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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE JOHN DORANTES,

Defendant and Appellant.

B289777

(Los Angeles County  
Super. Ct. No. BA405435)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed in part, reversed in part, and remanded with directions.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant shot multiple bullets into a crowded party, aiming for a gang member whose gang had embarrassed defendant's relative earlier the same evening. Two guests at the party were killed. Jurors could not reach a decision whether defendant was guilty of their murders.

Two other guests at the party suffered wounds, and defendant was convicted of their attempted murders (Emmanuelle and Ernesto).<sup>1</sup> Defendant was convicted of another count of attempted murder based on an incident occurring after defendant left the party. The victim of the later attempted murder was Marcus.

On appeal, defendant challenges two of the three attempted murder counts, those identifying Emmanuelle and Ernesto as the victims. Defendant argues that no substantial evidence supported the finding that he intended to kill Emmanuelle or Ernesto. On the same two counts, defendant argues that the trial court erred in instructing jurors on the "kill zone" theory of liability.

We conclude that no substantial evidence supported the finding that defendant intended to kill Emmanuelle. Emmanuelle believed and the prosecutor argued that defendant was aiming at gang members, not at Emmanuelle. There was no

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<sup>1</sup> Rule 8.90 of the California Rules of Court directs us to protect the privacy interests of "[v]ictims in criminal proceedings" (Cal. Rules of Court, rule 8.90(b)(4)) or "[p]ersons in other circumstances in which personal privacy interests support not using the person's name" (*id.*, rule 8.90(b)(10)) by referring to them by first name and last initial or by initials only if the first name is unusual. As a result, we refer to the victims and witnesses in this matter by their first names or initials, with no disrespect intended.

evidence that defendant had any interaction with Emmanuelle, any motive to kill her, or the specific intent to kill her.

We conclude that substantial evidence supported the finding that defendant intended to kill Ernesto. Ernesto asked defendant to leave the party just before the shooting. Defendant punched Ernesto in the face, and defendant's confederate came forward with a firearm, threatening Ernesto. This showing of animosity between defendant and Ernesto supported the inference that defendant harbored a motive to kill Ernesto and intended to kill him.

Following our Supreme Court's recent decision *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*), we hold that the trial court erred in instructing jurors on the kill zone theory of liability for the attempted murders of Emmanuelle and Ernesto. *Canizales*, decided after defendant's trial, makes clear that a kill zone instruction is not warranted when, as in this case, the defendant merely subjected persons near the primary target to lethal risk. (*Id.* at p. 615.) The circumstances of this case are not such that the only reasonable inference is that defendant intended to kill everyone in a zone of fatal harm to ensure the primary target's death.

We conclude that the kill zone instruction was prejudicial. The prosecutor relied exclusively on it to argue that defendant was responsible for the attempted murders of Emmanuelle and Ernesto. Given the evidence as well as the prosecutor's argument, jurors likely relied on this incorrect theory in convicting defendant of the attempted murders of Emmanuelle and Ernesto.

We reverse defendant's conviction for the attempted murders of Emmanuelle and Ernesto. In all other respects we affirm the judgment.

## **FACTUAL BACKGROUND**

We summarize those facts relevant to the issues on appeal.

On June 21, 2008, at least 40 people attended a graduation party at a house in Montebello (the House). The House was located on a street corner. The front and one side of the House bordered the street. A chain-link fence enclosed one side of the House. Gates at either end of the fence opened into the backyard. The backyard was in-between the House and a detached garage. The garage was located at the end of a driveway. The chain-link fence did not provide a visual barrier; a person standing on the sidewalk could see into the backyard.

On the night of June 21, 2008, tables were set up in the backyard for the graduation party. A band played, near the garage.

Eduardo, Danny, Marcus, Orlando, and Roman attended the graduation party. They were members of the Southside Montebello gang.

Danny and Marcus knew defendant. Prior to June 21, 2008, defendant had assaulted Danny. Marcus and defendant had engaged in numerous prior altercations, including shooting at each other. Defendant and Angel Sosa were related and were members of the tagging crew C.S.C. (aka Can't Stop Crime). This tagging crew was a rival to a tagging crew F.U.C. (aka Fucking Up Cities and Fucked Up Constantly), in which Eduardo and Marcus participated before joining the Southside Montebello gang.

## **1. First Incident at the Front of the House**

On the night of the graduation party, Danny, Roman, Eduardo, and Marcus (four Southside Montebello gang members) were involved in a fight in front of the House. Sosa (defendant's relative) and Sosa's confederates fought against the four Southside Montebello gang members (Danny, Roman, Eduardo, and Marcus). Danny hit Sosa on the head with a bottle. Sosa and his friends fled the scene. Sosa or one of his confederates said, "We will be back." Defendant was not with Sosa's group at that time.

After this incident, Ernesto, a guest at the graduation party, who informally was in charge of security for the graduation party, asked Danny to leave the party. Danny, Marcus, and Roman left the party and went to a friend's nearby residence. Southside Montebello gang members Eduardo and Orlando remained at the party.

## **2. Second Incident at the House**

Later that night, Jenny, a guest at the party and Emmanuelle's sister, spoke to defendant and his confederate. Defendant falsely told Jenny that he was "Michael" from the Southside Montebello gang. Defendant asked Jenny if Marcus was present. Jenny told defendant and his confederate that Marcus had left the party but Orlando and Eduardo (other Southside Montebello gang members) were in the backyard. Defendant and his confederate walked along the chain-link fence looking into the backyard to find Eduardo and Orlando.

Meanwhile, Jenny told Eduardo that "Michael" was looking for Marcus. Eduardo went to the gate. He did not see Michael but observed defendant. Defendant was with another male.

Eduardo stood about 14 feet from the gate. Defendant challenged Eduardo to fight. Eduardo chose to avoid fighting because he wanted to remain at the party. Eduardo observed defendant walk along the chain-link fence, looking at Eduardo and other people in the backyard of the House.

Around the same time, Jenny stood near the backyard gate, arguing with defendant. Emmanuelle observed Jenny arguing with defendant. Emmanuelle walked towards Jenny and defendant. Emmanuelle told Jenny to “come here,” and shortly afterwards saw defendant punch Ernesto.

Ernesto (the person responsible for informal security), approached defendant to ask defendant to leave. At the time, defendant was near the gate, looking into the backyard. Defendant punched Ernesto in the face. Defendant stood in a “fight stance.” Ernesto saw defendant’s confederate remove a firearm from his waistband. Ernesto ran towards the gate. Ernesto thought defendant or his confederate would kill Ernesto, and he ran to take cover.

A physical fight ensued between defendant and other partygoers. When Eduardo started to walk away from the fight, he heard shots. Eduardo was standing about a foot from the gate to the fence when he heard the shots. Eduardo ran to the other side of the backyard, jumped over the fence bordering the neighbor’s property, and then ran down the street.

Defendant shot his firearm multiple times. There was evidence that defendant was “pointing at two Southside gang

members that were sitting inside the fence[.]”<sup>2</sup> Defendant’s confederate also had a gun.

Ernesto suffered a graze wound to his hip. Emmanuelle was struck in the arm with a bullet. A guest was standing next to Emmanuelle, and he was grazed by a bullet. The guest was standing near the back door of the house inside the backyard. Twelve-year-old Albert Garcia was shot in his left chest and died of the gunshot wound. Albert was in the backyard of the House when he was shot. Juan Garcia (Albert’s father), died of a gunshot wound to the chest. Juan Garcia was in the backyard walking towards the fence when he was shot.

Witnesses heard multiple gunshots. One witness described hearing five or six shots. Ernesto heard three shots. Another guest heard at least four shots. Another witness believed he heard seven or eight shots. Emmanuelle heard multiple shots. Marcus heard shots from both a revolver and a semiautomatic firearm. Marcus believed that the shooter was trying to kill Southside gang members.

After the shooting, two or three casings remained on the pavement near the House. A bullet and bullet fragment were on the ground. A criminalist analyzed a cartridge case, a fired bullet, a bullet fragment, and a bullet the coroner had recovered from Juan Garcia’s body. The bullet that killed Juan Garcia was from a different gun than the casing and bullet fragment found at the House. The casing and fragment were consistent with a semiautomatic pistol.

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<sup>2</sup> Emmanuelle told officers that defendant and his confederate pointed at the two Southside Montebello gang members who were in the backyard.

### **3. Third Incident Shortly After Defendant Left the House**

After leaving the graduation party, Danny, Marcus, and Roman were at a residence nearby the House. When they heard gunshots, Danny, Marcus, and Roman walked in the direction of the House. They saw defendant jogging. Defendant shot at Danny. Defendant also fired at Marcus. Marcus shot back at defendant.

## **PROCEDURAL BACKGROUND**

### **A. Information**

In a second amended information, the People charged defendant with two counts of murder (Albert Garcia and Juan Garcia) and three counts of attempted murder (Emmanuelle, Ernesto, and Marcus). The People alleged that each attempted murder was committed willfully, deliberately, and with premeditation. Additionally, with respect to each attempted murder, the People alleged firearm enhancements. The People alleged a special circumstance within the meaning of Penal Code section 190.2, subdivision (a)(3) with respect to the two counts of murder.

### **B. Instructions**

For the attempted murders, the trial court instructed jurors on a kill zone theory of liability. Jurors also were instructed on the theory of express malice, i.e., a specific intent to kill. Jurors also were instructed as follows on aiding and abetting: “Principals include: one, those who directly and actively commit or attempt to commit the act constituting the crime; or two, those who aid and abet the commission or



attempted commission of the crime. [¶] When the crime charged is either murder or attempted murder, the aider and abettor's guilt is determined by the combined acts of all the participants as well as that person's own mental state."

The kill zone instruction was as follows: "A person who primarily intends to kill one person, or persons, known as the primary target, may at the same time attempt to kill all persons in the immediate vicinity of the primary target. This area is known as the zone of risk."

"A 'zone of risk' is created when a perpetrator, specifically intending to kill the primary target by lethal means, also attempts to kill anyone in the immediate vicinity of the primary target. If the perpetrator has this specific intent and employs the means sufficient to kill the primary target and all others in the victim's vicinity, the perpetrator is guilty of the crime of attempted murder of the other persons in the victim's vicinity."

"Whether a person actually intended to kill the victim, either as a primary target or someone within the victim's vicinity, is an issue to be decided by you."

### **C. The Prosecutor's Argument**

The prosecutor argued that the shootings at the party resulted in the murders of Juan and Albert Garcia and the attempted murders of Emmanuelle and Ernesto.

The prosecutor identified Eduardo as the primary target. The prosecutor described the kill zone as follows: "If you basically have an intent to kill a primary target and you take action that is consistent with you not only intending to kill that target but intending to kill everyone that is near them in order to kill the primary target, you've created a zone of risk. In that zone of risk under the law there is a concurrent intent as to each

of the people in that zone of risk. Emmanuelle . . . and Ernesto . . . were struck because they were in that zone of risk.” The prosecutor continued: If “you take actions which are consistent with you intending not just to kill him but intending to kill everyone around him in order to get him, you are going to be liable for those other people. And in this case it’s been simplified. Emmanuelle and Ernesto were both struck.”

The prosecutor further argued: “The zone creates concurrent intent. The shooter does not have to intend to kill Emmanuelle personally or Ernesto personally. He has to intend to kill Eduardo and everyone around him. And that intent of Eduardo and everyone around him happens at the same time. That intent to kill is bound within that zone.” “[A]s long as the defendant intended to kill not only Eduardo who he is shooting at, but also the people around him, then he is guilty of their attempted murders.”

The prosecutor argued that defendant had the “intent to kill everyone standing” near Eduardo (the Southside gang member who remained at the party) based on the circumstances that defendant was “unloading directly at that area where not only Eduardo is, but the people directly around him.”

The prosecutor characterized the evidence as follows: Defendant went to the party with “the intent to kill. And his initial target is Marcus . . . . That’s who he has his long-standing feud with. But remember, he is told by Jenny that [Marcus] has left but [Marcus’] homies are still in the back, Eduardo and Orlando. So by the time he is going to the back and looking in, the defendant at this point is looking for what? If Marcus is not there, Marcus’ homies are good enough. Why? Because those are the people that had just gotten in a fight with his nephew, a fight

that his nephew lost. An embarrassment and they were there to retaliate.”

With respect to the two murders, the prosecutor argued that defendant intended to kill Eduardo and instead hit Albert and Juan Garcia. “[A]s this defendant and the other shooter are trying to get Eduardo, they instead kill Albert and Juan [Garcia] and the intent transfers.”

#### **D. Defense Counsel’s Argument**

Defendant’s defense was based on misidentification. Defense counsel emphasized discrepancies in the eyewitness’s description of the shooter.<sup>3</sup>

#### **E. Conviction and Sentence**

Jurors found defendant guilty of the attempted murders of Emmanuelle, Ernesto, and Marcus. With respect to each, jurors found the special allegation that the attempted murder was committed willfully, deliberately, and with premeditation not true.

With respect to the attempted murder of Emmanuelle, jurors found that defendant personally and intentionally discharged a firearm causing great bodily injury within the meaning of Penal Code<sup>4</sup> section 12022.53, subdivision (d),

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<sup>3</sup> The inconsistencies in the description of the shooter are not relevant to any issue on appeal. We view the evidence in the light most favorable to the judgment and presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

<sup>4</sup> All statutory citations are to the Penal Code.

discharged a firearm within the meaning of section 12022.53, subdivision (c), and used a firearm within the meaning of section 12022.53, subdivision (b). With respect to the attempted murders of Ernesto and Marcus, jurors found that defendant discharged a firearm within the meaning of section 12022.53, subdivision (c) and personally used a firearm within the meaning of section 12022.53, subdivision (b).

Jurors were unable to reach a verdict on the two murder counts, and the trial court declared a mistrial as to those counts.<sup>5</sup>

At sentencing the prosecutor argued: “As the court is aware it was a kill zone theory, and frankly, we probably could have charged more than one or two victims with that kill zone.”

The trial court sentenced defendant to the high term for the attempted murder of Emmanuelle. The trial court sentenced defendant to an additional consecutive 25-year term for the section 12022.53, subdivision (d) enhancement. For the attempted murders of Ernesto and Marcus, the trial court sentenced defendant to consecutive sentences of two years four months (one-third the mid-term). The trial court further imposed consecutive six year eight month terms for the section 12022.53, subdivision (c) firearm enhancements. This timely appeal followed.

## **DISCUSSION**

Defendant challenges his convictions for the attempted murder of Emmanuelle and Ernesto. He challenges the

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<sup>5</sup> With respect to the murders, jurors requested further clarification on the meaning of aiding and abetting. The prosecutor and defense counsel provided additional argument regarding aiding and abetting.

sufficiency of the evidence of his intent to kill, an element of attempted murder. (*Canizales, supra*, 7 Cal.5th at p. 602.) Defendant also argues that the trial court erred in instructing jurors on the kill zone theory of liability.

## **I. Sufficiency Of The Evidence**

“The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.’ ”

(*People v. Perez* (2010) 50 Cal.4th 222, 229 (*Perez*).)

A conviction for attempted murder requires proof that the defendant intended to kill the victim and a direct but ineffectual act toward accomplishing that goal. (*Perez, supra*, 50 Cal.4th at p. 229.) “ “[G]uilt of attempted murder must be judged separately as to each alleged victim.” ’ [Citation.] ‘[T]his is true whether the alleged victim was particularly targeted or randomly chosen.’ ” (*Id.* at p. 230.)

As we explain, we conclude that substantial evidence supported the finding that defendant intended to kill Ernesto. We find no substantial evidence supported the finding that defendant intended to kill Emmanuelle.

### **a. Ernesto**

Ernesto, a guest at the party and the person informally responsible for security, testified that that he noticed defendant and a confederate as they stood near the fence in the area of the driveway. Defendant and his confederate were looking through

the fence into the party. They appeared to be looking for someone. Ernesto said, “[H]ey guys, I don’t want any confrontation.” According to Ernesto, defendant or his confederate then punched Ernesto in the face. Immediately after hitting Ernesto, the person who hit Ernesto assumed a “fight stance” by raising both of his fists. The other person brandished a firearm. Ernesto thought he would be killed and ran to take cover. As soon as he started running, he heard gunshots.

Emmanuelle testified that defendant was the person who hit Ernesto, and she testified that defendant also had a gun and shot it.

“Direct evidence of intent to kill is rare, and ordinarily the intent to kill must be inferred from the statements and actions of the defendant and the circumstances surrounding the crime.” (*Canizales, supra*, 7 Cal.5th at p. 602.) The foregoing uncontroverted evidence supported the conviction for the attempted murder of Ernesto. The evidence showed that defendant and his confederate were angry that Ernesto confronted them. Defendant and his confederate demonstrated their anger by punching Ernesto, assuming a fighting stance, and brandishing a firearm. Immediately after the confrontation, one or both of them fired shots. Additionally, it appeared to Ernesto that the person with the gun intended to shoot him as Ernesto believed he would be killed. This evidence supported the inference that defendant intended to kill Ernesto.

**b. Emmanuelle**

As noted, Jenny, the guest who interacted with defendant, was Emmanuelle’s sister. As Emmanuelle and Jenny sat on the front porch of the House, defendant and his confederate asked for Marcus. Jenny said that Marcus was not at the party, but

Eduardo and Orlando (other Southside Montebello gang members), were at the party. Defendant and his confederate ran to look for Eduardo and Orlando.

Jenny left the front porch to speak to defendant and his confederate. Emmanuelle saw Jenny arguing with defendant. Emmanuelle was about 22 feet away from defendant. Emmanuelle called Jenny, and Jenny turned to walk towards Emmanuelle. Emmanuelle then saw defendant strike Ernesto. After that Emmanuelle heard gunshots. She felt her “arm go limp.”

Based on the foregoing evidence, respondent argues that defendant could have perceived Emmanuelle as “having interfered with the confrontation with [Ernesto].” The fact that Emmanuelle called Jenny does not support the inference that Emmanuelle intervened in defendant’s interaction with Ernesto. There was no evidence that Jenny’s interaction with defendant concerned Ernesto. Evidence that Emmanuelle said “come here” after Jenny argued with defendant does not support the reasonable inference that defendant intended to kill Emmanuelle. Moreover, Emmanuelle was not a member of the Southside Montebello gang and did not confront defendant in a manner similar to Ernesto. Emmanuelle did not even speak to defendant. The record lacks evidence supporting the inference that defendant had the specific intent to kill Emmanuelle.

## **II. The Circumstances Of The Case Did Not Support A Kill Zone Instruction**

The trial court has the duty to instruct on general principles of law and the correlative duty to refrain from “‘instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of

confusing the jury or relieving it from making findings on relevant issues.’” (*People v. McCloud* (2012) 211 Cal.App.4th 788, 796 (*McCloud*), disapproved on another ground in *Canizales*, *supra*, 7 Cal.5th at pp. 607–608, fn. 5.) “[I]f the record contains no evidence that would support application of the kill zone theory in this case, then the trial court erred by instructing the jury on that theory.” (*McCloud*, at p. 796.)

“To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else.” (*People v. Bland* (2002) 28 Cal.4th 313, 328 (*Bland*).) For purposes of an attempted murder charge, intent to kill does not transfer to nontargeted individuals. (*Ibid*; see also *McCloud*, *supra*, 211 Cal.App.4th at p. 797.) “Nonetheless, the kill zone theory, first approved by the Supreme Court in *Bland*, yields a way in which a defendant can be guilty of the attempted murder of victims who were not the defendant’s ‘primary target.’” (*McCloud*, at p. 797.)

A conviction for attempted murder under a kill zone theory requires evidence that the defendant created a kill zone; that is, while targeting a specific person “the defendant tried to kill the targeted individual by killing everyone in the area in which the targeted individual was located. . . . [¶] In a kill zone case, the defendant does not merely subject everyone in the kill zone to lethal risk. Rather, the defendant specifically intends that everyone in the kill zone die.” (*McCloud*, *supra*, 211 Cal.App.4th at p. 798, italics omitted.)



### III. *Canizales*<sup>6</sup>

Recently, our Supreme Court clarified the circumstances warranting a kill zone instruction. *Canizales* explains that: “[T]he kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant’s attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target’s death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm.” (*Canizales, supra*, 7 Cal.5th at p. 607.)

The “determination whether substantial evidence supports instruction on the kill zone theory is based on evidence regarding the circumstances of the attack on the primary target, from which the defendant’s intent to create a zone of fatal harm may be inferred.” (*Canizales, supra*, 7 Cal.5th at p. 611.) “Such a determination does not turn on the effectiveness or ineffectiveness of the defendant’s chosen method of attack.” (*Ibid.*) As relevant here, *Canizales* held that “[e]vidence that a defendant who intends to kill a primary target acted with only conscious disregard of the risk of serious injury or death for those around a primary target does not satisfy the kill zone theory.” (*Id.* at p. 607.)

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<sup>6</sup> We requested and received supplemental briefing on the application of *Canizales* to this case.

*Canizales* applied these principles in a case similar to the present one. The convictions in *Canizales* followed a gang-related shooting at a party. (*Canizales, supra*, 7 Cal.5th at p. 598.) There were between 10 and 30 people at the outdoor party. (*Id.* at p. 599.) The victims ran away when defendant's confederate shot multiple times. (*Id.* at p. 600.) Neither of the intended targets was hit by a bullet, but a bystander was struck in the abdomen. (*Ibid.*) Five casings were found at the scene. (*Ibid.*)

The high court explained that no substantial evidence supported a reasonable inference that the defendants intended to kill everyone in the kill zone. (*Canizales, supra*, 7 Cal.5th at p. 611.) The Supreme Court reasoned that the circumstances of the shooting did not support the inference that the defendants intended to create a zone of fatal harm around their rival gang member. (*Ibid.*) The high court further noted that the intended victim was not hit by any bullet. (*Ibid.*)

#### **IV. Under *Canizales*, A Kill Zone Instruction Was Error**

No substantial evidence supported the inference that defendant intended to kill everyone near the intended target (Eduardo) to ensure the primary target's death. The force used was insufficient to kill everyone at the party. Defendant fired somewhere between two and seven<sup>7</sup> shots—a number insufficient to kill everyone at the party. There was no evidence that defendant sprayed everyone near Eduardo with gunfire. None of

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<sup>7</sup> One eyewitness heard seven or eight shots. Although no other witness heard that number, assuming there were eight shots, at least one shot was fired by defendant's confederate. The bullet found in Juan Garcia did not match the others.

the shots hit Eduardo. The circumstantial evidence does not support the conclusion that the only reasonable inference was that defendant intended to kill everyone around Eduardo to ensure Eduardo's death.

Like in *Canizales*, defendant shot into a party. Like in *Canizales*, the intended target ran away from the party and innocent bystanders were killed. Defendant fired a maximum of seven shots into an area from which victims could escape by running into the house or by leaving the scene as Eduardo did. Additionally, like in *Canizales*, the intended target, Eduardo, was not hit by a bullet. The circumstances of the attack on the primary target did not show that the only reasonable inference was that defendant intended to create a zone of fatal harm. Therefore, under *Canizales*, instructing jurors on the kill zone was error.

## **V. The Error In Giving A Kill Zone Instruction Was Prejudicial**

As in *Canizales*, there was a “reasonable likelihood that the jury understood the kill zone instruction in a legally impermissible manner.” (*Canizales, supra*, 7 Cal.5th at p. 614.) The prosecutor's argument suggested that defendant created a kill zone by shooting at a primary target when people were standing near the primary target. Neither the instruction given nor the prosecutor's argument required jurors to find that defendant intended to kill everyone near the intended target to ensure the death of the intended target. Neither the instruction given nor the prosecutor's argument invited jurors to consider the circumstances of defendant's attack when it determined whether there was a kill zone and whether Emmanuelle and Ernesto were within the kill zone. If it is not clear beyond a reasonable doubt

that jurors would have rendered the same verdict absent the error, the conviction must be reversed. (*Id.* at p. 615; see also *People v. Aledamat* (Aug. 26, 2019, S248105) \_\_ Cal.5th \_\_ [19 D.A.R. 8143].) Under this standard, reversal is required.

The People relied exclusively on the kill zone theory when arguing that defendant was responsible for the attempted murders of Emmanuelle and Ernesto. Based on the prosecutor’s argument, it was likely the jurors relied on the kill zone theory of liability to convict defendant. Defendant suffered prejudice because it is likely that jurors based two counts of attempted murder “entirely on an instruction that should not have been given.” (*McCloud, supra*, 211 Cal.App.4th at p. 803.)

Respondent argues that jurors “could” have concluded that defendant targeted Emmanuelle and Ernesto specifically. We previously explained that no substantial evidence supported the conclusion that defendant could have targeted Emmanuelle specifically. Even if jurors “could” have concluded that defendant targeted Ernesto (a theory the prosecutor did not advance), the error in giving the kill zone instruction was not harmless beyond a reasonable doubt. (*Canizales, supra*, 7 Cal.5th at p. 615.) Respondent applies the incorrect standard in evaluating prejudice. Pursuant to the correct standard, the error was prejudicial.<sup>8</sup>

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<sup>8</sup> The parties agree that the abstract of judgment contained clerical errors. Because our disposition requires a new abstract of judgment, we do not discuss the clerical errors in the current one.

## **DISPOSITION**

The judgment is affirmed in part and reversed in part. The judgment of conviction of the attempted murder of Marcus is affirmed. The judgment of conviction of the attempted murder of Emmanuelle is reversed for lack of sufficient evidence and prejudicial instructional error. The judgment of conviction of the attempted murder of Ernesto is reversed for prejudicial instructional error. Upon remand, the trial court shall resentence defendant for the attempted murder of Marcus. The trial court shall forward an amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

JOHNSON, Acting P. J.

WEINGART, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.