first degree murder, the jury had to find that he personally premeditated and deliberated. Defendant argues the jury would not have understood this requirement because CALCRIM No. 601, pertaining to the allegation that the attempted murder was willful, deliberate, and premeditated, included the following language: "The attempted murder was done willfully and with deliberation and premeditation if either the defendant or principal or both of them acted with that state of mind."

CALCRIM No. 521 is a correct statement of law. It is fully consistent with its counterpart, CALJIC No. 8.20, which has repeatedly been held to be a correct statement of the law. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123; *People v. Lucero* (1988) 44 Cal.3d 1006, 1021.) After defining "willful," "deliberate," and "premeditated," CALJIC

No. 8.20 states, "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree." Accordingly, defendant forfeited his contention that the trial court should have modified the instruction by failing to request such a modification.

Even if we were to conclude that defendant had not forfeited his claim, we would not find instructional error. Defendant's claim is largely based upon speculation that the jury would have misapplied the above-quoted portion of CALCRIM No. 601 to the issue of the degree of the murder, even though CALCRIM No. 601 is expressly phrased in terms of making a finding on the allegation that the attempted murder charged in count 2 was willful, deliberate, and premeditated. CALCRIM No. 601 expressly frames its scope in its first sentence: "If you find the defendant guilty of attempted murder in Count 2, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation." When reviewing claims that a jury would have misunderstood or misapplied an instruction, we consider whether, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016–1017.) Considering the entire charge, especially the wording of CALCRIM Nos. 521 and 601, we conclude there is no reasonable likelihood that the jury took the language about willfulness, premeditation, and deliberation from CALCRIM No. 601 out of its expressly described context and applied that language to a determination of the degree of murder. In addition to the introductory sentence of CALCRIM No. 601, the sentence from CALCRIM No. 601 that defendant argues the jury might have imported into CALCRIM No. 521 expressly refers to attempted murder: "The attempted murder was done willfully and with deliberation and premeditation if either the defendant or principal or both of them acted with that state of mind." In addition, CALCRIM No. 601 contains numerous other references to "the attempted murder" and "the attempted

killing," but no references to a completed murder. Given these repeated express restrictions of the principles set forth in CALCRIM No. 601 to the allegation that the attempted murder was willful, deliberate, and premeditated, there is no reasonable likelihood that the jury applied any portion of CALCRIM No. 601 to its determination of the degree of Macias's murder.

In addition, CALCRIM No. 521 was phrased in terms that directed the jury to determine whether *defendant* premeditated and deliberated: "The *defendant* is guilty of first degree murder if the People have proved that (*he*/) acted willfully, deliberately, and with premeditation. The *defendant* acted willfully if (*he*/) intended to kill. The *defendant* acted deliberately if (*he*/) carefully weighed the considerations for and against (*his*/) choice and, knowing the consequences, decided to kill. The *defendant* acted with premeditation if (*he*/) decided to kill before completing the act that caused death." If the instruction had been phrased in terms of "the slayer," "the actor," "a principal," or "the perpetrator," defendant's argument would probably have merit. But it was not so phrased, and the jury expressed no misunderstanding or confusion about the instruction. We further observe that even if the jury found defendant was an aider and abettor, "[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required" to convict an aider and abettor of first degree murder. (*Samaniego, supra*, 172 Cal.App.4th at p. 1166.)

4. Cumulative error

Defendant contends that the cumulative prejudicial effect of the various individual errors he has raised on appeal requires reversal of the judgment. His cumulative error claim has no greater merit than his individual assertions of error, which we have rejected or found to have been forfeited or harmless.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.