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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JESUS ALBERTO PERALTA et al., Defendants and Appellants.	B265960 (Los Angeles County Super. Ct. No. MA060719)

APPEALS from a judgment of the Superior Court of Los Angeles County, Eric P. Harmon, Judge. Affirmed as modified.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant Jesus A. Peralta.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Carlos Peralta.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant

Attorney General, Victoria B. Wilson and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant brothers Jesus Peralta and Carlos Peralta had a verbal altercation with a man at a Palmdale gas station. After the man pepper-sprayed them and drove away, defendants followed in their truck. Jesus[1] fired at least nine bullets at the man's car. One of the bullets struck and killed a child who was in the backseat. A jury convicted defendants of one count of murder for killing the child, three counts of attempted premeditated murder for shooting at the three other people who were in the car, and one count of shooting into an occupied motor vehicle.

Defendants both contend that jury instructions concerning provocation and the kill zone theory of attempted murder were legally erroneous. They further contend that the jury's findings regarding premeditation of the attempted murders were not supported by sufficient evidence. Jesus also argues that the court erred by admitting inculpatory statements that he made involuntarily and hearsay testimony about statements he made prior to the shooting, and by awarding him zero credit for time he spent in custody prior to trial. Carlos joins Jesus's custody credits argument, to which the Attorney General raises no objection.

We direct the trial court to modify the abstracts of judgment to reflect the correct amount of custody credits to which each defendant is entitled but otherwise affirm. Although we agree with defendants that the court's use of the disjunctive "or" in the kill zone instruction was erroneous, we conclude that the

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[1] We refer to defendants by their first names to avoid confusion. No disrespect is intended.

error was harmless beyond a reasonable doubt.

PROCEDURAL HISTORY

An information charged defendants with one count of first degree murder (Pen. Code, §§ 187, subd. (a) & 189),[2] three counts of attempted murder (§§ 187, subd. (a) & 664, subd. (a)), and one count of shooting at an occupied motor vehicle (§ 246). The information further alleged that defendants committed the attempted murders willfully, deliberately, and with premeditation. It also alleged as to all counts that Jesus personally used a firearm (§ 12022.53, subds. (b) & (e)(1)), personally and intentionally discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), and personally and intentionally discharged a firearm and proximately caused great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)).

Defendants were tried jointly. A jury found them guilty as charged and found true the allegations that the attempted murders were willful, deliberate, and premeditated. The jury also found true as to Jesus the enhancements under section 12022.53, subdivisions (b), (c), and (d); the prosecution did not introduce gang evidence or pursue the gang-related enhancements in section 12022.53, subdivision (e)(1).

The trial court sentenced Jesus to 25 years to life on the murder count, plus an additional consecutive 25 years to life for the section 12022.53, subdivision (d) enhancement. The court imposed consecutive sentences of life, plus additional 25 years to life for the section 12022.53, subdivision (d) enhancement, on each of the three attempted murder counts. The court imposed and stayed sentences for the section 12022.53, subdivisions (b)

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

and (c) enhancements on the murder and attempted murder counts pursuant to section 654. The court also imposed and stayed a midterm sentence of five years for shooting into an occupied motor vehicle.

The trial court sentenced Carlos to 25 years to life on the murder count, and consecutive terms of life on each of the three attempted murder counts. It imposed and stayed the midterm sentence of five years for shooting into an occupied motor vehicle.

The court concluded that neither defendant was entitled to conduct credits due to the murder conviction. (§ 2933.2.) It did not discuss presentence custody credits and did not award any to either defendant.

Defendants timely appealed.

FACTUAL BACKGROUND

I. Events Prior to Gas Station Altercation

Maritza Montoya testified that in 2013 she and defendants were students at Charter College. Montoya spent the afternoon and evening of September 3, 2013 drinking beer with defendants at defendants' home. Around 8:00 p.m., the three of them drove to Eduardo Diaz's house. Around 11:00 p.m., Carlos drove Montoya to a liquor store in his dark green Ford F-150 pickup truck so they could purchase more beer. While they were en route to the liquor store, Carlos received a call on his cell phone. Montoya testified that Carlos told her Jesus was on the phone. She further testified that Carlos told her that Jesus told him to go home and get a gun because Jesus was "mad" and "something was going to happen."

After receiving the phone call, Carlos drove to his house and went inside while Montoya waited in the truck. Montoya testified that Carlos came out with a silver and black gun that he

tucked into his pants. Carlos later put the gun underneath a cupholder in the truck's center console. He drove back to Diaz's house.

Montoya testified she and defendants remained at Diaz's house until her mother called or texted Carlos and told him to bring her home. All four of them—defendants, Montoya, and Diaz—got into the truck and took Montoya home. Montoya testified that Jesus was "kind of mad" and was "staring . . . down" or "mad dogging" cars during the drive. Defendants and Diaz left after dropping Montoya off between midnight and 12:15 a.m. on September 4, 2013.

II. Gas Station Altercation

Victims Lorena I. and Brandon C.[3] testified to the following. Shortly after midnight on September 4, 2013, Lorena I. drove her boyfriend, Brandon, and her two daughters, Mary Jane L. and Desirae M., to a gas station in Palmdale. Brandon was seated in the front passenger seat. Mary Jane was in the backseat behind Lorena, and Desirae was in the backseat behind Brandon. The front passenger window was down.

Lorena pulled the car, a red Toyota Camry or Corolla, up to a gas pump. Brandon got out of the front passenger seat and joined a line outside the cashier's window, about 10-17 feet away. He stood behind two men he and Lorena identified in court as defendants. Both Lorena and Brandon testified that Carlos was wearing a dark shirt, and Jesus was wearing a white shirt.

Brandon testified that Jesus asked him where he was from. Brandon understood the question to ask what gang he belonged

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[3] Pursuant to California Rules of Court, rule 8.90(b)(4), we refer to the victims in this case by their first names to protect their personal privacy interests. No disrespect is intended.

to. Brandon testified that he was not from any gang and accordingly responded, "Excuse me?" Brandon also took a step back, as he saw Carlos step toward him. Carlos raised his dark shirt to reveal a gun tucked in "his front waistline." Defendants "started saying things," including "little bitch." Brandon started walking backward to Lorena's car, with his hands behind his back to alert him to obstacles in his path.

Lorena testified that she saw defendants look back at Brandon and heard one of them say, "Back the fuck up," or "Back up, you little bitch." Lorena heard Brandon respond, "Excuse me?" Defendants repeated their demand that Brandon back up. Brandon put his hands behind his back and started walking backwards toward the car. Lorena did not see anything in Brandon's hands. At some point, Lorena saw Carlos raise his shirt. He did not raise it very high, only to his waist line, and she did not see anything concealed beneath it. She assumed Carlos had a gun but never saw one or heard anyone mention one. Lorena saw Carlos raise his shirt a total of three times.

As Brandon backed toward the car, defendants walked toward him, telling him both to back up and "don't be scared." Brandon testified that defendants seemed "confrontational," and he felt his life was in danger. He nevertheless continued to engage with defendants and told them he was not scared.

Brandon reached the car and got inside. Defendants continued to taunt him, telling him to "get off the car," calling him a "little bitch," and saying, "don't be scared." Brandon continued to respond that he was not scared. Brandon also testified that he said "kids," "[b]ecause there were kids in the vehicle." Lorena likewise testified that she "repeatedly" said that her kids were in the car when defendants came within a few feet

of the car.

Defendants walked back toward the line, away from the car, but continued to make comments to Brandon "about him being scared." Brandon continued responding that he was not scared. Lorena did not drive away because she "was in a frozen state of mind" and "didn't know what to do." Brandon also testified that he "was in shock." His shock prevented him from telling Lorena to drive away once defendants walked back to the cashier's window. A surveillance video from the gas station showed that the Toyota remained at the gas pump and defendants remained at the cashier's window for approximately 30 seconds. Defendants then turned and began walking toward the car again.

Lorena saw Brandon reach under the ash tray and retrieve a can of pepper spray. Brandon sprayed defendants with the pepper spray as they neared the car. He explained that he did so because "I thought they were going to shoot me." Lorena testified that she heard Brandon say, "Go, go" after he sprayed defendants. Either she or Brandon turned the keys in the ignition, and Lorena drove away.

When confronted with the surveillance video of the encounter, which was played for the jury and admitted into evidence, Lorena conceded that her car moved forward several inches before Brandon pepper sprayed defendants. She stated that she was "telling you now that, as I was going, I see his hand out the window," but admitted that "in my first testimony" she said the car was not turned on at that point. After watching the video, Lorena testified that she saw Carlos "slouch" upon getting hit with the pepper spray, and saw Jesus "pull up his shirt like if he's wiping his eyes." She did not see defendants take these

actions when she was driving away. Brandon did not disclose that he pepper sprayed defendants during his first interview with police.

The 10-minute surveillance video does not have audio. The events it visually depicts are in line with Lorena's and Brandon's testimony. The video also shows what happens after Brandon pepper sprayed defendants: a man in a white shirt, Jesus, walked toward a truck, gesturing toward Lorena's departing car. Carlos pulled up his dark shirt and wiped his face while walking to the truck several paces behind Jesus. Both defendants appeared to exchange words with Diaz, who was standing outside the truck the whole time. Jesus used his shirt to wipe his face, walked around the truck, and got in the driver's seat. Carlos got in the front passenger seat, and Diaz got in the back seat. Approximately 45 seconds after Lorena's car drove away, the truck left the gas station and went in the same direction.

III. Chase and Shooting

Lorena testified that she turned left out of the gas station and drove up Fort Tejon Road at about 50 miles per hour. After about a half mile, she noticed headlights behind her, "driving fast." Lorena "knew it was them" and tried to evade defendants by turning right into a residential neighborhood. She made a series of turns through the neighborhood, but defendants continued to follow. Lorena "thought they were going to hit us, but that's when they started shooting." She heard a total of about 12 gunshots, in three distinct bursts, before defendants abandoned the chase. Lorena stopped briefly at an elementary school before driving home.

When Lorena arrived home, Mary Jane told her that Desirae would not wake up. Lorena pulled Desirae out of the car

and noticed that Desirae was bleeding. Lorena screamed that Desirae had been shot. Brandon was on the phone with 911 operators, who told her to put pressure on Desirae's wound. Lorena put pressure on the wound and performed CPR. Emergency responders arrived and transported Desirae to the hospital. Doctors declared her brain dead on September 5, 2013. A medical examiner testified that Desirae was shot in the head by a single bullet, which caused her death.

Brandon testified that Lorena turned left out of the gas station and drove north on Fort Tejon Road. At some point, he looked in the rearview mirror and saw defendants following them. Lorena turned right into a residential neighborhood, and he heard two or three gunshots. Later, along a different street, Brandon heard a second group of gunshots.

Brandon called 911 during the chase. A recording of the call was played for the jury. During the call, Brandon told the operator that Hispanic males in a green F-150 were following and shooting at him. He said there were five males in the truck, one of whom was wearing a white shirt and one of whom was wearing a blue shirt. Brandon did not realize that Desirae had been shot in the head until he and Lorena arrived home.

IV. Investigation

Los Angeles Sheriff's Department (LASD) deputy Andrea Lefebvre received a call reporting shots fired around 12:40 a.m. on September 4, 2013. The dispatcher informed Lefebvre to be on the lookout for three to five Hispanic males in a dark-colored Ford F-150 truck. Approximately five minutes later, Lefebvre saw a Ford F-150 and made a U-turn to follow it. She conducted a traffic stop after the truck ran a stop sign.

Lefebvre testified that there were three Hispanic males in the truck; none of them seemed to be suffering any symptoms associated with pepper spray. She obtained their names either by talking to them or looking at their identification cards. According to Lefebvre, Carlos was driving, Jesus was in the front passenger seat, and Diaz was in the back seat. When shown defendants' booking photos taken after the traffic stop, Lefebvre identified Jesus as the person wearing a white shirt and Carlos as the person wearing a black shirt. She could not "determine which one is which" in court, however, because Jesus and Carlos looked very similar.

LASD Detectives Michael Thompson and Anthony Delia interviewed Jesus on the morning of September 4, 2013. A recording of the interview was played for the jury. During the interview, Jesus said that Carlos was driving the truck at the time of the traffic stop, and he (Jesus) was sitting in the front passenger seat. After initially denying any involvement in the incident, Jesus admitted to exchanging words with Brandon at the gas station, and to following him. Jesus also told the detectives that he fired a gun at Brandon's car two or three times because Brandon had pepper sprayed him. Jesus stopped firing when the gun emptied. He claimed that after the shooting, someone in the truck called Montoya, and they met with her to give her the gun. Later, after the detectives discovered that Montoya did not have the gun, they told Jesus that they did not want a child to find the gun and pick it up. Jesus then admitted that defendants tossed the gun out of the truck window and into a bush near a park.

LASD deputies searched the area where Jesus said defendants had disposed of the gun. Thompson testified that a

silver and black Smith & Wesson gun was found in some juniper bushes in a raised planter. A fingerprint expert testified that Carlos' right middle fingerprint was found on the magazine inside the recovered gun.

LASD forensic identification specialist Daniel Rosell testified that he recovered five cartridge cases from one area along the chase route. Rosell recovered three cartridge cases and two bullet fragments from a second location along the route. LASD Detective Jose Espino testified that a civilian found and turned in an additional bullet casing and expended bullet, and a medical examiner testified that he recovered a bullet from inside Desirae's brain. LASD criminalist Robert Keil testified that he tested all of the casings, bullets, and bullet fragments and determined that they were fired from the same 40 caliber Smith & Wesson pistol—the gun recovered from the bushes. Keil also examined Lorena's Toyota and found four bullet holes in the vehicle: two in the rear bumper, one near the brake lights, and one in the rear edge of the roof.

Thompson testified that he had been sprayed with pepper spray "several times" during his training and work as a Sheriff's deputy. He testified that pepper spray is "very painful," such that pain consumes the focus of someone who is sprayed. Thompson stated that pepper spray is not disorienting, however, and does not cause loss of vision; victims involuntarily close their eyes due to the pain and it hurts to open them.

DISCUSSION

I. Admissibility of Evidence

Jesus contends the court erred by admitting evidence of incriminating statements he made during an interview with police and testimony about statements he made prior to the

shooting. We find no prejudicial error.

A. Jesus's Statements to Detectives

1. The Interview

Detectives Thompson and Delia jointly interviewed Jesus at 6:55 a.m. on September 4, 2013, approximately six hours after the shooting incident. After asking Jesus some background biographical questions, such as his age, address, and phone number, Thompson advised Jesus of his *Miranda*[4] rights. After informing Jesus of each right, Thompson asked him, "Do you understand?" Jesus answered affirmatively each time. Immediately after Jesus acknowledged the final *Miranda* warning, Thompson began asking him substantive questions about the evening's events.

Jesus initially stated that he, Carlos, and Diaz had been driving from Diaz's house to defendants' house when they were stopped and arrested. He denied stopping at a gas station until Delia informed him there were cameras at the gas station and said, "If we catch you lying . . . ." Jesus told the detectives that Brandon was "trying to act hard" in line at the gas station after both detectives advised him to "[b]e honest."

The detectives asked Jesus for more information about what happened while he was waiting in line at the gas station. During this line of questioning, the detectives made statements including, "And this can go, go bad for you. How do you want it to go?" and "You tell me, you tell me the truth, you sit here and tell me the truth - - [¶] and it's gonna be, and it will be less bad for you. If you sit here and lie and deceive us or try to deceive us and - - [¶] Yeah and leave shit out of this, out of what happened, you're gonna get screwed." Jesus's immediate response was,

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

"That's all I know, nothing, that's it."

Later, Thompson told Jesus, "All right, listen man. We know there's more to the story. We know that when you guys left the gas station, you followed that car. You - - he got into a car and left and you guys got into your truck and followed." Jesus agreed but insisted "we didn't do nothing." Delia told Jesus that he had seen videos demonstrating that Jesus was lying, and told him, "we want you to be honest." Thompson subsequently stated, "It's interesting how you, how you're, you're being honest about this and then when, when shit really went bad, all of a sudden, that, that wasn't you, you weren't there." Jesus continued to provide vague answers in response to questions about what happened after defendants left the gas station.

There was a break in the interview when Thompson left the room to get a map. The interview resumed at 7:18 a.m. Shortly thereafter, Jesus said, "I'm tired, man." Thompson asked Jesus if that was why he was lying, and Jesus said, "No, man." Thompson then asked Delia if Thompson "should . . . tell him," and then said—or, according to Jesus, yelled—"'Cause you fucking assholes shot an eight-year-old girl in the back of the head, that's why." Delia said, "I just want to know why. Did that guy threaten you? What happened?" Jesus responded, "What are you talking about?" Thompson testified at trial that Jesus's "demeanor changed" and that he looked "very somber" after Thompson informed him that a child had been shot. Delia told Jesus, "Because right now, there's a little girl, probably getting (INAUDIBLE) hours, I'm telling you. You need to come clean, dude." After Jesus said, "I already told you," Delia responded, "No, you didn't come clean with everything. The beef started at the Mobil, you already, I appreciate, I like the honesty. I want to

know why you guys shot at (INAUDIBLE)." At that point, Jesus said, "You want to know why we shot, we shot at him?" and then followed up with "Cause he threw shit at us." The detectives asked some clarifying questions, and Jesus explained that Brandon had pepper sprayed him "All over my fucking eyes and shit."

After eliciting more details about the gas station encounter, Thompson asked Jesus where the gun came from: "The gun you guys used, where was it at? Where it did come from? Who had it?" Jesus responded, "I had it." Later, in response to Thompson's query, "How many times did you fire the gun?" Jesus said "Two times." After Thompson told him that three casings had been recovered, Jesus said he fired three times.

Approximately 45 to 60 minutes after they concluded the first interview, the detectives discovered that Montoya did not have the gun. They returned to Jesus and told him that they did not want a child to find the gun and pick it up. Jesus told them that defendants tossed the gun out of the truck window and into a bush near a park.

2. Proceedings Below

Prior to trial, Jesus's counsel challenged the admissibility of the statements Jesus made during the interview on the ground that he did not voluntarily waive his *Miranda* rights. He explained, "The defense position is that [there] was an incomplete Miranda. There is not an implied waiver of Miranda. Even though the items or the specific points to be made in the Miranda admonition appeared to have been made, there was no questioning whatsoever about whether, having heard his right [*sic*], he understood them or was willing to waive them and speak with them. When Detective Thompson, after his last warning

about being unable to afford an attorney, he then just jumps into questioning as if there is no issue whatsoever about the ability to say, no, I don't want to be questioned." He later asserted that this argument rested upon unspecified "due process grounds."[5]

The trial court ruled that Jesus's interview was admissible in its entirety. Relying on *Berghuis v. Thompkins* (2010) 560 U.S. 370, the court held that Jesus impliedly waived his *Miranda* rights by speaking with detectives after indicating that he understood his rights. The court noted that it had reviewed the entire interview and found "there has been a knowing and intelligent, voluntary waiver based on the totality of the circumstances, given that there was an implied waiver."

3. Jesus Forfeited His Current Argument

Jesus now contends that the "trial court erred by finding appellant made a knowing, intelligent and voluntary waiver of his constitutional rights" because his incriminating statements "were made in response to implied threats and promises of leniency by the detectives and not as a knowing and intelligent waiver of appellant's *Miranda* rights." The Attorney General asserts that this argument is forfeited because it was not raised below. We agree.

Evidence Code section 353 provides in relevant part that "[a] verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, based on the

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[5] Jesus's counsel also argued that, if the interview were found admissible, the court should exclude Thompson's statement, "Because you fucking assholes shot an eight-year-old girl in the back of the head, that's why." Counsel contended, "that's an inflammatory perception of my client, and I don't think it really serves any particular purpose in that interview."

erroneous admission of evidence unless: [¶] (a) [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." In accordance with this statute, courts consistently have held that the failure to make a timely and specific objection on the ground asserted on appeal constitutes a forfeiture of that ground on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.) "The statute does not require any particular form of objection. Rather, 'the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.] What is important is that the objection 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. If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*Id.* at pp. 434-435.)

Here, Jesus did not ask the court to exclude his statements on the ground that they were the product of coercive threats or promises; he asked the court to exclude them because he did not understand or waive his *Miranda* rights. Jesus contends his argument below "essentially was the same" as that raised here

and points to his counsel's use of the word "willing" in his objection to the trial court. Both arguments claim that Jesus's statements were involuntary, but they do so on substantially different grounds. Making a statement due to the failure to understand *Miranda* warnings is not the same as making a statement in response to threats or promises, whether or not the same word ("willing") may be used in either context. The trial court did not have an opportunity to evaluate Jesus's current argument, and we will not do so for the first time on appeal.

4. Even were the Argument Preserved, it would Fail

Even if we did consider Jesus's argument, however, we would conclude that Jesus's statements were not the involuntary product of coercive threats or promises.

"An involuntary confession may not be introduced into evidence at trial. [Citation.] The prosecution has the burden of establishing by a preponderance of the evidence that a defendant's confession was voluntarily made. [Citations.] In determining whether a confession was voluntary, "'[t]he question is whether defendant's choice to confess was not 'essentially free' because his [or her] will was overborne.'" [Citation.] Whether the confession was voluntary depends upon the totality of the circumstances. [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 169; see also *People v. McWhorter* (2009) 47 Cal.4th 318, 347 ["'In determining whether or not an accused's will was overborne, 'an examination must be made of "all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." [Citation.]' [Citation.]'"].)

A confession "elicited by any promise of benefit or leniency," whether express or implied, is involuntary and therefore

inadmissible. (*People v. Holloway* (2004) 33 Cal.4th 96, 115.) A confession elicited by a threat is viewed analogously because threats of penalty contain implicit promises of leniency. (*People v. Cahill* (1994) 22 Cal.App.4th 296, 311.) "However, mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. . . . Thus, '[w]hen the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made. [Citation.]" (*People v. Holloway*, *supra*, 33 Cal.4th at p. 115.) Even if police conduct is found to be coercive, a defendant's statement will not be considered involuntary unless it is causally linked to the coercive conduct. (*Colorado v. Connelly* (1986) 479 U.S. 157, 164, fn. 2, & 167; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 347.) We review the voluntariness of a tape recorded confession de novo. (*People v. Peoples* (2016) 62 Cal.4th 718, 740.)

Here, the detectives repeatedly encouraged Jesus to tell the truth and suggested that providing a truthful statement would be to his advantage. This type of encouragement is permissible. Even if we were to conclude that the detectives' conduct was impermissibly coercive, however, there is no evidence that Jesus's will was overborne by it. Jesus's response to Thompson's assertion that he was "gonna get screwed" if he withheld information was "That's all I know, nothing, that's it." Similarly, when Thompson said that a child had been shot, and Delia told Jesus he needed "to come clean, dude," Jesus stood firm and responded "I already told you." Jesus claims that "[l]earning that someone had been shot would have forced appellant to face the

fact that he was facing serious charges," and "would have brought back Thompson's implied promise that it would be less bad for appellant if he told the truth and his threat that appellant was gonna get screwed if he did not." That assertion is not supported by the record, which indicates that Jesus continued to provide evasive answers and lied to the detectives about giving the gun to Montoya even after they allegedly threatened him.

In addition, the evidence of the remaining circumstances of the interrogation supports the conclusion that Jesus's statements were voluntary. The record does not reveal any physical or mental limitations that would affect Jesus's ability to decide whether to speak to the detectives. Jesus argues that he was tired and had been awake for "many more than 19 hours by the time of the interview," but he answered the detectives' questions coherently and did not ask for a break. He also denied that his tiredness was affecting his ability to be truthful, and has not presented any authority demonstrating that being awake for "many more than 19 hours" renders a defendant's statement involuntary.

B. Montoya's Testimony

1. Statements and Rulings

Montoya testified that Carlos received a phone call while she and Carlos were driving to the liquor store on September 3, 2013. She testified that Carlos told her Jesus was the caller, and that Jesus told Carlos to go home and get a gun "[b]ecause Jesus was mad, and he said something was going to happen." She further clarified that Carlos told her that Jesus "said just to get it." Jesus moved to exclude this testimony below on numerous grounds, including relevance, hearsay, foundation, confrontation

clause, undue prejudice, and *Aranda-Bruton*.[6] Carlos did not join any of these objections.

The court ruled that the evidence was relevant and not unduly prejudicial. It explained, "this is evidence they were working together before the killing. It is also consistent with the same manner of death. . . . [I]t's the type of weapon, almost exactly, a handgun, that is alleged to have been used in the current crime so that access to the gun and the knowledge that Jesus had of Carlos's possession and vice versa is something I think is relevant." The court also ruled that Jesus's directive to get a gun was not hearsay, and that the other statements were admissible as coconspirator statements.

2. Any Error in Admitting the Testimony was Harmless

Jesus now contends that the court erred in admitting Montoya's testimony about his statements to Carlos. He argues that the testimony was inadmissible hearsay not subject to any exception and that there was no evidence of a conspiracy. He further argues that the testimony violated *Aranda-Bruton* because it incriminated him while deflecting blame from Carlos. Jesus contends that admission of Montoya's testimony prejudiced him because "the prosecutor was able to use the hearsay statements attributed to [him] and Carlos to suggest planning and argue that the shooting was not committed in the heat of passion." Carlos filed a letter indicating his intent to join these arguments. Because he did not object to Montoya's testimony

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[6] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123. These cases hold that one codefendant's statement implicating another codefendant is not admissible at trial against the non-declarant codefendant.

below, however, we conclude he has forfeited the ability to join Jesus's arguments. (See Evid. Code, § 353, subd. (a).) We further conclude that the arguments cannot prevail in any event, because any error in admitting the evidence was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836 and the more stringent test in *Chapman v. California* (1967) 386 U.S. 18, 24. Specifically, other admissible evidence in the record established that the shooting was planned and was not committed in the heat of passion.

Jesus and the Attorney General address Montoya's testimony as three distinct statements: (1) Carlos told Montoya that Jesus was mad; (2) Carlos told Montoya that Jesus told him to get a gun; and (3) Carlos told Montoya that Jesus said something was going to happen. The admission of the first statement plainly was harmless under any standard. Montoya testified that she personally observed Jesus was "kind of mad" and was "mad-dogging" cars while he and the others were driving her home shortly before the incident. Montoya's uncontroverted testimony as a percipient witness established that Jesus was mad. Her challenged testimony that Carlos said that Jesus was mad was duplicative.

The second statement, that Jesus told Carlos to get a gun, was not hearsay. "[W]ords of direction or authorization do not constitute hearsay since they are not offered to prove the truth of any matter asserted by such words." (*People v. Reyes* (1976) 62 Cal.App.3d 53, 67; see also *People v. Curl* (2009) 46 Cal.4th 339, 361-362 [instruction to "'get rid' of a pair of boots" was "a directive that was neither inherently true nor false"].) Even if it were, or if its admission violated Jesus's confrontation rights, any error in admitting it was harmless. Montoya testified that Carlos detoured from their intended destination of the liquor store,

drove to his house, and emerged with a silver and black gun that he placed in the middle console of the truck. Regardless of what was said during the phone conversation, there is no dispute that Carlos obtained the gun and placed it in the truck shortly before defendants drove the same truck to the gas station. The surveillance footage from the gas station shows that Jesus was driving the truck and that he was next to Carlos when Carlos displayed the gun to Brandon; the jury could infer from this that Jesus knew Carlos had the gun, whether or not he directed Carlos to get it.

The final statement, that "something was going to happen," was relevant to the prosecutor's theory that defendants were looking for trouble and approached Brandon with a nefarious goal already in mind. It tended to show premeditation and negate defendants' theory that they acted under the heat of passion. Any error in admitting the statement for its truth in support of this purpose was harmless. As discussed below (section II, *post*), the record contained other evidence that defendants acted with premeditation. The introduction of this statement for that same purpose accordingly was harmless.

II. Sufficiency of Evidence

Carlos contends that the evidence was insufficient to support the jury's findings that the murder and attempted murders were willful, premeditated, and deliberate. He argues that it is "clear that the shooting resulted from a rash impulse in response to provocative conduct by Brandon C[.] rather than from preexisting reflection." Jesus joins this argument.

"'"When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it

contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] We determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] In so doing, a reviewing court "presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.]' [Citation.]" (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.)

"'Premeditated' means 'considered beforehand' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled in part by *People v. Scott* (2015 61 Cal.4th 363, 390.) "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'" (*Ibid.*) The key inquiry is whether a rational jury could have concluded that the crime occurred as a result of preexisting reflection rather than a rash impulse. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1626.) Evidence of planning, motive, and the manner of killing is often important to a finding of premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) However, these categories of evidence do not "redefine the requirements for proving premeditation and deliberation," and "do not represent an exhaustive list of evidence that could sustain

a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight." (*People v. Young* (2005) 34 Cal.4th 1149, 1183.) The question remains whether, in light of the whole record, there was substantial evidence from which the jurors could have found that the shootings were the result of preexisting thought and the careful weighing of considerations. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1270.)

Here, there was such evidence. Montoya testified that Jesus was mad and was "mad-dogging" cars during the drive to her house, shortly before defendants went to the gas station. Brandon testified that Jesus acted "confrontational" and initiated a verbal altercation with him at the gas station. Carlos escalated the altercation by displaying a weapon that Montoya testified Jesus told him to get, and both defendants gestured at Brandon and approached him, driving him from the line back to his car. Defendants continued the altercation despite Lorena and Brandon both stating that children were present, and despite Brandon leaving them and getting into his car. After they were pepper sprayed, defendants slowly wiped their faces, appeared to talk with one another and their friend, and got into their truck. They chose to pursue Brandon, knowing there were other people in the car, and followed him into a residential neighborhood. Jesus fired a series of shots while Carlos continued to follow Lorena's car, and then fired a second series of shots. All of this evidence supports the jury's finding that defendants reflected before and during the undertaking of their crimes.

Carlos contends that he and Jesus were "robb[ed] . . . of reasoned judgment" when they were pepper sprayed, such that they could not have deliberated or considered their actions. This

contention is not borne out by Thompson's testimony about the effects of pepper spray or defendants' conduct after they were sprayed. Carlos and Jesus followed Brandon, turning into a residential area to do so, shot at his car multiple times, and disposed of the gun. The evidence also suggests that, at some point, defendants switched drivers, which the jury could infer facilitated the chase, the shooting, or both. All of these actions suggest deliberation and premeditation; there were multiple junctures at which defendants could have ceased their conduct but chose to move forward. Sufficient evidence supports the jury's findings.

III. Jury Instructions

Defendants contend that the court erroneously instructed the jury about provocation and the kill zone theory of attempted murder. We conclude that any error was not prejudicial.

A. Provocation Instruction

1. Background

Defendants requested that the court instruct the jury on provocation using CALCRIM Nos. 522 ("Provocation: Effect on Degree of Murder") and 570 ("Voluntary Manslaughter: Heat of Passion—Lesser Included Offense). The prosecutor opposed both instructions on the ground that a defendant who instigates an altercation cannot claim he was provoked when the victim responds to his challenge. In the alternative, the prosecutor proposed that, if the court delivered CALRIM No. 570, it further instruct the jury, "A defendant who provokes a physical encounter by rude challenges to another with threats of violence or violent conduct is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent or actual use of such force." The prosecutor's

proposal was an adaptation of the following language in the Bench Notes to CALCRIM No. 570, a quotation from *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1303 (*Johnston*): "[A] defendant who provokes a physical encounter by rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim that he was provoked into using deadly force when the challenged person responds without apparent (or actual) use of such force."

Defendants opposed the prosecutor's proposed modification. They agreed that it was a correct statement of the law, but argued it was confusing and suggestive, as well as duplicative of language about a defendant setting up "his own standard of conduct" already included in CALCRIM No. 570. The trial court rejected these contentions and ruled that it would give CALCRIM No. 570 with the language from *Johnston*, rather than the modification the prosecutor proposed. The trial court explained, "That quotation which is taken from Johnston I think is a correct statement of the law. I believe that it may or may not apply depending on the jurors' findings, but I do think they need some guidance and . . . I don't think it would confuse or that it's unduly prejudicial, so I will give it." The court added the language to CALCRIM No. 570 when it instructed the jury. It did not add to or modify CALCRIM No. 522 or CALCRIM No. 603 ("Attempted Voluntary Manslaughter: Heat of Passion—Lesser Included Offense").

2. Analysis

Defendants each argue that the trial court's modification of CALCRIM No. 570 was not supported by the evidence, was argumentative and suggestive, and lightened the prosecutor's burden of proof. They characterize the modification as

"unnecessary [and] unwarranted," because "there was no substantial evidence that either [defendant] made threats of violence or death to anyone in [Lorena's] car." They additionally claim the modification "resulted in withdrawing a lesser included offense from the jury's consideration" because it "did not instruct the jury it was up to the jury to determine whether [defendants] provoked [Brandon] to act or whether [Brandon] provoked [defendants] to act." They further assert that the instruction "directed the jury to not only draw inferences favorable to the prosecutor but also find [defendants] were not entitled to claim provocation." These contentions are not persuasive. Even if they were, any error in the instruction was harmless beyond a reasonable doubt in light of the jury's findings that defendants acted with premeditation and deliberation; such findings inherently negate the conclusion that defendants acted in the heat of passion.

"'A trial court has a duty to instruct the jury "sua sponte on general principles which are closely and openly connected with the facts before the court."'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824.) The court also has a sua sponte duty to instruct on the defendant's theory of the case, including defenses the defendant is relying on and defenses that are not inconsistent with the defendant's theory of the case, if there is substantial evidence to support them. (*People v. Abilez* (2007) 41 Cal.4th 472, 517.) Courts do not, however, have a sua sponte duty to give "pinpoint" instructions. (*People v. San Nicolas* (2004) 34 Cal.4th 614, 669 (*San Nicolas*); *People v. Saille* (1991) 54 Cal.3d 1103, 1119 (*Saille*).) A pinpoint instruction is one that relates "particular facts to a legal issue in the case or 'pinpoint[s]' the crux of a defendant's case." (*Saille*, *supra*, 54 Cal.3d at p. 1119.)

A court must give a pinpoint instruction on request when there is substantial evidence supportive of the theory. (*Ibid.*) Like all jury instructions, pinpoint instructions should not be argumentative, meaning they should not "recite[ ] facts drawn from the evidence in such a manner as to constitute argument to the jury in the guise of a statement of law," or invite the jury to draw inferences favorable to one side from specified items of evidence. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1244.)

Defendants first argue that the modification should not have been given because there was no substantial evidence that they threatened "violence and death" to Brandon and his family. The record is to the contrary. Brandon testified that Carlos displayed a gun, easily accessible beneath his shirt, and approached the car. While Lorena testified that no explicit verbal threats of violence or death were made, the jury could conclude that Carlos's display of the gun, and repeated lifting of his shirt in Lorena's line of sight, was an implicit threat of violence to Brandon, Lorena, and the children. Lorena testified that she assumed defendants had a gun based on this conduct, that Carlos seemed angry, and that Brandon seemed scared. The jury could conclude from this evidence that defendants threatened Brandon, Lorena, and the children. Defendants suggest that Brandon and Lorena's testimony was not credible, but the credibility of witness testimony is a jury determination that we do not revisit on appeal. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Moreover, even if there were no evidence that defendants threatened Brandon and his family, it is unclear how the challenged instruction would prejudice defendants. It instructs the jury that a defendant "who provokes a physical encounter by

rude challenges to another person to fight, coupled with threats of violence and death to that person and his entire family, is not entitled to claim" provocation. If the evidence did not support a jury finding that defendants made threats of violence, then under the instruction they *would* be entitled to claim provocation.

Defendants next contend that the modification was argumentative and favored the prosecution because it did not instruct the jury that the question of who provoked whom was one of fact for the jury to decide. Instead, they claim, it "invited the jury to conclude that [defendants] were the initial aggressors and, therefore, they were not entitled to invoke the heat-of-passion defense." We disagree.

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.) We presume that the jury is "able to understand and correlate instructions." (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Thus, the omission of explicit language in the modification that the jury was responsible for determining whether defendants provoked the challenges or made threats must be considered in light of the other instructions the court delivered. Those instructions unambiguously informed the jury, "You must decide what the facts are. It is up to all of you, and you alone, to decide what happened, based only on the evidence that has been presented to you in this trial." The jury also was instructed that "Some of these instructions may not apply, depending on your findings about the facts of the case. *Do not assume just because I give a particular instruction that I am suggesting anything about the facts*. After you have decided what

the facts are, follow the instructions that do apply to the facts as you find them." These instructions informed the jury that it was responsible for making factual findings and applying instructions that were applicable in light of those findings. The court was not required to repeat these directives in conjunction with each instruction that required a factual finding.

Nothing in the modification—which defendants conceded was legally correct—lightened the prosecution's burden of proof. The court repeatedly informed the jury that the prosecution had the burden of proving its case beyond a reasonable doubt. Indeed, the paragraph of CALCRIM No. 570 immediately preceding the modification stated, "The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder."

Even if the modification were erroneous, the error would be harmless beyond a reasonable doubt. The jury found that defendants murdered Desirae (and attempted the murders of Brandon, Lorena, and Mary Jane) with premeditation and deliberation. These findings, which were supported by substantial evidence (see, section II, *ante*), establish that defendants acted with a state of mind "manifestly inconsistent with having acted under the heat of passion." (*People v. Wharton* (1991) 53 Cal.3d 522, 572; see also *People v. Peau* (2015) 236 Cal.App.4th 823, 828-832.) Defendants have not challenged the propriety of the court's instructions regarding first-degree murder based upon premeditation, and deliberation. It is well recognized that "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides

the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646; *People v. Peau*, *supra*, 236 Cal.App.4th at p. 830.) The same principle applies when the alleged error is not failure to give an instruction but rather the delivery of an argumentative or unsupported instruction.

B. Kill Zone Instruction

1. The Kill Zone Theory

To obtain a conviction for attempted murder, the prosecution must prove that the defendant intended to kill the alleged victim, not someone else; intent cannot be transferred between victims. (*People v. Bland* (2002) 28 Cal.4th 313, 328 (*Bland*).) "Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Ibid.*) However, "[t]he conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them." (*Bland*, *supra*, 28 Cal.4th at p. 329.) This "kill zone" theory holds that a defendant may have a concurrent intent to kill a specific victim and those around him or her "'when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity.'" (*Ibid.*) That is, "a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of

that victim." (*People v. Smith* (2005) 37 Cal.4th 733, 746.) The kill zone theory "is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others." (*Bland*, *supra*, 46 Cal.4th at p. 331, fn. 6; see *People v. Stone* (2009) 46 Cal.4th 131, 137.) The "defendant's mental state must be examined as to each alleged attempted murder victim." (*Bland*, *supra*, 28 Cal.4th at pp. 327-328.)

The kill zone theory is not automatically applicable every time a defendant fires at a group of people. In *People v. Perez* (2010) 50 Cal.4th 222, the Supreme Court concluded that a defendant who fired one shot into a group of eight people could not be convicted of eight attempted murders on the kill zone theory. Instead, the Court held that the evidence supported a single conviction for attempted murder. (*Id.* at pp. 224-225.) The Court explained that "neither *Bland* nor *Smith* stands for the proposition that to the extent shooting a single bullet at a group of persons endangers them all, the shooter may be found guilty of the attempted murder of every individual in the group on that basis alone." (*People v. Perez, supra*, at p. 231.) Even though the defendant "endangered the lives of every individual in the group into which he fired the single shot," he did not target a single individual and did not use a means of force calculated to kill everyone in the group. (*Id.* at p. 225.) The Court of Appeal reached a similar conclusion in *People v. McCloud* (2012) 211 Cal.App.4th 788, in which a defendant was convicted of 46 counts of attempted murder for firing 10 shots into a crowd of approximately 400 partygoers. The Court of Appeal reversed the defendant's convictions on all but eight of the attempted murders.

(Two of the 10 shots resulted in completed murders. (See *People v. McCloud*, *supra*, 211 Cal.App.4th at p. 790.)) The court held that the kill zone theory does not apply "if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury." (*Id.* at p. 798.) It further held that the kill zone theory does not apply if "the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual. Rather, the kill zone theory applies only if the evidence shows that the defendant tried to kill the targeted individual *by killing everyone in the area in which the targeted individual was located*. The defendant in a kill zone case chooses to kill *everyone* in a particular area as a means of killing a targeted individual within that area. In effect, the defendant reasons that he cannot miss his intended target if he kills everyone in the area in which the target is located." (*Ibid.*, emphasis in original.)

2. Kill Zone Instruction

While the court was reading instructions to the jury, the prosecutor made a belated request for an instruction on the kill zone theory of attempted murder. Defendants objected that the proposed instruction, arguing that CALCRIM No. 600 ("Attempted Murder"), was not applicable because there was no evidence that they intended to kill anyone other than Brandon. They also contended that the instruction was unduly prejudicial under Evidence Code, section 352. The court overruled these objections and instructed the jury as follows, with emphases added:

"A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict a defendant of the attempted murder of Mary [Jane L.] *or* Lorena [I.], the People must prove that the defendant not only intended to kill Brandon C[.] but also either intended to kill Mary [Jane L.] *or* Lorena [I.], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Mary [Jane L.] *or* Lorena [I.] or intended to kill Brandon C[.] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Mary [Jane L.] *and* Lorena [I.]."[7]

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[7] This was the written instruction given to the jury. The court's oral instruction differed slightly; the differences are emphasized: "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or kill zone. In order to convict a defendant of the attempted murders of Brandon [C.], Mary [Jane L.] *and* Lorena [I.] the People must prove that the defendant not only intended to kill Brandon C[.] but also either intended to kill Brandon C[.], Mary [Jane L.] *and* Lorena [I.] or intended to kill everyone within the kill zone. If you have a reasonable doubt as to whether the defendant intended to kill Brandon C[.], Mary [Jane L.] *and* Lorena [I.] or intended to kill Brandon C[.] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Mary [Jane L.] and Lorena [I.]." "To the extent a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury will control." (*People v. Wilson* (2008) 44 Cal.4th 758, 803.) We accordingly reject the Attorney General's reliance on the oral instruction.

3. Analysis

a. Substantial Evidence

Defendants contend that the kill zone instruction was improper for several reasons. The first is that it was not supported by substantial evidence. "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) They argue that such error was present here because there was no evidence that they intended to kill everyone in Lorena's car in order to kill Brandon. At most, they contend, the evidence showed that they did not care that Lorena and the children were in the car and placed them at a risk of lethal harm while attacking Brandon. We disagree.

The evidence showed that defendants followed Lorena's car as it wended through a residential neighborhood at a high rate of speed. Defendants knew that their target victim Brandon, a passenger in the car, was not the only person in the vehicle. They nevertheless fired at least nine bullets at the car, more than double the number of passengers in the car. They first fired approximately five shots; when the car did not stop, they fired a second volley of shots. Jesus told detectives he stopped shooting only when the gun ran out of ammunition. The car was struck at least four times during the onslaught. "Even if the jury found that defendant[s] primarily wanted to kill [Brandon] rather than [Brandon's] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers when [defendants] . . . fired a flurry of bullets at the fleeing car and thereby created a kill zone." (*Bland*, *supra*, 28 Cal.4th at pp. 330-331.) In other words, the jury reasonably could infer from the evidence that defendants "harbored a specific intent to kill every living being

within the [car] they shot up." (*People v. Vang* (2001) 87 Cal.App.4th 554, 563-564.)

Defendants emphasize that all four bullets that pierced the car did so on the right rear side. They claim that this indicates that "Jesus was not firing randomly into the car in an effort to kill everyone inside the vehicle, nor that he aimed the gun at [Lorena], intending to kill [Lorena], nor that he intentionally shot into other areas of the car with the intent to kill other persons who might be in the backseat." While the jury could have reached that conclusion, the alternative conclusion that defendants were firing at the car in an effort to kill everyone inside also was supported by substantial evidence. The kill zone instruction was properly given on this record.

b. Kill Zone Undefined

Defendants next argue that the kill zone instruction was legally erroneous because it does not define the terms "kill zone" or "zone of harm." They assert that the absence of definitions for these terms is "likely to mislead or confuse a jury" and does not "adequately provide meaningful limits on the 'kill zone' where individuals might suffer harm or be at risk of suffering harm." This contention is not persuasive. The "kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack." (*People v. Perez*, *supra*, 50 Cal.4th at p. 232.) That is, it presents a question of fact not amenable to a rigid definition. Moreover, the terms "kill zone" and "zone of harm" are not technical legal terms with a peculiar meaning that must be defined for a jury of laypeople. (See *People v. Estrada* (1995) 11 Cal.4th 568, 578.) "We credit jurors with intelligence and common sense [citation] and do not assume that these virtues will abandon them when presented with a court's

instructions." (*People v. Coddington* (2000) 23 Cal.4th 529, 594, overruled on another ground by *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069 & fn. 13.)

Defendants contend that the prosecutor's argument underscored the misleading nature of the instruction. They point to his statement that "A person who primarily intends to kill one person may also concurrently intend to kill other persons within a particular zone of risk. This zone is termed the kill zone. If I fire at a car not once, but if I fire multiple times, nine times, and if I hit that car four separate times and one child in there dies, I have created a kill zone. I have created an area of danger. [¶] Isn't that what happened here? He was trying to kill Brandon C[.], but he created a kill zone for everybody in that car." Defendants omit from their excerpt, however, the prosecutor's succinct and accurate summary of the kill zone theory: "*If you're trying to kill everyone to get that one, everybody in that zone is a victim of attempted murder. That's what the law says, and that's what he did.*" Taken as a whole rather than as isolated segments, the prosecutor's argument accurately conveys the kill zone theory.

c. Concurrent and Specific Intent

Defendants also argue that the instruction—and the CALCRIM pattern instruction on which it is based—"gives a misleading characterization of the necessary element of specific intent required for attempted murder." They explain, "Because the instruction refers to the concept of concurrent intent . . . and never mentions specific intent, a jury could reasonably infer that the instruction is introducing a different concept of intent that can be used as a substitute for the specific intent that would otherwise be required under the attempted murder instruction."

The fundamental premise underlying this argument is that "the concept of 'concurrent intent to kill'" is not "a legally recognized theory for prosecuting murder." This premise is faulty. First, the kill zone theory is relevant to the crime of attempted murder, not murder. Second, although concurrent intent "is not a legal doctrine," our Supreme Court has recognized that it is "a reasonable inference the jury may draw in a given case." (*Bland*, *supra*, 28 Cal.4th at p. 331 & fn. 6.) In *Bland*, the seminal case discussing the kill zone theory, the Court held that a jury finding that a defendant harbored the specific intent to kill one victim and the concurrent intent to kill others nearby "fully supports attempted murder convictions as to" the others nearby. (*Id.* at p. 331.) It further held that "a primary intent to kill a specific target does not rule out a concurrent intent to kill others"—i.e., the requisite specific intent necessary to sustain the attempted murder convictions as to the non-primary targets. (*Bland*, *supra*, 28 Cal.4th at p. 331 & fn. 6.)

d. Use of Disjunctive "Or"

Defendants' final argument focuses on the modifications the court made to CALCRIM No. 600. That pattern instruction includes blanks in which the court is to "insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory," "insert name of primary target alleged," and "insert name or description of primary target alleged." In the first three blanks for names of alleged attempted murder victims, the court listed Mary Jane's and Lorena's names using the disjunctive "or"; in the fourth, it linked the names with the conjunctive "and." The instruction thus read in relevant part, with the blanks underlined and conjunctions italicized for emphasis: "In order to convict a defendant of the attempted

murder of Mary [Jane L.] *or* Lorena [I.], the People must prove that the defendant not only intended to kill Brandon C[.] but also either intended to kill Mary [Jane L.] *or* Lorena [I.], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Mary [Jane L.] *or* Lorena [I.] or intended to kill Brandon C[.] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Mary [Jane L.] *and* Lorena [I.]."

Defendants argue that the use of the disjunctive "or" "permitted conviction for attempted murder based on transferred intent." They contend it "effectively did away with the requirement that [they] specifically intended to kill each of the victims, either as individuals or because they inhabited a kill zone. Specifically, the instruction permitted the jury to convict [defendants] of the attempted murder of [Mary Jane] without finding that [defendants] intended to kill [Mary Jane] so long as the jury found that [defendants] intended to kill [Brandon] or [Lorena]. The instruction similarly permitted [defendants] to be convicted of the attempted murder of [Lorena] based on the jury's finding that [defendants] intended to kill [Brandon] or [Mary Jane]." The Attorney General failed to address the substance of this argument in its brief.

The recent case of *People v. Falaniko* (2016) 1 Cal.App.5th 1234 (*Falaniko*), which no party cited, agreed with defendants' argument. In *Falaniko*, the defendant was charged with one count of first degree murder and seven counts of attempted murder arising out of three separate shooting incidents. The trial court used "and/or" to link alleged victims' names when instructing on the kill zone theory with a modified version of CALCRIM No. 600. The resultant instruction read in pertinent

part:

"'In order to convict the defendant of the attempted murder of Meki Siafega as charged in count 2, Esther Vaafuti as charged in count 3, and Kelly Kese as charged in count 4, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Meki Siafega, Esther Vaafuti, *and/**or*** Kelly Kese, *and/or* intended to kill everyone within the kill zone.

'In order to convict the defendant of the attempted murder of Uchenna Ojinna as charged in count 6 and Thomas Sablan as charged in count 7, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Uchenna Ojinna *and/**or*** Thomas Sablan *and/or* intended to kill everyone within the kill zone.

'In order to convict the defendant of the attempted murder of Edward Coral as charged in count 9 and Brandon Alaimalo as charged in count 10, the People must prove that the defendant not only intended to kill a person, but also either intended to kill Edward Coral *and/**or*** Brandon Alaimalo *and/or* intended to kill everyone within the kill zone.'"" (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1242; emphases added by the *Falaniko* court.)

The *Falaniko* court concluded that this instruction misstated the law. (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1244.) It explained, "Even if the jury rejected the kill zone inference, the court's modification of the instruction with the disjunctive 'or' permitted the jury to convict on all charges of attempted murder in each of the three shooting incidents without finding specific intent as to each victim individually." (*Ibid.*) Instead of requiring the jury to find that the defendant specifically intended to kill each of the named victims if it rejected the kill zone theory, the disjunctive "or" joining the alleged victims' names

"permitt[ed] the jury to convict on all charges of attempted murder in each of the three shooting incidents without finding specific intent as to each victim individually." (*Falaniko, supra*, at p. 1245.) The court emphasized that the defendant's mental state must be analyzed separately as to each alleged attempted murder victim. (*Id.* at p. 1244, citing *People v. Perez*, *supra*, 50 Cal.4th at p. 230.)

Although the instruction in *Falaniko* used "and/or" rather than simply "or," the disjunctive "or" was the word that posed the problem. The instruction in *Falaniko* consequently is materially indistinguishable from that given in this case. We adopt the *Falaniko* court's persuasive reasoning and conclude the instruction here was legally erroneous.[8]

The instruction misstated the law regarding the intent element of the attempted murder charges. "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201; see also *Chapman v. California*, *supra*, 386 U.S. at p. 24.) The *Falaniko* court held that the error was reversible as to two of the three shooting incidents.

The first incident, which involved a shooting at a park, involved four alleged victims (attempted murder counts 2-4).

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[8] We note that because the kill zone theory is merely a reasonable inference the jury may draw and "not a legal doctrine requiring special jury instructions" (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6), courts have explained that is "*impossible* for a trial court to commit error, much less prejudicial error, by declining to give a kill zone instruction." (*People v. McCloud*, *supra*, 211 Cal.App.4th at p. 803 [emphasis in original].)

(*Falaniko*, *supra*, 1 Cal.App.5th at p. 1239.) One victim sustained multiple fatal shots. The second victim, who was wounded, was standing 30-50 feet away. The third victim, who also was wounded, was sitting on a bench. The fourth was in her car; the assailants fired a single bullet directly at her after the primary shooting had ceased. (*Id.* at pp. 1239-1240.) The court held that substantial evidence did not support the kill zone instruction as to the fourth victim, but found that error harmless under *People v. Watson*, *supra*, 46 Cal.2d at pp. 836-837 because "any reasonable jury would have convicted on the charge of attempted murder . . . without reliance on a kill zone theory." (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1245.) The court concluded that the instructional error as to the other victims in that incident was not harmless beyond a reasonable doubt. The court reasoned that if the jury disregarded the kill zone portion of the instruction and found an ordinary specific intent to kill the fourth victim, it could have convicted for the attempted murders of the other victims "without separate findings that appellant intended to kill each of them." (*Id.* at p. 1246.) In light of this "clear path to improper attempted murder convictions" as to those victims, the court reversed the convictions on the counts pertaining to them. (*Ibid.*)

The *Falaniko* court also found reversible error in connection with the second incident (attempted murder counts 6 & 7), a shooting at a night club. There too, the court found that substantial evidence did not support the kill zone theory, and that "the disjunctive wording of the instruction nevertheless permitted conviction for attempted murder without a separate finding of intent as to each of the victims." (*Falaniko*, *supra*, 1 Cal.App.5th at p. 1246.)

The court found the error harmless as to the third incident (attempted murder counts 9 & 10), in which the defendants stood in the middle of the street and fired more than 30 shots at three individuals seated on the front porch of a home. (*Falaniko*, *supra*, 1 Cal.App.5th at pp. 1238, 1246.) The court described this incident as "a classic kill zone scenario" in which the evidence was "undisputed and overwhelming." (*Id.* at p. 1246.) It concluded the instructional error was harmless "because the jury could properly convict under the kill zone theory." (*Ibid.*)

The incident in this case is closely analogous to the third *Falaniko* incident. There was no evidence that defendants specifically targeted Mary Jane or Lorena; the kill zone theory was the only one the prosecution presented as to those victims. As discussed above, there was substantial evidence that this was a "classic kill zone" case: the defendants pursued and attacked their targeted victim, Brandon, in such a way as to demonstrate their concurrent intent to kill everyone inside the car. Thus, the jury properly could—and necessarily did—convict defendants of the attempted murders of Mary Jane and Lorena under the kill zone theory. The erroneous wording did not pertain to Brandon. The instruction required the jury to find that defendants specifically intended to kill Brandon and did not allow the jury to transfer defendants' intent to kill him to Mary Jane or Lorena. The error accordingly was harmless and all three attempted murder convictions stand.

IV. Cumulative Error

Defendants contend there was cumulative error. "To the extent there are a few instances in which we have found error or assumed its existence, no prejudice resulted. The same conclusion is appropriate after considering their cumulative

effect." (*People v. Valdez* (2012) 55 Cal.4th 82, 181.) Similarly, the cumulative effect of any errors in this case was not prejudicial.

V. Custody Credits

Jesus asks that we order the trial court to modify his abstract of judgment to reflect its post-sentencing ruling that he was entitled to 689 days of presentence custody credit. Carlos joins this request, which we grant.

Defendants who have been in custody during the pendency of their charges are entitled to receive credit against their sentence for days served in connection with the charged conduct. (§ 2900.5, subd. (a); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) The trial court has a duty to determine the amount of time served and the total number of custody credits to which a defendant is entitled. (§ 2900.5, subd. (d); *People v. Buckhalter*, *supra*, 26 Cal.4th at p. 30.) Defendants contend, and the Attorney General does not dispute, that the trial court did not perform that duty here. Indeed, the transcript of the sentencing hearing and the abstracts of judgment indicate that neither defendant received any custody credit. (See § 2900.5, subd. (d) ["The total number of days to be credited shall be contained in the abstract of judgment"].)

Jesus filed an ex parte motion for correction of the error in the trial court. (§ 1237.1.) His attorney provided a declaration stating that Jesus was arrested on September 4, 2013 and sentenced on July 24, 2015, and was in custody for the intervening 689 days. The trial court heard Jesus's motion on January 4, 2016 and ordered that he receive 689 days of credit for the days he spent in custody. The trial court's order was not accompanied by an order that the abstract of judgment be

corrected.

Carlos did not file a similar motion to correct his sentence. He seeks to join Jesus's argument, however, claiming that "[i]t appears from the record that [defendants] were arrested at the same time and taken immediately into custody." Although section 1237.1 states that "[n]o appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence custody credits, unless the defendant . . . first makes a motion for correction of the record in the trial court," we previously have held that section 1237.1 precludes an appeal "only if there is no other issue argued." (*People v. Donan* (2004) 117 Cal.App.4th 784, 793.) We accordingly consider this argument as to Carlos as well.

Defendants have the burden to demonstrate their entitlement to credit. (*People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.) They have carried that burden here. The probation reports in the record indicate that both defendants were arrested on September 4, 2013 and remanded into custody at that time. Defendants remained in custody at the time of their preliminary hearing and throughout all proceedings up to and including their sentencing. Defendants accordingly are each entitled to receive 689 days of custody credit for that time.

DISPOSITION

Both defendants' custody credits are ordered corrected to reflect 689 days of presentence custody credit (including conduct credit) instead of 0 days. The clerk of the superior court is instructed to prepare amended abstracts of judgments for both defendants reflecting these corrections and to serve copies on the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.