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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHRISTIAN J. MIRANDA et al., Defendants and Appellants.	B266817 (Los Angeles County Super. Ct. No. KA107796)

APPEALS from a judgment of the Superior Court of Los Angeles County, George Genesta, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant Christian J. Miranda.

Paul Richard Kleven, under appointment by the Court of Appeal, for Defendant and Appellant Derek J. Sommer.

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

Attorney General, Zee Rodriguez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christian Miranda walked up to a man standing outside a Pomona restaurant and punched him in the face. When the man's three friends rushed to his aid, codefendant Derek Sommer drew a gun and shot the man, two of his friends, and Miranda; he also took aim at the third friend but did not fire at him. A jury convicted Sommer of five counts of attempted murder, five counts of assault with a firearm, and one count of felon in possession; a separate jury convicted Miranda of one count each of attempted murder and assault with a firearm.

Miranda and Sommer both challenge their convictions. Miranda contends the evidence was insufficient to support the jury's conclusions that he was culpable in the attempted murder of the punched victim and that the attempted murder of that man was willful, deliberate, and premeditated. Sommer likewise contends that the evidence did not support the jury's findings that the attempted murders were willful, deliberate, and premeditated. He also argues there was no evidence he intended to kill or took a direct step toward killing the one victim who was not shot, that the "kill zone" instruction was not supported by substantial evidence, and that his counsel rendered ineffective assistance during closing argument.

We reject these contentions and affirm the judgment of the trial court in full.

PROCEDURAL HISTORY

An amended information charged Miranda and Sommer each with four counts of attempted murder (Pen. Code, §§ 187,

subd. (a) & 664)[1] and four counts of assault with a firearm (§ 245, subd. (a)(2)). It further charged Sommer with the attempted murder of Miranda (§§ 187, subd. (a) & 664), assault of Miranda with a firearm (§ 245, subd. (a)(2)), and illegal possession of a firearm (§ 29800, subd. (a)(1)). The amended information alleged that each of the attempted murders was committed willfully, deliberately, and with premeditation (§§ 189 & 664, subd. (a)), and involved a principal's use of a firearm (§ 12022.53, subds. (b) & (e)(1)), intentional discharge of a firearm (§ 12022.53, subds. (c) & (e)(1)), and intentional discharge of a firearm with great bodily injury (§ 12022.53, subds. (d) & (e)(1)). It further alleged that each of the crimes was committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subds. (b)(1)(A) [firearm possession] & (b)(1)(C) [attempted murders and assaults]), and that Sommer personally used a firearm during the each of the assaults (§ 12022.5, subd. (a)) and suffered three prison priors (§ 667.5, subd. (b)). The priors allegations ultimately were stricken.

Defendants were tried jointly before two separate juries. Sommer's jury found him guilty as charged and found true all of the allegations except one: intentional discharge of a firearm against the attempted murder victim who was not shot.[2] Miranda's jury found him guilty of assaulting and attempting to

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

[2] The verdict form for that particular count only included two of the three firearms allegations: use (§ 12022.53, subds. (b) & (e)(1)) and intentional discharge (§ 12022.53, subds. (c) & (e)(1)), as the evidence at trial did not indicate the victim sustained any injury.

murder the man he initially punched, and found true the enhancement allegations pertinent to those counts. The trial court declared a mistrial on the remaining counts against Miranda after the jury indicated it was hopelessly deadlocked, and the prosecution later dismissed those counts.

The court sentenced Sommer to a total of 140 years to life on the five attempted murder counts and related enhancements, plus two years concurrent on the firearm possession count. The court imposed and stayed sentences on the five assault counts pursuant to section 654.

The court sentenced Miranda to seven years to life on the attempted murder count, plus an additional 25 years to life for the related firearm enhancement, for a total of 32 years to life. The court imposed the midterm of three years on the assault count, plus an additional 10 years for the gang enhancement; it stayed the resultant 13-year term pursuant to section 654.

Both defendants timely appealed.

FACTUAL BACKGROUND

I. Victim Testimony

On October 4, 2014, Brandon R., his brother, Nathan R., and their friends Joanny A. and Wesley V. attended a motocross event at the Fairplex in Pomona.[3] The group left the Fairplex around 6:30 p.m., and Brandon drove them to nearby Alberto's Restaurant in his white hatchback. As they were pulling into the restaurant's drive-through lane, Brandon and Wesley both noticed some people standing near an apartment complex less than 100 yards behind the restaurant. Neither Brandon nor

[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.

Wesley thought much of this; Brandon testified that he did not know the people and had never had problems at Alberto's in the past.

After everyone in the car ordered their food, Brandon pulled up to the pick-up window and Wesley stepped outside the car to smoke a cigarette. Wesley stood about five feet away from the car, on the passenger side. Somewhere between 30 seconds and five minutes after Wesley started smoking, two men walked up to him. Without saying a word, one of the men punched Wesley in the face.

Brandon saw Wesley get hit. He "screamed" to Nathan and Joanny, who were in the backseat, that Wesley had been hit or punched. Nathan and Joanny immediately exited the car and rushed to Wesley's aid. Joanny testified that Wesley was on the ground, and the assailant was "bent down, kind of like on top of him." Nathan testified that he tried to pull the assailant off Wesley, and Joanny testified that he began either hitting or kicking the assailant, whom he identified in court as Miranda. Brandon testified that he saw "[e]verybody" throwing punches at one another, including the second man who had walked over with the assailant; he said "they were in, like, a group, fighting." Joanny testified that the second man was standing a "[c]ouple feet away" from "the jumping or the hitting Wesley," apparently "waiting for something to go wrong his way." Joanny identified the second man in court as Sommer.

As Brandon was getting out of the car to join the fray, he heard three sounds, like firecrackers with pauses in between, which he later learned were gunshots. Brandon saw Joanny and Wesley running toward the street; Nathan was still fighting with the person who initially hit Wesley. Brandon testified that he

ran toward his brother and "got involved." The other man, whom Brandon identified in court as Sommer, had run toward the apartments, but came back toward the fight scene and pointed a revolver at Brandon. Brandon "told him that I was sorry and that we did don't want any more problems." Sommer did not shoot the gun; instead, he turned around. Brandon dragged Nathan away and screamed for bystanders to call 911.

None of the victims saw Sommer shoot anyone. Wesley testified that he heard five or six shots from "[n]o further than five feet" away, at which point he felt "[e]xtreme pain" and "burning" in his groin area. Once he felt the pain, he stood up, ran across the street with Joanny, and lay down in a grassy area. Wesley was airlifted to USC Medical Center; he had been shot once in the groin and three times in the buttocks. His wounds were "through and through," though bullet fragments remained in his groin at the time of trial. Wesley did not know who shot him, but he was "pretty sure" that Sommer punched him. Wesley noted that his memory of the events was "pretty fuzzy," however.

Joanny testified that he "saw Wesley up out of nowhere and running," and around the same time "felt like somebody hit me with a bat in the back of my leg." Joanny heard Wesley say he was shot, and ran across the street with Wesley. When Joanny got there, he looked down and saw that he had a bullet in his leg. Joanny flagged down a passing motorist, who got out of her car to help. Paramedics also arrived and airlifted Joanny to USC Medical Center. Joanny testified that bullet fragments remained in his leg at the time of trial and were painful because "they're poking my nervous system."

Nathan testified that he did not hear any gunshots. He nevertheless was aware that he had been shot in his left forearm

and left leg. He did not recall much after being shot, but remembered hearing Brandon telling him that everything would be okay, and remembered paramedics arriving on the scene. Nathan testified that he underwent two operations to remove a bullet from his leg and to put plates and screws in his arm.

II. Other Eyewitness Testimony

At around 6:40 p.m. on October 4, 2014, Michael Santos was in the drive-through lane at Alberto's Restaurant. As he was driving around the restaurant, he saw two people jump over a fence separating the lot behind Alberto's from an apartment complex about 50 yards away. Santos thought the people were retrieving a ball or something and "didn't think anything else of it."

Santos placed his order and pulled up behind a white car that was waiting at the pick-up window. He saw a man get out of the white car and begin smoking a cigarette. About five to ten minutes later, Santos testified, "somebody from the rear of my vehicle came and punched the guy that was smoking, just randomly" without saying anything. After that, "they continued to be in a brawl." Within about 25 seconds, the smoker's friends got out of the car and "[p]unches were being tossed left and right."

Santos observed that "the person who came and punched him was starting to lose the battle." The brawl began to "migrate" toward Santos's car. When it reached the back passenger window of his car, Santos heard "about four gunshots," with breaks in between. Santos knew from the sound that the gun was a revolver. After the first "round of shots," "like two," Santos saw two of the fighters get up and run away. Santos testified that he would not recognize any of the aggressors if he

saw them again.

Cinthya Lopez went to Alberto's Restaurant with her family on October 4, 2014. As her husband was pulling the car into the restaurant, she "heard a noise, kind of like a shot or firework" from the direction of the drive-through. She looked around to see what was happening and saw two people fighting one another, moving toward the back of the menu board. "Right after" she saw them, she "saw the person with the gun, and then he shot." Lopez saw one of the men fighting fall to the ground. The man who shot the gun "ran towards the back of Alberto's, going to some apartments or building that . . . was behind Alberto's place." A man at the apartments "pointed and makes some sign with his hand to go back to Alberto's." "The person that had the gun, he jumped back into Alberto's. He came running back . . . . And he had . . . the gun in his hand." At that point, Lopez told her husband to leave. Once they left Alberto's, Lopez called 911.

Miguel Tovar also was present at Alberto's Restaurant on October 4, 2014. He planned to get food at the drive-through, but changed his mind when he saw four or five men "[p]ushing each other and hitting each other" in the drive-through lane. Tovar also saw a person with a gun standing near the fight, about three feet away. Tovar heard two gunshots—one when he was pulling into the parking lot, and another after he saw the man with the gun. After the second shot, Tovar saw one of the fighters fall to the ground. He did not see the person get up. The man who fired the gun ran toward the back of the restaurant and jumped over a fence. Tovar saw the man come back over the fence and return to the Alberto's parking lot. Tovar then left the restaurant.

III. Law Enforcement Response & Investigation

Pomona police detective Jerry Uribe was dispatched to Alberto's Restaurant at around 6:42 p.m. on October 4, 2014. Upon arriving, he saw Wesley and Joanny lying on the ground across the street from the restaurant. Uribe testified that Wesley "seemed to be bleeding heavily from the groin area," and that Joanny "had a leg injury." A woman was with Joanny, "trying to tend to him." Uribe asked Joanny who shot him, and Joanny responded that the person who did it ran behind Alberto's.

Pomona police officer Joe Hernandez testified that he was dispatched to a shooting at Alberto's Restaurant at around 6:40 p.m. on October 4, 2014. He found Nathan lying face down in the drive-through, with gunshot wounds in his leg and forearm. Nathan was being treated by paramedics from the Los Angeles County Fire Department.

Pomona police officer Vaneric Mendoza was dispatched to a fire station near Alberto's Restaurant around 6:44 p.m. on October 4, 2014. There he found Miranda, with a "through and through" bullet wound in his right chest. Miranda told Mendoza that he had been shot while waiting in line at Alberto's.

Pomona Police Department crime scene investigator Adam MacDonald was dispatched to Alberto's on October 4, 2014. He testified that he photographed bloodstains outside the restaurant. He further testified that he found a black baseball cap with the letter P on it at the scene. He did not find any shell casings, but testified that some guns, including revolvers, do not eject casings when they are fired.

Pomona police detectives Eric Berger and Greg Freeman were assigned to investigate the Alberto's shooting. During their investigation, Berger interviewed Sommer. Sommer told Berger

that he had beaten up Miranda earlier in the day on October 4, 2014.

Freeman obtained surveillance video from the apartment complex behind Alberto's. Freeman testified that the video, which was played for the jury, showed two people jumping the fence separating the apartment complex from the vacant lot behind Alberto's just before 6:40 p.m. on October 4, 2014. Freeman showed Sommer stills from the video when he interviewed him. Freeman testified that the video showed four members of the Westside Pomona gang near the fence: Miranda, Steven Vasquez, and individuals Freeman knew as "Darky" and "Greedy."[4]

Pomona police officer Alan Pucciarelli testified about an incident that happened before the shooting, on the afternoon of October 4, 2014. He testified that he was dispatched to the apartments behind Alberto's to assist with a traffic stop. The officer performing the traffic stop had detained a man named Jorge Terrazas, but needed assistance in locating another passenger who had "bailed" from the vehicle. Pucciarelli searched the apartment complex and found Miranda, who was wearing a black baseball cap with a letter P on it. Terrazas was arrested, but Miranda was not. Pucciarelli testified that he left Miranda at the apartment complex.

IV. Sommer's Jail Calls

Berger testified that, at some point during the investigation of the Alberto's incident, Sommer was arrested and placed in the Pomona City Jail. While Sommer was housed at the jail, his outgoing calls were monitored and recorded. Two recordings of

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[4] Prosecution gang expert Michael Lee testified that Greedy was Sommer's gang moniker.

phone calls Sommer made to his father were played for both juries.

During the first call, made on October 13, 2014, Sommer told his father, "I'm facing attempt" in "that thing at Alberto's[, t]hose four fools that got shot." He stated, "They got all the evidence against me. I'm fucked." Sommer admitted to his father that he had a gun and told him that he already had taken the blame. He told his father that he had seen himself on a tape that "shows everything." Sommer's father told him to "[f]ight it," to which Sommer replied, "I'm not gonna' [*sic*] fight it. I'm guilty." Sommer nonetheless told his father that "[i]t was self defense" and explained, "we were the ones that went up there but we were the ones that ended up getting jumped. My intentions—my intentions were not to go kill. I mean, that's what I'm gonna tell them, like I'm gonna let the courts know."

Sommer also told his father that he had "a crimey" there with him, to which his father responded, "If you didn't do it, don't take the blame for it, Derek." Sommer replied, "I did it. Fucking I did it. I shot it. I shot. I shot it." Sommer's father asked him who the victims were, and Sommer said, "I don't know who the fuck they were. The other fool was bald—it was only one fool originally. He was bald and he looked like a gang member and everything."

During the second phone call, made on October 14, 2014, Sommer's father told him, "don't take the blame for someone else. Don't be a dumbass." Sommer assured him, "I'm not taking no blame for nobody but myself."

V. Miranda's Interview

Before Miranda's jury only, Freeman testified that he interviewed Miranda during the course of the Alberto's shooting

investigation. The prosecution played a recording of the interview for Miranda's jury, and provided the jurors with transcripts that included translations of the Spanish portions of the interviews.

During the interview, Miranda said that "they can't accuse me of that, of what happened there, because the video shows that I didn't shoot." Detectives Freeman and Berger informed Miranda that did not matter, because "you were part of, of what happened." Miranda told them that the shooter was on the video too, so they should get him. The interpreter assisting with the interview told Miranda, "They know it was your friend who shot," to which Miranda responded, "Did my friend shoot me?" The detectives told him yes. Miranda explained that one person was on top of him, fighting, when he heard a gunshot, felt pain, and saw that he was bleeding. Because he was pinned to the ground at the time, Miranda did not see who shot him. Later in the interview, he said, "in my mind, Greedy was the one that shoot me, you know? It was my friend." He also said, however, "Like, like uh he shot me too, like, what the fuck he's supposed to be my friend, you know. What the fuck?"

The detectives asked Miranda whom he went to the restaurant with, and he told them Greedy. Miranda did not know Greedy's real name but described him as having a "WS" tattooed on his face. Miranda said that Greedy was "with West Side, and I'm not with West Side." Nevertheless, Miranda told the detectives that he was wearing a black hat with the letter P on it when he went to Alberto's; the prosecution's gang expert testified that such hats were indicative of gang affiliation.

When asked why he and Greedy went to the restaurant, Miranda explained that the man smoking a cigarette "was like

looking for a problem with me." Miranda later stated that he had previously "gotten in an argument with that fool before," approximately an hour before the incident. Detective Freeman asked, "He had a problem with you?" Miranda responded, "Yeah. But, I, I . . . go fight with him, you know? But the thing is that the four guy[s] that came out, I don't know what, I don't know what happened, you know? Four guy came out [*sic*] the car, like." Miranda explained that Greedy "was walking . . . to defend me from the four guys, fool," a few steps behind Miranda. Miranda told the detectives that he knew Greedy took a gun with him to Alberto's and said it was a revolver, either "a .38 or a 357." Miranda did not know how many times Greedy fired the gun; he estimated two or three.

VI. Relevant Gang Evidence[5]

Pomona police officer Michael Lee testified before both juries as the prosecution's gang expert. Lee testified that West Side Pomona was one of about 10 active Pomona gangs. Lee stated that Alberto's Restaurant was within West Side's territory, and described the apartment complex behind the restaurant as "West Side Pomona's stronghold." West Side members used the letters W and S, and wore hats with Ps or Ws on them. Lee explained that hats with the letter P were not unique to the West Side Pomona gang; several gangs in Pomona used that symbol.

Lee testified that the notion of respect was "imperative" to gang culture. Gang members "will go that extra mile to be respected, whether it's assaulting innocent victims within their

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[5] Neither defendant challenges the jury's findings on the gang enhancements or any pertinent evidentiary rulings. We accordingly limit our discussion of the gang evidence to that necessary to the issues presented in this appeal.

own city, assaulting rival gang members, [or] committing crimes within their own neighborhood." Such actions instill not only respect but fear in the community. They also help gang members "gain status within the gang." Gang members frequently commit crimes in the presence of other gang members, because "[t]hey want somebody that's going to be able to come back and vouch for them and say so-and-so committed this crime. . . . So now all the other gang members look at that member and say, oh, he's respectable."

Lee testified that a person desiring to join a gang typically gets "jumped in," meaning he or she is beaten by current members, or commits a crime for the gang. He explained that a person usually begins the process by "associating with them in some way. You start to hanging [*sic*] around. You hang out with them, drink beer with them, maybe commit a couple small crimes for the gang, hold gun for them, hold a little bit of dope for them, something like that so they start to trust you." Then, "someone will vouch for you and they'll actually want to put you into the neighborhood." Until that point, the person is merely an associate, a "hanger on" who chooses to put him or herself into the gang lifestyle or a gang neighborhood. Lee opined that it was uncommon for gang members to accompany or "support and defend" associates while the latter were committing crimes. It also would be uncommon for a gang member to take full credit for a crime he committed with others; "it wouldn't benefit him to say, you know, only I did it, because it would make these guys look bad."

Lee opined that Sommer was a member of West Side Pomona who went by the gang moniker "Greedy." Lee noted that Sommer had facial tattoos indicative of gang membership, "a W

under his right eye, an S under his left." Lee further opined that Jorge Terrazas, with whom Miranda was detained on the afternoon of October 4, 2014, also was a member of West Side Pomona. Lee testified that Miranda was "at minimum" an associate of West Side Pomona, "if not a full-fledged gang member with the West Side Pomona gang." Lee opined that Miranda's residence in the laundry room of West Side Pomona's apartment stronghold was evidence that he was "placing himself with these people on his own." "He chose to put himself in a set of circumstances where he's associating with people who are known to carry guns, known to commit violent crimes against other gang members and have violent crimes committed against them."

Lee opined that a hypothetical punching and shooting like those that occurred at Alberto's Restaurant on October 4, 2014 would have been committed for the benefit of West Side Pomona. He explained that such acts would garner respect in the community and, if "[a]n undocumented gang member goes with a documented gang member, this could be his initiation into the gang." Lee further opined that it was common within gang culture for a fistfight to escalate into a shooting. "The gang member who brings a gun to a fist fight, there's some intent to use it, whether it's, you know, they start losing the fight and they decide to bring out the gun" or merely "a complete lack of regard for human life." Lee also explained that shooting is the highest form of confrontation, and that gang members "want to be known for taking that to the next level." Additionally, assaults with firearms are one of West Side Pomona's primary activities.

VII. Defense Evidence

Miranda testified on his own behalf before both juries. He

testified that he immigrated to California from Puerto Rico approximately two years before. He recently moved into the laundry room of the apartment complex behind Alberto's because his wife kicked him out of the house for using drugs. Miranda's P hat belonged to his brother-in-law.

Miranda testified that on October 4, 2014, he was trying to buy drugs from Terrazas when the police arrived. Miranda ran because he "didn't want to get held with drugs." The police took Terrazas to jail, but did not arrest Miranda. Shortly thereafter, a man named Steven arrived at the apartment complex. He seemed angry that the police had arrested Terrazas but not Miranda. Steven gave other people, including Sommer, permission to beat up Miranda, which they did. When the beating ended, Steven said he would kill Miranda if Miranda left the apartments before Steven figured out whether Miranda snitched on Terrazas.

Miranda accordingly found himself hanging out with Steven and some other people behind the apartment complex that evening. Miranda claimed that Steven "ordered me to go hit that guy" at the Alberto's drive-through, and he complied. Three men responded by hitting him, and he was shot while that was going on. Miranda concluded he was the first person shot "[b]ecause I had the four people in front of me," and Greedy—Sommer—was standing about five to six feet away. Miranda ran to a nearby fire station upon noticing he was "bleeding a lot." "[W]hen he shot me, I left and there was nobody else injured."

Miranda testified that the detectives interviewed him at the hospital, while he was under the influence of morphine. At that time, he told the detectives he punched the man at Alberto's because the man looked at him funny. Miranda testified that

was a lie, but said he feared that "they"—presumably the gang members at the apartment complex—"would kill my family" if he told the detectives the truth. Miranda lied to first responder Mendoza, whom he did not know was a police officer, for the same reason.

Miranda gave conflicting testimony as to whether he knew that Greedy brought a gun to Alberto's. Miranda initially testified that he had seen Greedy with a gun but did not know who had shot him. He later testified that he did not know Greedy brought a gun with him: "At that moment at Alberto's I didn't know that that he had it, but I know that he always carries one in the apartments."

On cross-examination, Miranda admitted that he also lied to the detectives about having a previous altercation with Wesley. He claimed he had never punched anyone before and "didn't imagine" that Wesley would punch back, or that Wesley's friends would defend him. Miranda agreed with the prosecutor's assertion that Greedy had "tried to kill" him, and further testified, "they sent me there to punch the guy, but I think they set me up and they send him [Greedy] to get me killed." That is, he thought the members of West Side Pomona "were setting me up, you know . . . I had to do it because I felt intimidated by them." He also reiterated that he "only saw the gun after I got up and after receiving the first shot and I looked up, and I saw him [Greedy] with a gun."

Miranda also called Berger to testify before both juries. The parties stipulated that Berger was an expert in the area of criminal street gangs. He opined that Miranda was an associate of West Side Pomona.

DISCUSSION

I. Sufficient Evidence Supported the Attempted Murder Convictions, Kill Zone Instruction, and Premeditation Findings

Sommer contends the evidence was insufficient to support his conviction for the attempted murder of Brandon or a jury instruction on the kill zone theory. He further contends that there was insufficient evidence that any of the attempted murders was willful, deliberate, and premeditated. Miranda similarly argues that there was insufficient evidence to support his conviction for the attempted murder of Wesley and the jury's finding that the attempted murder was willful, deliberate, and premeditated.[6] None of these arguments is persuasive.

A. Standard of Review

"'"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

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[6] Both Miranda and Sommer state in their opening briefs an intent to "join[] in and incorporate[] as though fully set forth in appellant's opening brief the arguments set forth in the opening briefs of all co-appellants that accrue to his benefit." (See California Rule of Court, rule 8.200(a)(5); *People v. Bryant* (2014) 60 Cal.4th 335, 363-364.)

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.)

B. Attempted Murder of Brandon

1. Direct Step

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Ervine* (2009) 47 Cal.4th 745, 785.) A direct step is something more than mere preparation. However, "[c]onduct that qualifies as mere preparation and conduct that qualifies as a direct but ineffectual act toward the commission of the crime exist on a continuum." (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 12.) "Whether acts done in contemplation of the commission of a crime are merely preparatory or whether they are instead sufficiently close to the consummation of the crime is a question of degree and depends upon the facts and circumstances of a particular case." (*Id.* at p. 14.) The dividing line between making preparations and taking a direct step is crossed when, "by reason of the defendant's conduct, the situation is 'without any equivocality,' and it appears the design will be carried out if not interrupted." (*Id.* at 13.) "[W]hen the acts are such that any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway, and a last-minute change of heart by the perpetrator should not be permitted to exonerate him." (*People v. Dillon* (1983) 34 Cal.3d 441, 455, overruled on other grounds, *People v. Chun* (2009) 45 Cal.4th 1172, 1186.)

Sommer argues that pointing the gun at Brandon was not a direct step toward killing him. Instead, Sommer contends, he "voluntarily abandoned any attempt murder without taking the direct step of firing." This view of a direct step is too restrictive.

The Supreme Court long has recognized that "the law of attempts would be largely without function if it could not be invoked until the trigger was pulled, the blow struck, or the money seized." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 455; see also *People v. Nelson* (2011) 51 Cal.4th 198, 212; *People v. Ervine*, *supra*, 47 Cal.4th at pp. 785-786.) "[I]t is not necessary that the overt act be the last possible step prior to the commission of the crime"—here, the trigger pull. (*People v. Morales* (1992) 5 Cal.App.4th 917, 926.) Here, the record at trial supported the inference that Sommer intended to kill Brandon when he pointed the revolver at him. As Sommer acknowledges in his opening brief, evidence admitted at trial showed that "Sommer pointed a gun at Brandon R[.] when he returned from the apartment complex." When he pointed the gun at Brandon, he already had fired several shots and seriously wounded all of Brandon's companions. The jury readily could infer that Sommer returned to Alberto's to finish what he and Miranda had started by shooting Brandon, particularly since Sommer positioned himself and aimed the gun in Brandon's direction. Indeed, Brandon himself inferred that Sommer intended to shoot him and interrupted Sommer's efforts with an apology and plea for mercy. (See *People v. Dillon*, *supra*, at p. 455.) Sommer's last-second change of heart, made after Brandon pleaded for mercy while attempting to drag his injured brother out of harm's way, does not negate Sommer's actions up to that point; abandonment of the effort prior to completion of the crime does not compel the

conclusion that the defendant lacked the intent to kill. (See *People v. Smith* (2005) 37 Cal.4th 733, 741.)

2. Kill Zone

Sommer also contends that the jury could not have found him guilty of the attempted murder of Brandon under the kill zone theory. He argues the jury should not have been instructed on the kill zone theory because the theory was not supported by the evidence. He further contends, that these errors were compounded by a supplemental argument the prosecutor made in response to a jury question.[7] We disagree.

a. 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."

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[7] The Attorney General claims that "Sommer essentially concedes his case" on the kill zone by acknowledging that Brandon, Nathan, Joanny, and Miranda were in the kill zone. We reject this mischaracterization of Sommer's argument. Sommer's opening brief says, "While the jury also heard Miranda state his belief that he was being set up [citation], *that testimony was contrary to the prosecution's theory that Sommer intended to kill [Wesley, Joanny, and the R. brothers], and Miranda was in the 'kill zone.*'"

(*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*, *supra*, 37 Cal.4th at p. 746.)

b. Use in this Case

The prosecution in this case sought to apply a kill zone theory to explain Sommer's alleged shooting of codefendant Miranda. The prosecutor argued, "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. That's the theory regarding Mr. Miranda. The way the defendant shot with this group of people there, the number of shots he was shooting, I'm going to kill these people and I don't care who I kill. . . . He didn't care whether Christian Miranda got killed or not. . . . With the others, it's more clear. With Christian Miranda, you may have to think about it a little bit more and say how many shots did he fire? How close was he? Did he really care whether Christian Miranda got killed or not?"

The trial court instructed the jury on the kill zone as to Miranda: "In order to convict the defendant of the attempted murder of Christian Javier Miranda, the People must prove that the defendant not only intended to kill [Joanny, Nathan,

Brandon, and Wesley] but also either intended to kill Christian Javier Miranda, or intended to kill everyone within the kill zone. If you have a reasonable doubt as to whether the defendant intended to kill Christian Javier Miranda or intended to kill [Joanny, Nathan, Brandon, and Wesley] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Christian Javier Miranda."

After some deliberation, and a request for readback of Brandon's testimony, Sommer's jury submitted two questions to the court: (1) "Does the simple fact that pointing a gun [*sic*] qualify as a direct step," and (2) "What constitutes a kill zone only relevant counts." The court informed the jury that the instructions addressed both issues. It nevertheless permitted the attorneys to make supplemental closing arguments to address the questions.

After some general comments about the kill zone, and the jury's responsibility to determine its size, the prosecutor made the following argument: "If you get someone like Brandon [R.], who wasn't shot, you have to figure out - - try to figure out, the best you can with the inferences, where he was. So you figure out where that kill zone is and, if it's relating to Brandon [R.], was he there or was he not. If the only evidence you have is that he pointed the gun and you can't say beyond a reasonable doubt that he's within the kill zone, then maybe you only have an assault with a firearm and not an attempted murder. . . . But if you look at the facts, you put Brandon in that area where he's shooting the other people, the number of shots the defendant's firing, you can conclude he was trying to kill him as well, then you have the attempted murder as well."

Sommer's counsel raised no objection to this argument, which suggested that the kill zone theory applied to Brandon in addition to Miranda.[8] She argued, "Mr. Bean sort of gave you his view on that. Mr. Bean is the prosecutor. I will have a different view. So, again, you're getting, you know, kind of clarification from advocates, but you, the jury, now - - because you've deliberated quite a bit, so, you know, you've had a good understanding of the evidence and the instructions. And if you feel somebody was or was not within the kill zone or what is or is not a kill zone, as you know, following the instructions, looking at the evidence and the law, if you feel you are not sure, you know, that's your call to make. That's why we have reasonable doubt instructions for you. That's why we have the other instructions for you. So I really add this point, I think that - - I don't think it is for us to be able to help you. You need to help yourselves. And if there is an issue, you're not sure if it exists or not, then so be it."

c. Analysis

Sommer contends that the original instruction on the kill zone doctrine—which was based on CALCRIM No. 600—was not supported by the evidence. He relies on *People v. McCloud* (2012) 211 Cal.App.4th 788, 798, which 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 nearby individuals to a risk of fatal injury." At most, he argues, the evidence showed

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[8] In his opening brief, Sommer argued the prosecutor committed misconduct by belatedly applying the kill zone theory to Brandon. "Upon further consideration," however, Sommer affirmatively abandoned this theory in his reply brief.

that he fired "four random shots . . . in response to people coming to help fight Miranda," thereby subjecting Wesley and his friends to a risk of fatal injury. He further asserts that applying the kill zone theory "to allow convictions for the attempted murder of more people than there were shots fired where the additional person was not in the line of fire [is] improper." We are not persuaded.

There was evidence from which the jury could infer that Sommer fired more than four shots at the five victims. Wesley testified that he heard "five or six," and the jury could infer from the eight collective wounds sustained by the victims that at least that many shots were fired. This is not a case like *People v. McCloud*, in which defendants who fired 10 shots into a large group of people were charged with 46 counts of attempted murder. (See *People v. McCloud*, *supra*, 211 Cal.App.4th at pp. 790-791, 801.) Nor is it like *People v. Perez* (2010) 50 Cal.4th 222, 232, in which the kill zone did not apply because the defendant indiscriminately fired one shot at a group of people. The jury reasonably could infer that Sommer created a kill zone by firing "a flurry of bullets" at a small group of people. (*Bland*, *supra*, 28 Cal.4th at p. 331.)

The manner in which Sommer carried out the attack—firing at a group of people who were fighting with their hands mere feet away from him—was suggestive of an intent to kill everyone in the area. "The act of firing toward a victim at close, but not point blank, range 'in a matter that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of an intent to kill . . . .' [Citation.]" (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) Sommer appears to assume that Wesley was the only intended target, but the

prosecution theorized and argued that Sommer intended to kill Wesley and his friends, while Miranda happened to be in the kill zone. There was evidence from which the jury could conclude that Wesley's friends were specifically targeted, not merely placed at risk of a fatal injury due to Sommer's focus on Wesley alone. Sommer told his father he shot at the "fools," eyewitnesses testified that Miranda—Sommer's "crimey" and likely gang associate—was losing the fight, and Sommer continued shooting at close range even after some of the men had been hit.

Sommer also contends that even if the kill zone instruction was proper generally, it was not applicable to Brandon because there was no evidence that he was within the kill zone. He asserts that Brandon was not shot and was "on the other side of the car" when the shots were fired. Even if Brandon was on the "other side of the car," that was mere feet away from the fight, and the jury reasonably could infer that area was encompassed within Sommer's gang-motivated kill zone. Sommer has not pointed to any case law holding that a kill zone may extend only a specific number of feet, and for good reason: a kill zone is "necessarily defined by the nature and scope of the attack" in each case and therefore varies with the circumstances of every case—as both the prosecutor and Sommer's counsel noted in their supplemental arguments. (*People v. Perez*, *supra*, 50 Cal.4th at p. 232.) A reasonable jury could infer that the area around the car was within Sommer's kill zone. Moreover, there was evidence that Brandon approached what remained of the fray to aid his wounded brother, who was still being attacked at the time. The jury could conclude that Brandon entered a more narrowly defined kill zone at this time.

C. Attempted Murder of Wesley

Sommer does not challenge his conviction for the attempted murder of Wesley. Miranda, however, argues that there was insufficient evidence that he aided and abetted this attempted murder. He contends that Sommer's attempted murder of Wesley was not a natural and probable consequence of Miranda's initial punch. We reject this contention.

"[U]nder the natural and probable consequences doctrine, '[a]n aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime.' [Citation.] Moreover, '[a] consequence that is reasonably foreseeable is a natural and probable consequence under this doctrine. "A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable."' [Citation.] 'The latter question is not whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable.' [Citation.] The natural and probable consequences doctrine applies equally to aiders and abettors and conspirators. [Citation.]" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 901.)

Miranda recognizes that "[j]urors in a number of cases have found shootings to be a foreseeable consequence of gang confrontations, and those findings have been affirmed on appeal." (*People v. Ayala* (2010) 181 Cal.App.4th 1440, 1449; see also *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10.) He argues that this case is different, however, because "all that was contemplated initially was a fistfight between a low-level associate and a possible gang member," and "the intervention of

[Wesley's] friends, which prompted Sommer to shoot, was unforeseen and independent of the plan to commit the assault."

This argument is not persuasive. "'Aider and abettor liability under the natural and probable consequences doctrine does not require assistance with or actual knowledge and intent relating to the nontarget offense. . . .' [Citation.] "'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.'" [Citation.]" (*People v. Romero* (2015) 62 Cal.4th 1, 42.) Even if the jury believed Miranda's testimony that he did not expect Wesley or his friends to fight back, the question it had to resolve was whether, from an objective standpoint, an attempted murder was a reasonably foreseeable consequence of Miranda's punch. There was sufficient evidence in the record to allow the jury to resolve that question affirmatively. Gang expert Lee testified that committing crimes such as assaults and shootings help members gain status in gangs, and it was common within the gang culture for a fistfight to escalate into a shooting. The jury reasonably could find that would be particularly true where, as here, there was evidence that the altercation was gang-related and the initial aggressor was aware that his companion brought a gun to the scene.

Miranda nevertheless maintains that this case is more analogous to *People v. Leon* (2008) 161 Cal.App.4th 149 (*Leon*) than it is to the numerous cases holding that shootings are reasonably foreseeable consequences of gang-related assaults. In *Leon*, the defendant and a confederate broke into a truck. When they were confronted by the truck's owner and other eyewitnesses

to the crime, who threatened to call the police, the confederate looked at the witnesses "and fired a gun in the air." (*Leon*, *supra*, 161 Cal.App.4th at pp. 153-154.) Defendant and his confederate were charged with and convicted of burglary (§ 459), attempting to dissuade a witness from reporting a crime (§ 136.1, subd. (b)(1)), and two gang-related firearms offenses (§§ 12025, subd. (b)(3), 12031, subd. (a)(1).) (*Id.* at p. 152.) On appeal, defendant argued and the appellate court agreed that there was insufficient evidence that witness intimidation was a natural and probable consequence of the other offenses. (*Id.* at pp. 159-161.) The court reasoned that there was "not a 'close connection' between any of the target crimes Leon aided and abetted, and [his confederate's] commission of witness intimidation." (*Id.* at p. 161.) The court recognized that "the fact that the crimes were gang related and that they were committed in a rival gang's territory clearly increased the possibility that violence would occur," but concluded that witness intimidation simply "cannot be deemed a natural and probable consequence of any of the target offenses." (*Ibid.*)

This case has virtually no factual similarity to *Leon*. Unlike the crimes of burglary and witness intimidation, the target crime of assault and the ultimate crime of attempted murder share a close connection that numerous courts have recognized. The gang-related nature of the incident here rendered the escalation of violence a near certainty, not the mere abstract possibility it was in *Leon*.

In short, the evidence amply supported Miranda's conviction for attempted murder under the natural and probable consequences theory, the only one the prosecution argued. We accordingly need not address Miranda's alternative argument

that a more traditional aiding and abetting theory also was not supported by sufficient evidence. (See *People v. Holt* (1997) 15 Cal.4th 619, 671; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.)

D. Willfulness, Deliberation, and Premeditation

Both defendants argue that the juries' findings that the attempted murders were willful, deliberate, and premeditated were not supported by sufficient evidence. Miranda claims there was no indication that Sommer intended to kill Wesley "until the whole group turned the tables on" Miranda, an abrupt change of circumstances that prompted Sommer to abandon his original intent to merely assault Wesley on the spur of the moment, without deliberation. Sommer similarly contends that there was insufficient evidence from which a reasonable jury could infer that he was following "'a calculated design to ensure death rather than an unconsidered explosion of violence.' (*People v. Horning* (2004) 34 Cal.4th 871, 902-903.)" We disagree.

"'[P]remeditated' 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.) "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.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), the Supreme Court developed guidelines to aid reviewing courts in assessing sufficiency of the evidence to sustain findings of premeditation and deliberation. *Anderson* identified three categories of evidence pertinent to the analysis: those indicative of planning, motive, and manner of killing. The *Anderson* guidelines have been applied in the context of premeditated attempted murder. (See, e.g., *People v. Lenart* (2004) 32 Cal.4th 1107, 1127-1128; *People v. Felix*, *supra*, 172 Cal.App.4th at pp. 1626-1627; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8 , overruled on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 199.) Importantly, however, the *Anderson* guidelines are "descriptive, not normative"; they reflect the Supreme Court's effort "to do no more than catalog common factors that had occurred in prior cases." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) Thus, the categories of evidence described in *Anderson* 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 Sommer's shootings were the result of preexisting thought and the careful weighing of considerations. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1270 (*Boatman*).)

Here, the evidence was sufficient for a jury to conclude that Sommer planned to kill, had a motive for doing so, and attacked the victims in a manner indicative of preconceived design.

Sommer stated during his jail calls that the "fool" who initially caught his attention, Wesley, "looked like a gang member and everything." Alberto's Restaurant was in the heart of West Side Pomona territory, near its stronghold, and the jury could infer that Sommer was angry or felt disrespected upon seeing an unknown gang member in his territory. From these facts, the jury could infer motive. Sommer armed himself with a gun before walking to Alberto's with a fellow gang member or associate who had been instructed to initiate an assault on Wesley, and stepped aside to use the gun when Miranda began to lose the fight. From these facts, the jury could infer planning.

Defendant argued that the evidence showed that Sommer and Miranda were taken by surprise when Wesley's friends rushed to his aid. But "[p]remeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.) The manner in which Sommer acted also is indicative of deliberation. He stepped back a few feet from the brawl and repeatedly shot his gun at the participants, pausing between each shot. The jury could infer from Sommer's disengagement from the fistfight, his retreat mere steps away, and shooting of the participants one by one, some multiple times, that he carefully considered his actions. Though Sommer did not actually shoot Brandon, his actions in leaving the immediate scene, then returning and pointing the gun at Brandon while Brandon was assisting his bleeding brother demonstrate a calculated, considered attempt to kill.

Defendants maintain this evidence is insufficient because it is not as strong as evidence in other cases. Sommer highlights

cases in which there was evidence of explicit planning by a gang member to shoot known rivals, such as repeated drive-bys (*People v. Sanchez*, *supra*, 26 Cal.4th at pp. 849-850; *People v. Rand* (1995) 37 Cal.App.4th 999, 1001); and cases in which the manner of killing or attempted killing—execution-style shots to the head—was more indicative of a deliberate, calculated intent to kill (*People v. Romero* (2008) 44 Cal.4th 386, 400-401; *People v. Martinez* (2003) 113 Cal.App.4th 400, 412-413).

Miranda likens this case to *Boatman*, 221 Cal.App.4th 1253, in which the appellate court concluded that none of the *Anderson* factors was satisfied where the defendant shot his girlfriend in the face during an argument in a manner that he maintained was accidental. The *Boatman* court noted that Boatman testified that he did not intend to kill his girlfriend (*Boatman*, *supra*, 221 Cal.App.4th at p. 1268); here, defendants note that Sommer told his father that his "intentions were not to go kill."[9] The *Boatman* court also emphasized that defendant's actions after the murder—crying, calling 911, wondering aloud how he could go on with his life—were consistent with "someone horrified and distraught about what he had done, not someone who had just fulfilled a preconceived plan." (*Boatman, supra*, at p. 1267.)

"[T]he facts of other cases, such as [those cited by defendants], are not particularly helpful in evaluating the sufficiency of the evidence in this case." (*People v. Rundle* (2008)

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[9] Jury disbelief of a defendant's statements or testimony cannot, without more, support an inference "that defendant did that which he denied doing." (*People v. Velazquez* (2011) 201 Cal.App.4th 219, 231; *Boatman, supra*, 221 Cal.App.4th at p. 1267.) We reject the Attorney General's assertion to the contrary.

43 Cal.4th 76, 140, disapproved on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Many cases have unique evidence and circumstances, and the divergence of facts from one case to another does not mean that one of the cases is devoid of sufficient evidence to support the jury's verdict. The evidence in this case may not have been as compelling as that in the cases defendants highlighted, or as weak as that in *Boatman*. It nonetheless was sufficient to allow the jury to infer that Sommer acted with premeditation and deliberation.

II. Sommer's Counsel was not Ineffective

Sommer contends that his trial counsel rendered ineffective assistance during closing and supplemental closing arguments. He argues that her closing argument was "rambling" and "disjointed," and did not address the elements of the charges against him or explain the concepts of premeditation and deliberation. He further claims her reliance on a self-defense theory was improper, as was her acknowledgement that she as a juror would have "strong suspicions" about Sommer's guilt. Sommer further asserts that the supplemental argument, made in response to the jury's questions about direct steps and the kill zone, "provided no defense," and that both arguments "lessened the prosecution's burden and undermined the adversary process." We disagree.

"The standard for showing ineffective assistance of counsel is well settled. 'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. [Citations.]" (*People v.*

Gray (2005) 37 Cal.4th 168, 206–207.) "Further, 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982.)

A criminal defendant's constitutional right to effective assistance of counsel extends to closing arguments. (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5.) "Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his [or her] closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. [Citation.] Judicial review of a defense attorney's summation is therefore highly deferential." (*Id.* at pp. 5-6.)

Sommer selectively highlights isolated excerpts of his counsel's lengthy closing argument, characterizing them as incoherent and improper. For instance, he points out that she stated, "the issue is not whether Derek Sommer, my client, is guilty of attempted murder and these other charges," and "you are not here to decide is Mr. Sommer guilty of attempted murder." He neglects to place these statements in context, however. Immediately after the first statement, counsel argued, "the issue is has there been presented to you proof, compelling evidence from which you can say to yourself that you feel an

abiding conviction that the case has been proven to you beyond a reasonable doubt." Similarly, after the second statement, she emphasized that the jury had to decide whether Sommer harbored the requisite intent to warrant an attempted murder conviction: "So the attempted murder has to have a specific intent to kill, and based on the evidence here, as you can see, are the way those two folks jumped over the fence, walked over there. You make the decision, right? So if you decide that, yes, there was a shooting done, and you know, we know there were victims who were shot or hurt by that, you know, got hit. Why did he do that? He did that because he's aiding his friend, and he maintained his story."

Placed in context, the statements Sommer isolates demonstrate a tactical decision to not dispute the facts but rather to focus the jury's attention on the prosecution's heavy burden of proof and Sommer's possible exculpatory motivation for his actions. Indeed, Sommer acknowledges that counsel "argued repeatedly that he was not guilty of attempted murder" and advanced a self-defense theory. This approach was eminently reasonable, given the eyewitness evidence and inculpatory statements made by Sommer, and well within the bounds of prevailing professional norms.

Sommer also highlights two paragraphs of closing argument—collectively about one page of the 24-page argument—and argues they are rambling and disjointed. We agree with Sommer that the excerpts he identifies are not exemplars of outstanding oration. But they accurately state the law and continue counsel's evidence-driven approach of focusing on Sommer's intent—to aid Miranda—and the prosecutor's heavy burden, along with the jury's responsibility to determine the

facts. Counsel's argument highlighted a theory of the case supported by at least some of the evidence and advanced Sommer's interests within the bounds of professional norms.

The same is true of her suggestion to the jury that she had "strong suspicions" about Sommer's guilt, which appears to have been a tactical decision designed to build rapport with the jury and reiterate the importance of the reasonable doubt standard. Likewise, her emphasis on "minor discrepancies in the recollections of the prosecution's witnesses and Miranda" appears to be a reasonable effort to hold the prosecution to its burden. Sommer notes that counsel could not recall victim Wesley's 13-letter surname or the sibling relationship between Brandon and Nathan, but he does not explain how these minor memory lapses rendered the underlying factual summation and legal argument improper or constitutionally ineffective.

Sommer also claims that counsel's supplemental argument (*ante*, section I.2.b) "provided no defense" and merely said "it was up to the jury to decide based on the instructions." As the United States Supreme Court has recognized, however, "which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether." (*Yarborough v. Gentry*, *supra*, 540 U.S. at p. 6.) Counsel's supplemental argument was responsive to the prosecutor's and emphasized that the kill zone query was one of fact for the jury to determine. It was not unreasonable for counsel to take such an approach. Trial counsel enjoy considerable latitude in crafting and delivering argument. None of the purported deficiencies Sommer identifies, together or separately, demonstrate that his counsel's strategic approach to this case was so objectively unreasonable or inadequate as to fall

below prevailing professional norms.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.