Filed 3/13/15 P. v. Moreno CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID LOPEZ MORENO, Defendant and Appellant.	B247367 (Los Angeles County Super. Ct. No. BA390713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Laura S Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Theresa A. Patterson and David Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David Lopez Moreno appeals from the judgment entered following his conviction by jury of second degree murder, with findings he personally used a firearm, personally and intentionally discharged a firearm, personally and intentionally discharged a firearm causing great bodily injury and death, and committed the offense for the benefit of, at the direction of, and in association with, a criminal street gang (Pen. Code, §§ 186.22, subd. (b)(1), 187, 12022.53, subds. (b), (c), & (d)). The court sentenced appellant to prison for 40 years to life. We affirm.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established on August 10, 2009, Jesus Medina and her friend, Maria Flores, were in the parking lot of their apartment building on 81st in Los Angeles when Medina saw a man later identified as Cesar Garcia (the decedent). Garcia was riding a bicycle on 81st, away from Figueroa and towards Hoover. Medina heard a gunshot, then saw Garcia fall. Medina also testified she heard at least two gunshots. A second man walked away from Garcia at a normal pace and, as the second man walked to an alley near Figueroa, he put an object in his waistband. Medina believed the object was a gun. Medina called 911, then approached Garcia. No one else approached Garcia and there were no weapons around him.

Flores testified the incident occurred about 4:00 p.m. and she heard three gunshots. According to Flores, after the shooting, the second male moved his right hand and walked away towards Figueroa. Once the second male reached the alley, he ran. Rafael Anguiano, who lived on 81st street at the time of the shooting, testified that prior to the shooting he was on his front porch. He too heard three gunshots, saw Garcia fall, and saw the second man tuck his right hand into his waistband as he walked away towards Figueroa. Medina, Flores, and Anguiano each testified to the effect no one was near Garcia and the second man when the shooting occurred.

Miguel Rodriguez testified that on August 10, 2009, he lived in an apartment on 81st between Hoover and Figueroa. Sometime prior to 5:48 p.m., Rodriguez saw his neighbor "Lazy," later identified as Jerome Saucedo. Saucedo (a member of the Notorious 13 gang of Bell Gardens) was outside the apartment building and socializing with three men, two of whom were Notorious 13 gang (hereafter, Notorious) members. The third man was appellant. About 5:48 p.m., Rodriguez was in his apartment when he heard about three gunshots. Rodriguez exited and saw Saucedo running from the front of the apartment building towards the back. Shortly thereafter, appellant was coming alone from an alley and towards the back of the building, jumping fences. Saucedo asked Rodriguez to let Saucedo's "homey" hide in Rodriguez's residence, but Rodriguez refused. Rodriguez assumed appellant entered the building's laundry room.

Los Angeles Police Officer Bryan Schilling testified that about 5:55 p.m. on August 10, 2009, Schilling and his partner were the first responders to the shooting scene and about two blocks from it when they received the call to go there. Schilling arrived and saw Garcia bleeding from a gunshot wound to his head. The bicycle was between Garcia's legs and no weapons were near him.

Los Angeles Police Detective Bertha Durazo, the primary investigator in this case, testified that about 6:15 p.m., she arrived at the scene and saw Garcia's body. The shooting occurred in an area claimed by the 18th Street gang and another gang. No shell casings were at the scene, a fact consistent with use of a revolver during the shooting. Garcia had been an associate of the 18th Street gang.

On September 26, 2011, Durazo interviewed Saucedo about the shooting. He initially said he was inside his residence, heard gunshots, and went outside. He told Durazo he then saw an unknown male run towards a dead body, grab something, and flee. Durazo testified Saucedo later changed his story.

Detective Durazo testified Saucedo later said, inter alia, the following. Saucedo was in the carport of his apartment building when the shooting occurred. Saucedo's friend (whom Saucedo later identified to Durazo as appellant (aka Sleepy)) was involved in the shooting. After appellant left Saucedo's yard, Garcia "banged on" appellant.

Appellant later "banged on him back." Appellant and Garcia were between cars, and appellant ducked. Appellant reappeared and Garcia, on a bicycle, had a gun.[1] Saucedo saw appellant shoot, then flee eastbound on 81st towards Figueroa.

Appellant returned to Saucedo's apartment through the alley, jumping fences to enter the apartment complex. Appellant asked Saucedo to hide him, but Saucedo refused. Appellant hid in the building's laundry room and at some point changed clothes. Appellant asked Saucedo to get the handgun appellant had left behind apartments near Figueroa.

On September 27, 2011, Detective Durazo interviewed Xene Fernandez, Saucedo's sister. Durazo testified Fernandez said the following. On the day of the shooting, Saucedo's friend David (aka Sleepy) came over to Saucedo's residence. Saucedo and Sleepy later went outside. Fernandez was inside when the shooting occurred. After the shooting, Fernandez saw Sleepy jump a fence and approach the rear of the apartment building from an alley. Fernandez also saw Sleepy change his shirt around the time police spoke with him. Fernandez heard Sleepy tell police that Sleepy had been inside sleeping when the shooting occurred, but Sleepy's statement was a lie. Saucedo told Fernandez that Sleepy committed the shooting.

An autopsy revealed Garcia died from a single gunshot wound to his right temple. The bullet traveled from right to left and "slightly front" to back. Stippling near the wound indicated the gun, when fired, was most likely four to twelve inches from Garcia.

Bell Gardens Police Officer Angel Puente, a gang expert, testified he had been a police officer over 11 years, and had worked in the department's gang unit from 2004 through 2010. Notorious was an active gang in Bell Gardens during that six-year period. In 2009, the gang had 25 to 30 active members. Some of the gang's primary activities were murder, attempted murder, assault with a deadly weapon, robberies, and vandalism.

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[1] Durazo denied any evidence obtained during her investigation supported Saucedo's assertion Garcia had a gun.

When Detective Puente referred to primary activities, he was referring to crimes Notorious members were "consistently being arrested [for] and convicted of." He testified these were crimes of which he was aware based on his personal experience. The following then occurred: "[By The Prosecutor]: Have you consulted resources like databases, looked at other officers to confirm those numbers? [¶] [Detective Puente:] Yes. One, personal knowledge through my investigations involving [Notorious], and I had a records clerk pull up several reports related to [Notorious]."[2]

Detective Puente personally had arrested two Notorious members for murder. He also personally had investigated three to five cases involving the gang. One of those cases involved assault with a deadly weapon; another involved robbery and murder. Puente was aware of two murder convictions involving Notorious members. There were other murders not yet in court because there was not enough evidence. Based on four "subjects" from Notorious, which Puente testified was "obviously a small sample," he counted five robberies within the last 10 years, two of which robberies occurred in the last five years. Notorious and the 18th Street gangs were rivals. Based on a 2005 shooting, Notorious member Omar Ramirez was convicted of attempted murder. Based on a 2006 shooting, Notorious member Mike Oquendo was convicted of murder.

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[2] During cross-examination, Detective Puente testified his opinion that murder, attempted murder, robberies, and vandalism were primary activities of Notorious was based on "my experience, 11 years as a police officer in Bell Gardens, statements from other officers, research that I've done and had records clerks look up police reports involving [Notorious]." Puente also testified that, at the preliminary hearing, he testified "there just has to be more than one criminal case against a gang member before you consider the crime a primary activity of a particular gang." Puente added, "if you have a group of incidents, then you're picking the most common ones, the primary." During redirect examination, the prosecutor asked if a primary activity was a principal or chief occupation of a gang member, and Puente replied yes.

Detective Puente testified "banging" was street vernacular referring to one person confronting another to determine what gang the latter was from. If a gang member "banged on" a rival gang member and the latter "banged back," a violent confrontation could be expected. Puente was familiar with appellant and Saucedo. Appellant was a member of Notorious and his moniker was Sleepy. Saucedo was known as Lazy from Notorious.

In response to a hypothetical question based on evidence, Detective Puente opined the shooting benefited the shooter's gang and the shooter. When the victim "bang[ed] on" the shooter and the shooter "bang[ed] back," this showed the shooting was committed in association with the gang because such conduct was typical of gang members, and they usually responded with violence. In defense, a psychologist testified concerning various factors affecting alleged eyewitness identifications.

ISSUES

Appellant claims (1) the trial court erred by failing to give sua sponte CALJIC No. 8.50, (2) the jury instructions allowed the jury to convict appellant of murder without considering whether imperfect self-defense required a voluntary manslaughter conviction, (3) the prosecutor committed misconduct during jury argument, (4) cumulative prejudicial error occurred, and (5) insufficient evidence supported the true finding as to the gang enhancement allegation.

DISCUSSION

1. *The Trial Court Did Not Prejudicially Err by Failing to Give CALJIC No. 8.50.*

Appellant claims the trial court prejudicially erred by failing to give sua sponte CALJIC No. 8.50, which distinguishes murder and manslaughter. The instruction, inter alia, indicates the People must prove beyond a reasonable doubt the absence of imperfect self-defense. CALJIC No. 8.50 states, inter alia, "To establish that a killing is murder . . . and not manslaughter, *the burden is on the People to prove beyond a reasonable doubt* each of the elements of murder and *that the act which caused the death was not done . . . in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury*." (Italics added.)

In essence, appellant argues that because the trial court did not give CALJIC No. 8.50 with its above italicized language, the jury was never told (1) to prove the killing was murder, the People had to prove beyond a reasonable doubt appellant did not act in imperfect self-defense and (2) even if a defendant has intent to kill, imperfect self-defense negates malice, precluding guilt for murder. For the reasons below, we reject appellant's claim of prejudicial error.

a. *Pertinent Law.*

In *People v. Rios* (2000) 23 Cal.4th 450 (*Rios*), our Supreme Court stated, "The distinguishing feature [between murder and the lesser included offense of manslaughter] is that murder includes, but manslaughter lacks, the element of malice. . . . [¶] Malice exists, if at all, only when an unlawful homicide was committed with the 'intention unlawfully to take away the life of a fellow creature' [citation], or with awareness of the danger and a conscious disregard for life [citations]. In certain circumstances, however, a finding of malice may be precluded, and the offense limited to manslaughter, even when an unlawful homicide *was* committed with intent to kill. In such a case, the homicide, though not murder, can be no less than voluntary manslaughter." (*Id.* at p. 460, fn. omitted.)

Rios stated murder is the unlawful killing of a human being with malice, and a defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. (*Rios, supra*, 23 Cal.4th at p. 460.) *Rios* observed " 'Generally, the intent to unlawfully kill constitutes malice,' " (*ibid.*) but a defendant who intentionally and unlawfully kills nonetheless lacks malice when the defendant acts in imperfect self-defense, i.e., with an unreasonable but good faith belief in the need to act in self-defense. (*Id.* at pp. 453, 460.) *Rios* stated, these mitigating "circumstances" (*id*. at p. 461) reduce an intentional, unlawful killing from murder to voluntary manslaughter " 'by negating the element of malice' " (*ibid.*, italics omitted, quoting *People v. Breverman* (1998) 19 Cal.4th 142, 154 otherwise inherent in such a homicide.

In a murder case, unless the People's evidence suggests the defendant killed in imperfect self-defense, the defendant is obligated to proffer evidence on this issue sufficient to raise a reasonable doubt of the defendant's guilt for murder. (*Rios, supra,* 23 Cal.4th at pp. 461-462.) *Rios* stated, "If the issue of . . . imperfect self-defense is thus 'properly presented' in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704 [95 S.Ct. 1881, 1892, 44 L.Ed.2d 508] [*Mullaney*]), the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.] . . . In such cases, if the fact finder determines the killing was intentional and unlawful, but is not persuaded beyond reasonable doubt that [imperfect self-defense] was absent, it should acquit the defendant of murder and convict him of voluntary manslaughter. [Citations.]" (*Rios*, at p. 462.) This follows because evidence of imperfect self-defense sufficient to raise a reasonable doubt of the defendant's guilt for murder already has been presented to the trier of fact, and the People have not proven beyond a reasonable doubt imperfect self-defense was absent.

Appellate review of the adequacy of instructions is based on whether the trial court fully and fairly instructed on the applicable law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether error has been committed in giving or not giving jury instructions, an appellate court *must consider the instructions as a whole and assume jurors are intelligent persons capable of understanding and correlating all given instructions.* (*Ibid.*) Moreover, " '[i]nstructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*) The ultimate question is whether there is a reasonable likelihood the jury applied the challenged instruction in an impermissible manner. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220.)

As mentioned, appellant argues, inter alia, the court, using CALJIC No. 8.50, had a sua sponte duty to instruct the jury that to prove the killing was murder, the People had to prove beyond a reasonable doubt appellant did not act in *imperfect* self-defense. Appellant cites no case holding that, nor have we found any such case.

Our independent research has revealed cases addressing an analogous claim, i.e., a claim of prejudicial instructional error regarding the People's burden of proof beyond a reasonable doubt (hereafter, People's burden) in relation to *perfect* self-defense.

In *People v. Sanchez* (1947) 30 Cal.2d 560 (*Sanchez*), the trial court refused the following defense-requested instruction relating reasonable doubt to perfect self-defense: " 'In a trial for murder it is not necessary for the defendant to establish self defense by evidence sufficient to satisfy the jury that the self defense was true, but if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was justified, then he is entitled to an acquittal.' " (*Id.* at p. 571.) Such an instruction combines, in a single instruction, principles of reasonable doubt and justification (self-defense).

Notwithstanding the trial court's refusal, *Sanchez* later stated, " '. . . its principle was repeatedly brought to the attention of the jury for, . . . they were told as to murder of the first degree, again as to murder of the second degree, and again as to manslaughter, that to warrant a verdict of guilty they must believe 'beyond a reasonable doubt and to a moral certainty' that, among other things, the killing 'was not justifiable [or was unjustifiable] under the law as I have given it to you in the preceding instructions.' *They were also told that they 'should consider all of the instructions as a whole in arriving at' their verdict.* Under the circumstances the error in failing to give the instruction as requested was not prejudicial." (*Sanchez, supra,* 30 Cal.2d at pp. 571-572, italics added.)

In *People v. Sandoval* (1970) 9 Cal.App.3d 885 (*Sandoval*), the trial court gave the "standard instruction on reasonable doubt." (*Id.* at p. 887.) The trial court also gave defense-requested instructions on self-defense. (*Ibid.*) The defendant did not ask that the trial court give, and the trial court did not give, a *Sanchez* instruction (*Sandoval*, at p. 887), i.e., an instruction which *Sandoval* characterized as instructing that the jury "should acquit defendant if the evidence raised a reasonable doubt as to whether defendant was justified in killing [the victim] in self-defense." (*Ibid.*) *Sandoval* concluded, "Here the judge fulfilled his *sua sponte* obligations when he instructed the jury on the general principles of reasonable doubt and self-defense." (*Id.* at p. 888.) *Sandoval* observed, "A trial court must instruct the jury *sua sponte* on 'those principles of

law commonly or closely and openly connected with the facts of the case . . . ,' *but need not instruct on specific points developed at the trial unless requested*. [Citations.] . . . The *Sanchez* instruction is a specific point, actually a *pinpointing* or amplification of two general principles -- the rule of reasonable doubt and the defense of justification." (*Sandoval*, at p. 888, second and third italics added.) *Sandoval* also stated, "Defendant's failure to request the amplifying *Sanchez* instruction bars his claim of error on appeal. [Citation.]" (*Ibid.*)

People v. Adrian (1982) 135 Cal.App.3d 335 (*Adrian*) involved a trial court's refusal to give a *Sanchez* instruction in an assault with a deadly weapon case. (*Id.* at p. 336.) *Adrian* held such an instruction must be given "upon request whenever the claim of self-defense has been properly tendered and the evidence warrants submitting the issue to the jury." (*Ibid.*) *Adrian* treated the instruction as a pinpoint instruction. (*Id.* at pp. 337-341.) (*Adrian* observed, "As to homicide cases, the function performed by the *Sanchez* instruction is now fulfilled by CALJIC No. 5.15.")[3] (*Id.* at p. 342, fn. 7.) *Adrian* concluded the trial court's erroneous refusal to give the instruction was harmless *in light of the fact the court gave CALJIC No. 2.90, CALJIC No. 2.01, and, on perfect self-defense, CALJIC No. 5.30*. (*Id.* at pp. 341-342.)

Similarly, in *People v. Wittig* (1984) 158 Cal.App.3d 124 (*Wittig*), the defendants were convicted of, inter alia, assault with a deadly weapon (*id.* at p. 126) and the People (in light of *Adrian*) conceded the trial court erroneously refused instructions that the defendants "were entitled to an acquittal if the evidence of self-defense was sufficient to raise a reasonable doubt." (*Wittig*, at p. 135.) However, *Wittig* concluded the error was harmless *because the trial court gave CALJIC Nos. 2.90 and 2.01, and instructions on perfect self-defense*. (*Id.* at pp. 135-136.)

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[3] The trial court in the present case gave CALJIC No. 5.15 (as to perfect self-defense). That instruction stated, "Upon a trial of a charge of murder, a killing is lawful if it was justifiable. The burden is on the prosecution to prove beyond a reasonable doubt that the homicide was unlawful, that is, not justifiable. If you have a reasonable doubt that the homicide was unlawful, you must find the defendant not guilty."

In sum, as to perfect self-defense, *Sandoval* concluded a trial court fulfilled its *sua sponte* duty by giving *separate* instructions, i.e., (1) a standard instruction on reasonable doubt, and (2) perfect self-defense instructions. Having done that, the trial court was under *no* sua sponte duty to give a *single* instruction *combining* the concepts of reasonable doubt and perfect self-defense. *Sanchez*, *Adrian*, and *Wittig* concluded a trial court erroneously *refused* to give a *defense-requested* combining instruction relating reasonable doubt to perfect self-defense.

Moreover, *Sanchez*, *Adrian*, and *Wittig* reviewed for prejudice a trial court's erroneous refusal to give a combining instruction relating reasonable doubt to perfect self-defense. *Adrian* and *Wittig* concluded no prejudice occurred because the trial court instructed with CALJIC Nos. 2.90 and 2.01, and with perfect self-defense instructions.

Mullaney involved jury instructions based on a state law requiring "*a defendant* charged with murder to prove that he acted 'in the heat of passion on sudden provocation' in order to reduce the homicide to manslaughter." (*Mullaney*, *supra*, 421 U.S.at p. 684-685, italics added.) *Mullaney* concluded the law violated due process, in part because it shifted the burden of proof to the defendant. (*Id*. at p. 701.) *Mullaney* later stated, "[w]e . . . *hold* that the Due Process Clause requires the *prosecution* to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Id.* at p. 704, italics added.)

Leaving aside the fact *Mullaney* did not involve imperfect self-defense, we note *Mullaney's holding* pertained to error in the *allocation* of the burden of proof—to the *defendant* instead of to the People—in relation to heat of passion. *Mullaney* did not hold a trial court's otherwise correct allocation of the burden of proof to the People was erroneous merely because that allocation was *articulated* (1) in *separate* instructions on the People's burden, heat of passion, and the jury's duty to consider instructions as a whole, respectively, instead of (2) in a *single* instruction *combining* concepts of the People's burden and heat of passion. *Mullaney's* holding does not control the present case.

Moreover, *Adrian* and *Wittig*, which evaluated a trial court's refusal to give a defense-requested *Sanchez* instruction for prejudice, were decided after *Mullaney*. *Adrian* approvingly cited *Sandoval* for the proposition a *Sanchez* instruction is a pinpoint instruction. (*Adrian*, *supra*, 135 Cal.App.3d at p. 339.)

Nonetheless, after the present case was fully briefed, the Fourth District decided *People v. Speight* (2014) 227 Cal.App.4th 1229 (*Speight*). *Speight*, a case involving the interaction between attempted murder and attempted voluntary manslaughter, concluded a trial court erred by failing to instruct sua sponte with CALJIC No. 8.50 that the People were required to prove beyond a reasonable doubt the defendant did not act as a result of *heat of passion*. (*Speight*, at pp. 1233, 1240-1241, 1244.) *Speight* observed the defendant in that case did "not spend much time explaining how the court erred in failing to instruct the jury on that point." (*Id*. at p. 1241.) Nor did the appellate court in *Speight* discuss the fact the trial court in that case gave to the jury (1) CALJIC 2.90, and (2) instructions on attempted murder, malice, attempted voluntary manslaughter, *and heat of passion*.

b. *Application of the Law to This Case.*

(1) *We Assume the Trial Court Erred by Failing to Give CALJIC No. 8.50.*

In the present case, we assume, as a matter of evidence, the issue of imperfect self-defense was properly presented to the jury.[4] However, as mentioned, first, appellant cites no case holding the trial court had a sua sponte duty to instruct, using CALJIC No. 8.50, that the People had to prove beyond a reasonable doubt appellant did not act in imperfect self-defense. Second, *Sandoval*, presenting an analogous situation involving perfect self-defense, militates against any such sua sponte duty to give such a combining instruction.

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[4] Saucedo said Garcia "banged on" appellant and Garcia had a gun; at least three witnesses (Flores, Anguiano, and Rodriguez) testified they heard three gunshots and/or about three gunshots; Garcia was shot only once; and Saucedo saw an unknown male grab something after Garcia was shot. Moreover, the shooting occurred in an area claimed by the 18th Street gang, Garcia had been an associate of that gang, Notorious and 18th Street gangs were rival gangs, and appellant was a Notorious member, facts from which a jury might have concluded appellant was afraid at the time of the shooting.

Third, *Sandoval* concluded a trial court had no sua sponte duty to give a *Sanchez* instruction, i.e., a combining instruction relating reasonable doubt to perfect self-defense, assuming separate instructions were given on those issues. *Adrian* observed that in homicide cases the function performed by a *Sanchez* instruction is now fulfilled by CALJIC No. 5.15. CALJIC No. 5.15 is a combining instruction, relating reasonable doubt to perfect self-defense.

CALJIC No. 5.15 is analogous to CALJIC No. 8.50 to the extent the latter relates the People's burden to imperfect self-defense. By parity of reasoning, we might very well have concluded based on *Sandoval* and *Adrian* that the trial court in the present case had no sua sponte duty to give CALJIC No. 8.50, a combining instruction relating the People's burden to imperfect self-defense, because the court gave separate instructions on (1) the People's burden (CALJIC No. 2.90) and (2) murder (CALJIC No. 8.10), malice (CALJIC No. 8.11), and imperfect self-defense (CALJI C No. 5.17) (all discussed *post*). This is particularly true where, as here, the trial court in the present case also, using CALJIC No. 1.01, told the jury to "[c]onsider the instructions as a whole and each in light of all the others" and we, as an appellate court, must consider the instructions as a whole and assume jurors are intelligent persons capable of understanding and correlating all given instructions. (*Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) Nonetheless, in light of *Speight*, we assume without deciding the trial court in this case erred by failing to give CALJIC No. 8.50 to instruct that the People had the burden to prove beyond a reasonable doubt the absence of imperfect self-defense.

However, we reject appellant's other argument about CALJIC No. 8.50, i.e., because the trial court did not give CALJIC No. 8.50, the trial court never told the jury that, even if a defendant has intent to kill, imperfect self-defense negates malice, precluding guilt for murder. CALJIC No. 8.10 indicated murder required killing with malice. CALJIC No. 8.11 indicated, inter alia, express malice was based on *intent to kill* and if express malice or implied malice was present, no *other* mental state needed to be shown to *establish* malice. CALJIC No. 5.17 indicated a person who killed in imperfect self-defense *lacked* malice and did *not* commit murder. However, imperfect self-defense

negates malice, not intent to kill. CALJIC No. 5.17 did not conflict with CALJIC No. 8.11, the latter of which indicated when malice was established; CALJIC No. 5.17 was exceptive, indicating when malice was not established. The trial court adequately instructed the jury that, even if a defendant has intent to kill, imperfect self-defense negates malice, precluding guilt for murder.

(2) *Any Instructional Error Was Not Prejudicial.*

Even if the trial court erred by failing to give CALJIC No. 8.50, it does not follow we must reverse the judgment. *Speight* concluded trial court error in failing to give CALJIC No. 8.50 could be found harmless beyond a reasonable doubt. (*Speight, supra,* 227 Cal.App.4th at pp. 1245-1246.) We assume without deciding that that standard of prejudice applies here. For the following reasons, we conclude the trial court's failure to give CALJIC No. 8.50 was harmless beyond a reasonable doubt.

First, Penal Code section 1096a, states, "In charging a jury, the court may read to the jury Section 1096, *and no further instruction on the subject* of the presumption of innocence or defining reasonable doubt need be given." (Italics added.) The substance of section 1096 has been incorporated into CALJIC No. 2.90. (*People v. Aranda* (2012) 55 Cal.4th 342, 352.)

Second, *Sandoval* taught a trial court has *no sua sponte duty* to give a combining instruction relating the People's burden to perfect self-defense (where adequate separate instructions were given). *Adrian* indicated CALJIC No. 5.15 is such a combining instruction and, as previously discussed, CALJIC No. 8.50 is analogous. These facts militate against a conclusion the trial court's failure in the present case to give CALJIC 8.50 was *prejudicial* (where, as here, separate instructions, discussed *post*, were given).

The third reason involves the separate instructions given in this case. *Adrian* and *Wittig* considered the separate instructions of CALJIC Nos. 2.90 and 2.01, and perfect self-defense instructions, when evaluating prejudice. In the present case, the trial court gave CALJIC No. 2.90. It stated, in relevant part, "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This

presumption places upon the People the burden of *proving him guilty* beyond a reasonable doubt." (Italics added.)

The court, using CALJIC No. 2.61, instructed on appellant's right not to testify, an instruction that also related the People's burden to *elements* of the charge. The instruction stated, "In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential *element* of the charge against him. No lack of testimony on the defendant's part will make up for a failure of proof by the People so as to support a finding against him on any essential *element*. (Italics added.)

The court, using CALJIC No. 8.10, instructed on the *elements* of murder as follows: "[Appellant is] accused . . . of having committed the crime of murder, a violation [of] section 187 of the Penal Code. [¶] Every person who unlawfully kills a human being with malice aforethought, *is guilty* of the crime of murder in violation of Penal Code section 187. [¶] A killing is unlawful, if it is neither justifiable nor [excusable]. [¶] In order to *prove* this crime, each of the following *elements* must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with *malice*." (Italics added.)

The court gave CALJIC No. 8.11 to define malice. That instruction stated, " 'Malice' may be either express or implied. [¶] Malice is express when there is manifested an intention unlawfully to kill a human being." CALJIC No. 8.11 also set forth the components of implied malice (generally, an intentional act resulting in death and performed with conscious disregard for life). The instruction further stated, "When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought."

The court, using CALJIC No. 5.17, instructed on imperfect self-defense. The instruction stated, in relevant part, "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully *but does not harbor malice* aforethought and is *not guilty* of murder."[5] (Italics added.) Finally, the court gave CALJIC No. 1.01, which told the jury, inter alia, to "[c]onsider the instructions as a whole and each in light of all the others."

In sum, the above instructions were reasonably susceptible of the interpretation that to prove appellant *guilty* of murder beyond a reasonable doubt, the People had to prove the *element* of malice beyond a reasonable doubt and, since a person who killed in imperfect self-defense *lacked* malice and was *not guilty* of murder, the People, proving the *element* of malice, had to prove beyond a reasonable doubt appellant *did not* kill in imperfect self-defense. The above interpretation is consistent with *Rios's* conclusion that when the element of malice is otherwise established, except evidence of the mitigating circumstance of imperfect self-defense (sufficient to raise a reasonable doubt of the defendant's guilt for murder) has been presented to the trier of fact, the People must prove beyond a reasonable doubt the absence of that mitigating circumstance in order to prove beyond a reasonable doubt the presence of the element of malice. Because the trial court gave separate instructions on the People's burden and imperfect self-defense, and told the jury to consider instructions as a whole, no prejudice resulted from the trial court's failure to give CALJIC No. 8.50.

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[5] The court, using CALJIC No. 8.40, instructed on voluntary manslaughter. The instruction stated, "Every person who unlawfully kills another human being *without malice* aforethought but either with an intent to kill, or with conscious disregard for human life, is guilty of voluntary manslaughter in violation of Penal Code section 192, subdivision (a). [¶] There is *no malice* aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." (Italics added.)

Fourth, the trial court did not give a combining instruction relating the People's burden to the murder *element* requiring the killing of a human being, or to the murder *element* requiring that the killing be unlawful; instead the court gave (1) CALJIC No. 2.90, on the People's burden, (2) CALJIC No. 8.10, defining murder, including the elements of the killing of a human being and an unlawful killing and (3) CALJIC No. 1.01, telling the jury to consider instructions as a whole. If the trial court did not err by giving separate instructions on the People's burden and these elements, the court did not prejudicially err by giving separate instructions on the People's burden and the mitigating circumstance of imperfect self-defense.[6]

Fifth, in the present case, the People's evidence contained no direct evidence appellant harbored malice. For example, the People's evidence contained no statement from appellant to police that he harbored malice. Appellant, as was his right, did not testify; therefore, there was no direct testimony he killed in imperfect self-defense. In other words, the evidence appellant killed *with malice*, as well as the evidence he killed *in imperfect self-defense*, was wholly circumstantial.

The court, using CALJIC No. 2.01, instructed on the sufficiency of circumstantial evidence. That instruction indicated if circumstantial evidence permitted two reasonable interpretations, one pointing to guilt and the other to innocence, the jury had to acquit appellant. The evidence of malice pointed to appellant's *guilt for murder* and the evidence of imperfect self-defense pointed to his *innocence for murder* (even though evidence of imperfect self-defense pointed to his guilt for voluntary manslaughter). In sum, CALJIC No. 2.01 was merely another way of restating the reasonable doubt standard of proof, and the jury, by convicting appellant of murder based on circumstantial inferences he harbored *malice*, necessarily rejected circumstantial inferences he killed *in*

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[6] During oral argument here, appellant asserted the jury was told *the prosecution had to prove the elements beyond a reasonable doubt*, and the jury was told malice was an element. However, the jury was never given a combining instruction relating the People's burden to the elements of murder. Instead, the jury was given separate instructions on these issues, i.e., CALJIC No. 2.90, CALJIC No. 8.10 (defining murder with its elements), and CALJIC No. 1.01.

imperfect self-defense. (*Cf. People v. Reliford* (2003) 29 Cal.4th 1007, 1016.) As mentioned, *Sanchez*, *Adrian*, and *Wittig* concluded no prejudicial instructional error occurred, each case relying in part on the fact CALJIC No. 2.01 was given.

Sixth, the court repeatedly instructed on the principle of the People's burden, the standard of proof beyond a reasonable doubt, and/or reasonable doubt, when instructing the jury on the People's burden (CALJIC No. 2.90), the sufficiency of circumstantial evidence (CALJIC No. 2.01), the fact appellant could rely on the state of the evidence (CALJIC No. 2.61), the burden of proof regarding justification on a charge of murder (CALJIC No. 5.15), doubt as to whether first or second degree murder had occurred (CALJIC No. 8.71), partial verdicts (CALJIC No. 8.75), and the firearm use (CALJIC No. 17.19), firearm discharge (CALJIC No. 17.19.5), and gang (CALJIC No. 17.24.2) enhancements. No other burden or standard of proof was enunciated by any instruction in this case.

Seventh, there is the matter of the evidence of appellant's guilt. Even if Saucedo's statements to Detective Durazo provided substantial evidence of imperfect self-defense, the evidence was weak. It was impeached by Saucedo's initial statements to Durazo. In those statements, Saucedo made no mention of Garcia, appellant, Garcia and appellant "banging on" each other, either having a gun, or Saucedo seeing a shooting. According to Saucedo's initial statements, he heard shooting, then went outside and saw an unknown male run toward a dead body, grab something, and flee. Saucedo's ultimate statements to Durazo concerning what happened were a complete change in Saucedo's story to Durazo, and the jury reasonably could have concluded they were fabricated. Moreover, Saucedo's ultimate statements were impeached by the facts Saucedo and appellant were both Notorious members and, according to Rodriguez, after the shooting Saucedo asked Rodriguez to let appellant, Saucedo's "homey," hide in Rodriguez's residence.

On the other hand, the testimony of Medina, Flores, Anguiano, and Rodriguez provided evidence the person who shot Garcia left the scene, but none of those witnesses testified Garcia had a gun. Medina testified no weapons were around Garcia. When

Officer Schilling arrived at the scene, he saw no weapons near Garcia. Detective Durazo denied any evidence obtained during her investigation supported Saucedo's assertion Garcia had a gun.

After the shooting, Rodriguez saw appellant coming towards the back of the building and jumping fences. Appellant hid in the laundry room, at some point changed clothes, and told Saucedo to get the gun appellant had left behind the apartments. These facts were evidence of appellant's consciousness of wrongdoing. Moreover, there was substantial evidence Fernandez heard appellant tell police he had been inside sleeping when the shooting occurred, but she knew appellant's statement was a lie. Saucedo told Fernandez appellant committed the shooting. There was also evidence the shooting was committed for the benefit of a gang. The only direct evidence in this case that Garcia had a gun was the substantially impeached testimony of Saucedo, appellant's "homey." There was overwhelming evidence appellant committed murder, not voluntary manslaughter based on imperfect self-defense.

Eighth, during jury argument, appellant's counsel commented appellant was "entitled to have each of you hold on to the *doubt* that you have." (Italics added.) Appellant's counsel later commented, ". . . I don't have any burden of proof. [The prosecutor] does. [¶] And if you have a reasonable doubt, it's her burden to explain away that doubt so that it goes away. Because while you retain that reasonable doubt, you cannot find my client guilty."

Appellant's counsel later, during jury argument, discussed standards of proof, characterizing them as "possibl[e]," "likely," "probable cause," preponderance of the evidence, clear and convincing evidence, and finally, beyond a reasonable doubt, arguing only the last applied in the present case. Appellant's counsel also indicated that to convict appellant, the jury needed to have an abiding conviction. The court did not prejudicially err, under any conceivable standard, by failing to give CALJIC No. 8.50.[7]

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[7] The fact the prosecutor made comments which appellant claims were misconduct does not alter our analysis, since we conclude *post* no prosecutorial misconduct occurred.

2. *The Jury Instructions Did Not Preclude Jury Consideration of Imperfect Self-Defense.*

Appellant presents the related claim the jury instructions permitted the jury to convict appellant of murder without the jury considering whether he was guilty of voluntary manslaughter based on imperfect self-defense. Appellant focuses on, inter alia, CALJIC Nos. 8.10 (regarding the elements of murder) , 8.11 (regarding malice), and 5.17 (regarding imperfect self-defense). We reject his claim.

As mentioned, we consider instructions as a whole (*Ramos, supra*, 163 Cal.App.4th at p. 1088) and assume jurors understood and correlated them. CALJIC Nos. 8.10, 8.11, 8.40 (see fn. 5, *ante*), and 5.17, read together, did not permit the jury to convict appellant of murder absent jury consideration of whether he was guilty of voluntary manslaughter based on imperfect self-defense. Instead, the instructions were reasonably susceptible of the interpretation the jury could convict appellant of murder *unless* the jury concluded he killed (1) with intent to kill or with conscious disregard for life *and* (2) in imperfect self-defense (negating malice), in which case he would be guilty of voluntary manslaughter. We conclude the trial court fully and fairly instructed the jury on the applicable law, and there was no reasonable likelihood the jury applied the instructions at issue in an impermissible manner. No instructional error occurred.

The fact that, once it was shown a killing resulted from the intentional doing of an act with express or implied malice, no *other* mental state needed to be shown to *establish* malice, did not preclude the jury from considering whether, once it was shown a killing resulted from the intentional doing of an act with intent to kill or conscious disregard for life, malice was *absent* and appellant could be guilty of voluntary manslaughter. We consider the instructions as a whole. If we did not, it would mean the trial court, using CALJIC No. 5.17, instructed on imperfect self-defense without ever permitting the jury to consider the elements of murder or what malice was, since CALJIC No. 5.17 itself did not instruct on those issues. Finally, in light of our previous discussion about CALJIC No. 2.01, circumstantial inferences, and the jury's verdict, as well as our previous discussion about the overwhelming evidence of appellant's guilt, the alleged instructional error was harmless beyond a reasonable doubt.

3. *No Prosecutorial Misconduct Occurred.*

During opening argument, the prosecutor commented, ". . . when you hear the argument by counsel, and more importantly, when you go back and deliberate, ask yourself *if there is any proposition that is posed to you by [defense counsel]* that you can think of in the jury room *about what the evidence means or what conclusion you can draw from it*. [¶] The first thing I want you to ask yourself is, is that reasonable? Because although [defense counsel] doesn't have a burden of proof, if he gets up here and *asks you to base your verdict on any proposition*, the first thing you need to ask yourself is, is there evidence for that proposition because your verdict has to be based on the evidence." (Italics added.) Appellant posed an "[i]mproper argument" objection and the court overruled it.

The prosecutor then commented, "You have to *base your verdict* on the *evidence*. And so *if you are asked* to draw *any conclusions* from this, *from the evidence* you are presented, *any theories*, they have to be based in evidence or a reasonable interpretation of the evidence. [¶] So I just ask that you ask yourselves that question, is *this proposition* reasonable? Is it *based on the evidence*? Not one piece of evidence but the entirety of the evidence." (Italics added.) During closing argument, the prosecutor commented, "This idea that there's two guns. Where is the evidence? I began my opening argument to you yesterday by saying *if [defense counsel] wants to propose something* to you -- and yes, he had no burden. But he is *asking you to make certain conclusions*. *Those conclusions* have to be based *in fact, in evidence*, and they have to be reasonable." (Italics added.)

Appellant claims the prosecutor's above comments were misconduct. The claim is unavailing. Appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the challenged comments, and a jury admonition would have cured any harm. Appellant waived the issue of whether the comments constituted misconduct. (*Cf. People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

Even if the prosecutorial misconduct issue were not waived, appellant's claim is without merit. Appellant argues the prosecutor committed misconduct because, notwithstanding the prosecutor's comments, "[d]efense argument may be based entirely on the lack of evidence at trial, and the defense may ask jurors to draw inferences from the lack of evidence." Appellant also argues the prosecutor committed misconduct by arguing "that propositions favorable to the defense, . . . must be based in the evidence." However, first, the thrust of the prosecutor's comments pertained, not merely to propositions favorable to the defense, or to whether defense propositions were based on the evidence, but to defense propositions about what the evidence meant, and defense propositions about what conclusions could be drawn from the evidence.

Second, CALJIC No. 2.90, given by the trial court, stated as part of its definition of reasonable doubt that it was the state of the case which, "after the entire comparison and consideration of all the evidence," left jurors such that they could not say they felt an abiding conviction of the truth of the charge.

The language quoted immediately above has been construed as informing the jury the People may not meet their burden of proof based on evidence not offered at trial. (*People v. Garelick* (2008) 161 Cal.App.4th 1107, 1118.) The language cannot reasonably be interpreted as precluding the jury from considering any perceived lack of evidence when determining the defendant's guilt. (*Ibid*.) To the extent the prosecutor commented (1) if the defense asked the jury to base its verdict on any proposition, it had to be based on the evidence, or (2) any defense theories or propositions had to be based in, or on, the evidence, the prosecutor's comments were proper and analogous to the

above quoted language in CALJIC No. 2.90 as judicially construed.[8] Finally, the prosecutor herself presented argument based on lack of evidence, and effectively asked jurors to draw an inference from the lack of evidence, when the prosecutor commented, "This idea that there's two guns. Where is the evidence?"

There was no reasonable likelihood the prosecutor's comments were misconstrued or misapplied by the jury, or interpreted in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970.) The comments did not render appellant's trial fundamentally unfair in violation of his right to due process, nor did the prosecutor use deceptive or reprehensible methods to attempt to persuade the court or jury. (See *People v. Hill* (1998) 17 Cal.4th 800, 819).)[9] No prosecutorial misconduct occurred.[10] Finally, in light of our previous discussion about CALJIC No. 2.01, circumstantial inferences, and the jury's verdict, as well as our previous discussion about the overwhelming evidence of appellant's guilt, the alleged instructional error was harmless beyond a reasonable doubt.

4. *Sufficient Evidence Supported the Gang Enhancement.*

Appellant claims insufficient evidence supports the Penal Code section 186.22, subdivision (b) gang enhancement, because insufficient evidence supports the "primary activities" element of subdivision (f). We disagree. Our power begins and ends with the determination whether there is substantial evidence, contradicted or uncontradicted, to support the judgment. (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.) "The phrase 'primary activities,' as used in the gang statute, implies that the commission

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[8] We note the trial court, using CALJIC No. 1.00, told the jury its first duty was to "determine what facts have been proved from the evidence received in the trial and not from any other source." The court, using CALJIC No. 1.03, told the jury it "must decide all questions of fact in this case from the evidence received in this trial and not from any other source."

[9] In light of our previous discussion, we reject appellant's claim cumulative prejudicial error occurred.

[10] *People v. Centeno* (2014) 60 Cal.4th 659, cited by appellant in his supplemental letter, does not compel a contrary conclusion.

of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. . . . [¶] Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony . . . ." (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 323-324.)

We have recited in our Factual Summary the pertinent facts and have considered appellant's arguments. We conclude there was sufficient evidence the primary activities of Notorious included murder, assault with a deadly weapon, and robberies (Pen. Code, § 186.22, subd. (e)(1), (2), & (3)), and sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, Notorious had "as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to (25), inclusive, . . . of subdivision (e)" within the meaning of Penal Code section 186.22, subdivision (f).[11]

[11] None of the cases cited by appellant compel a contrary conclusion. This includes *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-612, which is distinguishable. (*People v. Margarejo* (2008) 162 Cal.App.4th 102, 107-108; *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

EDMON, P. J.

ALDRICH, J.