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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL ALLEN STEVENS, Defendant and Appellant.	B235370 (Los Angeles County Super. Ct. No. LA063293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Rubinson, Judge. Modified with directions, and as modified, affirmed.

Marilee Marshall, 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, Mary Sanchez and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Michael Allen Stevens guilty of attempted murder, first degree attempted robbery, and first degree burglary. Defendant contends on appeal, first, that the prosecutor knowingly introduced "false evidence" about the nature of the victim's injuries; second, that a photographic six-pack was unduly suggestive and unreliable; and, third, that the jury should have been instructed on attempted manslaughter under an imperfect self-defense theory. We hold that the abstract of judgment must be modified, but we otherwise reject defendant's contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The shooting of Eric Owens.*

In October 2009, Eric Owens and Jace Jensen lived together in Woodland Hills in a house at which Owens grew and sold marijuana. Shortly after going to bed around 11:30 p.m., on October 4, Owens was awakened by a black handgun pressing against his head. The man holding the gun was over six feet tall, although shorter than Owens, who was 6 feet 6 inches tall. The man also had a partial mustache split in the middle, a shaved head, and reddish-whitish or blotchy skin. When the man told Owens to give him money or he'd kill him, Owens pointed to his closet. As the man moved toward the closet, Owens "plunged" against the man, and they fought.

The man yelled, " 'Biggie,' " and another man entered the room.[1] This second man was big, "fat" (weighing in Owens's estimation at least 250 pounds), wore eyeglasses, had some facial hair, and was over six feet tall. Because of the light in the room, Owens could clearly see Biggie. Biggie shot Owens with a gun, which left the wall in Owens's room pockmarked. Owens fell to the ground, and the men left. When

[1] At trial, Owens couldn't identify defendant as the second man who entered the room.

the police arrived minutes later, Owens told them that Mike Goldberg and Biggie were involved.[2]

Los Angeles Police Officer Mark Mireles responded to the scene, where a bloodstained Owens said he'd been shot in the chest with a shotgun. He described the intruders as "White guys" from Simi Valley. Owens said that Goldberg had the gun, and that Goldberg threw the gun to Biggie, who shot him. Afraid that Owens would die, Officer Mireles recorded his statement. At the hospital, Owens repeated to Officer Mireles that Goldberg and Biggie were involved and that Biggie shot him. The parties stipulated that that Owens had multiple gunshot wounds, two the chest, one over the abdomen, and one in the right flank.

On October 6, 2009, Los Angeles Police Detective Pam Pitcher showed a photographic lineup to Owens, who immediately identified defendant as " 'the one that shot me.' " He identified Bryan Hernandez from another photographic lineup. Owens told the detective that the gun that shot him was black.

At trial, Owens recalled telling the police he'd been shot with a shotgun, but at trial he said it was a handgun.

Ammunition fragments were found in Owens's bedroom. The parties also stipulated that ammunition fragments were found in the bedroom. Three of the fragments were unsuitable for analysis, lacking marks of value; and the remaining six were inconclusive, meaning that none of the fragments could be conclusively linked to a particular gun.

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[2] Owens had prior contacts with Goldberg: in the summer of 2009, Owens saw Goldberg in front of Goldberg's house and, a few months later, Goldberg got into the back of Owens's car and gave him marijuana. Goldberg had also robbed Owens's roommate two or three times, and Owens thought that Goldberg broke into his house and stole items on another occasion. Earlier on the day Owens was shot, Jensen had an encounter with Goldberg.

B. *The testimony of Jacob Vegtel*.

On the night of October 4, 2009, Jacob Vegtel and Steve Kim went to Mike Goldberg's apartment in the San Fernando Valley. Also at the house were Bryan "Bubba" Hernandez and "Justin." Goldberg and Kim sold marijuana. When Vegtel arrived at the apartment, Goldberg had a six-shooter revolver. Hernandez had a black nine-millimeter pistol, which was introduced at trial and identified by Vegtel as the gun Hernandez had that night. Goldberg and Hernandez talked about going to a house and robbing it at gunpoint. Goldberg said he would go inside the house and shoot the people inside if they didn't cooperate, and he told Vegtel, who'd agreed to join them, to tie up everybody in the house with plastic zip ties and to put the marijuana in bags.

Kim, Goldberg, Hernandez, and Vegtel drove to the house, where Hernandez looked around while the others waited. After Hernandez told the others what he saw, Goldberg said he didn't want to go through with it, and the four men returned to Goldberg's apartment, where Goldberg took a nap.

Kim called defendant and asked if he wanted to help with a big job. Defendant arrived at the apartment around 10:30. Kim told defendant there was a house with marijuana inside, and they had already checked it out, but they needed a big guy to handle it. Defendant said, "Okay" and " '[L]et's do it.' " Hernandez showed one of the guns to defendant.

The men put zip ties, trash bags, and latex gloves into Kim's car, and Vegtel, Kim, Hernandez, and defendant drove back to the house. Vegtel drove. When they arrived at the house, Vegtel stayed in the car while the three others got out. They ran back when Vegtel accidentally set off the car alarm. They got back into the car and drove around the block. Kim yelled at Vegtel, and Hernandez threatened to shoot Vegtel. They decided to go back to the house, and Kim, Hernandez, and defendant got out. Vegtel again stayed in the car. Vegtel heard "boom" sounds, and the three men came back to the car. Crying, Hernandez asked, " 'Why did you shoot him?' " Defendant repeatedly said, " 'You told me to,' " and he handed a gun to Hernandez.

They drove back to Goldberg's apartment, where defendant told Vegtel that Hernandez and a guy in the house got into a big fight. Hernandez tossed the gun to defendant, and he shot the guy until the guy fell to the ground.

II. Procedural background.

On May 24, 2011, a jury found defendant guilty of count 1, attempted murder (Pen. Code, §§ 187, subd. (a) & 664);[3] count 2, first degree attempted robbery (§§ 211, 664); and count 4, first degree burglary (§ 459). As to counts 1 and 2, the jury found true gun-use enhancements under section 12022.53, subdivisions (b), (c), and (d). As to count 4, the jury found true a personal gun-use enhancement under section 12022.5, subdivision (a).

On August 10, 2011, the trial court sentenced defendant, on count 1, to the midterm of 7 years plus a consecutive 25 years on the gun enhancement under section 12022.53, subdivision (d). The trial court imposed but stayed, under section 654, sentences on the remaining enhancements and counts.

DISCUSSION

III. The firearm enhancement.

Defendant contends that the judgment or, at a minimum, the true findings on the section 12022.53, subdivision (d), firearm enhancements must be reversed because the prosecutor knowingly introduced false evidence to support them, namely, evidence that Owens was shot with bullets when, in fact, he was shot with rock salt pellets.[4] We disagree with this contention.[5]

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[3] All further undesignated statutory references are to the Penal Code.

[4] Although defendant breaks his contention into two arguments, one about false evidence and the second about the prosecutor's misconduct in using false evidence, we treat the issue as one argument.

[5] The Attorney General argues that the claim has been forfeited because defendant did not raise the issue below. Despite defendant's failure to object below, we address the issue on appeal.

" 'Under well-established principles of due process, the prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents, even if the false evidence was not intentionally submitted.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 711; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 633 ["[A] prosecutor's knowing use of false evidence or argument to obtain a criminal conviction or sentence deprives the defendant of due process"].) "Put another way, the prosecution has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. [Citations.] This obligation applies to testimony whose false or misleading character would be evident in light of information known to the police involved in the criminal prosecution [citation], and applies even if the false or misleading testimony goes only to witness credibility [citations]." (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717.) But inconsistency between a witness's pretrial statements, including preliminary hearing testimony and trial testimony, "does not ineluctably demonstrate his trial testimony was false, or that the prosecutor knew it was false." (*Avila*, at p. 712.) In any case, when a witness whose testimony is alleged to be false is subjected to cross-examination and impeachment, the defendant is not denied a fair trial or due process. (*People v. Riel* (2000) 22 Cal.4th 1153, 1180-1182.)

Defendant claims that the prosecutor knowingly misled the court and the jury about who and what caused Owens's injuries. According to defendant, Hernandez shot Owens with rock or sea salt. This claim is based on statements in defendant's probation report. That report alludes to statements the investigating officer, Detective Pitcher, made to the probation officer that Hernandez had a shotgun containing rock salt; that the victim wouldn't have survived had he been shot with bullets; and that the victim said he was told he was shot with sea salt.

Although defendant suggests that these statements reflect the "truth" about what happened, it was merely one theory of the case. Moreover, it was a theory of the case defendant was allowed to pursue. When questioned, for example, about his familiarity with rock salt guns or rock salt pellets, Officer Mireles said he thought shotguns fire rock

salt but he was more familiar with nonlethal weapons used by the Los Angeles Police Department, like a beanbag shotgun. The People's firearms examiner testified on cross-examination he had not heard of a shotgun that fires anything like salt rock or a nonmetallic material. He did, however, see it once in a movie. The expert was also familiar with bean bag guns, which are a less lethal law enforcement device, and he had heard about hand loading or reloading, where people manufacture their own shotgun shells or regular handgun ammunition cartridges.

The defense also asked the victim, Owens, about rock salt, and Owens said he didn't know if he'd been hit with rock salt. Defense counsel asked Vegtel if Steve Kim, when discussing what happened that night, said anything about rock salt bullets. The trial court sustained a hearsay objection, and the following discussion occurred at sidebar:

"[Prosecutor]: Counsel and I have had an off-the-record discussion regarding this particular issue and the manner this sort of information would come in.

"The court: What is the issue?

"[Prosecutor]: The issue is potentially I think counsel will argue at some point that these were salt rock bullets and not normal 9 millimeter bullets, casings, that whole thing. So basically it goes to the intent to kill. I think that's counsel's angle. That's my expectation. But he'd have to confirm that.

"[Defense counsel]: Well, you're about halfway there. There's other issues, but yeah.

"The court: The immediate issue is whether Steve Kim told him that it was rock salt bullets. That's hearsay.

"[Prosecutor]: Yeah, right. I told counsel I wouldn't have an objection if we're talking about a hearsay issue where it was communicated to the defendant. If we're talking—

"[Defense counsel]: Wait a minute. To him, I thought.

"[Prosecutor]: No, no, no. If there's a discussion regarding whether or not the defendant would have heard this information, I can see how that would be allowed in because it goes to the defendant's intent and knowledge.

"The court: Correct.

"[Prosecutor]: If we're talking about Vegtel and Steve Kim, that's something very different.

"The court: Unless it's then communicated—right. If it's communicated in some way to the defendant, that's a different story.

"[Defense counsel]: Here's what I'll do: I'll ask it this way: I'll say, 'Was there any conversation of salt rock bullets in [defendant's] presence.?' Is that objectionable?

"The court: It wouldn't be because that would have—it's not hearsay because it's being offered for the effect on the person who hears it rather than the person . . . it's intended for.

"[Defense counsel]: It's also talking about the conspiracy because he's talking about what he knew about this conspiracy. We're talking about Hernandez and Goldberg being willing to shoot someone, so the question is does he know anything about the role of salt rocks being used. I think it is relevant that Steve Kim talks about it, you know, because it is the effect on the listener because it talks about his conspiracy.

"[Prosecutor]: Vegtel is not on trial.

"The court: Hold on. [¶] The effect on the listener, the listener being the defendant. That's what matters.

"[Defense counsel]: Okay.

"The court: That's why I think if the question is phrased, 'was salt rock'—or rock salt. . . . If the potential use of rock salt bullets was discussed in the presence of the defendant on that night, that would be non-objectionable.

"[Defense counsel]: Then I'll ask that question and limit it to that.

"[Prosecutor]: That's what I thought we had an agreement on.

"[Defense counsel]: All right. Now we're straight. So if he's heard anything about that in Stevens' presence is what you're saying.

"[Prosecutor]: Yes, because that goes to knowledge and intent."

In front of the jury, defense counsel asked Vegtel if anyone suggested, in defendant's presence, any type of nonlethal weapon like a pellet gun or anything like that. Vegtel answered, "No."

This discussion and testimony makes it clear that the prosecutor was not hiding something concerning rock salt pellets. Rather, defense counsel was allowed to introduce evidence that Owens had been shot with rock salt rather than bullets. The prosecutor countered—not with "false evidence"—but with a different theory of the case, namely, that defendant shot Owens with a semiautomatic pistol containing bullets.[6] That theory was supported by, for example, Officer Mireles's and the firearm examiner's testimony that they were unfamiliar with rock salt being fired from a shotgun; Detective Pitcher's testimony that she found bullet fragments in Owens's bedroom; the actual fragments, which were shown to the jury and introduced into evidence; the firearm examiner's testimony that the fragments were consistent with bullet fragments; the parties' stipulation that Owens suffered "gunshot" wounds; and Vegtel's testimony that Hernandez and Goldberg had guns the night of the shooting.

Given that defendant does not claim these witnesses were lying and the physical evidence was fabricated and that the defense had the opportunity to introduce evidence Owens was shot with rock salt, we fail to see how the prosecutor's evidence was "false." The prosecution "simply presented its evidence and allowed a fully informed jury to evaluate it." (*People v. Riel, supra,* 22 Cal.4th at p. 1181.) We therefore reject defendant's contention that the prosecutor relied on "false evidence" or committed misconduct in doing so.

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[6] Defendant cites the following portion of the prosecutor's closing argument as evidence that the prosecutor "falsely" argued that Owens was shot with bullets: "Now, the net result of these violent, senseless, criminal actions is Eric Owens laying on his bedroom floor with four bullet holes in his chest and abdomen bleeding, gasping, not being sure if he was going to make it. [¶] Now, the net result of these violent, senseless, criminal actions is the defendant pointing a gun, . . . pulling that trigger, pulling that trigger, pulling that trigger, pulling that trigger, pulling that trigger, firing at a minimum five shots, putting four bullets into Mr. Owens."

IV. The photographic six-pack.

Owens identified defendant as the shooter from a photographic six-pack. Defendant was the only one of six men wearing glasses. Defendant now contends that the lineup was impermissibly suggestive and led to an unreliable identification, thereby violating his federal due process rights.

A. *The trial court refuses to exclude evidence of the photographic six-pack identification.*

The defense moved to exclude evidence of the photographic six-pack identification of defendant on the ground that defendant was the only person wearing glasses in the lineup, making it unduly suggestive. The trial court asked whether Owens described his attacker as wearing glasses, and defense counsel answered, "As far as I'm aware, no." The prosecutor believed that was correct and said, "I think the most significant things were facial hair and weight." The court looked at the six-pack and said: "I think you've got a number of gentlemen here with—you know, all apparently Caucasian, they've all got short hair. It looks like four out of the six have facial hair. And they're all looking straight at the camera. Several of them appear to be heavyset, or at least stocky. [¶] The fact that one is wearing glasses—I mean, you know, No. 3 is the only one wearing a white shirt. Does that indicate that the witness should be picking out No. 3 because he's the only one with a white shirt? No. 5 is the only one with blond hair. Should he be picking the person with blond hair? [¶] I just don't see the fact of glasses being as something that would draw a witness' attention, especially when the witness had not indicated in his description the person was wearing glasses. So it's a matter of cross-examination and argument more than admissibility under these circumstances."

At trial, Owens testified he didn't remember telling Officer Mireles that the shooter wore eyeglasses. When asked, "[D]id you tell the detectives who tried to get a description from you later whether or not the person had eyeglasses who shot you?"

Owens answered, "Yes, I believe in the hospital."[7] The investigating officer, Detective Pitcher, testified that Owens never told her that the shooter wore glasses; he said he didn't remember glasses.

Defendant later filed a motion for a new trial based on the photographic lineup. The trial court denied the motion: "I do not find that this six-pack line-up was unduly suggestive. The description that Mr. Owens made did not emphasize the issue of glasses; not to my recollection, in any event. [¶] I'm looking again at the exhibit, and the six photographs are all Caucasian males with relatively short hair. Some are larger gentlemen. Some are not as large. Four out of the six have facial hair, including your client, . . . They're wearing, you know, different types of shirts. The hairlines, there's a couple with receding hairlines, including your client; a couple that don't have that. [¶] It doesn't seem to me—yes, your client's the only one with glasses, but that to me does not transform this—that factor in and of itself does not transform this six-pack into one which is unduly suggestive to the point that it should not be admitted into evidence."

B. *Owens's identification was reliable under totality of the circumstances.*

" 'Due process requires the exclusion of identification testimony only if the identification procedures used were unnecessarily suggestive and, if so, the resulting identification was also unreliable.' " (*People v. Avila*, *supra*, 46 Cal.4th at p. 698; see also *Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114; *People v. Yeoman* (2003) 31 Cal.4th 93, 123.) "The question is not whether there were differences between the lineup participants, but 'whether anything caused defendant to "stand out" from the others in a way that would suggest the witness should select him.' " (*Avila*, at p. 698.) An identification procedure is sufficiently neutral where the subjects are " 'similar in age, complexion, physical features and build . . .' [citation]." (*People v. Leung* (1992) 5 Cal.App.4th 482, 500; see generally *People v. Johnson* (2010) 183 Cal.App.4th 253, 272; *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1082-1083; *People v. Wimberly* (1992) 5 Cal.App.4th 773, 789-790.)

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[7] This testimony is unclear whether Owens was saying merely that he answered a question about eyeglasses or that he said the shooter wore eyeglasses.

The defendant bears the burden of demonstrating the identification procedure was unreliable. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 942.) Unfairness must be proved as a " 'demonstrable reality, not just speculation.' " (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.) A due process violation occurs only when the identification procedure is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. (*Ibid*.) We review the trial court's findings of fact deferentially, but independently review its ruling that a pretrial identification procedure was not unduly suggestive. (*People v. Avila, supra*, 46 Cal.4th at pp. 698-699; *People v. Gonzalez,* at p. 943.)

The pretrial photographic lineup at issue here consists of color photographs of six different men, including defendant. All appear to be Caucasian; all have similar, short hairstyles; all appear to be about the same age; three of the men, including defendant, appear to be heavyset; and at least three men have goatees and mustaches with a fourth man having a goatee and perhaps a slight mustache. Defendant's photograph does not " 'stand out' " from the others in a way that would have suggested the witness should select him. (See *People v. Johnson, supra*, 183 Cal.App.4th at p. 272 [lineup not suggestive where all five subjects were Black, were of a similar age, complexion, and body type, wore similar clothing, and had similar hair]; *People v. Ybarra, supra*, 166 Cal.App.4th at p. 1082 [lineup not suggestive where six subjects were all young male Hispanics with similar shaved heads, heavy builds, and some facial hair]; *People v. Wimberly, supra,* 5 Cal.App.4th at p. 790 [physical differences between participants did not necessarily render lineup unduly suggestive].)

Defendant, however, argues that the photographic lineup was unduly suggestive because he was the only man wearing glasses, and he told the police this before being shown the six-pack. Even assuming arguendo that the lineup was suggestive, the identification was nonetheless reliable under the totality of the circumstances. " 'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account

such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation [citation]. If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.]" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412; see also *People v. Arias* (1996) 13 Cal.4th 92, 168.)

Officer Mireles testified that when he arrived at the scene, the bedroom had a low light with an ambient light source, and he could clearly make out Owens's face. Owens also testified that, at the time of the attack, light from his upper closet was projecting out and his room light was on. Biggie was about eight feet from Owens, who said he focused on and got a good look at the shooter's face. Soon after being shot, Owens told Officer Mireles that Biggie was "fat" with a "kind of a moustache." This description fairly described defendant. Before being shown the photographic six-pack, Owens was given a standard admonishment. When the six-pack was shown to him, he immediately identified defendant. Owens made that identification on October 7, not long after being shot on October 5.

Although Owens did not recognize defendant at trial, Detective Pitcher also didn't recognize him, although she'd lived "this case for a year and a half." Vegtel also testified at trial that defendant looked different than he did in October 2009. By the time of trial, defendant had shaved, he was not wearing his glasses, and he had lost about 100 pounds.

Given the totality of these circumstances, we conclude that Owens's identification was reliable.

V. The attempted manslaughter instruction.

The trial court refused to instruct the jury on attempted manslaughter, under CALCRIM No. 604, imperfect self-defense.[8] The trial court did not err.

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[8] Defense counsel also asked that the jury be instructed on attempted manslaughter, heat of passion, under CALCRIM No. 603. The trial court denied that request as well, and defendant does not raise that as an issue on appeal.

" 'It is well settled that the trial court is obligated to instruct on necessarily included offenses—even without a request—when the evidence raises a question as to whether all of the elements of the charged offense are present and there is evidence that would justify a conviction of such a lesser offense.' [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 715.) Thus, "a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) We independently review "whether the trial court erred in failing to instruct on a lesser included offense." (*People v. Booker* (2011) 51 Cal.4th 141, 181.)

"Murder involves the unlawful killing of a human being with malice aforethought, but a defendant who intentionally commits an unlawful killing without malice is guilty only of voluntary manslaughter." (*People v. Blacksher* (2011) 52 Cal.4th 769, 832.) Imperfect self-defense is a theory of voluntary manslaughter, and it applies where the defendant actually, but unreasonably, believed he was in imminent danger of death or great bodily injury; under such circumstances, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter. (*People v. Booker*, *supra*, 51 Cal.4th at p. 182.)

Defendant argues that the jury should have been instructed on imperfect self-defense because he shot Owens to defend Hernandez. An imperfect self-defense, however, cannot be invoked, where, as here, the defendant's wrongful conduct (e.g., a physical assault or commission of a felony) created the circumstances in which the adversary's attack was legally justified. (*People v. Booker*, *supra*, 51 Cal.4th at p. 182; see also *People v. Valencia* (2008) 43 Cal.4th 268, 288; *In re Christian S.* (1994) 7 Cal.4th 768, 773 & fn. 1.) Imperfect self-defense is unavailable where the defendant is the initial aggressor. (*Booker*, at p. 182.)

Defendant's wrongful conduct created circumstances in which Owens's attack was legally justified. Defendant and his accomplices broke into Owens's house. Defendant's accomplice placed a gun to Owens's head and threatened to kill him. When Owens threw

himself against the accomplice, the accomplice called to defendant for help and gave him a gun, which defendant used to shoot Owens repeatedly. Under these facts, defendant was not "defending" his accomplice. Rather, defendant and his accomplice were the initial aggressors, and therefore, defendant was not entitled to raise an imperfect self-defense. (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179.)

V. The abstract of judgment.

The trial court sentenced defendant to 7 years for attempted murder plus a consecutive 25 years for the gun enhancement, for a total of 32 years in prison. The abstract of judgment, however, states that defendant was sentenced to 25 years for attempted murder and to 7 years for the gun enhancement. The abstract of judgment must be corrected to reflect the judgment imposed.

DISPOSITION

The abstract of judgment is modified to reflect that defendant was sentenced to 7 years for attempted murder (count 1) and to 25 years for the gun enhancement under section 12022.53, subdivision (d). The clerk of the superior court is directed to modify the abstract of judgment and to forward the modified abstract of judgment to the Department of Corrections. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.