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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ARTERO M. COLLINS, Defendant and Appellant.	B262755 (Los Angeles County Super. Ct. No. BA395459)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kathleen Kennedy, Judge. Affirmed.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Joseph P. Lee and Tannaz Kouhpainezhad, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Artero M. Collins appeals from a judgment following his conviction by jury of first degree murder (Pen. Code, § 187, subd. (a)),[1] and attempted premeditated murder (§§ 664 & 187, subd. (a)), with findings as to each crime that appellant personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (b)-(e)(1)) and committed the offense for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)), with court findings that appellant suffered two prior convictions within the meaning of the Three Strikes Law (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)).

Appellant contends (1) the trial court committed error and violated his right to confrontation when it admitted gang opinion testimony based on testimonial hearsay; (2) the trial court committed instructional error; and (3) cumulative error requires reversal. We reject his arguments and affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following facts.

A. Gas Station Shootings

On July 5, 2010, at about 3:30 a.m., Keith Campbell pulled his BMW into a gas station at the intersection of Western and Vernon Avenues. Campbell's cousin Chad Andrew was riding in the front passenger seat. Campbell got out of the car and walked to the station's cashier window, while Andrew remained seated in the BMW.

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

As Campbell walked to the cashier window, he noticed two men approaching him; they were wearing red and had what Campbell called a "vicious attitude." The men asked Campbell, "Where you from?" and he did not respond. Instead, Campbell turned around and ran back to his car, yelling for Andrew to get out of the car and run away.

Campbell entered the back seat of the BMW as Andrew tried to leave the car. As this occurred, the two men in red began shooting. Campbell was shot twice, once in the chest and once in the shoulder. Andrew, who had managed to exit the car, was shot several times and killed. After the shots were fired, the shooters ran from the gas station. Campbell called 911 on his cell phone, and the recording of his call was played at trial.

Police officers promptly responded to the shooting scene. They found Campbell's BMW at a gas pump, with a broken window. They also found a man on the ground who was unconscious and not breathing (Andrew), and another man with several gunshot wounds who was pacing nearby (Campbell). Campbell testified he did not get a good look at the shooters and could not identify them, but he did give a description of the shooters to police.

Detectives arrived at the scene and collected evidence. They found 22 expended nine-millimeter casings, two bullet fragments, and two fired bullets in the area outside the BMW; they also found several live rounds, two expended casings, and a bullet fragment inside the BMW. The gas station's surveillance video was recovered, and it displayed portions of the shooting sequence. The video was introduced into evidence and was played for the jury several times during the course of the trial.

A police criminalist reviewed all the firearms evidence and concluded that at least three firearms were used. A police firearms expert examined the bullet strike marks on the BMW, the location of expended casings, and the gas station surveillance video. He concluded that multiple shots were fired into the BMW, and shots were also fired from inside the car. Campbell, however, testified that he did not have a gun and did not shoot back at the men who fired at Andrew and him.

A custodian of records for Metro PCS testified about cellular telephone calls at the gas station where the shootings occurred. He authenticated records for a prepaid cell phone registered in the name of "Cirturo Collins." On July 5, 2010 at 3:38 a.m., that phone received an incoming call from the number 323-338-9360. The call was transmitted through a cellular tower that was located about 120 feet from the gas station. At 3:50 a.m. that morning, the same cellular tower transmitted an outgoing emergency call to 911 from a different phone.

B. Detentions and Arrests

On July 5, 2010, at about 4:10 a.m., Sheriff's Department dispatcher Joshua Gomez was working at Harbor UCLA Hospital and watching a security monitor. He noticed three men entering the emergency room with appellant, who appeared to be wounded. All of the men were wearing red and looked scared. The three men left appellant and ran away to a grey four-door Chevy Malibu. Gomez saw the Malibu's license number and radioed a description of the men and their car.

Deputy Sheriff Daniel Perez stopped the Malibu on hospital grounds. He saw three men in the car, and noticed the front passenger placing something into the center console area; Perez later searched the car and found a revolver in the console area. The men in the Malibu identified themselves as Dontrell Williams, Irving Holloway, and Mylik Birdsong. Williams told deputies he was a Black P-Stone gang member, and deputies later determined that Williams also went by the name Isiah Wheeler.

Appellant received treatment at the Harbor UCLA Hospital on the morning of July 5, 2010, shortly after he was dropped off by the others. The treating physician testified that appellant had a through-and-through gunshot wound to his left thigh.[2] When the physician asked him about the wound, appellant said he had been shot in the left thigh 30 minutes before he came to the hospital, and he had filed a report with the police at a "gas station." Appellant was treated for the wound and released from the hospital the same morning.

Mylik Birdsong was arrested in relation to the Campbell and Andrew shootings in March 2012. At the time of his arrest, detectives monitored a telephone call that he made from county jail. Based on statements made during the call, appellant's jail cell was searched and three cell phones were found. A detective examined the cell phones and found photographs of appellant and others, which were shown to the jury and considered by the prosecution's gang expert during his testimony.

C. Gang Evidence

Officer Phil Rodriguez testified for the prosecution as an expert concerning the Black P-Stone gang. At the time of trial,

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[2] In the gas station surveillance video, one of the shooters appears to have been struck by a bullet in the left thigh.

Rodriguez had been a police officer for nine years and had gang experience throughout his career. For seven years he served in the Southwest Division gang detail and had continuous experience with all gangs in the area, including the Black P-Stones. Rodriguez was a senior officer in the gang detail.

Rodriguez had extensive experience with the Black P-Stones. He had testified in more than 80 Black P-Stone gang cases, and he had "over a couple thousand" contacts with Black P-Stone members. As a senior gang officer, Rodriguez provided training on the Black P-Stone gang to federal and local law enforcement agencies.

Rodriguez testified the Black P-Stone gang is a clique of the larger Blood gang, and it has adopted red as its primary color. At the time of trial there were over 1,000 Black P-Stone gang members in Los Angeles County, and the gang claimed territory in two areas of lower Baldwin Hills. Rivals of the Black P-Stones included the Rollin' 40s gang, which claimed territory that included the gas station where Campbell and Andrew were shot.

Rodriguez testified the primary activities of the Black P-Stone gang included robberies, assault with deadly weapons, murders, attempted murders, extortion, rape, carjacking, and narcotic sales. During his testimony, he explained the benefits to the gang from violent crimes committed by its members (instilling fear in the community and deterring reports to law enforcement and testimony in court), and he described the hierarchy for committing gang crimes (older "generals" directing younger "soldiers" to put in work that benefits the gang). Rodriguez explained that murder and other violent crimes against rivals can benefit the gang by showing others that the gang is violent and by enhancing the reputation of the "soldiers" who commit the crimes.

Rodriguez stated his opinion that appellant was "absolutely" a member of the Black P-Stones gang. Rodriguez said he was personally familiar with appellant, who used the moniker "Papi." Rodriguez had at least two personal contacts with appellant; he was present when appellant was served with a gang injunction, and when appellant was in court on another occasion.[3] Rodriguez reviewed photographs of appellant's tattoos, which had references to the Black P-Stones and disrespectful references to the Crips. Rodriguez also reviewed photos of appellant, which showed him posing and flashing gang signs with individuals that Rodriguez knew as Black P-Stone members. Rodriguez based his opinion of appellant's gang membership on his personal interactions with appellant, as well as appellant's admission of Black P-Stone membership, Black P-Stone tattoos, arrests with Black P-Stone members, presence at Black P-Stone locations, and photos with other members of the gang.

Rodriguez testified that the three men who brought appellant to the hospital on the night of the shootings were also active members of the Black P-Stone gang: Birdsong, whose moniker was "Little Papi"; Williams, whose moniker was "Nook"; and Holloway, whose moniker was "T-Roll." Rodriguez said he was familiar with all three men through prior contacts and arrests, and he knew that all three were self-admitted and documented members of the gang. Rodriguez explained that

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[3] The transcript is somewhat confusing, as it suggests that Rodriguez had more than two personal interactions with appellant. It quotes Rodriguez as stating: "I believe I have had contact with defendant Collins on two occasions. Two in the lower Baldwin Village on a traffic stop; one where he was – I was present where he was served a gang injunction. And the other was a court hearing at Torrance court."

Birdsong's moniker "Little Papi" and appellant's moniker "Papi" reflected a younger gang member who looked up to an older gang member and took a modified moniker to demonstrate his respect.

Rodriguez was given a hypothetical question that mirrored the prosecution's evidence. In response, Rodriguez stated his opinion that the shootings were committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members. Rodriguez explained that such a crime would serve the goals of reducing the number of rival gang members, instilling fear and intimidation in the community, elevating the status of the gang, and helping with recruitment of new gang members.

D. Defense Evidence

Diona Floyd was the sole witness called by the defense. Floyd testified that she and appellant attended a party on July 4, 2010, at Jim Gilliam Park in the lower Baldwin Hills area. There were approximately 30 to 50 people at the gathering, drinking and watching fireworks. Around 1:00 a.m. or 2:00 a.m., gunshots were fired from a passing car; everybody ran and Floyd noticed that appellant had been shot in the leg. Shortly after the shooting, appellant got into a car with other men and they drove away.

Floyd admitted that she loved appellant and had written him a love letter while he was in custody. She said the 323-338-9360 telephone number which called the cell phone registered to "Cirturo Collins" on July 5, 2010 sounded familiar to the number she used at that time. Floyd admitted she had a felony record and was then in custody for a probation violation.

DISCUSSION

1. The Trial Court Properly Admitted the Prosecution's Gang Expert Testimony

Appellant contends the trial court committed error and violated his constitutional right to confrontation when it admitted gang opinion testimony based on testimonial hearsay. We disagree.

A. There was no error

The confrontation clause of the Sixth Amendment to the federal Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the United States Supreme Court held that the Sixth Amendment bars the introduction of testimonial hearsay against a criminal defendant, unless the declarant is unavailable and the defendant had an opportunity to cross-examine the declarant. (*Id.* at pp. 68-69.) The *Crawford* court did not provide a comprehensive definition of testimonial hearsay, but it stated, "Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 68.)

In *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), our Supreme Court recently applied *Crawford* to define the proper limits of expert testimony. Under state rules of evidence, an expert witness may express an opinion based upon personal knowledge, as well as information derived from hearsay. (*Id.* at pp. 675-676; Evid. Code § 801, subd. (b).) In *Sanchez*, the court considered the extent to which *Crawford* "limits an expert witness from relating case-specific hearsay content in explaining the basis for his opinion." (*Sanchez,* at p. 670.)

The facts in *Sanchez* involved a defendant charged with possession of a firearm by a felon, possession of drugs while armed with a loaded firearm, active participation in a street gang, and commission of a felony for the benefit of the gang. (*Sanchez, supra,* 63 Cal.4th at p. 671.) At trial, the prosecution called a gang detective to give expert opinions about the defendant's gang membership, gang culture, and the gang purposes and benefits of the crimes committed by the defendant. (*Id.* at pp. 672-673.)

The prosecution's gang expert admitted he had never met the defendant, and had not been present during any of the defendant's arrests or contacts with police. Instead, the expert prepared for trial by reviewing information stated by other police officers in police reports, Street Terrorism Enforcement and Prevention Act (STEP) notices, and field identification cards. In explaining the basis for his opinions, the expert recited detailed information contained in these materials, such as dates, statements by the defendant, and information about others who were present with the defendant (such as names, gang affiliations and statements they made). (*Sanchez*, *supra,* 63 Cal.4th at pp. 672-673.)

The *Sanchez* court held that "the case-specific statements related by the prosecution expert concerning defendant's gang membership constituted inadmissible hearsay under California law. They were recited by the expert, who presented them as true statements of fact, without the requisite independent proof." (*Sanchez*, *supra,* 63 Cal.4th at p. 670.) The court also held that some of the hearsay statements recited by the expert, such as statements contained in police reports and the STEP notice, were "testimonial hearsay" and should have been excluded under *Crawford*. (*Sanchez,* at pp. 694-697.) The court could not determine whether statements in the field identification cards

were improper under *Crawford*, because it was not clear whether they were prepared during an investigatory stop or for a more general purpose. (*Sanchez,* at pp. 697-698.) Because of the improper admission of this evidence, the court reversed the jury's findings on the defendant's street gang enhancements. (*Id.* at pp. 698-699.)

The present case is much different than *Sanchez*. Although the expert in *Sanchez* had considerable experience with gangs, he did not know the defendant. The expert prepared for trial by compiling what he called a " 'gang background' " for the defendant, and his testimony contained many detailed references to matters contained in police reports, STEP notices, field identification cards, and other materials prepared by other police officers. (*Sanchez*, *supra,* 63 Cal.4th at pp. 672-673.) In the present case, the prosecution's gang expert, Officer Rodriguez, did not recite information prepared by others and did not refer to details contained in police reports, STEP reports, field identification cards, and similar documents.

Much to the contrary, Rodriguez demonstrated personal knowledge and familiarity with the subjects of his testimony. He explained that he had seven years of experience with the Southwest Division gang detail, which included regular interaction with Black P-Stone gang members; he had "over a couple thousand" contacts with Black P-Stone members and had

testified in more than 80 Black P-Stone gang cases.[4] Rodriguez said he was personally familiar with the Black P-Stone members in this case: appellant ("Papi"), Birdsong ("Little Papi"), Williams ("Nook"), and Holloway ("T-Roll"). Rodriguez testified that he had been present during police contacts with the men, had personally made arrests, and had personal interactions with them.

In explaining his opinions, Rodriguez also relied on material that was not hearsay. He reviewed photographs of appellant's tattoos, as well as photographs of appellant and individuals that Rodriguez knew as Black P-Stone members, who were dressed in gang attire and posing and flashing gang signs.

Appellant has argued "it is likely" or "it is not clear" that Rodriguez's opinions were based on information obtained from testimonial hearsay derived from conversations with other officers and statements made by suspects during police investigations. That argument is not borne out by the record. Rodriguez's testimony appears to be based on his extensive experience with the Black P-Stone gang, and his personal familiarity and interaction with the individuals involved in this case. During the trial, appellant did not make hearsay objections

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[4] Appellant contends Rodriguez admitted that at the time of the shootings he was not as familiar with the Black P-Stones and has since developed better contacts and understanding of the gang and its members. That is not a fair summary. Rodriguez merely agreed with the prosecutor's common sense observation that Rodriguez did not know as much in 2010 as he did in 2014, "given that it was four years ago." But Rodriguez did not discount or admit deficiencies in his knowledge about any of the subjects of his testimony.

to Rodriguez's testimony and did not cross-examine him about the underlying sources of his opinions.[5]

It is a well-settled rule of appellate review that " ' "error must be affirmatively shown." ' " (*People v. Giordano* (2007) 42 Cal.4th 644, 666; accord, *People v. Carpenter* (1999) 21 Cal.4th 1016, 1046.) Under the circumstances of this case, appellant has not demonstrated from the appellate record that reversal is required. (See *People v. Ochoa* (2017) 7 Cal.App.5th 575, 584-585 & fn. 7, 586 [rejecting the defendant's *Crawford* and *Sanchez* arguments because the record did not support them]; accord, *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 414.)

B. Any error was harmless

There was no error in the admission of the prosecution's gang expert testimony, and to the extent there was any error, it was harmless. Officer Rodriguez gave comprehensive opinions based on his personal experiences and other forms of admissible evidence. As our Factual Summary has shown, there was

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[5] Because of appellant's failure to raise objections based on hearsay and the confrontation clause and *Crawford*, the arguments now made on appeal have been forfeited. (*People v. Redd* (2010) 48 Cal.4th 691, 730 [The defendant "did not raise an objection below based upon the confrontation clause, and therefore has forfeited this claim."]; *People v. Tafoya* (2007) 42 Cal.4th 147, 166.) By failing to object, appellant did not "fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) That failure is particularly meaningful here, where it appears the expert had such pertinent experience that he could have responded to an objection by calling upon personal knowledge or other appropriate information to explain his opinions.

independent evidence of gang affiliation by appellant and his companions, such as gang tattoos, photographs of gang poses and hand signs, gang colors, gang challenges at the crime scene, and Williams' admission of gang affiliation when he was detained at the hospital. Under these circumstances, any error was harmless under federal and state standards. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).)

C. There was no ineffective assistance

Appellant contends he was denied effective assistance of counsel because his attorney failed to object at trial to testimony by the prosecution's gang expert. To establish entitlement to relief on this claim, appellant must show: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the attorney's error, a more favorable result would have occurred. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Holt* (1997) 15 Cal.4th 619, 703 (*Holt*).) Appellant has not made a sufficient showing for either component.

Appellant has not made an affirmative showing of inadequate performance by his attorney. An attorney's adequate assistance and reasonable judgment are presumed. (*Holt*, *supra*, 15 Cal.4th at p. 703.) And ordinarily, "where counsel's trial tactics or strategic reasons for challenged decisions do not appear on the record, we will not find ineffective assistance of counsel on appeal unless there could be no conceivable reason for counsel's acts or omissions." (*People v. Weaver* (2001) 26 Cal.4th 876, 926.) There is nothing in the record which clearly explains the attorney's reasons for failing to object, and that alone is fatal to appellant's claim.

Appellant also failed to demonstrate prejudice. As we have discussed, any error in admitting testimony of the prosecution's

gang expert was harmless. It necessarily follows that any failure to object was harmless.

2. The Trial Court Was Not Required to Instruct Sua Sponte on Imperfect Self Defense

Appellant contends the trial court committed error by failing to instruct sua sponte on the lesser included offense of voluntary manslaughter under a theory of imperfect self-defense, using CALCRIM No. 571.[6] We disagree.

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[6] Appellant contends the trial court should have given the following modified version of CALCRIM No. 571: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense or imperfect defense of another. [¶] If you conclude the defendant acted in complete self-defense or defense of another, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense or defense of another and imperfect self-defense or imperfect defense of another depends on whether the defendant's belief in the need to use deadly force was reasonable. [¶] The defendant acted in imperfect self-defense or imperfect defense of another if: [¶] 1. The defendant actually believed that he or someone else was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. [¶] In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense or imperfect defense of another. If the People have not met this burden, you must find the defendant not guilty of murder." (CALCRIM No. 571, as modified.)

A. Summary of proceedings

During the jury instruction conference, the trial court and counsel discussed instructions on self-defense and voluntary manslaughter under a theory of imperfect self-defense. Defense counsel requested an instruction on self-defense, using CALCRIM No. 505, and the court answered, "Okay. And what about imperfect self-defense?" Defense counsel responded, "I don't think so. And the reason I say that is because the theory would be – the theory would be that the force was equal; that Mr. – and there is evidence that there was firing coming out of the car. So I would have to say that – I couldn't – there is no reason for it."

The prosecutor objected to instructions on both self-defense and imperfect self-defense, arguing, "There is absolutely – I mean, their defense is alibi. We didn't hear anything that the defendant was acting in fear; that he had to shoot back. He started it." The court noted that defense counsel was "taking a position that's kind of at odds with your defense." But defense counsel explained that there was a possibility the jury would not believe the alibi defense, but could believe "that Mr. Campbell was the initial aggressor."

The trial court agreed to instruct on self-defense and asked about defense of another, which defense counsel declined. The prosecutor made a final effort to prevent instructions on self-defense, arguing, "And again, the difficulty I have is that the video is pretty clear who starts firing first. It is not Mr. Campbell; it is clearly [appellant] and whoever he is with." The court was not persuaded, and ruled that the jury would be instructed with self-defense, using CALCRIM No. 505.

When the jury was instructed during trial, the court gave instructions on murder (CALCRIM Nos. 500, 520, 521 & 640) and attempted premeditated murder (CALCRIM Nos. 600 & 601). The court also gave instructions on self-defense as a defense to

murder and attempted murder, using CALCRIM Nos. 505 and 3472.

B. General principles

As our Supreme Court explained in *People v. Breverman* (1998) 19 Cal.4th 142 (*Breverman*), " ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." ' " (*Id*. at p. 154, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) This duty includes a duty to instruct on a lesser included offense. (*People v. Moye* (2009) 47 Cal.4th 537, 548 (*Moye*); *Breverman*, at p. 154.)

This duty exists even when a defendant's trial counsel opposes an instruction on a lesser included offense, as in this case. " ' "The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to its being given." ' " (*People v. Souza* (2012) 54 Cal.4th 90, 114, quoting *Breverman*, *supra*, 19 Cal.4th at p. 154.)

But the duty to instruct arises only if there is sufficient evidence to support the lesser included offense. Our Supreme Court explained this requirement in *Moye*: " 'As our prior decisions explain, the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.] "Substantial evidence" in this context is " 'evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that

the lesser offense, but not the greater, was committed. [Citations.]' (*Breverman*, *supra*, 19 Cal.4th at p. 162.)." (*Moye*, *supra*, 47 Cal.4th at p. 553; accord, *People v. Simon* (2016) 1 Cal.5th 98, 132 ["Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the lesser offense was committed."].)

C. There was insufficient evidence to support an instruction on imperfect self-defense

Appellant contends the trial court should have given an instruction on voluntary manslaughter under a theory of imperfect self-defense. Imperfect self-defense reduces murder to voluntary manslaughter, and it "arises when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury." (*People v. Duff* (2014) 58 Cal.4th 527, 561.) As explained in CALCRIM No. 571, the instruction which appellant claims the trial court should have given, it requires proof that, "1. The defendant *actually believed* that he or someone else was in imminent danger of being killed or suffering great bodily injury; [¶] AND [¶] 2. The defendant *actually believed* that the immediate use of deadly force was necessary to defend against the danger; [¶] BUT [¶] 3. At least one of those beliefs was unreasonable." (Italics added.)

The trial court had no obligation to instruct on imperfect self-defense, because there was no evidence appellant "actually believed" that he was in imminent danger or that the immediate use of deadly force was necessary to defend against that danger. Appellant's entire theory at trial was that he was not even present at the gas station during the shootings. Appellant presented an alibi that he was at Jim Gilliam Park at the same time Campbell and Andrew were shot by others. The evidence introduced by appellant and the argument made to the jury by

appellant's trial counsel were entirely inconsistent with imperfect self-defense.

There was no evidence of any kind that appellant "actually believed" he was in imminent danger or needed to use deadly force in defense. Appellant did not testify, there was no evidence of any statements by appellant, and appellant's companion did not testify about his words or conduct during the shootings. The only evidence on this subject was from Campbell, who testified that appellant and his companion made a gang challenge ("Where you from?") and then started shooting with no provocation whatsoever. Without substantial evidence of appellant's actual subjective belief in the need for self-defense, an instruction was not warranted. (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 82.)

Appellant contends his state of mind can be inferred from the gas station surveillance video and other evidence that Campbell fired his weapon from the back seat of his BMW. But that evidence says nothing about who initiated the exchange of gunfire, and the only evidence on this was from Campbell, who testified that appellant and his companion started shooting without provocation. There is no evidence to support appellant's version of a shooting initiated by Campbell, and the evidence at best supports an exchange of gunfire initiated by appellant and his companion. Under these circumstances an instruction was not required, because it is well settled that imperfect self-defense " ' "may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified." ' " (*People v. Enraca* (2012) 53 Cal.4th 735, 761, quoting *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1.)

Appellant relies to a great extent on *People v. Viramontes* (2001) 93 Cal.App.4th 1256 (*Viramontes*), and *People v. Vasquez* (2006) 36 Cal.App.4th 1176 (*Vasquez*), but both cases are inapposite. In *Viramontes*, the defendant shot and killed a man at a party. There was conflicting evidence as to who fired the first shot, with some witnesses pointing to the defendant and others to the decedent. (*Viramontes*, at pp. 1259-1261.) In *Vasquez*, the defendant shot and killed a man in an alley. The evidence was undisputed that the decedent lunged at the defendant and began choking him before the defendant fired his gun. (*Vasquez*, at p. 1178.)

In both *Viramontes* and *Vasquez*, there accordingly was substantial evidence that the decedent initiated an attack before the defendant responded in self-defense. There is no such evidence here. Campbell testified that appellant and his companion initiated the incident with a gang challenge followed by gunfire. There was no evidence – direct or circumstantial – that Campbell initiated the incident and that appellant "actually believed" he was in imminent danger or needed to use deadly force in defense.

" '[T]he doctrine [of imperfect self-defense] is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense.' " (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, quoting *In re Christian S., supra*, 7 Cal.4th at p. 783.) Because there was no substantial evidence to support this necessary element, an instruction on imperfect self-defense was not required.

D. Any error was harmless

Appellant contends a failure to instruct on imperfect self-defense is subject to the federal harmless error standard in *Chapman, supra*, 386 U.S. at p. 24, but that is wrong.

Our Supreme Court has made it clear that an erroneous failure to instruct on a lesser included offense is subject to the harmless error standard of *Watson, supra*, 46 Cal.2d at p. 836, so that reversal is required "only if it is reasonably probable the jury would have returned a different verdict absent the error or errors complained of." (*People v. Rogers* (2006) 39 Cal.4th 826, 867-868; accord, *People v. Prince* (2007) 40 Cal.4th 1179, 1267.)

Under this standard, any error was harmless. As discussed, there was no evidence that would have supported a verdict of imperfect self-defense. The jury was properly instructed on murder and attempted murder, and it found appellant guilty of both crimes. The jury was properly instructed on the gang allegation, and it found the allegation true. And the jury was properly instructed on perfect self-defense, and it rejected that theory. There is no reasonable basis to conclude the jury would have returned a verdict of imperfect self-defense if CALCRIM No. 571 had been given.

3. There Was No Cumulative Error

Appellant contends reversal is required because of the cumulative effect of the admission of gang expert testimony and the failure to instruct on imperfect self-defense. Because we have found no error in either area, appellant's argument fails. (See *Watson, supra*, 46 Cal.2d at p. 836; *People v. Mincey* (1992) 2 Cal.4th 408, 454.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

LAVIN, 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.