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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE EDWARD GARLAND, Defendant and Appellant.	B272272 (Los Angeles County Super. Ct. No. TA138176)

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Affirmed.

Emry J. Allen, 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, Idan Ivri and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant George Edward Garland of second degree murder and found true weapons allegations. Defendant appeals his conviction, arguing that (1) admission of preliminary hearing testimony in violation of his constitutional right to confrontation and (2) instructional errors warrant reversal. Defendant also contends that the trial court abused its discretion in denying his *Romero* motion to dismiss his prior strike for attempted murder. We affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

1. Perceived Threat in the Spook Town Territory

Following a football game on September 5, 2015, friends, including defendant, congregated at a house located in Compton. Defendant is a member of the Spook Town Crips criminal street gang, with the senior status of an "O.G.," i.e. "Original Gangster." The Compton house was located within Spook Town Crips territory.

Following the football game, Ricky Brown Jr. (the victim) drove to the house and parked his car across the street. Brown's cousin sat in the front passenger seat and his friend, Jaleel Jackson (also a Spook Town Crips gang member) sat in the back seat. Although Brown was not a gang member, Brown's father belongs to Spook Town Crips.

When Brown arrived, he made small talk with his aunt, Doris Williams. He then left for a short period of time and returned, again parking his car across the street. Brown, his cousin, and Jackson remained in the vehicle, smoking and talking. At this time, nine Hispanic individuals, armed with guns, were walking down the street leading to the house. Williams, who was standing in front of the house with several

other people, observed the Hispanic men. Concerned for the safety of herself and the children who were at the house, Williams ordered the children to remain inside and asked those standing in front of the house with her if anyone had a gun. Defendant replied "we straight" and went to the house next door, where another gang member lived. Defendant returned with a gun, which he pocketed in his jacket.

When the Hispanic men reached the vicinity of Brown's car, one of them complained that a lady had hit his car. Brown asked "are you okay?" Brown and the Hispanic individuals then started laughing and joking.

2. Defendant's Confrontation with Ricky Brown Jr.

Defendant observed the interaction between Brown and the Hispanic individuals and became angry. When the Hispanic individuals left, defendant yelled at Brown asking him why he talked to the Hispanics and why he "didn't do nothing [sic]" to them.[1] Brown laughed and said that they lived two doors down. Defendant told Brown, "you gotta get out of the hood." Brown responded "you fucked up" and stated that his parents were

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[1] At trial, a detective with gang expertise explained that a Spook Town O.G. may interpret a younger Spook Town affiliate warmly greeting a rival group as a sign of disrespect toward Spook Town, which could cause the members of the community to see the gang as "soft." This could in turn make it more likely that community members would report Spook Town crimes to police. The detective further explained that the younger member's failure to confront the rival group could also cause other gangs to move in on the gang's territory. The detective opined that the O.G. would feel obligated to retaliate against the younger member for this offense because the O.G. would otherwise lose respect within the gang.

Spook Town members and the only way he was leaving the neighborhood was in a body bag. Brown also told defendant to stop talking to him like that.

Defendant then ordered Brown to get out of the car. Brown exited the vehicle and approached the gate at the entrance to the front yard; defendant stood on the other side. Upon arriving at the gate, Brown "took a swing" at defendant over the gate. Defendant then took out the gun from his pocket and fired in a downward angle at Brown. Defendant shot Brown twice, once in the hand and fatally in the neck. Brown grabbed his chest and said "for real?" Brown then fled the scene, running away from defendant and around the corner. Brown stopped at a residence calling for help, and the occupant called 9-1-1.

Immediately after the shooting, defendant approached Brown's car. Brown's cousin was no longer inside the vehicle as he had fled when he heard the gunshots. Jaleel Jackson was hiding in the backseat, where he had taken cover when he heard gunshots. Defendant pointed the gun at Jackson and demanded the keys to the car. When Jackson said he did not have the keys, defendant ordered Jackson out of the car. Williams (Brown's aunt), who had watched defendant argue with and shoot Brown, intervened at this point. Williams ushered Jackson into the house and told defendant that he was not going to take Brown's car. Williams then asked defendant if he shot Brown. Defendant responded that he did not shoot Brown, he only "lit the fireworks."

3. Police Investigation

Responding officers found Brown dead near the location where the emergency call was made. A trail of blood drops led the police back to the front yard of the house. When police

officers arrived shortly thereafter, they questioned defendant about the shooting. He denied seeing or hearing anything related to the shooting and asserted he had been at the football game.

Investigating officers located a shell casing in front of the Compton house. Williams identified defendant as the shooter and Jackson later told police that defendant held him at gunpoint telling him to get out of the car immediately after the shooting. Police officers also determined from cell phone records that defendant's cell phone was in the area of the shooting when it occurred.

4. Defendant's Prosecution

On December 31, 2015, the district attorney filed an information in the Los Angeles Superior Court charging defendant with one count of Brown's murder. The information alleged that defendant suffered a prior conviction for a serious and/or violent felony, and included weapons and gang allegations.

Williams, investigating police officers, and a forensic pathologist testified at trial. Over objection, Jaleel Jackson's preliminary hearing testimony (during which he was cross-examined by defense counsel) was read into the record because in a hearing outside the jury's presence, the trial court found Jackson to be unavailable. The parties also sparred over jury instructions, which are discussed in detail below.

On March 18, 2016, a jury found defendant guilty of murder in the second degree. The jury found the weapons allegations true and the gang allegation not true. On May 4, 2016, the court found the alleged prior conviction for attempted murder to be true. The court denied defendant's *Romero* motion to strike the prior attempted murder conviction. That day, the

court sentenced defendant to a total aggregate term of sixty years to life in state prison.

DISCUSSION

Defendant raises several issues on appeal. He argues that admission of Jackson's testimony violated his constitutional right of confrontation. Defendant asserts the court erred in denying his request for a self-defense instruction, by giving the jury an instruction on consciousness of guilt, and by failing to sua sponte instruct on accomplice corroboration. Lastly, defendant asserts that the trial court erred in denying his *Romero* motion. We address each argument in turn.

1. Admission of Jaleel Jackson's Testimony Was Proper

Defendant contends that the trial court erred by allowing Jaleel Jackson's preliminary hearing testimony to be read into evidence after finding that Jackson was unavailable to testify at trial. Defendant argues the prosecution failed to exercise reasonable diligence in attempting to secure the attendance of the witness at trial and therefore admission of the preliminary hearing testimony violated his right to confront the witness against him as guaranteed by the United States and California Constitutions.

a. Applicable Law

The federal and state constitutions afford criminal defendants the right to confront and cross-examine the witnesses testifying against them. (*People v. Carter* (2005) 36 Cal.4th 1114, 1172; *Ohio v. Clark* (2015) 135 S.Ct. 2173, 2179.) However, the confrontation right is subject to certain exceptions. (*Ibid.*) These exceptions include "where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that

defendant." (*Carter* at p. 1172; see also Evid. Code, §1291, subd. (a) [hearsay exception].) For a witness to be unavailable under federal law, the prosecution must show that " 'it made "a good-faith effort" to obtain the presence of the witness at trial.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 675 (*Fuiava*); *Barber v. Page* (1968) 390 U.S. 719, 725.) Under California law, a witness is "unavailable" if the declarant is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

In this context, "reasonable diligence" and "due diligence" are synonymous. (*Fuiava, supra,* 53 Cal.4th at p. 675.) Diligence is a ;situation-specific inquiry that " ' "connotes persevering application, untiring efforts in good earnest, efforts of a substantial character." [Citations.] Relevant considerations include " 'whether the search was timely begun' " [citation], the importance of the witness's testimony [citation], and whether leads were competently explored [citation].' " (*Ibid.*)

In this case, the trial court admitted Jackson's preliminary hearing testimony, where he was subject to cross-examination by defendant. In that testimony, Jackson stated that he was in the back seat of Brown's car when he heard the gunshot. Jackson testified that defendant subsequently pointed a gun at him and demanded the keys to Brown's car.[2] At issue on appeal is whether the People made a good faith effort and exercised due diligence in procuring Jackson's attendance. We review de novo the trial court's determination. (*Fuiava, supra,* 53 Cal.4th at p. 675; *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

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[2] Jackson did not actually see defendant shoot Brown.

b. The Prosecution's Conduct in Securing Jackson's Testimony

On March 14, 2016, just prior to trial, the trial court held a hearing outside the presence of the jury regarding the efforts the prosecution made to find Jackson and secure his presence. Detective Richard Biddle testified that he became aware of Jackson as a witness a few hours after the shooting when Jackson spoke about the shooting over the phone to an inmate in the Los Angeles County Jail. Detective Biddle visited the residence listed on Jackson's DMV records and previous arrest records but could not locate him. The Brown family indicated that Jackson was homeless, had no family in Compton, and stayed with friends. According to Brown's father (Brown Sr.), Jackson felt threatened and was afraid to testify at the preliminary hearing. Brown Sr. had influence over Jackson because Brown Sr. was an "O.G." within the Spook Town Crips. Also, Jackson was dating Brown's sister, Porsha.

Detective Biddle testified that Brown's father "always indicated he would be able to get [Jackson] to come to court." Prior to the preliminary hearing, Brown Sr. convinced Jackson to talk to the police and then housed Jackson. Brown Sr. brought Jackson to court for the preliminary hearing on December 17, 2015.

In late February 2016, Detective Biddle learned that defendant's case would go to trial in early March and attempted to contact Jackson. Detective Biddle initially called Brown Sr. for assistance. Brown Sr. explained that he lost contact with Jackson because gang members had threatened Jackson and ordered him not to testify. Brown Sr. called his daughter, Porsha, who was dating Jackson and who was in the hospital due

to pregnancy complications. Porsha informed Brown Sr. that Jackson was no longer in California. Porsha refused to leave the hospital to discuss Jackson's whereabouts because of her medical situation and did not disclose the name of the hospital. Brown Sr. also did not know Porsha's location. Detective Biddle did not attempt to call all the hospitals in the area or obtain a court order to find where Porsha was being treated. He believed Porsha was medically unfit to assist with the investigation.

After obtaining subpoenas for Jackson's presence in court, Detective Biddle put an alert in the warrant system that would notify him if Jackson was arrested in California. Detective Biddle requested the local Compton gang unit to alert him if they saw Jackson. Detective Biddle also personally drove around the neighborhood twice looking for Jackson.

On March 7, 2016, Detective Biddle made an ex parte request with the trial court to issue a subpoena for Jackson. He also obtained a search warrant to "ping" both cellular phones associated with Jackson in order to locate him. On March 8, one phone company informed Detective Biddle that Jackson had turned off his phone and thus could not be located. On March 10, Jackson cancelled his phone service.

Detective Biddle testified that Jackson was set to appear in court for an appointment with his probation officer on March 10, 2016, and that Jackson's probation officer told him that Jackson never missed an appointment. The night before the appointment, Jackson's mother called the probation officer. She told him that Jackson received threats in Compton, did not want to come to court, and was staying with her in Las Vegas. Jackson's mother requested the probation officer to transfer Jackson's probation to Las Vegas so that he would not have to return to Compton.

Detective Biddle attended the probation appointment but Jackson did not appear. His probation officer issued a warrant for Jackson's arrest.

That afternoon, Detective Biddle attempted to call Jackson's mother using the Las Vegas phone number she gave to the probation officer. The number connected Detective Biddle to the manager at the apartment complex where Jackson's mother resided. The manager confirmed that Jackson's mother lived in the building and that a younger man was living there was well. Detective Biddle also left a message at the phone number last associated with Jackson. Neither Jackson nor Jackson's mother ever returned Detective Biddle's call.

One week before the hearing on the motion to admit Jackson's prior testimony, Brown Sr. informed Detective Biddle that Porsha told him Jackson was in Louisiana. Detective Biddle did not explore any connections to Louisiana that Jackson may have had. Detective Biddle did not check train, bus, or plane records to see if Jackson's name had come up. While there was no definite information that Jackson was in Las Vegas, Detective Biddle notified Las Vegas police on the day of the hearing to look for Jackson, and said that he would drive there to look for him.

At the hearing, the prosecutor argued that the district attorney's office and the sheriff's department exercised reasonable diligence in attempting to locate Jackson by pinging his phone and using family and friends to locate him. The prosecutor noted that Jackson's homelessness and intentional evasiveness made the search very difficult. Defense counsel countered that the prosecution did not do its due diligence because law enforcement did not ping Jackson's phone sooner, did not attempt to find Jackson's newest working phone number and

location by searching Porsha's records, and should have located Porsha to compel her to assist in finding Jackson.

The trial court found that the prosecution acted reasonably. The court explained that the prosecution's failure at the preliminary hearing to request the court order Jackson back was excusable: "this is a situation where, obviously, even though it does not appear that Mr. Jackson was cooperative in that he wanted to be here, he did come in. He was not under arrest when he came in at the time of the preliminary hearing. And it does seem that Mr. Brown, perhaps, through his daughter, who had a relationship with Mr. Jackson or may still have a relationship, did have the ability to bring him in, and he did so. And with that assurance that he would still have control over Mr. Jackson." The court noted that the prosecution timely subpoenaed Jackson and that Detective Biddle thoroughly researched Jackson's addresses and phone numbers. The court stated that Detective Biddle went looking for Jackson in Compton, pinged his phone, and attended his probation meeting, which Jackson had never previously missed. The court opined that because Jackson's phone was turned off, getting a warrant for that number would not be helpful. The court stated that even if the prosecution obtained Porsha's information, it doubted that law enforcement could do more than identify several cell towers in the area where Jackson had called from and this would be insufficient to locate him.

The court concluded, "at this point in time I don't think that there could be any question, whatsoever, that Mr. Jackson is doing whatever he can to avoid service in this matter, to avoid coming to court. As such, the court does find that it is reasonable, as to what they have done, the efforts they have

taken so far, and I assume that they are going to be further taking. . . . I do believe that the People have shown that reasonable diligence has been provided by law enforcement."

c. The Prosecution Made Reasonable, Good Faith Efforts to Secure Jackson's Testimony

We, too, conclude that the prosecution made reasonable, good faith efforts to secure Jackson's attendance and testimony at trial. Law enforcement attempted to locate Jackson based on known addresses, phone numbers, and communication with Brown Sr. and Jackson's girlfriend Porsha. Detective Biddle contacted the Compton gang unit to look for Jackson and performed his own searches of Jackson's neighborhood. Detective Biddle contacted Jackson's probation officer, left a message for Jackson's mother in Las Vegas, left messages for Jackson on his last know phone number, phoned Jackson's mother's landlord, and notified the Las Vegas police to look for Jackson.

In *People v. Valencia* (2008) 43 Cal.4th 268, 292, the Supreme Court found generally similar efforts sufficient to show that the witness was unavailable. There, the prosecution's investigator called known numbers of the witness, attempted to get new phone numbers for the witness through the telephone company, went to the address the witness had identified as his residence, contacted the DMV for addresses, searched credit information and criminal database information, and searched real estate holdings to find the witness. These efforts were unfruitful. (*Ibid*.) The Supreme Court concluded the investigator used due diligence to find the witness. (*Id*. at p. 293.) The Court noted that although during cross-examination and argument, the defendant "has suggested other things the prosecution might have done," such "suggestions do 'not change our conclusion that

the prosecution exercised reasonable diligence. "That additional efforts might have been made or other lines of inquiry pursued does not affect this conclusion. [Citation.] It is enough that the People used reasonable efforts to locate the witness." ' " (*Ibid.*)

Likewise here, Detective Biddle searched DMV and arrest records for addresses, and searched known numbers. Public records did not shed light on Jackson's whereabouts. The prosecution nonetheless worked many angles to contact Jackson by communicating with gang-related community members to locate Jackson. It is clear that Jackson intentionally made himself unavailable following the preliminary hearing. Defendant suggests further conduct the prosecutor could have engaged in, like compelling Porsha to produce her phone and then obtain Jackson's number from her contacts with him. Yet, we look at the conduct as a whole to assess whether the prosecution acted reasonably as there will always be unexplored, speculative avenues of conduct in retrospect. Based on the circumstances presented here, we conclude the prosecution acted reasonably in attempting to secure Jackson's attendance at trial.

Defendant argues that at the preliminary hearing, the prosecution should have had the court order Jackson to appear at the trial. As mentioned above, " '[t]he lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness.' " (*People v. Herrera* (2010) 49 Cal.4th 613, 622.) Absent knowledge of a "substantial risk" that the witness will flee, the prosecution is not required to take protective measures to prevent the witness's disappearance. (*People v. Wilson* (2005) 36 Cal.4th 309, 342.) "[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence . . .

but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." (*Hardy v. Cross* (2011) 565 U.S. 65, 71.)

Defendant next argues that "the District Attorney's office could have taken steps to protect [Jackson], just as it did with Doris Williams, if Jackson had expressed a fear for his safety due to his status as a prosecution witness in a 'gang' related case." Defendant references the fact that the District Attorney put Williams up in a hotel prior to testifying at trial. Defendant's argument in this regard is speculation. At the time of the preliminary hearing, Jackson was residing with Brown's family and did testify. There was no indication that additional protection from law enforcement was necessary at that time. This only became apparent in hindsight when Jackson fled Compton.

Defendant also argues that the prosecution had a duty to attempt to secure Jackson's attendance at trial through the Uniform Act after it learned that Jackson was living in Las Vegas. The "Uniform Act To Secure the Attendance of Witnesses from Without a State in Criminal Proceedings provides a means by which prosecuting authorities from one State can obtain an order from a court in the State where the witness is found directing the witness to appear in court in the first State to testify." (*Barber v. Page, supra,* 390 U.S. at p. 724, fn. 4.)

Use of the Uniform Act was not practical in this case. Jackson's address was never established during the investigation. There was speculation Jackson lived in Las Vegas with his Mother but no confirmation. In addition, Detective Biddle only developed suspicions that Jackson was living in Las Vegas with his mother in March 2016, when his mother called his probation

officer. Perhaps if Jackson's address had been known, utilizing the Uniform Act would have produced Jackson at trial. Without a location to serve Jackson, the Act could not serve its purpose.

Defendant cites *People v. Masters* (1982) 134 Cal.App.3d 509, 526, (*Masters*), criticized on other grounds in *People v. Perez* (1989) 207 Cal.App.3d 431, 436, repeatedly in his brief in arguing that the prosecution did not act reasonably. In *Masters*, the witness testified at the preliminary hearing. (*Id*. at p. 520.) Subsequently, the witness moved out of state without telling the prosecution. The prosecution then ascertained the witness's address and successfully served her with a subpoena. (*Id*. at p. 521.) At this point in time, the witness was reluctant to testify but over the phone agreed to return to California and testify. (*Id*. at p. 522.) When trial commenced, the witness had moved again and did not appear. (*Ibid*.) The trial court admitted her preliminary hearing testimony over the defendant's objection after finding the witness unavailable. (*Id*. at pp. 520-521.) The appellate court reversed, concluding that the prosecution failed to exercise reasonable diligence in securing the witness's appearance. The court explained that the prosecution should have used the Uniform Act to secure the witness's attendance at trial, as the district attorney's investigator knew the witness's address and phone number, and understood she was reluctant to testify, uncooperative, and out of state. (*Id*. at p. 526.) *Masters* does not address the current situation, where the witness could not be contacted by phone or physically located for purposes of the Uniform Act.

2. The Trial Court Did Not Commit Error by Refusing to Instruct on Self-Defense and Imperfect Self-Defense

Defendant argues that the trial court erred in refusing to instruct the jury on self-defense and imperfect self-defense. "A trial court has no duty to instruct the jury on a defense—even at the defendant's request—unless the defense is supported by substantial evidence." (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1355.) "Evidence is 'substantial' if it allows a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1147.) A trial court's refusal to instruct on self-defense or imperfect self-defense will be upheld where the record contains no substantial evidence to support the instructions. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1270.)

"Self-defense requires an actual and reasonable belief in the need to defend against an imminent danger of death or great bodily injury. [Citation.] If, however, the killer actually, but unreasonably, believed in the need to defend him or herself from imminent death or great bodily injury, the theory of 'imperfect self defense' applies to negate malice." (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1261, italics omitted.) A self-defense instruction "requires without exception that the defendant must have had an actual belief in the need for self-defense. . . . Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of imminent danger to life or great bodily injury. ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must

be instantly dealt with." . . . [¶] This definition of imminence reflects the great value our society places on human life.' [Citation.] Put simply, the trier of fact must find an actual fear of an imminent harm. Without this finding, [self-defense or] imperfect self-defense is no defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 783, italics omitted.)

Here, defense counsel requested the court instruct the jury on self-defense or imperfect self-defense because Brown and defendant were arguing and "the victim in this case connected a blow to [defendant], and that precipitated anything that happened from there on." The prosecution responded that "a punch is not fear of imminent danger of being killed or suffering great bodily injury," particularly because the victim was not in a position to inflict serious harm as he threw the punch from the other side of the gate. The court denied defendant's requested instruction explaining: "we don't have any testimony that the punch even landed, that it did any harm at all, anything along those lines. I just can't see there being a legitimate basis for giving self-defense in this matter. . . . I don't even believe it's enough to get an honest but unreasonable belief. There just [is] no basis for that. And I don't believe that actual self-defense would apply in this situation. So over the objection of counsel, the court is not going to give self-defense."

We conclude that there was no substantial evidence to support a finding that defendant actually either reasonably or unreasonably believed Brown's punch placed him in imminent danger of death or great bodily injury. The sole evidence we have about Brown's conduct comes from Williams's testimony. She stated that when defendant told Brown to get out of the car, Brown exited and walked up to the gate in front of the house.

Williams stated that when Brown got to the gate, Brown "swung at [defendant]. He hit him -- or he tried to hit him. He swung at him." Williams testified, "and then [defendant] shot him, and that was that." Williams clarified that Brown was standing on the sidewalk when he swung and defendant was standing on the other side of the gate in the front yard. Essentially, a fence separated the two men. Williams specified that Brown swung over the gate toward defendant. There is no evidence in the record indicating whether Brown's punch actually connected with defendant. The medical examiner noted that Brown's hands lacked any wounds, like bruising or cuts, on the back of his hands, consistent with inflicting a blow. Importantly, even assuming Brown made contact with defendant, the swing did not pose a serious threat that would have justified self-defense.

Citing the prosecution's gang expert testimony, defendant argues that because this was a gang-related confrontation implicating gang "values," the likely outcome of the confrontation was infliction of great bodily injury or death. Defendant cites *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*), for support. In *Medina*, members of one gang engaged in a fistfight with the victim, who was a member of another gang. (*Id*. at p. 916.) "After the fistfight ended, one of the defendants shot and killed the victim as he was driving away from the scene of the fight with his friend." (*Ibid*.) The jury had found the gunman guilty of murder and attempted murder of the friend, as the actual perpetrator, and two non-shooting defendants in the fistfight guilty of those offenses as aiders and abettors. (*Ibid*.) The California Supreme Court upheld the jury's verdict of first degree murder for two aiders and abettors based on the natural and probable consequences doctrine, concluding "that a rational

trier of fact could have found that the shooting of the victim was a reasonably foreseeable consequence of the gang assault in this case." (*Id.* at 922.) A gang expert in *Medina* testified that confrontations between rival gangs could lead to physical altercations and even death. (*Ibid.*) The Supreme Court reasoned that the jury could reasonably infer that the aiders and abettors would have or should have known that retaliation against the opposing gang member (who successfully fought off the defendants) "was likely to occur and that escalation of the confrontation to a deadly level was reasonably foreseeable." (*Id.* at p. 923.)

Medina is inapt. It stands for the principal that challenges between rival gangs may escalate to deadly violence for purposes of natural and probable consequences application to aiders and abettors. The shooting, in our case, was not the result of rival gang members or the type of violence that occurs between rival gangs like *Medina*. The present case involved a conflict between a member of the Spook Town Crips and a non-gang member whose father was a Spook Town Crip. There was no gang-on-gang altercation. At issue here is whether there was evidence defendant *actually believed* he was at risk of serious bodily injury or death of the hands of Brown. There was no direct or indirect evidence of defendant's subjective beliefs for purposes of self-defense or imperfect-self-defense. Nor would any such belief be objectively reasonable.

3. The Court Did Not Err in Instructing the Jury With CALCRIM No. 362

Defendant argues that the trial court erred by instructing the jury with CALCRIM No. 362 because the "instruction lightened the prosecution's burden of reasonable doubt, and

violated his state and federal due process rights and right to a jury trial." The customized CALCRIM No. 362 the court provided to the jury stated:

> "If the defendant Mr. Garland made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt.
>
> "If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The false information referenced by the instruction was defendant's statement to police that he was at the football game when the shooting occurred. Defendant contends that in order for the jury to find his statement to be false, it had to assume in advance the ultimate fact to be proved, that defendant shot Brown. We disagree.

First, collateral evidence, independent of Williams's testimony identifying defendant as the shooter, showed that defendant's statements to law enforcement were false. While defendant told Deputy Garcia at 10:15 p.m. on the night of the shooting that he had just returned to the house from the football game, defendant's phone records showed that he had been at the scene of the shooting since 9:34 p.m. As a practical matter, the jury was not required to assume defendant shot Brown in order to find his statement to law enforcement false. Defendant could have lied about the football game and still not have shot Brown.

Second, the instruction itself tells the jury that the false statement itself cannot prove defendant's guilt. As matter of

principle, we assume the jury follows these instructions. (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

Third, it is well settled in California that a consciousness of guilt instruction like CALCRIM No. 362 is proper if it is supported by evidence of false or misleading pretrial statements like it was supported here by Williams's and Jackson's testimony and defendant's cell phone records. (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.)

Finally, the California Supreme Court has upheld use of CALJIC No. 2.03, the predecessor to CALCRIM No. 362, against challenges identical to this one. (See *People v. Stitely* (2005) 35 Cal.4th 514, 555.) "The instructional language [CALJIC No. 2.03] sufficiently protects against conviction based on the defendant's false statements or consciousness of guilt alone. [Citation.] Nor is it argumentative or biased in the prosecution's favor. [Citation.] Finally, insofar as the jury believed defendant lied about the charged crimes, the instruction did not generate an irrational inference of consciousness of guilt." (*Ibid.*)

4. Accomplice Instructions Were Not Required

Defendant contends the trial court erred by failing to sua sponte issue the jury accomplice instructions with respect to Williams's testimony. " '[W]hen there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices.' " (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) Accomplice instructions involve admonishing the jury that it should view the accomplice's testimony with "care and caution" (*People v. Guiuan* (1998) 18 Cal.4th 558, 569), and that a defendant cannot be convicted " 'upon the testimony of an accomplice unless it be corroborated by such other evidence as

shall tend to connect the defendant with the commission of the offense.' " (*Tobias* at p. 331.)

An accomplice is defined as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.) "This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90.) "[A]n aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages." (*Ibid*; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

Defendant argues that Williams was an accomplice because she "admittedly ordered, suggested or otherwise induced [defendant] to secure a gun, minutes prior to the shooting in response to the instigating event (the appearance of nine armed Hispanic males across the street from her and [defendant])." The argument continues that a reasonable jury could have found that Williams acted with conscious disregard for human life by asking defendant to arm himself in anticipation of gang violence and therefore was an accomplice.

We disagree. When Williams saw the nine armed Hispanics walking down the street, Williams asked if anyone (not just defendant) had a gun. Williams was concerned about the safety of her friends and family at the house, including Brown and defendant. Although a conflict between the Hispanic men

and defendant might have been foreseeable, a conflict between Brown and defendant was not a likely or natural consequence of Williams's generally asking the group at the house if someone had a gun. There was no evidence that defendant had clashed with Brown or any of the people at the house previously or had some ongoing conflict or rivalry with them, such that asking defendant if he had a gun would pose a threat to people at the house.

The shooting took place after the Hispanic men had left and resulted from words exchanged between defendant and Brown. Also, Williams merely asked if someone had a gun; she did not instruct or encourage defendant to obtain a weapon. It appeared that she was taking an inventory of the level of protection she had standing in front of the house in the context of an approaching threat.

Defendant again cites *Medina, supra,* 46 Cal.4th at pages 922-923, 927, arguing that Brown's death was a natural and probable consequence of Williams's inquiry as to whether anyone had a gun due to foreseeable gang violence. As explained above, *Medina* is inapposite. *Medina* involves a conflict between two rival gangs and stands for the principle that a shooting could be a natural and probable consequence of a fist fight between two opposing gangs. (*Id.* at 922.) The point was that such a conflict between rival gangs could escalate to shooting and that those involved in the initial conflict could be held criminally responsible for the escalation. (*Id.* at pp. 922-923.) We have no such facts here.

5. No Abuse of Discretion in Denying Defendant's Romero Motion

Defendant contends the trial court abused its discretion by denying his *Romero* motion to dismiss his prior strike for attempted murder. We review the trial court's denial of defendant's *Romero* motion for abuse of discretion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) The key question on that review is whether the ruling in question falls "outside the bounds of reason." (*People v. Williams* (1998) 17 Cal.4th 148, 164.) The burden is on the party attacking the sentence to show irrationality or arbitrariness. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) In the absence of that showing, the presumption arises that the trial court engaged in a proper exercise of discretion to achieve legitimate sentencing objectives. (*Id.* at pp. 977–978.)

In *People v. Carmony* (2004) 33 Cal.4th 367, 378, the Supreme Court explained: The"trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances." "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he [or she] squarely falls once he [or she] commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Ibid.*)

Defendant argues that this conviction fell outside the intended spirit of the Three-Strikes law, and that the trial court

gave no weight to his youth at the time of the attempted murder conviction (he was 22 years old then). We disagree.

The court specifically noted that defendant's prior conviction was from 1993. Nonetheless, the court was dissuaded from striking this conviction due to defendant's ongoing criminal conduct. Simply because a conviction is old does not mean the court abuses its discretion by not striking it: "In determining whether a prior conviction is remote, the trial court should not simply consult the Gregorian calendar with blinders on." (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.) The court specifically noted defendant continued to engage in criminal conduct between the attempted murder conviction and the present case. "Where, as here, the defendant has led a continuous life of crime after the prior, there has been no 'washing out' [i.e. a crime-free cleansing period of rehabilitation] and there is simply nothing mitigating about a 20-year-old prior." (*Ibid.*)

Defendant argues that his prior strike should have been stricken since "[c]ourts have recently acknowledged that offenses committed by youthful offenders are mitigated and require special sentencing consideration." Yet, the cases defendant cites for this principle address the constitutionality of imposing the death penalty and life without possibility of parole on offenders who were juveniles when their current crimes were committed. (See *Miller v. Alabama* (2012) 567 U.S. 460, 465; *Graham v. Florida* (2010) 560 U.S. 48, 52-53; *People v. Caballero* (2012) 55 Cal.4th 262, 265; *People v. Dillon* (1983) 34 Cal.3d 441, 450.) These cases are irrelevant to the issue before us. This case does not involve sentencing a minor to lifetime imprisonment.

Defendant was not a juvenile when he committed attempted murder at age 22, or when he murdered Brown at age 55.

We find no abuse of discretion.[3]

DISPOSITION

We affirm defendant George Edward Garland's conviction.

RUBIN, Acting P.J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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[3] Although the prior strike was 23 years old, it was a serious and violent crime—attempted murder— and was not outside the spirit of the Three Strikes law.