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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOHNNY GOINS, Defendant and Appellant.	B281831 (Los Angeles County Super. Ct. No. GA095841)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jared D. Moses, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Joseph P. Lee and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Johnny Goins appeals from his conviction by jury of the first degree murder of his sister, the attempted murder of his nephew, and two counts of shooting at an inhabited dwelling. The jury also found true several firearm allegations pursuant to Penal Code section 12022.53.[1] Defendant was sentenced to state prison for 77 years to life.

Defendant claims various errors in the jury instructions, contends there is no substantial evidence supporting his conviction for attempted murder, and argues remand is warranted in light of the amendment of section 12022.53 during the pendency of this appeal.

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by amended information with one count of murder (§ 187, subd. (a); count 1), one count of attempted murder (§ 187, subd. (a), § 664; count 2), and two counts of shooting at an inhabited dwelling (§ 246; counts 4 & 5).[2] It was alleged as to count 2 that the attempted murder was committed willfully, deliberately and with premeditation. It was further alleged as to counts 1 and 2 that defendant personally used and discharged a firearm in the commission of the offenses within the meaning of section 12022.53, subdivisions (b) and (c), and as to all counts that defendant personally used a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d).

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[1] All further undesignated section references are to the Penal Code.

[2] Count 3 (assault with a firearm) was dismissed.

The case proceeded to trial by jury in February 2017. The following facts were established by the testimony and evidence received at trial.

1. The Shooting of March 5, 2015

Tanaya Goins was defendant's older half sister. In March 2015, Tanaya lived with her 13-year-old son Andre J. and her longtime boyfriend, Jason Washington, in a one-bedroom apartment in San Gabriel.[3] Because the apartment was small, Mr. Washington and Tanaya slept on a mattress in the living room and Andre slept in the bedroom. The front door to the apartment opened into the living room, and there was a large window adjacent to the front door.

On March 5, Mr. Washington woke up Tanaya around 6:00 a.m. Tanaya got up and went to the bathroom to take a shower. Andre had already taken his shower and was getting dressed for school. Mr. Washington went to use the bathroom while Tanaya showered. He heard several loud knocks on the front door which caused their two small dogs to start barking. Tanaya asked Mr. Washington to quiet the dogs, and said it was probably Mr. Richard, a neighbor, at the door.

The knocking on the door interrupted Andre getting dressed. He walked over to the front window and looked out. Defendant was standing at the door and told Andre, "let me in." Andre did not open the door, but walked to the bathroom to let his mother know "Uncle Johnny" was at the door.

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[3] Because Andre is a minor, we refer to him only by his first name and the first initial of his last name to protect his privacy. Because Ms. Goins shared a common surname with defendant, we refer to her by her first name only for clarity.

Tanaya quickly got out of the shower and wrapped a towel around herself. She looked "concern[ed]" and said "see" to Mr. Washington as she left the bathroom. About a week earlier, Tanaya told Mr. Washington that defendant had threatened he was going to kill her, so she had gotten a gun. She showed the gun to Mr. Washington and hid it under a cushion in the love seat in the living room.

Mr. Washington did not immediately follow Tanaya because he was using the toilet at the time, but Andre followed his mother into the living room. She went to the window and opened the blinds. Andre stopped a few feet behind her and stood on the mattress that was lying on the floor. Tanaya started yelling loudly at defendant to "get the f away" from their house. Tanaya was holding the towel with one hand and gesturing with her other hand at defendant to leave.

From the bathroom, Mr. Washington heard Tanaya yelling loudly and angrily at defendant: "Johnny, can you please leave. Johnny, can you please get the f--k out of here. Johnny, can you please leave, bro." Mr. Washington did not hear her threaten defendant in any way.

Mr. Washington thought he heard defendant say, "man" but did not hear him say anything else. Within seconds, he heard a loud explosion and saw a flash of light. The noise was so loud that Mr. Washington was confused and unsure about what had happened. Andre was also stunned by the sound of the gunshots. He saw his mother fall to the ground. In the confusion, he did not realize he had been injured.

Andre was frantic and went to get Mr. Washington from the bathroom. Mr. Washington saw that Andre had a gash on his wrist. Mr. Washington quickly walked into the living room. He

saw several bullet holes in the front window. Tanaya was lying face up on the floor, her towel dropped at her side. There was blood all around her head. She did not appear to be breathing. Mr. Washington did not see anything in her hands or near her body other than the towel. However, there was a handgun on the mattress and he saw that one of the seat cushions on the love seat was pushed up. Andre also had not seen anything in his mother's hands before or after the shooting.

Mr. Washington tried to hold and talk to Tanaya, but she did not respond. He did not want her lying there exposed, so he placed the towel over her body. He went outside and started screaming for help. Mr. Washington waited outside "going crazy" until the police arrived a few minutes later.

Deputy Sheriff Scott Berner and his partner arrived on the scene and entered the apartment. Deputy Berner saw Tanaya lying face up on the floor to the left of the front door. He saw a significant amount of blood, as well as brain matter, near her head. She appeared to be dead. Deputy Berner saw three bullet holes in the front window, and another bullet hole in the front door. He did not see any weapon near Tanaya.

Paramedics arrived, checked on Tanaya's condition and pronounced her dead at the scene. Paramedic Shane Sengua was told there was a second patient to assist. He went to a neighboring apartment and found Andre, sitting on the couch, looking dazed. He appeared to have a "graze" gunshot wound to his wrist. Mr. Sengua bandaged the wound and checked for other injuries. Andre was thereafter taken to the hospital where a doctor sutured the wound on his wrist.

Two of Tanaya's neighbors, Raquel Barron and Carmen Lopez, told the deputies on the scene what they witnessed that

morning around 6:30. Both reported seeing a man, later identified as defendant, dressed in dark pants, a white shirt and a denim jacket walk from the back of the complex with his hands in his pockets and go to Tanaya's apartment.

Ms. Barron reported she had been walking her baby back and forth in her apartment when she noticed defendant through the window. When she turned away from the window, she heard several gunshots (five or six), one right after the other.

Ms. Barron put her baby down and ran back to the window. She saw defendant running toward the front gate of the apartment complex. Ms. Barron called 911. While she was on the phone with the dispatcher, she heard Mr. Washington outside the apartment yelling "she's dead."

Ms. Lopez was doing laundry in the laundry room at the back of the complex. Through the window of the laundry room, she saw defendant walk up to Tanaya's front door. Defendant knocked on the door, but no one answered. Defendant then cupped his hands around his eyes, put his face up to the glass, and peered into the apartment. Tanaya's dogs began to bark. Ms. Lopez did not hear anyone talking or yelling, just the dogs barking.

Ms. Lopez did not recognize defendant as someone who lived in the complex. Since she had left her front door unlocked, she walked back to lock her front door. When she walked by defendant, still standing outside Tanaya's front door, he turned away from her. Ms. Lopez locked her door and then walked back to the laundry room to finish her laundry. Just before she reached the laundry room door, Ms. Lopez heard five or six gunshots. Ms. Lopez went into the laundry room and looked out

the window. She saw defendant running away toward the front of the apartment complex.

Defendant was arrested later in the evening at the Moreno Valley shopping mall. The arresting deputy took possession of defendant's cell phone.

2. The Events Leading Up to the Shooting

About a year before the shooting, defendant moved in with S.O. They lived in Moreno Valley with S.O.'s young children from a prior relationship.

On February 20, 2015, about two weeks before the shooting, defendant and S.O. were at home in their apartment, talking. S.O. told defendant he was "nosey." Defendant got upset and slapped S.O. hard across the face. It left a mark and her cheek was slightly swollen. S.O. started screaming. Defendant shut the window and locked the door. He then grabbed S.O. and held her down on the bed. He placed his hands over her nose and mouth, telling her to "shut the f--k up" and calling her a "bitch." S.O. had trouble breathing and felt defendant was trying to suffocate her. She continued to struggle and defendant let her go. He then left for work. S.O. reported the incident to the police.

S.O. exchanged several text messages with defendant about the incident, explaining how upset she was because she felt like he had been trying to kill her "this time." In one response, defendant apologized and said he was just trying to make her stop screaming and was not trying to suffocate her. Later in the day, the police arrived at defendant's work place and arrested him. Defendant was subsequently fired from his job.

Over the ensuing days, S.O. spoke to defendant's cousin (Connie Hayes), as well as Tanaya, about the incident. Defendant got mad at her for talking to Tanaya about what

happened. Nevertheless, defendant tried to convince S.O. to continue their relationship. He expressed feelings of depression about their breakup and the loss of his job over the incident. They discussed getting back together, but S.O. never agreed to do so.

Tanaya spoke with her cousin, Ms. Hayes, numerous times about defendant's arrest and the "situation" with S.O. and expressed her concern. Tanaya told her cousin that if defendant came to her house it would not be to talk, but to kill her.

During this same time period, Tanaya also spoke to her longtime friend, Jazmine Harris. Tanaya expressed concern about the tension that had developed between her and defendant over his assault of S.O. A few days before the shooting, Tanaya sent a text message to Ms. Harris telling her that defendant was "crazy," and that things were getting "really bad." Ms. Harris told her to call the police. Tanaya texted her back: "I can call the police but how can I do that after I'm dead, he better not go to my house." She said she did not want to wait to see what he was going to do. Tanaya, apparently referencing a funeral, said there was going to be "slow singing and flower bringing." Ms. Harris told Tanaya to tell defendant to meet her and then have the police with her for the meeting. Ms. Harris was not aware Tanaya had purchased a gun.

3. Other Evidence

An autopsy confirmed Tanaya suffered two fatal gunshot wounds: one to her head and one through her upper torso. Both entrance wounds were on the right side of her body. A toxicology report revealed small quantities of marijuana and methamphetamine in her system at the time of her death.

Anny Wu, a senior criminalist with the Los Angeles County Sheriff's Department, examined the bullet holes in the front window and door of Tanaya's apartment. Among other things, she confirmed that all four bullet holes resulted from the firing of a gun from the outside of the apartment into the apartment (none were shot from inside the apartment).

Detective David Gunner attested to his investigation of the shooting. He verified information extracted from defendant's cell phone which had been seized at the time of his arrest. One text message from the phone was sent on February 27, 2015, and said "You got burner for sale." In Detective Gunner's experience, a burner is a common term for a gun.

The day after defendant sent the text asking for a burner, defendant created a video on his cell phone which he later posted to Facebook. The video was played for the jury. In it, defendant apologized to S.O., expressed his love for her and made several other statements. In one portion, defendant referred to Tanaya as a "bitch," who wanted to see his "downfall," provoked him just to get him to react, and called him a narcissist who did not like "dark-skinned girls."

S.O. testified that defendant called her on the morning of the shooting, sometime before 8:00. while she was getting her children ready for school. S.O. was unaware of the shooting at that time, and defendant did not say anything about it to her. Defendant told her he was upset because Tanaya had spoken poorly of him to his cousin and his cousin did not want him coming over to her house anymore. Defendant drove to S.O.'s apartment that morning and gave her some money. S.O. understood he wanted her to have the money because he was "turning [himself] in" on the domestic violence charge since he

was not able to pay the bail bond company in full. She learned later in the day that Tanaya had been shot.

4. Defense Evidence

Defendant testified and explained that he had a difficult childhood. He said that he and Tanaya had the same mother, but different fathers. They were raised by their mother because both men were in prison when they were growing up. When he was young, he witnessed numerous domestic violence incidents against his mother by various boyfriends, some of which involved gun use. He was also shot at in a drive-by shooting. Defendant said his mother physically abused him as a child, that he was removed from his mother's care for a period of time and lived with relatives on and off.

Defendant said he stopped talking to Tanaya in 2014 when he started dating S.O. because Tanaya believed he had cheated on a friend of hers to be with S.O., which was not true.

With respect to the domestic violence incident with S.O. on February 20, 2015, defendant admitted he slapped her in the face because he got upset that she insinuated he was "nosey." He said she tried to hit back at him and began screaming at the "top of her lungs" so he threw her down onto the bed and tried to get her to stop screaming. He admitted he put his hand over her mouth to quiet her. He did not want the neighbors or her kids to hear her screaming like that. Defendant explained that is why he shut the door and the window. He said he had no intent to hurt her or suffocate her. Defendant said he apologized to S.O. and then went to work.

Defendant said he was later arrested while at work which caused him to be fired from his job. He was very upset about that because he had worked there for almost 10 years. Defendant

posted bail and was released, but then he found out Tanaya had spoken to S.O. He did not like his sister knowing his personal business. Tanaya sent him a text saying she was angry at him about the incident and that it was wrong to blame their mother for allegedly hitting him when he was a child. Defendant was angry and blocked and erased Tanaya's number from his cell phone. Defendant explained he then started getting calls from the bail bond company about payment and it stressed him out because he did not have the money to pay them and had lost his job.

Defendant said he had never owned a gun in his entire life, but after the incident with S.O., he started getting threatening phone calls and threats on Facebook, including one from S.O.'s brother. He therefore bought a gun for protection. He denied he bought the gun to kill Tanaya. He did however carry the gun around with him all the time because he feared for his life.

Defendant admitted that during this same time period, he exchanged various texts with his mother, including one that said: "Keep playin, it's funny now, you gone [*sic*] be crying later. I promise." He explained that he was "having words" with his mother and he was trying to tell her that people would learn the truth about her calling him a liar and trying to "sweep under the rug" her abuse of him when he was young.

Defendant made the video on his cell phone to set the record straight about what had happened in his childhood and what happened with S.O. on February 20. He did not post it right away because he was busy with other things.

Defendant denied knowing Tanaya had purchased a gun or that she had been saying she feared he was going to try to kill

her. He said he did not know whether she used drugs, but knew she would sometimes smoke marijuana.

Defendant went over to Tanaya's house on March 5 to talk to her about everything that was going on. He was going to turn himself in on the domestic violence charge and did not know when he would be able to talk to her later. Because he had erased her information from his phone a few days before, he could not just call Tanaya so he decided to go see her in person. He denied he went to the apartment with the intent to kill his sister.

When he arrived at Tanaya's apartment complex that morning, the front security gate was locked so he went around through the back. He knew how to get in that way because Mr. Washington had shown him how to do it when he used to stay over with them sometimes. Defendant knocked on Tanaya's door. His nephew, Andre, came to the window and looked out. Defendant told him to get his mother. He then heard yelling from inside the apartment and the dogs barking.

Tanaya did not open the door but appeared at the window with a gun in her hand. She looked really mad, but did not say or yell anything at him. It all "happened fast" but defendant took the gun from his pocket and shot towards the window.

After he shot several times, defendant ran out of the apartment complex and drove to Moreno Valley to see S.O. When he got to her apartment, he told her he was going to turn himself in and gave her some money. He then left and went to Wendy's. At some point, he posted the video he had made to Facebook because he knew he would be going to jail. He also sent several text messages to a few friends and family members. Defendant admitted he said nothing in those messages about having shot at Tanaya because she pointed a gun at him first. He also admitted

that when the detectives interviewed him after his arrest, he never told them that Tanaya had pointed a gun at him. He told the police he threw his gun away after he left Tanaya's apartment.

Defendant presented the expert testimony of Dr. Kevin Booker, a trauma specialist. Dr. Booker offered his opinion that defendant suffered from severe, chronic posttraumatic stress disorder as a result of a history of exposure to violence, particularly in childhood. He also suffered from major depressive disorder and substance abuse disorder, but the substance abuse was in full remission. Dr. Booker opined that as a result of these disorders, defendant exhibited hypervigilance. Individuals who suffer from such disorders tend to be paranoid and often overreact to perceived threats.

5. The Verdict and Sentencing

The jury found defendant guilty of the first degree murder of Tanaya (count 1), the attempted premeditated murder of Andre (count 2), and two counts of shooting at an inhabited dwelling (counts 4 & 5). As to counts 1 and 2, the jury found true the firearm use allegations pursuant to section 12022.53, subdivisions (b) and (c). The jury also found true the allegations as to counts 1 and 4 that defendant personally used and discharged a firearm causing great bodily injury pursuant to section 12022.53, subdivision (d). They found not true the allegation that defendant had inflicted great bodily injury on Andre.

The court sentenced defendant to a state prison term of 77 years to life, calculated as follows: 25 years to life on count 1, plus a consecutive term of 25 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (d); a

term of life on count 2 with a minimum parole eligibility of seven years, plus a consecutive term of 20 years to life for the firearm enhancement pursuant to section 12022.53, subdivision (c). The court imposed and stayed the sentences on counts 4 and 5 and the remaining firearm enhancements. The court awarded 763 days of custody credits (actual days/no conduct credits), and made further orders not at issue in this appeal.

This appeal followed.

DISCUSSION

1. There Were No Instructional Errors

Defendant raises three challenges to the jury instructions. We conclude none has merit.

a. CALJIC No. 5.42

The trial court thoroughly and correctly instructed, as requested by the parties, on the law pertaining to self-defense and imperfect self-defense, including CALJIC Nos. 5.12, 5.15, 5.17, 5.30, 5.50, 5.51, 5.52, 5.55 and 8.50.

Over defendant's objection, the court further instructed with CALJIC No. 5.42 as follows: "A person may defend her home or dwelling against anyone who manifestly intends or endeavors in a violent or riotous manner, to enter that home or dwelling and who appears to intend violence to any person in that home or dwelling. The amount of force which the person may use in resisting the trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. She is not bound to retreat even though a retreat might safely be made. She may resist force with force, increasing it in proportion to the intruder's persistence and violence if the circumstances which are

apparent to the lawful occupant of the property are such as would excite similar fears and a similar belief in a reasonable person."[4]

Defendant contends it was error to give CALJIC No. 5.42 because it is intended to apply to a defendant's right to self-defense in his or her home, *not* a victim's. Defendant argues the use of the instruction on the facts here improperly shifted the jury's focus away from the correct inquiry, namely, whether defendant reasonably believed in the need to use force to defend against an imminent threat of death or great bodily injury. In substance, defendant argues Tanaya's belief in the need to use force to defend herself from him was irrelevant.

This same argument on substantially similar facts was rejected in *People v. Watie* (2002) 100 Cal.App.4th 866 (*Watie*). In *Watie*, the defendant was convicted of voluntary manslaughter for the shooting death of the victim following a confrontation between the two men on the front porch of the victim's home. (*Id.* at pp. 873-874.) The trial court instructed on the law pertaining to self-defense, imperfect self-defense and on the defense of a dwelling, including CALJIC No. 5.42. (*Watie,* at pp. 876-877.) On appeal, the defendant argued it was error to instruct on the

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[4] The court also instructed with CALJIC No. 5.43 (a related instruction on defense of a dwelling) which defendant does not challenge: "When conditions are present which, under the law, justify a person in using force in defense of property, that person may use that degree and extent of force as would appear to a reasonable person, placed in the same position, and seeing and knowing what the resisting person then sees and knows, to be reasonably necessary to prevent imminent injury threatened to the property. Any use of force beyond that limit is excessive and unjustified, and anyone using excessive force is legally responsible for the consequences thereof."

defense of a dwelling because it was irrelevant to resolving the merit of his self-defense claim and likely confused the jury. (*Id.* at p. 876.)

In concluding there was no instructional error, *Watie* explained, "the jury was confronted with the question of whether defendant's use of deadly force was justified as he confronted [the victim] on the front porch of [the victim's] home and whether defendant's unlawful conduct created the circumstances that legally justified [the victim's] use of force. If [the victim] had a right to use force to defend himself in his home, then defendant had no right of self-defense, imperfect or otherwise. The court's instructions on [the victim's] rights and defendant's right to turn to deadly force correctly stated the law." (*Watie*, *supra*, 100 Cal.App.4th at p. 878.) In so holding, *Watie* cited to two similar cases that also reasoned a victim's right of defense *in the home* is a relevant consideration in resolving a defendant's claim of self-defense or imperfect self-defense: *People v. Gleghorn* (1987) 193 Cal.App.3d 196 and *People v. Hardin* (2000) 85 Cal.App.4th 625.

Defendant acknowledges *Watie*, but urges us to reject it, contending it is at odds with *People v. Minifie* (1996) 13 Cal.4th 1055 (*Minifie*). Defendant cites *Minifie* for the proposition that the law of self-defense is *not* focused on the victim's acts and intent, but rather on whether the defendant acted reasonably in the face of a perceived threat of force. (*Minifie*, at p. 1068.) This is an accurate principle of law, but defendant's reliance on *Minifie* is nonetheless unavailing.

Minifie and *Watie* are not at odds. *Minifie* did not address the propriety of CALJIC No. 5.42 or any jury instruction for that matter, nor did it factually involve an altercation *in a home*. *Minifie* involved two patrons at a bar. The defendant had

previously killed the victim's friend. The victim confronted the defendant when he came into the bar and punched him. The defendant in turn pulled a gun, and took several shots at the victim both inside the bar and outside as the victim fled. (*Minifie*, *supra*, 13 Cal.4th at pp. 1060-1061.)

The defendant in *Minifie* sought to introduce evidence that several friends and family of the man he had killed had threatened him and his wife. He argued that evidence of those third party threats was relevant to show his fear of the victim based on his status as a member of that group of friends, even if the victim had not personally threatened him. (*Minifie*, *supra*, 13 Cal.4th at pp. 1061-1063.) *Minifie* concluded the third party threat evidence was admissible on the reasonableness of the defendant's fear. (*Id*. at pp. 1064-1069.) *Minifie* says nothing about the propriety of instructing on the defense of a dwelling in conjunction with instructing on self-defense when the defendant has attacked someone in their own home because no such issue was presented in that case.

Here, the evidence involved a confrontation between defendant and Tanaya, while Tanaya was inside her home. The evidence warranted the giving of CALJIC No. 5.42, in addition to the other instructions related to self-defense. CALJIC No. 5.42 is a correct statement of the relevant law and applied to the facts in this case. It did not misdirect the jury or operate to compel them to find defendant's claim of self-defense was precluded. Indeed, the jury was specifically instructed that "[w]hether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist." And, the instructions on self-defense admonished the jury that "a killing is lawful if it was justifiable,"

that the prosecution had the burden to prove beyond a reasonable doubt that the killing was unlawful, and that if the jury had "a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

b. Sudden quarrel/heat of passion

Defendant next contends the court erred in failing to instruct on the lesser included offense of voluntary manslaughter based on sudden quarrel or heat of passion.

" ' "The trial court is obligated 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." ' [Citation.] 'Conversely, even on request, the court "*has no duty to instruct on any lesser offense unless there is substantial evidence to support such instruction*." ' [Citation.] This substantial evidence requirement is not satisfied by ' "*any* evidence . . . no matter how weak," ' but rather by evidence from which a jury composed of reasonable persons could conclude 'that the lesser offense, but not the greater, was committed.' [Citation.] 'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' " (*People v. Avila* (2009) 46 Cal.4th 680, 704-705 (*Avila*), first italics added.)

Here, the court instructed on the lesser included offense of voluntary manslaughter based on imperfect self-defense, but not on sudden quarrel/heat of passion. "Imperfect self-defense, which reduces murder to voluntary manslaughter, arises when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury. [Citations.] Heat of passion, which likewise reduces murder to voluntary manslaughter, arises when the defendant is provoked by acts that would 'render an ordinary person of average disposition

"liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment" ' [citation] and kills while under the actual influence of such a passion." (*People v. Duff* (2014) 58 Cal.4th 527, 561-562 (*Duff*).)

Defendant's own testimony belies any claim that an instruction on sudden quarrel/heat of passion was warranted. Defendant testified he heard yelling inside the apartment after he knocked, as well as the dogs barking, but he did not hear Tanaya say anything or yell anything at him. She said nothing to him when she came to the window. He testified she came to the window looking very angry and pointing a gun at him, so he shot at her and ran away. According to defendant, it happened that quickly and there was no discussion, argument, or back and forth interaction between the two as erroneously suggested in defendant's opening brief.

None of the prosecution's evidence supported an instruction on sudden quarrel/heat of passion either. Both Mr. Washington and Andre denied Tanaya had anything in her hand, let alone a gun, when she went to the window. Indeed, according to their testimony, one of her hands was occupied with holding up her towel. Both Mr. Washington and Andre said Tanaya angrily yelled at defendant to leave, but otherwise did not engage in threatening or provocative behavior toward defendant. The medical examiner testified the entrance wounds on Tanaya's body were on her side, indicating she was likely turning away from the window when she was shot, not facing forward in a confrontational manner as defendant now claims. Both of the neighbors testified the shooting happened quickly, with five to six shots occurring in rapid succession. Neither of them heard any arguing beforehand. Such evidence supported the instruction on

imperfect self-defense (as well as defendant's claim of self-defense), but not sudden quarrel/heat of passion.

People v. Moye (2009) 47 Cal.4th 537 is instructive. The defendant there also argued the trial court erred by failing to instruct on voluntary manslaughter based on sudden quarrel/heat of passion. Like defendant here, the defendant in *Moye* testified in his own defense. In concluding there was no instructional error, the Supreme Court pointed to the defendant's own testimony: "[A]ccording to defendant, he responded to [the victim's] attack with the baseball bat by grabbing the bat from him and using it to defend himself from [the victim's] continuing advances. The thrust of defendant's testimony, in every particular, was that he approached [the victim] with peaceful intentions . . . intending to talk things out and resolve any lingering hostility that might have carried over from the previous evening's altercation." (*Id.* at pp. 553-554.) The defendant's testimony was that he was surprised by the victim suddenly turning on him with a baseball bat and he therefore responded immediately in self-defense. (*Ibid.*; accord, *Duff*, *supra*, 58 Cal.4th at pp. 535-536 [evidence that the defendant told police the victims surprised him by pulling guns on him so he shot in self-defense did not warrant an instruction on sudden quarrel/heat of passion].)

c. CALJIC No. 8.66.1

Defendant's final challenge to the jury instructions pertains to CALJIC No. 8.66.1 on the kill zone theory. Defendant contends the instruction incorrectly stated the law, allowing the jury to find him guilty of the attempted murder of Andre under a kill zone theory without finding he acted with the intent to kill Andre.

Respondent argues this contention has been forfeited because defendant did not object or otherwise seek a clarification of the instruction in the trial court. "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638; accord, *People v. Jones* (2013) 57 Cal.4th 899, 969 [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 appropriate clarifying or amplifying language' "].)

Defendant concedes no objection or request for modification was made to the trial court, but argues the contention is properly reviewed under section 1259 because the defective instruction violated his substantial rights. He contends the instruction lowered the prosecution's burden of proof by expanding the liability for attempted murder to include implied malice. He also claims the court had a duty to properly instruct on the law relative to the burden of proof and the elements of the crime, including intent.

We are not persuaded the alleged defect in the instruction impacted defendant's substantial rights. Defendant at most articulates an argument that the instruction was ambiguous as to the intent required for persons in the kill zone as opposed to the primary target. Such ambiguity could have been addressed in the trial court with a request for modification. Defendant's contention is therefore forfeited. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236 [failure to seek clarification of

alleged ambiguity in kill zone language of CALCRIM No. 600 forfeited contention on appeal].)

In any event, to the extent there is any ambiguity in the instruction, any prejudice arising from that ambiguity was harmless by any standard.

The jury was instructed with CALJIC No. 8.66.1 as follows: "A person who primarily intends to kill one person, known as the primary target, may – at the same time – attempt to kill all people – in the immediate vicinity of the primary target. This area is known as the 'kill zone.' – A kill zone is created when a perpetrator specifically intending to kill the primary target by lethal means also attempts to kill anyone in the immediate vicinity of the primary target. If the perpetrator has this specific intent, and employs the means sufficient to kill the primary target and all others in the kill zone, the perpetrator is guilty of the crime of attempted murder of the other person in the kill zone. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you."

The instruction is consistent with the kill zone theory of concurrent intent described by the Supreme Court in *People v. Bland* (2002) 28 Cal.4th 313, 329-330 (*Bland*): "[T]he fact [a defendant] desire[d] to kill a particular target does not preclude finding that the [defendant] also, concurrently, intended to kill others within . . . the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . . For example, . . . a defendant who intends to kill A and, in order to ensure A's death,

drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. . . . When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, 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. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.' "

Defendant contends the instruction does not require the jury to find a specific intent to kill others in the kill zone which is required for attempted murder. But the concluding sentence of the instruction specifically instructed the jury that whether defendant "actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you."

Moreover, the instructions setting forth the elements of attempted murder, including CALJIC Nos. 3.31 and 8.66, clearly instructed the jury that attempted murder requires evidence of express malice or an intent to kill. And, CALJIC No. 2.02 told the jury that "if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence."

"In reviewing a claim of instructional error, the ultimate question is whether 'there was a reasonable likelihood the jury

applied the challenged instruction in an impermissible manner.' [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] 'Moreover, any theoretical possibility of confusion [may be] diminished by the parties' closing arguments . . . .' [Citation.] ' " 'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' " ' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled in part on other grounds as stated in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; accord, *People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

2. Substantial Evidence Supports the Attempted Murder Conviction

Defendant contends his conviction in count 2 for the attempted premeditated murder of Andre is not supported by substantial evidence. We disagree.

" 'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine '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.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Avila*, *supra*, 46 Cal.4th at p. 701.)

Attempted murder requires evidence establishing express malice or the specific intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Defendant argues the evidence did not demonstrate a specific intent to kill Andre under a kill zone theory, or otherwise. He contends the evidence established, at most, implied malice or depraved indifference, neither of which supports an attempted murder conviction.

" '[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may . . . be inferred from the defendant's acts and the circumstances of the crime.' " (*Avila*, *supra*, 46 Cal.4th at p. 701.) " 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.' " (*People v. Smith* (2005) 37 Cal.4th 733, 741 (*Smith*).)

Of particular relevance here, "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." (*Smith*, *supra*, 37 Cal.4th at p. 742; accord, *People v. Houston* (2012) 54 Cal.4th 1186, 1218 [the "act of shooting a firearm toward a victim at close range in a manner that could have inflicted a mortal wound had the shot been on target is sufficient to support an inference of an intent to kill . . . attempted murder does not necessarily require a specific target"].)

In *Smith*, the defendant shot a single round at close range through the back window of a vehicle where his ex-girlfriend was seated in the driver's seat and her newborn baby was seated in a car seat directly behind her. (*Smith*, *supra*, 37 Cal.4th at pp. 742-743.) The bullet narrowly missed both victims by a few

inches. (*Id.* at p. 743.) The defendant was convicted of the attempted murder of both victims. The Supreme Court rejected the defendant's substantial evidence challenge, concluding the evidence was sufficient to support a specific intent to kill both the baby and the mother. (*Id*. at pp. 743-747; see also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 691 [sufficient evidence of express malice as to both victims where the defendant fired one shot at close range toward two police officers crouched next to each other].)

Here, defendant arrived at Tanaya's apartment with a loaded gun, knowing the small size of the apartment, and knowing Andre was home and had just come to the window in response to his knocking on the door. Tanaya came to the window immediately thereafter and opened the blinds. Andre was standing just behind her. Defendant was standing outside the window and had been seen peering into the window. From this vantage point, defendant fired multiple shots, at close range, through the window into the living room, striking both Tanaya and Andre. Viewing this evidence in the light most favorable to the judgment, and presuming every fact the jury could reasonably infer from such evidence, we conclude the evidence was sufficient to support an intent to kill Andre.

Even if we assume defendant did not see that Andre had remained in the living room near his mother, the evidence nonetheless supports the attempted murder conviction under a kill zone theory. Evidence demonstrating concurrent intent under a kill zone theory, as argued by the prosecution here, is another way in which the requisite intent may be established. Concurrent intent is "a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not

rule out a concurrent intent to kill others." (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)

The evidence amply supports the finding that defendant created a kill zone in the close quarters of the living room by the manner in which he chose to shoot at Tanaya multiple times at close range, sufficient to raise an inference of a concurrent intent to kill anyone standing nearby. "Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm." (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1023.)

3. The Firearm Enhancements

Finally, defendant argues that even if his conviction is affirmed in whole or in part, remand for resentencing on the firearm enhancements pursuant to section 12022.53 is warranted because of the amendment to the statute that took effect during the pendency of this appeal. We conclude remand is not warranted.

On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amended section 12022.53, subdivision (h), removing the prohibition against striking the firearm enhancements under section 12022.53. The amendment grants trial courts discretion to strike or dismiss an enhancement under section 12022.53. (Stats. 2017, ch. 682, § 2.)

The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742-748; *People v. Brown* (2012) 54 Cal.4th 314, 323; see also, *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit

from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["[a] judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired"]; *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["[t]he rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it"].)

It is undisputed defendant's appeal was not final as of January 1, 2018, when the amendment took effect.

Respondent relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike the firearm enhancement. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Id.* at p. 1896.) While the defendant's appeal was pending, the Supreme Court held that trial courts have discretion to strike prior convictions under the "Three Strikes" law in the furtherance of justice. The Court of Appeal, however, declined to remand for resentencing, reasoning it was obvious the trial court would not exercise its newfound discretion given it increased the defendant's sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Id.* at p. 1896.)

Similarly here, the court rejected defendant's request for concurrent sentencing on counts 1 and 2 and imposed the maximum sentence. The court stated it found defendant's crimes to be "particularly cruel and cowardly" and emphasized its

dismay that defendant continued to refuse to take responsibility for his actions in claiming, even in his statement at the sentencing hearing, that he never meant to hurt anyone. "He put one bullet into Tanaya's head, right through her brain, he put one bullet right through her torso, right into her heart, shot her at close range right through her door. Didn't have the courage apparently, to do it face to face looking at her, instead he hid behind the door and shot through the door. A terribly cruel and cowardly crime."

The court also remarked on its concern for the surviving victim, Andre, based in part on the way he presented himself on the witness stand: "a very flat affect. To me that is a very troubling sign. It shows somebody who has been deeply[,] deeply traumatized. And I think at this point, has probably not even begun to deal with the extent of the trauma that has been inflicted upon him and will certainly haunt him for his entire life."

The court reiterated that the crimes committed were particularly cruel, that the jury had "soundly rejected" all of defendant's excuses, and the jury's verdict "was well supported by the evidence."

Based on all of those considerations, the court imposed consecutive maximum terms on both counts 1 and 2, explaining "these are separate crimes of violence as to separate victims. And as I said before given the cruelty and the cowardliness of these crimes I believe consecutive sentence[s] are appropriate."

The court advised defendant of his appellate rights and asked if he understood those rights. Defendant responded, "f--k you, f--k you." After the court stated that was "certainly consistent" with his behavior during trial and in his life,

defendant again cursed at the court. The court concluded the proceedings noting that the "record should reflect [defendant] spit on me and it hit my head."

On this record, we conclude that remand would be futile, as it is not reasonably likely the court would exercise its discretion to reduce defendant's sentence under the amended version of the statute. (*Gutierrez*, *supra*, 48 Cal.App.4th at p. 1896.)

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

ROGAN, J.*

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