Filed 9/21/12 P. v. Duenas CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JULIO DUENAS, Defendant and Appellant.	B232101 (Los Angeles County Super. Ct. No. KA088051)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles E. Horan, Judge. Affirmed in part, reversed in part and remanded with directions.

Stephen Temko, 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, Assistant Attorney General, Shawn McGahey Webb and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant Julio Duenas appeals from a judgment entered after a jury convicted him of one count of murder in the first degree (Pen. Code, § 187, subd. (a)),[1] three counts of attempted willful, deliberate, and premeditated murder (§§ 187, subd. (a), 664), and one count of possession of a firearm by a felon (§ 12021, subd. (a)), and found to be true various firearm allegations (§§ 12022, subd. (a)(1), 12022.53, subd. (b)–(d), 12022.7, subd. (a).) He was sentenced to a total of 275 years to life, plus 46 years in state prison.

Duenas contends that the convictions are not supported by substantial evidence and that the trial court committed various errors in its jury instructions and in sentencing. We affirm in part and reverse in part.

FACTS AND PROCEEDINGS BELOW

I. Prosecution Evidence

Steven Castaneda and Duenas were friends.[2] On November 3, 2007, Castaneda went to a ranch about 10 minutes from the My Place Bar to meet Duenas. When he arrived at the ranch, Duenas got into Castaneda's SUV, a brown Yukon, and they followed another vehicle driven by Duenas's friends to the My Place Bar. They parked in back of the bar.

Consuelo Baca owned the My Place Bar and was working on November 3, 2007 as the bartender. Duenas arrived at the bar at about 7:00 p.m. with his group, entering through the back door. Baca served Duenas several Tecate beers. Duenas was the only one in the bar who drank Tecate that night. Duenas said that he had been invited so other friends were paying for the drinks and neither Castaneda nor Duenas paid for drinks. Jesus Mendoza went to the bar that night between 8:30 and 9:00 p.m. with two friends, including Bernardo Mendoza.[3]

---

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

[2] Castaneda knew Duenas by the name "Rocky" and his street name "Erasmo."

[3] We will refer to the two Mendozas by their first names to avoid confusion.

Two musicians were playing in the bar, one of whom was Raul Castro. Customers would pay the musicians, and the musicians paid Baca one dollar for every song they played. A man in Duenas's group of friends was ordering music, but left without paying. After the man left, Duenas and others were ordering music. At around 9:00 p.m., when the musicians were done playing, they asked Duenas for payment. There was an argument among Duenas and others about paying the musicians. Duenas said he was not paying for the music since he was invited and told Castaneda to get his SUV. Castaneda sensed a fight coming and left to get his SUV and planned to drive away.

Duenas asked his friends who were still there to help pay. One of Duenas's friends pulled out a $100 bill to give to Duenas, but Duenas did not take the money and instead hit him in the face. Baca came out from behind the bar and told Duenas not to fight, to calm down, and saying she would call the police if he continued fighting. Duenas said, "Be quiet. You don't know who I am. You don't know me." Duenas kicked Baca on the left hip or buttocks and Baca fell. A customer named "Alejandro" said, "Hit a man, don't hit a woman" and punched Duenas. According to Baca and Jesus, it was just Duenas and Alejandro fighting. Other people tried to separate Duenas and Alejandro. The fight moved outside through the front door. A group of people, including Jesus and Bernardo, followed the fight outside, watching.

Castaneda had pulled up the driveway toward the street when he heard a bottle break and turned to see three men punching Duenas in the face in front of the bar. When the men fighting with Duenas saw Castaneda, they ran into the bar. Castaneda told Duenas to get into the SUV, and he did.

Meanwhile, Baca had stayed inside the bar when the fight had moved outside and called the police to report that a customer had hit her. While she was on the phone, someone came in and told her that Duenas had left in a light-colored SUV. She told the police on the phone that Duenas had left and the police asked if she still wanted the police to come and she said "well, he left already."

In his SUV, Castaneda told Duenas he would take him to his car back at the ranch. Duenas was bleeding a little from the mouth and nose. Duenas was angry and

said, "They jumped me," "Fuck these motherfuckers, they jumped me," and asked Castaneda why Castaneda did not jump in and help Duenas. Castaneda did not reply. When they got to the ranch, Duenas got out and told Castaneda to wait. Castaneda started pulling away and Duenas told him again to wait. Duenas pulled out the stereo of his car and reached inside. He got back into Castaneda's SUV and Castaneda saw that Duenas had a gun. Duenas told Castaneda to take him back to the bar. Castaneda told Duenas, "No, you go alone if you want to." Duenas got "loud" and told Castaneda, "Take me back to the bar. . . . I'm going to shoot and kill the people that jumped me."[4] Castaneda said that "when he told me that, I didn't believe he was going to do it. I just thought like probably just playing, he's just going to show off the gun and scare them." Castaneda also claimed that he thought Duenas would shoot him if he did not drive Duenas to the bar so he started driving. When they got back to the bar, Duenas told Castaneda to drive into the back parking lot, which he did. Duenas then told him to turn around and stop on the driveway connecting the back parking lot and the front of the bar. Duenas told Castaneda to wait, and Duenas got out with the gun. Duenas walked toward the front door of the bar, and fired one shot. Castaneda jumped when he heard the shot and turned and saw that Duenas had the gun pointed in the air. Castaneda then realized that Duenas was "serious" and panicked. He made a right turn onto the street and heard four more shots. Castaneda did not see Duenas shoot anyone.

In the bar, about 15 to 25 minutes after Duenas left the bar, someone told Baca that Duenas was back. She saw the SUV in the back parking lot, and she closed and locked both the back door and front door to keep Duenas from coming back into the bar and fighting. About 10 minutes later, Castro, one of the musicians, said he wanted to leave. Baca opened the front door for him and saw the SUV on the exit driveway about to leave. Baca wrote down the license plate number on a napkin. When she finished writing, she saw Duenas coming from the passenger side of the SUV toward the bar and

---

[4] When Duenas and Castaneda spoke to each other, they used a mix of Spanish and English but Duenas's statement "I'm going to shoot and kill the people who jumped me" was in English.

she closed and locked the front door. According to Baca, no one approached with Duenas. Baca thought Duenas was going to continue fighting because the man who had hit Duenas was still inside the bar.

Upon closing the door, Baca immediately heard gunshots and a noise like the door had been struck. She did not realize she was hit until she walked toward the bar stools and noticed she was bleeding a lot from her right chest area. The bullet had entered her back and exited her chest area. About 10 seconds after she closed the door, she heard the front door burst open. She heard more shots and hid under the sink. When the shooting stopped, Baca waited about a minute before coming out from under the sink. She called the police and reported the shooting.

Jesus testified that he heard someone kicking the front door and, when the door opened, he saw Duenas at the door. He was 15 feet away and saw Duenas enter shooting a gun. Jesus and Bernardo turned and ran. They ran toward the back door, but it was locked. Jesus turned over the pool table and hid behind it, getting down on the ground and covering his head and face with his arms. The pool table was situated so that it was not visible from the front door. Jesus heard eight to nine gunshots. Jesus was shot in the back. It bled "a little" and hurt "a little" and was described as a "graze" wound. After the shooting stopped, Jesus moved his hands to see if Duenas had left and saw Duenas standing in the bar, still pointing the gun. After Duenas left, Jesus got up and tried to pick up Bernardo, shaking him, but he did not respond.

Meanwhile, Castaneda had driven down the street, then made a U-turn to head home. Duenas came running out across the street. Duenas said, "Don't let me down" and raised his gun. Castaneda stopped, and Duenas got in the SUV. Duenas told Castaneda to take him to Los Angeles, directing Castaneda where to go. Duenas made a phone call in the SUV and said in the call that he had just shot the people who had jumped him, that he would pick up his car from the ranch in the morning, and that "whoever got in the way, he was going to shoot them." Duenas was mad and breathing hard and saying, "Fuck these guys." Duenas tried to reach his girlfriend by phone but was unable to reach her. Castaneda drove Duenas to a party and Duenas's girlfriend

came outside. Duenas opened the SUV passenger door and got out, telling his girlfriend that he shot some people at a bar who had jumped him. When Duenas moved further away from the SUV's open door, Castaneda drove away.

At around 10:00 p.m., Sheriff Deputy William Strnad and his partner Deputy Ryan Vienna responded to a 911 hang-up call from the My Place Bar, arriving within minutes of the call. They were the first officers to arrive. A woman walking out of the bar said someone inside had been shot. When the deputies entered the bar, the bar was in extreme chaos with people yelling and screaming and some walking with bullet wounds.

The deputies were greeted by another woman (Baca) who had been shot and was applying pressure to a wound on her chest and told them that the shooter had left. Deputy Strnad saw Castro and Jesus in the bar. Castro was bleeding and injured on his left hand and left elbow. Jesus had a graze wound on his back.

Deputy Strnad saw a person lying by the end of the pool table, who was later identified as Bernardo Mendoza. He was pronounced dead at the scene. A fatal bullet had entered his left chest, passed through his left lung and lodged in the back of his heart. Bernardo also had an injury to his left hand that was consistent with a "tangential gunshot wound."

There were four surveillance cameras inside and outside the bar. They recorded in poor quality on VHS tape. The videos jumped four seconds, so it was not a continuous video. The video appeared to show the fight at about 10:00 p.m. The video depicted the aftermath of the shooting, but not the shooting itself.

The parties stipulated that Duenas's fingerprints were lifted from a Tecate beer can recovered from the bar. Four shell casings were recovered outside the bar, and six were found inside. All shell casings were .40 caliber Winchester brand. The parties stipulated that all of the casings were fired from the same gun. Three bullet holes and bullet fragments were found in the west wall of the bar, opposite the front door, and one was found in the south wall behind the pool table. A bloody napkin was found on the floor behind the bar near the sink.

According to a detective in the sheriff's department who saw Castro in the hospital, Castro had injuries to his left middle finger and left elbow. Jesus went to the hospital, and was released within about a half hour. He went to the police station to give a report later that night. He described the shooter and the gun. The next day, Baca spoke to detectives and gave a description of the shooter.

On November 4, 2007, sheriff's deputies stopped Castaneda in his SUV and arrested him. Castaneda gave several recorded statements.

The parties stipulated that Duenas had a felony conviction prior to the November 3, 2007 incident.

II. Defense Evidence

Duenas did not testify in his own behalf. Deputy Phillip Leyva spoke to Jesus Mendoza at the bar the night of the shooting and Jesus told Deputy Leyva that he did not see the shooter or have any suspect information.

III. Conviction and Sentence

The jury deliberated less than two hours before convicting.

The jury convicted Duenas of five felony counts: in count 1 for murder in the first degree of Bernardo Mendoza in violation of section 187, subdivision (a); in count 2 of attempted willful, deliberate, and premeditated murder of Baca in violation of sections 187, subdivision (a), and 664; in count 3 of attempted willful, deliberate, and premeditated murder of Castro in violation of sections 187, subdivision (a), and 664; in count 4 of attempted willful, deliberate, and premeditated murder of Jesus Mendoza in violation of sections 187, subdivision (a), and 664; and in count 5 of possession of a firearm by a felon in violation of section 12021, subdivision (a). The jury also found to be true the firearm allegations pursuant to sections 12022, subdivision (a)(1), and 12022.53, subdivision (b) to (d), as to counts 1 through 4 as well as the allegation of

infliction of great bodily injury pursuant to section 12022.7, subdivision (a), as to counts 2 and 3.[5]

In a bifurcated proceeding on prior convictions, Duenas admitted to two prior conviction allegations. The trial court sentenced Duenas on count 1 (first degree murder of Bernardo) to three consecutive terms of 25-to-life for a total of 75-to-life, an additional consecutive 25-to-life for the discharge of a firearm under 12022.53, subdivision (d), and to two five-year terms for prior convictions for a total of 100-to-life plus a 10-year determinate term. As to count 2 (attempted murder of Baca), the trial court sentenced Duenas to 25-to-life, an additional consecutive 25-to-life for the discharge of a firearm under 12022.53, subdivision (d), to two five-year terms for prior convictions, and to one three-year term under section 12022.7, for a total of 50-to-life plus a 13-year determinate term. As to count 3 (attempted murder of Castro), the trial court sentenced Duenas to the same sentence as count 2 for a total of 50-to-life plus a 13-year determinate term. As to count 4 (attempted murder of Jesus), the trial court sentenced Duenas to the same sentence as counts 2 and 3, except that the three-year term under section 12022.7 was not given, for a total of 50-to-life plus a 10-year determinate term. As to count 5 (possession of a firearm by a felon), the court imposed a 25-to-life sentence under the three strikes law. In sum, the trial court sentenced Duenas to 275 years to life, plus 46 years in state prison.

DISCUSSION

On appeal, Duenas makes three insufficiency of the evidence arguments, four claims of instructional error and two sentencing error claims. Because we find these claims to be without merit, we affirm.

I. Insufficiency of the Evidence Claims

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty

---

[5] The parties stipulated at the close of evidence that Jesus's injury was not serious and the great bodily injury enhancement as to him for count four was dismissed.

beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "When undertaking such review, our opinion that the evidence could reasonably be reconciled with a finding of innocence or a lesser degree of crime does not warrant a reversal of the judgment. [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 849.) "The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

A. Attempted Murder Convictions as to Castro and Jesus (Counts 3 and 4)

Duenas contends that "there was no evidence of express malice to kill" Castro and Jesus. We disagree, finding sufficient evidence demonstrating that Duenas acted with express malice, i.e., that he specifically intended to kill Jesus and Castro.

In order for a jury to find a defendant guilty of attempted murder, the prosecution must prove the defendant specifically intended to kill the victim and took a direct, but ineffectual, act toward killing that victim. (*People v. Smith* (2005) 37 Cal.4th 733, 739.) The jury may infer the requisite specific intent from the defendant's acts and the circumstances of the crime. (*Id.* at p. 741.) For example, "the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had

no particular motive for shooting the victim is not dispositive, although again, where motive is shown, such evidence will usually be probative of proof of intent to kill. Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon '"in a manner that could have inflicted a mortal wound had the bullet been on target"' is sufficient to support an inference of intent to kill. [Citation.] . . . Finally, even if the shooting was not premeditated, with the shooter merely perceiving the victim as 'a momentary obstacle or annoyance,' the shooter's purposeful 'use of a lethal weapon with lethal force' against the victim, if otherwise legally unexcused, will itself give rise to an inference of intent to kill. [Citation.]" (*Id.* at p. 742.)

Duenas returned to the bar after going to retrieve a gun and stating that he intended to "shoot and kill" the people who had "jumped" him. He fired a total of 10 shots — four from outside and through the front door of the bar and six inside the bar after he kicked in the door so that he could enter the bar and continue shooting. After the shooting, Duenas told two people that he had shot people at a bar who had "jumped" him and further stated that if anyone got in his way "he was going to shoot them."

In challenging his convictions for the attempted murders of Castro and Jesus, Duenas asserts that there was "little evidence that either man was shot." Here, there is evidence that is reasonable, credible and of solid value showing that Castro and Jesus had been shot. Jesus testified that he was hit by a bullet on his back and deputies testified that Castro was shot in the arm and hand.

Duenas also asserts that the location of the bullet holes in the bar showed that Duenas was "mainly shooting at the wall and not necessarily at the people in the bar." The fact that bullet holes were found in the walls of the bar do not preclude a finding that Duenas was aiming for Castro and Jesus as they ran or hid in the bar but missed or made only grazing or other nonlethal shots. Likewise, Duenas's contention that there was no showing that Duenas was trying to kill "everyone" at the bar as some people had run to the back of the bar but could not leave because the back door was locked and Duenas

could have but did not fire into that group,[6] does not preclude a finding that Duenas was aiming at Castro and Jesus.

In sum, the manner in which Duenas fired the shots coupled with his statements before and after the shooting constitute substantial evidence of Duenas's specific intent to kill Castro and Jesus. Because we find the attempted murder convictions to be supported by substantial evidence, we find no merit to Duenas's federal due process claims.

B. Great Bodily Injury as to Castro (Count 3)

Duenas asserts that the "evidence failed to show Juan [sic] Castro suffered great bodily injury" as his injuries were not shown to be significant and substantial. We agree.

Section 12022.7, subdivision (a), imposes a sentence enhancement of three years in prison if the jury finds the defendant personally inflicted "great bodily injury" on any person other than an accomplice in the commission of a felony or attempted felony. The statute defines great bodily injury as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) The jury was instructed that minor, trivial or moderate injuries do not constitute great bodily injury."

In *People v. Escobar* (1992) 3 Cal.4th 740, the Supreme Court held that the determination of whether there was "great bodily injury" within the meaning of section 12022.7 is not based on any specially defined criteria by which the gravity of the injury must be measured, but on the more general "'significant or substantial physical injury'" test provided in the statute. (*Id.* at pp. 746–747, 750; see also *People v. Le* (2006) 137 Cal.App.4th 54, 58–59.) Although there must be "a substantial injury beyond that inherent in the offense itself," the statutory test "contains no specific requirement that the victim suffer 'permanent,' 'prolonged' or 'protracted' disfigurement, impairment, or loss of bodily function." (*People v Escobar*, *supra*, 3 Cal.4th at pp. 746–747, 750.) The injury "need not be so grave" as to cause the victim permanent, prolonged, or protracted

---

[6] It should be noted that the only evidence that some patrons tried to go out the back door but could not because it was locked came from Jesus who stated that he and Bernardo tried to run out the back door before discovering it was locked and turning over the pool table, and both Bernardo and Jesus were in fact shot by Duenas.

bodily damage. (*People v. Cross* (2008) 45 Cal.4th 58, 64.) The injury cannot, however, be "insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066; see also *People v. Blake* (2004) 117 Cal.App.4th 543, 556.)

"'It is well settled that the determination of great bodily injury is essentially a question of fact, not of law. "'Whether the harm resulting to the victim . . . constitutes great bodily injury is a question of fact for the jury. [Citation.] If there is sufficient evidence to sustain the jury's finding of great bodily injury, we are bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.'"' [Citation.]" (*People v. Mendias* (1993) 17 Cal.App.4th 195, 205.)

We conclude that the evidence is insufficient to support the jury's finding that Castro suffered great bodily injury, because the evidence discloses no information from which the jury could reasonably infer that his injuries were significant or substantial rather than insignificant, trivial or moderate. Proof that a victim's bodily injury is "great," namely significant or substantial, is commonly established by evidence of the severity of the victim's physical injury, resulting pain, or the extent of medical care required to treat the injury. (*People v. Cross*, *supra*, 45 Cal.4th at p. 66.) Here, Castro did not testify and the only evidence of his injuries came from two deputies who testified that Castro had "wounds" to his left arm and left hand and that "[h]e had injury to his left middle finger and to his left elbow" and went to the hospital for treatment. Without any additional information on which to base its decision, the jury could only speculate as to whether the wounds were significant rather than trivial—they could have been trivial grazing wounds or serious flesh wounds or anything in between, but choosing among those alternatives on this evidentiary record would be mere guesswork.

We conclude that the section 12022.7 great bodily injury sentence enhancement imposed as to count 3 is not supported by the evidence.

C. Murder Conviction as to Bernardo (Count 1)

Duenas argues that the evidence failed to show that the killing of Bernardo was done with express malice and with premeditation or deliberation and therefore the first

degree murder conviction must be reversed and replaced with a second degree murder conviction. We disagree and affirm the first degree murder conviction in count 1.

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Murder that is deliberate and premeditated is murder of the first degree. (CALJIC No. 8.20.) Murder accompanied by intent and malice but not deliberation and premeditation is murder of the second degree. (CALJIC No. 8.30.) In the case of either first or second degree murder, the requisite malice may be express or implied. (§ 188.) Express malice is manifested by a deliberate intention to take away life. Implied malice is "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid.*) Thus, express malice murder requires an intent to kill; implied malice murder requires merely an intent to do some act the natural consequences of which are dangerous to human life. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

As discussed in section I.A., *ante*, the manner in which Duenas fired the shots coupled with his statements before and after the shooting constitute substantial evidence of Duenas's specific intent to kill Castro and Jesus and likewise constitute substantial evidence of his intent to kill Bernardo.

"'A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. . . . "Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' [Citations .]"' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1182.)

In *People v. Anderson* (1968) 70 Cal.2d 15, "the Supreme Court described the categories of evidence relevant to premeditation and deliberation that have been found sufficient to sustain convictions of first degree murder: '(1) facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in

activity directed toward, and explicable as intended to result in, the killing-what may be characterized as "planning' activity"; (2) facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a "motive" to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of "a pre-existing reflection" and "careful thought and weighing of considerations" rather than "mere unconsidered or rash impulse hastily executed" [citation]; (3) facts about the nature of the killing from which the jury could infer that the manner of killing was so particular and exacting that the defendant must have intentionally killed according to a "preconceived design" to take his victim's life in a particular way for a "reason" which the jury can reasonably infer from facts of type (1) or (2).' [Citation .]" (*People v. Concha* (2010) 182 Cal.App.4th 1072, 1084.)

The record shows evidence of premeditation pertaining to all three categories. As to planning activity, the evidence showed that Duenas went to retrieve a hidden gun, directed Castaneda to wait while he retrieved the gun even when Castaneda tried to leave, ordered Castaneda to drive him back to the bar over Castaneda's protests, stated during the drive that he intended to "shoot and kill" the people who "jumped" him, directed Castaneda to stop his SUV so that it faced the street, waited in Castaneda's SUV on the driveway until Baca opened the front door, told Castaneda to wait and approached the bar and began shooting. Viewed in the light most favorable to the prosecution: Duenas had Castaneda accompany him to serve as his getaway driver, directed Castaneda to position the SUV so it was ready for a quick escape after the shooting, and waited until the front door was opened and unlocked before exiting the SUV.

As to motive, the evidence showed that Duenas lost a fistfight he had initiated over payment to the musicians (one of whom was Castro), Bernardo (along with Jesus) followed the fight outside and watched, before the shooting Duenas stated that he was going to shoot and kill the people who "jumped" him, and after the shooting Duenas told two people that he had shot the people who had jumped him at the bar. Viewed in the light most favorable to the prosecution, Duenas's statements after the shooting stating

that he had in fact shot the people who "jumped" him, even though Bernardo had only watched the fight, show that he was motivated by revenge against not only those who had physically participated in the fight against him but also anyone else he perceived to be not on his "side" during the fight.

As to the manner of killing, the evidence showed that Duenas fired several shots through the door at Baca as she closed it, kicked open the door, moved into the center of the bar and fired six more shots at patrons. He was able to hit four people in the bar, including the murder victim Bernardo. Viewed in the light most favorable to the prosecution, Duenas did not want to simply shoot randomly into the bar, rather he kicked open the front door and purposefully entered the bar in order to see potential victims, including Bernardo.

We conclude substantial evidence exists from which a rational jury could have found beyond a reasonable doubt that Duenas's killing of Bernardo constituted willful, premeditated and deliberate first degree murder.

II. Instructional Error Claims

Duenas makes four claims of instructional error. On appeal, we apply a de novo standard of review for claims of instructional error. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581 (*Manriquez*); *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

A. Heat of Passion Manslaughter Instruction

Duenas asserts that the trial court erred in denying his request for a voluntary manslaughter and attempted voluntary manslaughter lesser included offense instruction based on heat of passion.

In discussing jury instructions, after Duenas's counsel stated that the defense had no requests for additional jury instructions, the court initiated a discussion on the voluntary manslaughter heat of passion instruction. The court noted that it did "not believe there is sufficient evidence of provocation to instruct the jury on manslaughter." Nonetheless, the court noted that "it's a situation that, on first blush, looks like you might have some action with a manslaughter, even though it's inconsistent with your defense. The problem I perceive is this. That the law—I believe the law of manslaughter is that

the provocation must come from the eventual victim. And we don't have any evidence that any eventual victim in the case was involved in any provoking conduct, i.e., in beating the defendant up in front of the bar." The court also noted even if the victims had been involved in beating Duenas up, "you have the original problem, which is according to Baca, the defendant starts it." The court also noted that there is the "cooling period" issue noting that "[f]ifteen minutes isn't too long. It's not like the next day" so that issue would be for the jury.

It is settled law that the trial court must instruct on lesser included offenses even in the absence of a request where the evidence raises a question as to whether all elements of the charged offense are present. (*People v. Barton* (1995) 12 Cal.4th 186, 195 (*Barton*).) "[I]n a murder prosecution, this includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*).) The Penal Code defines murder as "the unlawful killing of a human being . . . with malice aforethought" and defines manslaughter as "the unlawful killing of a human being without malice." (§§ 187, 192.) Although generally the intent to unlawfully kill constitutes malice, malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 153-154; *Manriquez*, *supra*, 37 Cal.4th at pp. 583-584; see § 192, subd. (a).) These principles apply to attempted murder and the lesser included offense of attempted voluntary manslaughter. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 833-834.)

A trial court must instruct on attempted voluntary manslaughter as a lesser included offense of attempted murder whenever there is substantial evidence to support the instruction, regardless of the tactics or objections of the parties or the relative strength of the evidence on alternate offenses or theories. (*Breverman*, *supra*, 19 Cal.4th at pp. 162, 169; *Barton*, *supra*, 12 Cal.4th at pp. 194-195, 201.) In this context, substantial evidence is defined as evidence which is sufficient to deserve consideration by the jury,

i.e., evidence from which a jury composed of reasonable persons could have concluded that the lesser, but not the greater, offense was committed. (*Breverman, supra,* 19 Cal.4th at p. 162.) The courts should not evaluate the credibility of witnesses. (*Ibid.*)

To justify an instruction of attempted voluntary manslaughter under the sudden quarrel or heat of passion theory, there would have to be substantial evidence that """"at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.""" (*Manriquez, supra,* 37 Cal.4th at p. 584; *Breverman, supra,* 19 Cal.4th at p. 163; *People v. Cruz* (2008) 44 Cal.4th 636, 664.) "[T]he passion aroused need not be anger or rage, but can be any ""'[v]iolent, intense, high-wrought or enthusiastic emotion'"" [citation] other than revenge." (*Breverman, supra,* 19 Cal.4th at p. 163.)

As the Supreme Court has explained, "'Although section 192, subdivision (a), refers to "sudden quarrel or heat of passion," the factor which distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation.'" (*Manriquez, supra,* 37 Cal.4th at p. 583.) "The provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim [citation] . . . or reasonably believed by the defendant to have been engaged in by the victim. (*People v. Lee* (1999) 20 Cal.4th 47, 59; *Manriquez, supra,* 37 Cal.4th at p. 583.) The provocative conduct by the victim may be physical or verbal; no specific type of provocation is required. (*Manriquez, supra,* 37 Cal.4th at pp. 583-584; *Breverman, supra,* 19 Cal.4th at p. 163; *People v. Wickersham* (1982) 32 Cal.3d 307, 326.)

The heat of passion requirement for manslaughter has both an objective and subjective component. (*Manriquez, supra,* 37 Cal.4th at p. 584; *Wickersham, supra,* 32 Cal.3d at pp. 326-327.) "The defendant must actually, subjectively, kill under the heat of passion." Plus, objectively, """the heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances."""" (*Manriquez, supra,* 37 Cal.4th at p. 584.)

Duenas argues that the trial court erred in refusing the instruction, because even assuming Duenas was the initial aggressor in kicking Baca, those involved in the fistfight "escalated the response to his initial act in both violence and intensity" and that Duenas could reasonably believe the actual victims were the source of the provocation. We find these arguments to be without merit.

There was no evidence that any of the victims "provoked" Duenas. At most, the evidence shows that Castro asked for payment for the music played, Baca asked Duenas not to fight in her bar or she would call the police, and Bernardo and Jesus watched the fistfight. The record contained no evidence that any of the four victims participated in the fistfight or acted in any way that could reasonably be viewed as provoking the defendant. Each of the victims' conduct was manifestly insufficient to cause an average person to become so inflamed as to lose reason and judgment and there was no evidence upon which Duenas could have reasonably believed that the victims were the source of the provocation. (*People v. Lee*, *supra*, 20 Cal.4th at p. 59; *Manriquez*, *supra*, 37 Cal.4th at pp. 583, 586.) Accordingly, the trial court did not err in declining to instruct the jury on voluntary manslaughter and attempted manslaughter.

B. Transferred Intent Instruction

Duenas next argues that the trial court erred in instructing the jury on transferred intent.

Before granting the prosecution's motion to include the transferred intent instruction, the court asked the prosecutor for the "factual underpinnings" as to Bernardo, the murder victim. The prosecutor noted that "Alejandro," the man who was fighting with Duenas according to Baca, was still in the bar when Duenas returned. The court responded that it "is conceivable—although I don't think it particularly likely given the number of people shot," that Duenas "was trying to kill the one fellow Alejandro and, in so doing, he just started shooting, and anybody that happened to get hit, got hit."

A court errs if it gives a legally correct instruction which is irrelevant, i.e., unsupported by substantial evidence. (*People v. Ponce* (1996) 44 Cal.App.4th 1380, 1386.) An error in giving a legally correct but irrelevant instruction requires reversal

only if it is reasonably probable the defendant would have obtained a more favorable verdict absent the error. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 164-179; *People v. Rowland* (1992) 4 Cal.4th 238, 282.)

The trial court gave the following instruction on transferred intent: "When one attempts to kill a certain person, but by mistake or inadvertence kills a different person, the crime, if any, so committed is the same as though the person originally intended to be killed, had been killed." (CALJIC No. 8.65.) This is a correct statement of the law. (See *People v. Shabazz* (2006) 38 Cal.4th 55, 62; *People v. Bland* (2002) 28 Cal.4th 313, 332.)

The instruction is also relevant. The evidence shows that when Duenas returned to the bar, Baca thought Duenas was going to continue fighting because the man who had hit Duenas (Alejandro), was still in the bar and that Duenas stated that he was going back to the bar to shoot and kill the people who jumped him. Although the prosecution's central argument was that each of the victims was targeted, the prosecutor also argued in the alternative that if the jury did not believe Bernardo was targeted and Duenas "was aiming at someone else" when he shot Bernardo, the doctrine of transferred intent applied.

Because the transferred intent instruction was supported by the evidence, we find no error in the trial court's decision to give the instruction.

C. Kill Zone Instruction

Next, Duenas argues that the kill zone instruction was given in error as it was not applicable to the case.

As given to the jury, the kill zone instruction stated: "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' zone of risk is an

issue to be decided by you." (CALJIC No. 8.66.1.) This is a correct statement of the law. (See *People v. Bland, supra*, 28 Cal.4th at pp. 330- 332.)

"'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ."'" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) In *People v. Bland, supra*, 28 Cal.4th 313, the Supreme Court held that, although the doctrine of transferred intent does not apply to attempted murder, a defendant who performs an act such as shooting at a group of people that includes his primary target or placing a bomb on board a plane on which his primary target is flying may be found to have concurrently intended to kill his primary target and everyone else within the "'kill zone.'" (*Id.* at pp. 329–330.) The concurrent intent doctrine applies "'[w]here the means employed to commit the crime against a primary victim create a zone of harm around that victim,'" such that "'the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.'" (*Id.* at p. 330.) It is a factual determination for the jury, which need not be instructed on concurrent intent or the kill zone concept. (*Id.* at p. 331, fn. 6.)

The instruction was relevant and the court was correct in giving this instruction. Duenas fired 10 shots into the bar, hitting four victims. The shooting occurred in an enclosed area, not an open area, and the patrons were trapped inside the bar because of the locked back door. Moreover, two of the victims, Jesus and Bernardo, were shot while trying to hide behind a pool table. A jury could reasonably conclude beyond a reasonable doubt that defendant concurrently intended to kill one or two or all of them in the immediate vicinity. (*People v. Bland*, *supra*, 28 Cal.4th at p. 330 ["'When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets . . . , the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death.'"].)

In any event, if instruction on the kill zone was in error, any error was not prejudicial. Under *People v. Watson* (1956) 46 Cal.2d 818, the verdict must be upheld

unless it appears "reasonably probable" the defendant would have obtained a more favorable outcome had the error not occurred. (*Id.* at p. 836.) The evidence at trial showed that Duenas stated that he wanted to shoot and kill the people who "jumped" him, that he went to get a gun and returned to the bar, he shot at Baca through the door, and then kicked in the door so he could enter the bar and continue shooting. After the shooting, he told two people that he had shot the people who had jumped him—just as he had said he would prior to the shooting.

Accordingly, he was not prejudiced by the instruction and we find that error, if any, was harmless. For the same reason, to the extent Duenas raises a federal constitutional claim, we conclude that the "kill zone" instruction, if error, did not violate Duenas's federal constitutional right to due process.

D. Definition of Term "Kill Zone"

Duenas argues that the trial court failed to define the term "kill zone" which has a special meaning, leaving the term impermissibly vague. We disagree.

The "kill zone" theory "is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it 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." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243.)

Here, the trial court gave the CALJIC No. 8.66.1 instruction. That instruction defines the "kill zone" as the "zone of risk" around the primary victim's vicinity.[7] (CALJIC No. 8.66.1.) The Supreme Court has approved the concept of a kill zone and the CALJIC instruction. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 319-331.) That authority is controlling. We therefore conclude that the term "kill zone" was adequately defined.

---

[7] The kill zone instruction is quoted in section II.B, *ante*.

III. Sentencing Error Claims

Duenas makes two claims of sentencing error pertaining to enhancements.

The sufficiency of the evidence to support an enhancement is reviewed in the light most favorable to the prosecution, and the appellate court may not reverse the judgment if any rational trier of fact could have found the essential elements of the enhancement beyond a reasonable doubt. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.) When consideration of the sufficiency of the evidence also requires construction of the applicable statute, a de novo standard of review is applied along with the usual rules of statutory interpretation. (*People v. Jones* (2001) 25 Cal.4th 98, 107-108; *People v. Frausto* (2010) 180 Cal.App.4th 890, 897.)

A. Enhancements for Firearms Causing Great Bodily Injury for the Attempted Murder Counts as to Castro and Jesus (Counts 3 and 4)

Duenas contends that the trial court erred in imposing enhancements pursuant to section 12022.53, subdivision (d), on the attempted murders of Castro (count 3) and Jesus (count 4) because neither Castro nor Jesus suffered great bodily harm and that the murder of Bernardo could not be used to find great bodily harm during the commission of those attempted murder counts. *People v. Frausto*, *supra*, 180 Cal.App.4th 890, held that the term "in the commission of" includes all crimes committed during one continuous transaction and therefore approved the use of a single fatal injury to support enhancements pursuant to section 12022.53, subdivision (d) to multiple attempted murder counts (*id.* at pp. 899-902); Duenas contends that *Frausto* was incorrectly decided.

Section 12022.53, subdivision (d) states in relevant part: "Notwithstanding any other provision of law, any person who, in the commission of [attempted murder] personally and intentionally discharges a firearm and proximately causes great bodily injury . . . or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

In *People v. Frausto*, the court held that where a defendant was convicted of one count of murder and two counts of attempted murder, the death of one victim supported imposition of the subdivision (d) enhancement with respect to the attempted murder of

the other two victims because "[a] reasonable trier of fact could find that the shootings were part of one continuous transaction." (180 Cal.App.4th at p. 903.) The court relied on *People v. Oates* (2004) 32 Cal.4th 1048, 1052–1056, which held that a single injury supports multiple subdivision (d) enhancements because the enhancement applies to the great bodily injury or death of "any person" and is not limited to the harm done to a particular victim.[8]

Here the verdict forms with respect to all the subdivision (d) enhancements referred to "great bodily injury or death to Bernardo Mendoza" Thus, it was the death of Bernardo that formed the basis for the enhancements in the attempted murder counts involving Castro and Jesus.[9] As in *Frausto*, the question is whether substantial evidence supported the enhancement on each count of attempted murder based on the death of a single victim. (*People v. Frausto*, *supra*, 180 Cal.App.4th at p. 903.)

Duenas fired four shots outside the bar, hitting Baca through the front door, before kicking in the door and entering the bar and firing six more shots, hitting Bernardo, Jesus and Castro. Thus, the murder of Bernardo and the attempted murders of Jesus and Castro were part of one continuous transaction. (Cf. *People v. Frausto*, *supra*, 180 Cal.App.4th at pp. 902–903.) Duenas argues that *People v. Frausto* was wrongly decided, arguing that the "[o]ne point that has crystallized over the past several years is that a crime is committed (and completed) whenever the defendant commits [an] act that satisfies the minimum elements of the crime" so that a violation is completed each time a new and separate act meeting the elements occurs. In support of this argument, however, Duenas cites one case decided 10 years before *People v. Frausto*.

We decline Duenas's invitation to reject *People v. Frausto*, and affirm the section 12022.53, subdivision (d) enhancements for counts 3 and 4.

---

[8] We note that section 12022.53, subdivision (d) expressly states that it applies "notwithstanding any other provision of law" and has been interpreted to be an express legislative exception to section 654. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313.)

[9] Appellant does not dispute the enhancement as to the attempted murder of Baca.

B. Enhancements for Firearms Causing Great Bodily Injury and Also for Infliction of Great Bodily Injury for the Attempted Murder Counts as to Baca and Castro (Counts 2 and 3)

Duenas's last argument is that the trial court improperly imposed both an enhancement pursuant to section 12022.53, subdivision (d), and an enhancement pursuant to section 12022.7 in count 2, the attempted murders of Baca and Castro. As discussed in section I.A., *ante*, we agree with Duenas's contention that the infliction of great bodily injury enhancement as to Castro was not supported by sufficient evidence. Thus, this argument only applies to the attempted murder of Baca in count 2.

The jury found to be true that Duenas personally and intentionally discharged a firearm causing great bodily injury to Bernardo within the meaning of section 12022.53, subdivision (b) and that Duenas personally inflicted great bodily injury on Baca within the meaning of section 12022.7, subdivision (a).

At sentencing, the trial court imposed the 25-years-to-life enhancement under section 12022.53, subdivision (d), and also imposed the three-year enhancement under section 12022.7, subdivision (a).

Section 12022.53, subdivision (f), states: "Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment. . . . An enhancement for great bodily injury as defined in Section 12022.7, 12022.8, or 12022.9 shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)." (§ 12022.53, subd. (f).)

Based on this language, Duenas argues that the three-year enhancement under section 12022.7, subdivision (a) should not have been imposed. The prosecution, however, argues that because the victim for the 25-years-to-life enhancement under section 12022.53, subdivision (d), was Bernardo, but the victim for the three-year enhancement under section 12022.7, subdivision (a), was Baca, the enhancements are based on separate victims and the prohibition of section 12022.53, subdivision (f), does

not apply. In addition, the prosecution argues that its interpretation is supported by section 1170.1, subdivisions (f) and (g), which both provide that the subdivisions "shall not limit the imposition of any other enhancements applicable to that offense." (§ 1170.1, subds. (f) and (g).)

Because section 12022.53, is more specific than section 1170.1, it is the controlling statute. (See *People v. Robinson* (2012) 208 Cal.App.4th 232, 259-260.) The plain language of section 12022.53, subdivision (f), states that "[o]nly one additional term of imprisonment under this section shall be imposed per person for each crime" and "[a]n enhancement for great bodily injury as defined in Section 12022.7, . . . shall not be imposed on a person in addition to an enhancement imposed pursuant to subdivision (d)," without reference to the victims. We therefore agree with Duenas and find that the three-year enhancement under section 12022.7, subdivision (a), as to count 2 should not be imposed. (Cf. *People v. Oates*, *supra*, 32 Cal.4th at pp. 1056-1057 [after quoting section 12022.53, subdivision (f), stating that [t]he enactment of this subdivision shows that the Legislature specifically considered the issue of multiple enhancements and chose to limit the number imposed only 'for each crime,' not for each transaction or occurrence and not based on the number of qualifying injuries."].)

DISPOSITION

The finding that Duenas committed great bodily injury upon Castro is reversed and the trial court is ordered to modify the judgment to strike the imposition of the three-year enhancement under Penal Code section 12022.7, subdivision (a), as to count 3 (attempted murder of Castro) and to modify the judgment to stay the imposition of the three year enhancement under section 12022.7, subdivision (a), as to count 2 (attempted murder of Baca). Upon remand, we direct the trial court to issue an amended abstract of judgment reflecting these modifications and to forward a copy of the amended abstract of

judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.