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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Appellant,

v.

RUBEN VILLA,

Defendant and Respondent.

B269082

(Los Angeles County  
Super. Ct. No. BA292983)

APPEAL from an order of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed in part, reversed in part and remanded with directions.

Jackie Lacey, District Attorney, Roberta Schwartz and Matthew Brown, Deputy District Attorneys, for Plaintiff and Appellant.

Ivy Kessel and Alex R. Kessel for Defendant and Respondent.

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## INTRODUCTION

Defendant Ruben Villa was charged by information with murder (Pen. Code,<sup>1</sup> § 187, subd. (a); count 1), possession of a firearm by a felon (former § 12021, subd. (a)(1); count 2), assault with a firearm (§ 245, subd. (a)(2); count 3), and shooting at an occupied motor vehicle (§ 246; count 4). On count 1, the jury convicted defendant of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)) and found true the allegation he personally used a firearm in the commission of the crime (§ 12022.5, subd. (a)). The jury convicted Villa on counts 2 and 3, and as to count 3 the jury found true the personal firearm use allegation (§ 12022.5, subd. (a)). The jury convicted Villa on count 4 and found true the allegations he personally used and personally and intentionally discharged a firearm, causing great bodily injury or death (§§ 12022.5, subd. (a), 12022.53, subds. (b), (c) & (d)).

Villa moved for a new trial, in part on the ground the trial court erred in failing to instruct the jury as to count 4 on the lesser included offense of grossly negligent discharge of a firearm (§ 246.3, subd. (a)). The trial court granted the motion as to count 4. The People filed this appeal. (See § 1238, subd. (a)(3).) We reverse the order granting a new trial as to count 4, reinstate the conviction on that count for shooting at an occupied motor vehicle, together with the related enhancement, and remand for sentencing.

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<sup>1</sup> All further statutory references are to the Penal Code.

## FACTS

### A. *Prosecution*

The victim, Matthew Brandon Simms, had been dating Amada Alvarez for two or three years. During her relationship with Simms, Alvarez also became romantically involved with Villa. Simms became angry when he learned about Alvarez's relationship with Villa and periodically asked her if she was still seeing him.

Alvarez's best friend, Noelle Jensen, lived across the street from Villa in the El Sereno area of Los Angeles. Alvarez and Jensen got together almost every day to smoke methamphetamine. Because Alvarez did not have a car, Simms dropped Alvarez off and picked her up at Jensen's house.

On October 23, 2005, Jensen was inside her house when she heard Simms drive up to pick up Alvarez. She heard Villa yelling at Simms that he told Simms not to come back up there. Alvarez went outside and began cursing at Villa, who warned her that Simms had better not come back up there.

The following day, October 24, Simms dropped off Alvarez at Jensen's house. Alvarez was planning to stay only about 15 minutes. Simms made a U-turn and stopped in front of Villa's house, with the driver's side of his car facing Villa's house. Alvarez noticed Villa outside, talking to the occupants of a car that was stopped in the street. When Villa saw Alvarez and Simms, he went into his house.

Jensen came outside and was talking with Simms. Suddenly, she saw Villa leaving his yard, holding a gun. She heard him say, "I told you not to come up here." Alvarez saw

Villa holding a gun and running out of his driveway toward Simms' car.

Villa fired a few shots through the driver's side window of Simms' car. The car began to roll down the street. Alvarez and Jensen saw and/or heard Villa fire a few more shots through the back window of the car as it rolled down the street.

Alvarez asked Villa what he was doing. He told her to shut up and that the shooting was her fault for letting Simms disrespect him.

According to Jensen, Villa pointed his gun at Alvarez's head and said he should shoot her too. He tucked his gun inside his pants and ran over to Simms' car. He then returned to his house and drove away in his father's truck. Jensen told Alvarez to go check on Simms. Jensen blamed Alvarez for the shooting and stopped talking to her after it happened.

Jensen's boyfriend, Art Estevez, who lived with her, was in the driveway of her house, working on stolen vehicles he had parked in the driveway. He heard several gunshots and dropped to the ground. He then heard five to 10 more gunshots.<sup>2</sup> He acknowledged that he saw someone running toward Simms' car, shooting at it. Estevez was worried about the police arriving at the scene because of the stolen vehicles. He left for a few days to avoid police attention.

Officer Ricardo Ortega of the Los Angeles Police Department was the first to arrive at the scene. He found Simms slumped forward in his car, which had crashed into a tree.

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<sup>2</sup> Estevez denied telling the police in an interview that he saw Villa fire at Simms through the car window at point blank range.

Officer Ortega observed a bullet wound in Simms' left cheek and blood in the car. The front driver's side window was open, the front passenger's side window was partially open, and the rear passenger windows were closed; all were intact. The rear window and rear wing window on the driver's side were shattered, and there were multiple bullet holes in the car's trunk. Eight shell casings from a semiautomatic handgun were found at the scene. The casings appeared to be going downhill in a "trail."

Paramedics took Simms to the hospital. Simms had gunshot wounds to his face, chest, and back. Simms died from a gunshot wound to the chest; the bullet pierced his lung, lacerated major blood vessels, and exited his body through his neck. There was no soot or stippling around the gunshot wounds, indicating that the muzzle of the gun was more than two feet from Simms when he was shot.

According to senior criminalist Nathan Cross of the Los Angeles Police Department, there were no bullet marks inside Simms' car that would have been caused by someone shooting through the driver's side window. The bullet marks he found were consistent with someone having fired into the car from the rear.

## **B. *Defense***

Villa testified on his own behalf. He met Alvarez through Jensen in April 2005. He had a relationship with her for several months. While she told him that she was living with another man and helping him take care of his child, she did not initially tell him the man's name or that he was her boyfriend.

About two weeks after Villa began seeing Alvarez, he had a confrontation with Simms. About 10 minutes after having been

picked up by Simms, Alvarez returned and came to see Villa. She was bleeding from her mouth, told him that Simms had thrown her out of his car, and warned him that Simms had threatened to kill him. While Alvarez and Villa were talking, Simms approached them, pointed a gun at Villa, and said something about Villa's relationship with Alvarez. Villa told Simms "don't come up here," Alvarez and Simms started arguing, and Alvarez pushed Simms back toward Jensen's house. Simms later called Villa to apologize, saying it was okay if Alvarez preferred Villa to him.

Villa had another confrontation with Simms when he was walking with Alvarez. Simms drove up, jumped out of his car, and tried to come at Villa. Alvarez got in between the two men and began arguing with Simms, and Villa walked away.

There was also an incident in which Villa was in his front yard and Simms drove up and ran at Villa, holding a machete and threatening to kill Villa. Villa's father came out of the home, grabbed a shovel, approached Simms, and told him to leave. Simms returned to his car and drove away.

Villa ended his relationship with Alvarez in August 2005. Two months later, on October 23, Villa was talking to one of his friends by his house when he noticed Simms leaving Jensen's house. As Simms drove away, he yelled curses at Villa, who yelled curses back at Simms. Alvarez and Jensen came outside, and Alvarez asked Villa why he was yelling at Simms. Villa told Alvarez to tell Simms to stop coming there and to stop disrespecting him.

Late the next morning, Villa was waiting for his coworkers to pick him up for work. When they arrived, he gave them a "tongue lashing" for being late and then went inside his house to

get his keys. When he came back out, he saw Simms' car in the middle of the street, facing downhill. Simms was in the driver's seat, and no one else was in the car. Villa approached the open window of the driver's door and told Simms not to disrespect his family.

Simms pointed a gun at Villa and cursed at him. Villa knocked the gun away as Simms fired a shot out the window. Villa tried to grab the gun away from Simms; as they fought over it, the gun fired again, and Villa ended up with the gun in his hand.

Villa wanted to go back to his house, but he thought Simms would kill him if he tried to do so, and then he thought about his family. Villa testified: "So as all this was happening, like he starts taking off, and just like impulse . . . I shot twice." At that point, Simms' car was about 10 feet away, and "[l]ike my hand just went up and I shot twice." Villa did not intend to kill Simms; he just wanted to protect himself and his family.

Villa remembered that Alvarez was yelling at him and that he probably told her it was all her fault. At that time, he was "all in a daze. Everything happened . . . like real fast."

On cross-examination, Villa denied shooting Simms in the face and said he did not see any blood after the first two shots were fired. He denied chasing after Simms' car and continuing to fire at it, and he could not explain how shell casings ended up further down the street in the direction the car had traveled. When he fired at the car, he was not trying to kill Simms; "[i]t was an impulse . . . I didn't mean to shoot." He fired two shots at Simms as he was driving away. When the car came to a stop about half a block away, Villa fired five more times: "I am thinking he is going to come out and start shooting at me with

another gun. I ran to the side by my driveway, and as soon as that's occurring, just five more went off," meaning five more shots were fired "uncontrollably from [his] hand."

After the incident, Villa did not call 911, because he does not trust the police. He took his father's truck and drove away. He disposed of the gun by throwing it in a gutter in El Monte. He did not keep guns around because he was on parole and subject to search at any time.

On redirect examination, the following colloquy took place:

"Q Did you ever fire the gun . . . and take aim at the body of [Simms]?"

"A No.

"Q Did you—you shot at the car?"

"A Yes.

"Q You were trying to hit the car?"

"A It was an impulse. It was a reflex. I mean—

"Q Did you have time to think about everything as we are in court going through it step-by-step? How fast is this happening out there?"

"A From my recollection, it was over in about 30 seconds."

## **NEW TRIAL MOTION**

One of the grounds for Villa's new trial motion was that, as to count 4, the trial court erred in failing to instruct the jury sua sponte on discharging a firearm in a grossly negligent manner (§ 246.3, subd. (a)), a lesser included offense of shooting at an occupied motor vehicle (see *People v. Ramirez* (2009) 45 Cal.4th 980, 990; *People v. Overman* (2005) 126 Cal.App.4th 1344, 1362).



This was based on Villa’s testimony that Simms had the gun in his car and tried to shoot Villa with it, and Villa was not trying to shoot at Simms or the car when he fired the gun. Villa argued that if the jury found he acted in self-defense, it nonetheless could have found that he was grossly negligent in shooting the gun after Simms’ car began rolling down the street. In opposition, the People argued that no instruction on the lesser included offense was warranted and that any error in failing to give the instruction was not prejudicial.

The court granted the new trial motion as to count 4, noting that “we don’t know how [the jury] got to the manslaughter [conviction]. We don’t know whether it was imperfect self-defense or if it was heat of passion.” In any event, “because the defendant testified in this matter, and he testified as to why he shot [Simms] and what he was thinking when he shot him,” the court did not “see how the jury could not have at least considered [the lesser offense],” even though the court did not “think they would have come back with that.”

## DISCUSSION

### A. *Standard of Review*

A defendant may move for a new trial on the basis of instructional error. (See § 1181, subd. 5; *People v. Iraheta* (2014) 227 Cal.App.4th 611, 619.) An order granting a motion for new trial is reviewed for abuse of discretion. (*People v. Ault* (2004) 33 Cal.4th 1250, 1260-1261.)

**B. *Instruction on Lesser Included Offenses***

The trial court has the duty “to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.’ [Citations.] ‘That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.’ [Citations.]” (*People v. Souza* (2012) 54 Cal.4th 90, 115-116.) Thus, the obligation to instruct on a lesser included offense arises only if the record contains substantial evidence that the defendant committed the lesser but not the greater offense. (See *People v. Avila* (2009) 46 Cal.4th 680, 705.)

Section 246 prohibits willful and malicious discharge of a firearm at certain specified targets, including an “occupied motor vehicle.” Section 246.3 was originally enacted to proscribe celebratory gunfire. (See *People v. Ramirez, supra*, 45 Cal.4th at pp. 985-987.) Subdivision (a) of section 246.3 (section 246.3(a)) prohibits willful discharge of a firearm in a grossly negligent manner that could result in a person’s injury or death.

The Supreme Court has held that “section 246.3(a) is a necessarily included lesser offense of section 246. Both offenses require that the defendant willfully fire a gun. Although the mens rea requirements are somewhat differently described, both are general intent crimes. The high probability of human death or personal injury in section 246 is similar to, although greater than, the formulation of likelihood in section 246.3(a), which requires that injury or death ‘could result.’ The only other difference between the two, and the basis for the more serious treatment of a section 246 offense, is that the greater offense requires that an [occupied motor vehicle] be within the

defendant's firing range. All the elements of section 246.3(a) are necessarily included in the more stringent requirements of section 246." (*People v. Ramirez, supra*, 45 Cal.4th at p. 990.)

### **C. Analysis**

The trial court was required to instruct on section 246.3(a) only if the record contains substantial evidence that Villa violated section 246.3(a) but not section 246. The People argue that the record contains no such evidence. We agree.

Villa admitted shooting at the car while aware that it was occupied by Simms and was well within firing range. There was no evidence to the contrary. The only differences between section 246 and section 246.3(a) are that section 246 requires that an occupied vehicle be within firing range and that there be a high probability of human death or personal injury; section 246.3(a) does not require the presence of an occupied vehicle in firing range and requires only that injury or death could result. (See *People v. Ramirez, supra*, 45 Cal.4th at p. 990.) There was no evidence that Villa fired a gun but not at the car occupied by Simms, or that he fired a gun in such a manner that injury or death could result but was not highly probable. Villa's own testimony—that he fired twice at the car from about 10 feet away and five more times from about half a block away—confirmed that he did fire at an occupied vehicle and that death or injury was highly probable.

Villa's testimony, if believed by the jury, was evidence he did not fire the gun *intentionally*. According to Villa, the first two shots were fired as he and Simms struggled over the gun. Once Villa took possession of the gun, he fired at Simms twice from a distance of about 10 feet while Simms was driving away, but

Villa described it as “an impulse”—he “didn’t mean to shoot,” his “hand just went up,” and he “shot twice.” After that, five more shots “went off,” firing “uncontrollably from [his] hand.” But if the jury had believed this testimony and had interpreted it as showing that Villa did not fire the gun intentionally, then the jury would have been required to find him not guilty under *both* section 246 and section 246.3(a), because both offenses require that the defendant willfully fire a gun. Villa’s testimony about his impulsivity and lack of intent therefore does not provide a basis on which he could be acquitted under section 246 but convicted under section 246.3(a).

Villa argues that the jury could have believed that he acted in self-defense and that the malice element of section 246 was therefore negated, but the jury could still have convicted him under section 246.3(a). The argument lacks merit. If Villa acted in “perfect” self-defense (i.e., under the honest and objectively reasonable belief in the need to use force to protect himself from imminent death or great bodily injury), then he would be not guilty under *both* section 246 and section 246.3(a). (See, e.g., *People v. Lee* (2005) 131 Cal.App.4th 1413, 1427 [applying perfect self-defense to a charge under § 246.3].) And if he acted in “imperfect” self-defense (i.e., under the honest but objectively unreasonable belief that he was in imminent danger of death or great bodily injury), then that would *not* be a defense under section 246. (See *People v. Iraheta, supra*, 227 Cal.App.4th at p. 623 [imperfect self-defense “is inapplicable to [§] 246 and similar crimes”]; see generally *id.* at p. 620 [explaining that imperfect self-defense is not a true defense but rather is a theory of manslaughter].) There is consequently no theory of self-defense

that would render Villa guilty under section 246.3(a) but not guilty under section 246.

For all of the foregoing reasons, we conclude that the trial court did not err by failing to instruct the jury on section 246.3(a). The court therefore abused its discretion by granting Villa's motion for new trial on that basis.

### **DISPOSITION**

The order granting a new trial as to count 4 is reversed, the conviction on that count for shooting at an occupied motor vehicle is reinstated, together with the related enhancement, and the matter is remanded for sentencing. In all other respects, the order on Villa's new trial motion is affirmed.

MENETREZ, J.\*

We concur:

PERLUSS, P. J.

SEGAL, J.

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