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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL MARES,

Defendant and Appellant.

B284442

(Los Angeles County  
Super. Ct. No. TA137918)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed and remanded with directions.

Mark R. Feeser, 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, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Angel Mares (Mares) shot Jose Aragon (Aragon) and Andy Chicas (Chicas) to death outside a fast food restaurant. At trial, Mares championed a self-defense theory of the events leading to Aragon's and Chicas's death. The jury rejected that defense in convicting Mares on two counts of first degree murder with multiple-murder special-circumstance and firearm-use findings. The trial court sentenced Mares to two consecutive life terms without the possibility of parole, plus two consecutive indeterminate terms of 25 years to life.

Mares challenges his conviction on two grounds. First, he contends the admission of the testimony of the investigating detective (Toni Martinez) regarding the detective's observations of the sequence of events depicted in video and photographic evidence was improper lay opinion that Mares did not act in self-defense in killing Aragon and Chicas. As set forth in detail below, the investigating detective's testimony about the video and photographic evidence merely described frame by frame the sequence of events and timing of those events leading up to and including the shootings. The jury viewed the same evidence and the prosecutor only briefly noted the detective's testimony in closing argument. The detective's testimony was thus not improper lay opinion evidence. As we also conclude, even if admission of the detective's testimony were error, it was harmless given the other evidence adduced at trial, including the testimony of eyewitnesses to the shootings.

Second, Mares argues there was insufficient evidence of premeditation. We disagree. The evidence that Mares was armed with a weapon in his waistband, used threatening language indicating he was "gonna fuck you up," and that he shot his victims at point blank range before his victims had an

opportunity to throw a punch, among other evidence, was sufficient to support the jury's finding of premeditation.

Finally, Mares contends remand is necessary to enable the trial court to exercise discretion provided in recent legislation to strike the firearm enhancement. We agree and remand to allow the trial court to exercise this newly authorized discretion.

## **INTRODUCTION**

This case began when Mares and his friend Abraham Dorantes (Dorantes) engaged in verbal confrontations with Aragon and his friend C.R. It quickly escalated into a fist fight and the shooting deaths of Aragon and his friend Chicas.

At trial, Mares did not dispute that he fired the gun that resulted in the killings. The primary issue at trial was Mares's intent when he pulled the trigger. The prosecution's theory was that Mares had acted with premeditation in shooting Aragon and Chicas without provocation. The defense theory, developed through cross-examination, was that Mares had acted in self-defense or in defense of Dorantes in committing the shootings, believing that he and/or Dorantes faced imminent danger of being killed or seriously injured by Aragon and Chicas.

In support of its case, the prosecution introduced video recordings from the fast food restaurant's indoor and outdoor security cameras, photographs produced from "enhanced stills" of the outdoor video recording, and cell phone audio footage of the sounds of gunshots. The prosecution also introduced the testimony of four eyewitnesses, a medical examiner, and the investigating officer. The eyewitnesses testified either from memory and/or while watching the video recordings at trial. The investigating officer's testimony concerned the contents of the video recordings, photographs, cell phone footage, and a video

made by the officer, which combined the outdoor video camera recording and the cell phone audio footage.<sup>1</sup> The defense introduced no witnesses or other evidence.

## **FACTS**

In light of Mares's arguments, we provide a detailed account of the evidence adduced at trial.

### **A. The Confrontation Between Mares's Friend, Dorantes, and Aragon and C.R.**

Late on the night of August 8, 2015, Aragon, Chicas, C.R., and sisters X.L. and Y.L. decided to stop at a fast food restaurant on their way to the beach. They parked in the restaurant's lot and walked to the entrance. The dining area of the restaurant was closed, but the manager let the group inside to order food and coffee. Mares and Dorantes arrived at the restaurant in a black car and parked in the parking lot. While Mares stayed in the car, Dorantes approached the restaurant. He was allowed inside after saying either that he was with the group that had just entered or that he needed to use the restroom. None of the people in the group knew Dorantes or Mares.

Once inside, Dorantes confronted C.R., insulted him, and repeatedly challenged him to a fight. C.R. attempted to ignore Dorantes, and Aragon tried to diffuse the situation. F.F. was one of two security guards sitting in the dining room. He told Dorantes to use the restroom as he had requested. While

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<sup>1</sup> We have reviewed the video and enhanced video recordings, photographs, and cell phone audio footage that were played at trial. We have also listened to the audio recording played to the jury of the 911 call made after the shootings.

Dorantes was gone, the group of friends remained near the counter. They conversed, ate, and laughed, appearing unconcerned about Dorantes's behavior. Dorantes returned from the restroom, said, "I'm ready," and continued to challenge C.R. When C.R. indicated a willingness to fight, Aragon told them both to back off. Dorantes accused C.R. of needing his "big, fat homie" to protect him. Aragon was 6 feet 2 inches tall and weighed approximately 380 pounds. Security Guard F.F. told Dorantes to leave the restaurant.

Mares, who was still in the parking lot, left the car and walked toward the fast food restaurant. Meanwhile inside the restaurant, Dorantes was telling Aragon that he would fight him too. Aragon laughed and said, "Naw, just come on. Let's just go outside." Aragon escorted Dorantes outside. C.R., X.L., and J.F., a restaurant employee, soon followed. Chicas and Y.L. remained inside. At some point, one and/or both security guards came outside. C.R. removed his sweater in preparation for a fight, but Aragon told him to back down. Dorantes continued his threats and derogatory language, and Aragon repeatedly told Dorantes to leave. Security Guard F.F. told Dorantes to leave or he would call the sheriff.

## **B. The Confrontation Between Mares and Aragon**

Mares walked up to Dorantes and Aragon. Security Guard F.F. and X.L. testified that Mares "reach[ed] into" or "grabb[ed] toward" his waistband either as he approached and/or immediately after joining Dorantes and Aragon. Because Dorantes was still arguing with Aragon, F.F. continued telling Dorantes and Mares to leave and that he was calling the sheriff. Initially, Mares did not say anything. Then, he tried to get

Dorantes to leave, pulling him away from Aragon and C.R. and saying, “Let’s go.”

Dorantes and Mares walked a few steps into the parking lot, followed by Aragon. Aragon told Mares and Dorantes to leave, which angered Mares. Employee J.F. testified that at one point Mares said, “Hey, I don’t care what y’all saying over there. Y’all don’t want none of this. I’m letting y’all know now, you don’t want none of this.” When J.F. warned that the police would be called if they did not leave, Mares replied, “I don’t care about none of that. I’m telling you guys y’all don’t want none of this.”

As Aragon walked behind him, Mares called Aragon a “‘white fat fuck’” and told him to “‘shut the fuck up’” and “‘get out of [my] face.’” Mares then said to Aragon, “‘Well, I’m gonna fuck you up. Where do you want me to fuck you up at? Let’s go. Let’s get down.’” C.R. testified that Aragon “got tired of it” and said, “‘Where do you want me to fuck you up?’” Mares suggested an area across the parking lot in front of the parked cars by the street. Aragon agreed and pointed to that area.

### **C. The Shootings**

The following facts are undisputed: Aragon followed Mares, and C.R. followed Dorantes across the parking lot to the designated area. Chicas left the restaurant and followed Aragon. Seconds later, Mares fired at least four shots, killing both Aragon and Chicas. The medical examiner testified that Aragon’s cause of death was two gunshot wounds, one in his neck and one in his abdominal area. Chicas’s cause of death was a single gunshot wound in his chest, although he was also shot in the right side of his back.

We set forth below a description of the different genre of evidence regarding Mares’s shooting of Aragon and Chicas. We

first detail what is depicted in the frames in the video, audio, and photographic evidence admitted into evidence. We detail this evidence in separate subsections: a description of the pre-shooting scene and descriptions of Mares's shooting of Aragon and Chicas. We then summarize the testimony of eyewitnesses to those shootings.

### **1. The outdoor video recording**

The outdoor video recording showed the parking lot from the perspective of an outdoor camera mounted above the door to the fast food restaurant. The recording displayed the parking lot, which consisted of an area for cars to drive through the property, beyond which, facing the street, was a single row of parked cars, including the black car in which Mares and Dorantes had arrived. Beyond the row of parked cars was a strip of dirt in which bushes and trees were growing ("planters") and an adjacent four-lane street.

The video recording showed Dorantes, dressed in black, appearing just beyond the restaurant door in the lower part of the frame. Dorantes took a step forward and immediately turned toward the door, while talking and moving his head and gesturing with his arms. He was joined seconds later by Mares, who was wearing a light brown or beige shirt that fell below his waist. Mares was also talking while turned toward the restaurant door. Aragon appeared next in the bottom of the frame just beyond the restaurant door. He was wearing a white shirt; his back was toward the door.

The three men conversed while walking a few steps into the parking lot. Aragon was standing alone, facing Dorantes and Mares, who were standing a few feet away from Aragon and each other. As they talked, Mares took some steps back and forth and

placed his hands under his shirt at waist height. Mares released his hands, and Aragon pointed to Dorantes, turned and walked back toward the restaurant door. Mares approached Dorantes and pulled Dorantes's left upper arm. Dorantes shook off Mares's hand, and the two of them conversed. Mares gestured with his arms toward Dorantes, brushed Dorantes shoulder with his left hand, and began walking toward the parked cars across the parking lot. Dorantes stood with his arms spread apart at waist height, palms up, while speaking to Mares. At this point, Aragon began to approach Dorantes, who had turned away and had joined Mares. Dorantes and Mares stopped walking and turned to face Aragon. They stood close together talking, and Aragon pointed in the direction of the street. The three men then began walking across the parking lot.

Meanwhile, X.L. had left the restaurant and was standing just beyond the door. After watching the three men, X.L. began following them across the parking lot, but she stopped and ran back to the restaurant as Chicas and then C.R. walked past her. Chicas followed Aragon, who was led by Mares around the passenger side of the black car in which Mares and Dorantes had arrived. C.R., who was wearing a gray shirt, followed Dorantes around the driver's side of the black car. In quick succession, X.L. and Y.L. ran out of the restaurant and around the passenger side of the black car. At this point, Mares, Dorantes, and the group of friends were on or near the street in front of the parked cars at the top of the frame.

C.R. and Dorantes started fighting. They moved between the left front fender area and driver's side of the black car, punching each other. Simultaneously, Aragon followed Mares, who was walking with his back toward Aragon. The two men



passed by the right front fender of the black car and angled slightly left across the front of the black car and toward the street. For approximately two seconds, Mares was blocked from view by the larger Aragon, whose arms remained at his side. Chicas continued to follow Aragon.

**a. The shooting of Aragon**

As Mares headed into the street, he put some distance between himself and Aragon. Approximately two seconds later, in one movement, Mares stopped walking, turned to face the black car, and bent his knees slightly before turning and advancing on Aragon while extending his arm. Aragon backed up several steps until Mares turned away and ran back into the street. Aragon pursued Mares, reaching him and throwing a punch, and Mares moved away. A second later, Aragon stopped chasing Mares, began clutching his lower chest or abdominal area and staggered by the driver's side of the black car. During this time, Dorantes chased C.R. back toward the door of the restaurant. Aragon looked in the direction of Mares, who was running to the driver's side of the black car. Aragon ran around the back of the black car as Mares got into the driver's seat. Aragon slumped against an adjacent parked car as Dorantes ran back from the restaurant and entered the back seat of the black car. Mares began to back out of the parking space, and Aragon hit the windshield with his hand. The car drove off, and Aragon staggered across the empty parking space, leaned against a car and collapsed on the ground.

**b. The shooting of Chicas**

As Mares began to advance on Aragon with his arm extended, and Aragon began to back away, Chicas moved forward

next to Aragon. As Aragon continued backing away from Mares, Chicas continued walking forward, past Mares and to the black car's left front fender area where Dorantes and C.R. were fighting. Chicas, followed by one of the sisters,<sup>2</sup> approached the combatants, and pushed or struck one of them in the arm before collapsing in front of the black car. Dorantes and C.R. continued to fight until Dorantes chased C.R. to the restaurant.

## **2. C.R.'s testimony**

C.R. testified Dorantes took a swing at him and missed. C.R. then grabbed Dorantes by the back of his head with one hand and punched him repeatedly with the other hand. C.R. looked up and saw Mares and Aragon standing in the street. Chicas started running to Mares. According to C.R., Chicas was trying to stop any fighting between Mares and Aragon by saying, “‘Come on. It's good.’ Like, ‘just chill, man.’” Mares extended his arm and shot Chicas and “didn't even look” at him. C.R. then heard three gunshots in rapid succession. He did not realize they were gunshots until Aragon yelled, “‘He gots a gun.’” C.R. saw Chicas on the ground. C.R. was still fighting with Dorantes when Aragon came up and attempted to separate them. C.R. testified that Mares shot Aragon twice in the back before he pointed the gun at C.R. C.R. fled to the fast food restaurant, pursued by Dorantes. The restaurant staff let C.R. inside and locked the

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<sup>2</sup> X.L. was wearing a black sweater over a white top and black pants. Y.L. was wearing a black sweatshirt with white writing and black pants. Because both sisters were in the area of the fight and the camera only showed the side and back of the woman following Chicas, it was difficult to determine which sister was with him.

door on Dorantes. Dorantes then ran back to the parking lot and got into the black car; Mares was already behind the wheel. As Mares was driving away, Aragon smacked the car windshield and yelled, “Why did you shoot me?” Aragon then collapsed on the ground.

### **3. X.L.’s testimony**

X.L. testified that she and her sister were outside after Dorantes left the restaurant. She saw C.R. and Dorantes fighting and Mares fire the gun. Although she was shown the surveillance video, X.L. testified from memory that she heard multiple shots, saw Chicas hit first and fall down, and then Aragon was hit. There was Mares, the gun out, Aragon further away, and “the bullets.” She was near Chicas when he collapsed. She saw Aragon on the video recording clutching his chest. X.L. memorized the black car’s license plate number for the police. She and her sister called 911. On cross-examination, X.L. testified that she did not remember Mares and Aragon fighting or her statement to police that they were fighting, and that “‘everybody was punching each other.’”

### **4. Security Guard F.F.’s testimony**

Security Guard F.F. identified Mares as the shooter. On cross-examination, F.F. acknowledged that he had written a report for the police indicating that Mares had “‘tried to break’” up a fight and got “‘jumped’” that night. On redirect examination, F.F. testified that he did not recall whether Mares “‘beg[an] to be involved in the fight” or whether he “‘actually s[aw] [Mares] getting hit.” F.F. recalled telling the police that Mares pulled out a gun and began firing, but he did not remember seeing it happen.

## **5. Employee J.F.'s testimony**

Employee J.F. testified that Aragon reluctantly agreed to fight and then “they [were] all rumbling.” Dorantes was fighting with C.R. Aragon was trying to “get up, riled, like, ready to fight,” when Mares shot him in the abdomen from about five to seven feet away. Aragon tried to grab onto the car as he fell. Before he was shot, Aragon had not thrown any punches at Mares. J.F. did not see Chicas after he ran out of the restaurant. J.F. was unaware that Chicas had been shot.

### **D. The Investigating Officer's Testimony, Mares's Objections, and the Trial Court's Rulings**

A focus of Mares's appeal is the testimony of Detective Toni Martinez of the Los Angeles County Sheriff's Department, who was one of the investigating officers. She recovered the video recordings from the fast food restaurant's indoor and outdoor security cameras. Martinez also obtained cell phone footage from a bystander who had crouched behind a car in the parking lot at the time of the shootings. The cell phone footage did not capture the shootings but recorded four shots in succession. Aragon was also heard saying, “ ‘Why did you shoot me?’ ”

Before Detective Martinez testified, defense counsel objected to her narrating the security camera video recordings. The trial court overruled the objection, agreeing with the prosecutor that as long as Martinez's testimony was limited to reciting the time stamps of certain events depicted on the video recordings, rather than describing what she saw on the recordings, her testimony was proper. The prosecutor then played the video recordings and asked Martinez several leading

questions about the events depicted and the time stamps on the recordings. For example, the prosecutor asked, “Then can you please step down for a minute and tell us at what time does it show, on camera 3, that Dorantes is walking into the [fast food restaurant]?” Martinez answered, “22:34:10.” The prosecutor’s final question for the day elicited from Martinez the time Chicas walked out of the fast food restaurant.

The following day, the prosecutor asked for an Evidence Code section 402 hearing to justify Detective Martinez as a crime investigations expert, which would allow her to narrate “specific portions” of the video recordings. The prosecutor argued that defense counsel had asked two witnesses on cross-examination if they felt part of the prosecution team.<sup>3</sup> The prosecutor, therefore, wanted to have Martinez explain to the jury what she saw in the video recordings as an investigating officer in determining whether this was a viable homicide. Defense counsel acknowledged Martinez’s “experience” as an investigator, but objected, arguing Martinez was not a percipient witness, the jury could watch the video recordings, and thus it was “improper and prejudicial for her to comment on what she [was] seeing.” Additionally, Martinez would be vouching for the sheriff’s department’s decision to charge this case as a homicide.

The trial court agreed that Detective Martinez could not testify as an expert regarding the “ultimate decision by the jury.” Nonetheless, Martinez could testify that she had watched the

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<sup>3</sup> Defense counsel posed this question to X.L., who answered, “I’m saying what I have experienced. Does that mean ‘yes’ or ‘no’?” Counsel also asked Employee J.F., who answered, “Yes, I do.”

video recordings, and the prosecutor could play portions of the recordings and ask whether Martinez had considered them during the investigation. The court found that Martinez would not be testifying as “an expert with regard to videos or anything like that,” and she could not give her opinion as to Mares’s culpability.

Detective Martinez resumed her testimony and was shown the security video recordings, which she had “reviewed all of these videos many times,” and a series of six consecutive photographs produced from the outdoor video recording. Martinez testified the photographs and outdoor video recordings showed that after Mares and Aragon agreed to fight and walked to the planters, Mares reached for his waistband while he and Aragon were four to five feet apart; Mares raised his arm and pointed a gun at Aragon while Chicas was standing behind Aragon, Aragon backed away from Mares and leaned his upper torso forward. Martinez further testified that the photographs and outdoor video recordings showed that neither Aragon nor Chicas had approached or thrown any punches or otherwise attacked Mares or Dorantes prior to being shot.

Over defense objection, Detective Martinez testified how she synchronized the outdoor video recording with the audio footage obtained from bystander Maria P.’s cell phone of the shots fired.<sup>4</sup> According to Martinez, this process enabled her to determine that Aragon had not thrown any punches prior to

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<sup>4</sup> Maria P. can be seen in the outdoor video recording crossing the street, entering the parking lot, ducking behind a parked car, and aiming her cell phone at the shootings while they are occurring. She then flees. Maria P. did not testify at trial.

being shot. The synchronized video recording (People's Exhibit 2) was played for the jury. The prosecutor confirmed with Martinez that four gunshots in rapid succession could be heard and a male voice saying, " 'Why did you shoot me?' " could be heard on the synchronized video.

On cross-examination, Detective Martinez testified the outdoor video recordings belied C.R.'s testimony that he held Dorantes and repeatedly punched him before Mares ever "pointed anything towards" Aragon, although Martinez agreed that they were in a "physical altercation" at that time. Martinez also acknowledged that the video recordings and photographs did not show any muzzle flashes that generally accompany the firing of a gun and what was depicted in the photographs was not entirely clear.

## **DISCUSSION**

### **A. The Trial Court Did Not Err By Admitting Detective Martinez's Testimony**

Mares does not dispute the admission of the video recordings, photographs and cell phone footage. Rather, he contends the trial court prejudicially erred by admitting what Mares characterizes as Detective Martinez's improper opinion testimony concerning that evidence. Specifically, Mares argues that Martinez should not have been permitted to testify that Mares shot the two victims before any punches were thrown, thereby implicitly negating Mares's self-defense theory of the events. The People maintain that Mares has forfeited this challenge to the detective's testimony because he did not object on that ground at trial. Alternatively, the People argue Martinez's testimony was admissible as lay opinion testimony.

**1. Mares did not forfeit his claim that the trial court abused its discretion by admitting the challenged testimony**

We reject the People's assertion that Mares forfeited his claim that the trial court abused its discretion by admitting Detective Martinez's testimony as an implicit opinion on his guilt because Mares failed to object on that ground at trial. Defense counsel's objections to the admission of Martinez's testimony concerning the video and photographic evidence because it was "improper and prejudicial for [Martinez] to comment on what she was seeing" was sufficient to preserve this issue on appeal. (*People v. Scott* (1978) 21 Cal.3d 284, 290 ["An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide."].)

However, we agree that Mares forfeited his claim, made for the first time on appeal, that the admission of the challenged testimony violated his due process rights. Constitutional claims arising out of a trial court's decision to exclude or admit evidence must be raised before the trial court. (*People v. Holloway* (2004) 33 Cal.4th 96, 129; *People v. Riggs* (2008) 44 Cal.4th 248, 292.)



## **2. Governing legal principles and standard of review**

Lay opinion testimony is admissible if it is both rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.) A lay witness's opinion is admissible where no particular scientific knowledge or specialized background is required. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1383.) "Unlike an expert opinion, a lay opinion must involve a subject that is 'of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness.'" ( *Id.* at p. 1384.) Thus, it has been held that a layperson can opine, for example, that a shoe and a shoe print appear similar (*People v. Maglaya* (2003) 112 Cal.App.4th 1604, 1608 (*Maglaya*); *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1111); about the significance of marks on a shotgun shell (*People v. Lewis* (2008) 43 Cal.4th 415, 503-504 (*Lewis*), disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919-920); and most recently, that a person depicted in a surveillance video recording of a crime was the defendant (*People v. Leon* (2015) 61 Cal.4th 569, 601). On the other hand, matters that "go beyond common experience and require particular scientific knowledge may not properly be the subject of lay opinion testimony." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 131.) On appeal, a trial court's admission of lay opinion testimony is reviewed for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

### **3. The admission of Detective Martinez's testimony was not an abuse of discretion**

Mares makes two arguments to support his claim that the trial court should have excluded Detective Martinez's challenged testimony. First, he asserts that Martinez "was not a percipient witness" and thus "had no relevant personal knowledge" of the crimes other than "like the jurors, she had watched the video" recordings.

In *Maglaya, supra*, 112 Cal.App.4th 1604, a police officer took photographs of shoeprints found in the dirt at the scene of an attempted burglary and testified they were similar to the pattern on the soles of defendant's shoes. The officer did not testify that the defendant's shoes made the prints at the scene of the crime. (*Id.* at pp. 1608-1609.) The appellate court held that this non-expert lay opinion was admissible as "'rationally based on the witness's [the officer's] perception.'" (*Id.* at p. 1608.) The *Maglaya* court reasoned that "[t]he officer's opinion was also helpful to a clear understanding of his testimony, since the jury would otherwise have to make its own tedious comparison of shoes and prints." (*Ibid.*)

In *Lewis, supra*, 43 Cal.4th 415, a police officer testified that an unexploded shotgun shell he recovered outside the defendant's apartment bore marks of a failed attempt to fire the shell from a shotgun. (*Id.* at p. 503.) Our Supreme Court concluded that the officer "properly testified as a lay witness about the significance of the marks on the shotgun shell," noting that his opinion "was rationally based on his perception and helpful to an understanding of his testimony" and "the subject of his opinion—the significance of marks on a shell primer—was not

so far ‘beyond [the] common experience’ that expert testimony was required.” (*Id.* at pp. 503-504.)

In *Maglaya* and *Lewis*, neither testifying officer was a percipient witness. Each officer’s testimony concerned evidence that he recovered at the scene and was admissible lay opinion because it was rationally based on the officer’s perception of the evidence and helpful to the jury’s understanding of the officer’s testimony.

Similarly, here, Detective Martinez’s testimony concerned the evidence—the outdoor video recordings—that she recovered from the scene. These video recordings were fast paced; the sequence of events occurred over a few minutes in a relatively dark venue. Martinez’s testimony about the contents of the recording, in particular, the interactions between Mares and Aragon and Mares and Chicas on the street, was rationally based on her personal observations of the shootings as recorded. In addition, Martinez relied on demonstrative evidence—the synchronized recording and the photographs—to illustrate her testimony and to clarify her perception of the circumstances of the shootings. All of this evidence was helpful for the jury to fully appreciate Martinez’s testimony regarding what was depicted on the video recordings. Significantly, in describing the video recordings, Martinez did not offer irrelevant or speculative testimony concerning what the evidence depicted. Nor did she characterize the behavior or actions of Mares, Aragon, or Chicas or attempt to sway the jury with argumentative responses.

Mares’s relies on *People v. Brown* (1981) 116 Cal.App.3d 820 (*Brown*) to make his second argument, to wit, that Detective Martinez’s testimony was inadmissible because it

went to the ultimate issue in this case—whether Mares acted in self-defense. *Brown* is inapposite.

In *Brown*, a police narcotics officer testified as an expert that the defendant was employed as a runner for a heroin dealer. (*Brown, supra*, 116 Cal.App.3d at pp. 827-829.) The primary evidence of the defendant's guilt as a runner was the narcotic officer's expert opinion. When coupled with an erroneous instruction regarding the criminal liability of a runner, the expert's testimony had the practical effect of opining that defendant was guilty of a crime. The combination of improper expert opinion testimony on the ultimate issue and an incorrect jury instruction essentially directed a guilty verdict. (*Ibid.*) "The term 'runner' having been defined for [the jury], the jury were as qualified as the witness to determine whether [defendant] 'was working as a runner.'" (*Id.* at p. 829.)

In contrast, here the prosecutor's questions asked Detective Martinez to respond based on her personal perceptions of the video recordings and photographs as lay opinion, not expert opinion. The questions did not invite Martinez's opinions on whether Mares was guilty of first degree murder or he acted in self-defense. Instead, the questions were designed to establish the sequence of events leading up to the shootings on video evidence that the jury too was able to review. Coupled with the eyewitness testimony, the detective's testimony assisted the jury in evaluating whether Mares acted in defense of himself or Dorantes or committed first degree murder of Aragon and Chicas.

Furthermore, the trial court instructed the jury that in considering opinion evidence, it was "not required to accept those opinions as true or correct" but could "give the opinions whatever weight [jurors thought] appropriate," considering "the extent of

the witness's opportunity to perceive the matters on which his or her opinion is based, the reasons the witness gave for any opinion, and the facts or information on which the witness relied in forming that opinion. You must decide whether information on which the witness relied was true and accurate. You may disregard all or any part of an opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (CALCRIM No. 333.)

Lastly, as just noted, the jury was given the same evidence on which Detective Martinez based her lay opinion, and there is no reason to believe jurors credited her testimony without independently evaluating that evidence for themselves. Indeed, prior to rendering a verdict, the jurors specifically asked to see the video recordings. (See *People v. Leon*, *supra*, 61 Cal.4th at p. 601 ["Moreover, because the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was defendant"]; *People v. Larkins* (2011) 199 Cal.App.4th 1059, 1068 ["Moreover, the jurors were able to test the [lay witness's] opinion that defendant was the person in the . . . videos" because jurors were shown some of the videos].) In sum, the trial court was within its discretion in admitting the Martinez testimony Mares challenges on appeal.

**B. Even If the Admission of Detective Martinez's Testimony Was Error, the Error Was Harmless**

Even if the admission of Martinez's testimony was an abuse of discretion, the error was not prejudicial in light of the strong evidence of Mares's guilt. Employee J.F., who was not acquainted with Mares, Dorantes, or the victims, testified that Mares fired the shots killing Aragon, when the two of them were several feet apart and no punches had been thrown. Consistent

with J.F.’s testimony was the outdoor video recording, which showed that Aragon and Chicas collapsed from gunshot wounds suffered prior to any involvement in a physical altercation.

We have carefully reviewed the prosecutor’s argument to the jury, which made no reference to Detective Martinez’s testimony that the outdoor video recordings showed that the shots were fired before any punches were thrown. It is true the prosecutor spoke repeatedly about the contents of the video recordings, photographs, and cell phone footage. The prosecutor, however, mentioned Martinez by name only twice concerning the video recordings: The prosecutor reminded the jury of Martinez’s testimony “about comparing the video to the cell phone” and “when [Martinez] analyzed the video.” On this record, there is no reasonable probability that a result more favorable to Mares would have been reached had the challenged testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

**C. Sufficient Evidence Supported the Jury’s Findings that the Murders of Aragon and Chicas Were Premeditated**

In assessing the sufficiency of the evidence in support of the convictions, we examine whether the record, viewed in the “ ‘ ‘ ‘light most favorable to the judgment to determine whether it discloses 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.’ ” ’ ’<sup>5</sup> (*People v. Howard* (2010) 51 Cal.4th 15, 33-34.)

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<sup>5</sup> During closing argument, the prosecutor stated that he did not “think [he] proved a first degree murder for Andy Chicas. . . . But, realistically, what this case is is a first degree of

To convict a defendant of first degree murder, the prosecution must prove beyond a reasonable doubt that the defendant acted with deliberation and premeditation. (Pen. Code, § 189 [first degree murder includes any “willful, deliberate, and premeditated killing”].) “ ‘ “Deliberation” refers to careful weighing of considerations in forming a course of action; “premeditation” means thought over in advance.” ’ ” ( *People v. Sandoval* (2015) 62 Cal.4th 394, 424, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) What matters is “ ‘ “the extent of the [defendant’s] reflection,” ’ ” not the “ ‘ “duration of time” ’ ” in which he undertakes it. ( *People v. Sandoval*, *supra*, 62 Cal.4th at p. 424, quoting *People v. Koontz*, *supra*, 27 Cal.4th at p. 1080.) The process of premeditation and deliberation can take place quickly. ( *People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) Our Supreme Court has identified three factors often considered in assessing whether a defendant has acted with premeditation and deliberation: (1) the defendant’s motive; (2) any planning activity; and (3) the manner of killing. ( *People v. Cage* (2015) 62 Cal.4th 256, 276, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Viewed in the light most favorable to the jury’s finding, there was substantial evidence that Mares acted with premeditation and deliberation in committing the murders of Aragon and Chicas. There was evidence of planning. As Mares approached and/or immediately after he joined Dorantes and

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Jose Aragon. It’s a second degree murder of Andy Chicas.” Both parties acknowledge that the concession was not binding on the jury and has no probative value regarding the sufficiency of the evidence for a finding of premeditation and deliberation.

Aragon outside the restaurant door, Mares “reached into” or “grabbed toward” his waistband, where he had secreted a gun. The jury could have reasonably found that by arming himself with a gun and ensuring the hidden weapon was readily available, Mares anticipated a violent encounter that night and was ready for it. (*People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing “a loaded handgun . . . indicat[ed]” that a defendant was “consider[ing] the possibility of a violent encounter”]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [“That [the] defendant armed himself prior to the attack [with a knife] ‘supports the inference that he planned a violent encounter.’ ”].) This is not to say that Mares had targeted Aragon or Chicas initially, but rather that he was preparing to kill someone.

The jury could have readily inferred from Mares’s extreme response to demands he and Dorantes leave that Mares was motivated by revenge. Aragon’s demand that they leave, which followed on the heels of the same demand by Security Guard F.F., and Mares unsuccessful efforts to make Dorantes leave, enraged Mares. He challenged Aragon to fight and threatened he was “‘gonna fuck you up.’ ” (*People v. Hyde* (1985) 166 Cal.App.3d 463, 478 [exacting revenge is sufficient motive to support premeditation].) What is perhaps most telling of Mares’s purposeful resolve at that point to shoot not only Aragon, but also anyone allied with Aragon, was Mares’s repeated threat, “Y’all don’t want none of this”; and, after Employee J.F. told him that the police would be called: “I don’t care about none of that. I’m telling you guys y’all don’t want none of this.” (See *People v. Rodriguez* (1986) 42 Cal.3d 730, 757-758 [evidence of the defendant’s prior generic threats to kill a police officer



furnished proof of planning and motive for premeditated murder of a police officer].)

The manner in which Mares fired the fatal shots further demonstrates premeditation and deliberation. There was nothing in Aragon's and Chicas's behavior or conduct to suggest to Mares that either man was armed with a weapon or intended to escalate the pending physical altercation beyond a fistfight. Yet neither Aragon nor Chicas had the chance to throw any punches before Mares shot them both at point-blank range. C.R. testified that C.R. shot Chicas without even looking at him. C.R. further testified that Mares shot Aragon twice in the back. J.F. testified he did not see Aragon hit Mares before Mares shot him. (*People v. Cage, supra*, 62 Cal.4th at p. 277 [a close-range shooting without provocation supports an inference of premeditation]; *People v. Silva* (2001) 25 Cal.4th 345, 369 [shooting of unarmed and defenseless victim posing no immediate threat supports premeditation]; *People v. Adcox* (1988) 47 Cal.3d 207, 240 ["[T]he fact that defendant brought his loaded gun . . . to [the location] and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance."].) Although Mares may have arrived at his decision to kill Chicas as an ally of Aragon in the time it took for him to turn, pull out his gun, and turn to shoot, this fact does not necessarily mean he acted on a rash impulse. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

In sum, substantial evidence supported the jury's finding of premeditation.

#### **D. Limited Remand for Resentencing Is Appropriate**

When the trial court resentenced Mares it imposed two 25-years-to-life enhancement terms pursuant to Penal Code section 12022.53, subdivision (d). At the time defendant was sentenced, section 12022.5 expressly provided that a trial court could not strike “an allegation under this section or a finding bringing a person within the provisions of this section.” (See former Pen. Code, §§ 12022.5, subd. (c), 12022.53, subd. (h).)

On October 11, 2017, the Governor signed Senate Bill 620, which amended both sections 12022.5 and 12022.53 to strike the language of subdivision (c) prohibiting striking the enhancement and in its place providing: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.” (Stats. 2017, ch. 682, §§ 1-2.) Senate Bill 620 does not contain an urgency clause. (*Ibid.*) Thus, it went into effect on January 1, 2018. (See *People v. Camba* (1996) 50 Cal.App.4th 857, 865-866 [operative date is “January 1 of the year following” enactment].)

Mares contends, the People acknowledge, and we agree, that the change to section 12022.53 applies to any judgment that is not final on January 1, 2018, including this case, and that Mares is entitled to a remand for resentencing. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507.)

### **DISPOSITION**

The judgment of conviction is affirmed. The matter is remanded for the purpose of allowing the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h).

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.