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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LUIS ERASMO GARCIA,<br><br>Defendant and Appellant. | B259708<br><br>(Los Angeles County Super. Ct. No. YA080092) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven R. Van Sicklen, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Colleen M. Tiedemann and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Luis Erasmo Garcia (defendant) of three counts of first degree, premeditated murder and one count of attempted premeditated murder after he shot and killed three rival gang members and shot and injured a friend's cousin at a streetside car show. On appeal, defendant argues that the trial court should have instructed the jury on the concepts of perfect and imperfect self-defense/defense of others, that the trial court should not have instructed the jury on a "kill zone" theory, and that there was insufficient evidence that the shootings were premeditated. We conclude there was no individual or cumulative error, and affirm.

## FACTS AND PROCEDURAL BACKGROUND

### I. Facts

On a night in August 2008, approximately 300 to 500 people gathered for an impromptu car show at the intersection of Western Avenue and Imperial Highway in South Los Angeles. Three members of the "South Los" street gang showed up, loudly proclaiming their gang affiliation and boisterously criticizing the multi-racial make-up of the crowd. Soon thereafter, someone fired a hail of four to eight bullets at the compact area where all three of the South Los gang members were standing next to one another. Some of the bullets struck and killed all three South Los gang members, and one bullet stuck Jose Garcia (Jose)[1] in the chest but did not kill him.

Although they recanted some of their prior statements while testifying, several persons called as witnesses had

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1 Because defendant and Jose Garcia share the same last name, we use Jose's first name for clarity. We mean no disrespect. We also note that the two men are unrelated.

previously given statements naming defendant as the shooter. Jose and his cousin (who was defendant's friend) each identified defendant as the shooter. Defendant later apologized to Jose for shooting him. And defendant bragged to others that he "dropped" "three [South Los members] in one."

## II. Procedural Background

The People charged defendant with the first degree, premeditated murders of the three South Los gang members (Penal Code, § 187, subd. (a)),[2] and with the attempted premeditated murder of Jose (§§ 187, subd. (a) & 664). The People further alleged that defendant personally discharged a firearm (§ 12202.53, subd. (d)) and committed the crimes at the direction of, for the benefit of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).

The trial court instructed the jury on first and second degree murder, and, as to the attempted murder count, on "kill zone" liability. The jury convicted defendant of three counts of first degree, premeditated murder and of attempted premeditated murder; it also found true the firearm and gang allegations.

For each first degree murder, the trial court imposed a prison sentence of life without the possibility of parole to be followed by 25 years for the firearm enhancement. The court imposed each sentence consecutively. The court also imposed a further, consecutive life sentence plus 25 years for the attempted premeditated murder count.

Defendant filed a timely notice of appeal.

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

## DISCUSSION

### I. Instructional Errors

Defendant argues that the trial court erred in instructing the jury because (1) the court did not instruct on perfect self-defense/defense of others or on the lesser included offense of voluntary manslaughter due to imperfect self-defense/defense of others, and (2) the court instructed that defendant could be liable for Jose's attempted murder on a "kill zone" theory. We independently review the trial court's jury instructions. (*People v. Cruz* (2016) 2 Cal.App.5th 1178, 1183.)

#### *A. Self-defense/defense of others*

A person has engaged in *perfect* self-defense/defense of others—and is not guilty of any homicide—if he kills a person with "'an honest *and* reasonable belief in the need to defend'" himself or others from great bodily injury or death. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1227 (*Valenzuela*), quoting *People v. Flannel* (1979) 25 Cal.3d 668, 674-675; § 197, subd. 3.) The person's honest, subjective belief negates the malice necessary to make the homicide murder, and "the reasonableness of th[at] belief . . . justifi[es] . . . the killing" entirely and renders it noncriminal. (*People v. Rodriguez* (1997) 53 Cal.App.4th 1250, 1269; § 187, subd. (a) [defining "murder" as an "unlawful killing . . . with malice aforethought"]; § 188 [defining "malice"].) A person has engaged in *imperfect* self-defense/defense of others if he kills a person with an "actual but unreasonable belief that he" or someone else "is in imminent danger of great bodily injury or death." (*People v. Simon* (2016) 1 Cal.5th 98, 132 (*Simon*).) As with perfect self-defense/defense of others, the person's actual, subjective belief negates the malice necessary to make the homicide murder; however, because that

belief is unreasonable, the homicide is still a crime but a lesser form of intentional homicide that lacks malice—namely, voluntary manslaughter. (*Ibid.*) In this respect, imperfect self-defense/defense of others is "not an affirmative defense" as much as it is a "'shorthand description of one form of [the lesser included offense of] voluntary manslaughter.'" (*Valenzuela*, at p. 1231, quoting *People v. Barton* (1995) 12 Cal.4th 186, 200; *Simon*, at p. 132.)

A trial court's duty to instruct on self-defense/defense of others is not tied to whether a defendant requests such instructions; instead, it turns on whether substantial evidence supports those instructions. For an affirmative defense like perfect self-defense/defense of others, a trial court has a sua sponte duty to instruct if (1) "'it appears the defendant is relying on such a defense,'" or (2) "'there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Boyer* (2006) 38 Cal.4th 412, 469, superseded on other grounds by section 22.) For a lesser included offense like voluntary manslaughter based on imperfect self-defense/defense of others, a trial court has a sua sponte duty to instruct if "there is substantial evidence that would absolve the defendant from guilt of the greater, but not the lesser, offense." (*Simon*, *supra*, 1 Cal.5th at p. 132.) In both instances, evidence is substantial if a reasonable jury could find, from the evidence presented at trial, that the elements of the pertinent self-defense/defense of others doctrine have been established. (*People v. Breverman* (1998) 19 Cal.4th 142, 159.) For these purposes, we review the evidence at trial "'in the light most favorable to the defendant.'" (*People v. Wright* (2015) 242

Cal.App.4th 1461, 1483 [as to lesser included offenses]; *People v. Mentch* (2008) 45 Cal.4th 274, 290 [as to affirmative defenses].)

*1. Evidence (viewed in the light most favorable to defendant)*

Although Jose flatly denied—and another witness confirmed—that Jose never had any altercation with the three South Los gang members, and although Jose's cousin had not mentioned being involved in a fistfight during his prior police interview or during his preliminary hearing testimony, Jose's cousin testified at trial that (1) he saw one of the three South Los members push Jose, (2) he rushed over to "defend" Jose, (3) he swung at one of the three South Los members who had swung at him but missed, but ended up only "tapp[ing]" him on the chin. The cousin also testified that the guy he "tapped" had a bottle in his hand, but had set it on the ground to take off his shirt at the time the gunshots were fired. The medical examiner testified that one of the three South Los members had an abrasion on his chin (as well as other places) that could have been caused by his fall to the ground or by a fight. The cousin also stated he had been friends with defendant for two to 12 months prior to the shooting.

*2. Analysis*

The trial court did not err in refusing to instruct the jury on the affirmative defense of perfect self-defense/defense of others or on the lesser included offense of voluntary manslaughter due to imperfect self-defense/defense of others. As noted above, both perfect and imperfect self-defense/defense of others require proof that the defendant had an "actual," "honest" and subjective belief in the need to defend himself or others from death or great bodily injury. (*Valenzuela*, *supra*, 199 Cal.App.4th at pp. 1230-1231; *Simon*, *supra*, 1 Cal.5th at p. 132.) However, there is no evidence

that defendant saw or otherwise perceived that Jose's cousin or, for that matter, Jose, were engaged in an altercation with any of the South Los gang members. There were hundreds of people at the car show, and there was no evidence that Jose or his cousin were even in defendant's line of sight prior to the shooting. Jose's cousin was the only person who testified to any altercation with the South Los members, and the cousin never testified that defendant was nearby or able to see what was happening. Jose testified that defendant was at some point eight feet away from him, but Jose also testified there was no altercation and that there were a number of people in between himself and defendant. In sum, there was no evidence indicating that defendant was looking at Jose or his cousin at the time the two South Los members were shoving Jose or swinging at Jose's cousin. Without such evidence, defendant could not have fired the shots with the intent to defend them or anyone else. There was also no evidence that the shove or the missed punch caused defendant to subjectively perceive that Jose or his cousin were in imminent danger of great bodily injury or death. (*Simon*, at p. 132.)

There is a further, independent reason why the trial court properly declined to instruct on perfect self-defense/defense of others. A defendant's belief is reasonable—and perfect self-defense/defense of others is available—only if "lethal force is *necessary* to prevent death or great bodily injury." (*People v. Uriarte* (1990) 223 Cal.App.3d 192, 197.) A defendant cannot invoke perfect self-defense/defense of others if he is the one who escalates a confrontation from one involving non-lethal force to one involving lethal force. (*People v. Clark* (1982) 130 Cal.App.3d 371, 380 ["deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or

likely to cause great bodily injury"]; CALJIC No. 5.31 ["[a]n assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury"].) Here, the South Los members and Jose's cousin were engaged in a fistfight, and the South Los member who was "armed" with a bottle put it down to fight the cousin; defendant's immediate resort to the lethal force of a gun therefore forecloses the availability of perfect self-defense/defense of others.

Defendant raises three sets of arguments in response. First, he asserts that a defendant is not required to take the stand at trial in order to establish the existence of his actual, subjective belief in the need to use deadly force to defend others. Defendant is right. (E.g., *People v. De Leon* (1992) 10 Cal.App.4th 815, 824.) But with or without a defendant's testimony, there still "must be evidence from which the jury could find that [defendant] actually had such a belief." (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1262.) Here, for the reasons explained above, there is no evidence that defendant *knew* Jose and his cousin were in a fistfight and thus no evidence that defendant subjectively believed he needed to defend them.

Second, defendant contends that the timing of the shooting (that is, not immediately upon the arrival of the three South Los members at the car show) as well as defendant's decision to be parsimonious with his bullets (that is, shooting only four to eight) shows that he was only trying to stop a fight; further, he argues, his gang rivalry with South Los does not preclude a finding that he acted to defend Jose and Jose's cousin. Significantly, these arguments do not cure the evidentiary deficiency outlined above.

Moreover, there was no evidence as to when defendant first became aware of the three South Los members vis-à-vis when he opened fire. Additionally, the fact that defendant shot one of the South Los members in the back and shot another in the head at point-blank range refutes defendant's contention that he was merely aiming to stop the fight rather than to kill.

Lastly, defendant argues any inconsistency between his "it wasn't me" defense at trial and "it was me, but I acted to defend others" on appeal is not a reason to deny him these instructions. We need not address this argument because, as explained above, he did not adduce substantial evidence to support an instruction on perfect or imperfect self-defense/defense of others.

***B. Kill zone instruction***

As a general rule, "'[a]ttempted murder requires the specific intent to kill'" a specific person. (*People v. Stone* (2009) 46 Cal.4th 131, 136 (*Stone*), quoting *People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) Consequently, a defendant who intends to kill one person, but shoots a second person instead, is not guilty of attempted murder of the second person. (*People v. Bland* (2002) 28 Cal.4th 313, 331 ["transferred intent does not apply to attempted murder"].) However, because "'a primary intent to kill a specific target does not rule out a concurrent intent to kill others'" (*Stone*, at p. 137, quoting *Bland*, at p. 331, fn. 6), a defendant who "specifically intend[s] to kill every single person in the area in which [his] primary target [is] located"—in the so-called "kill zone"—can be liable for the attempted murder of anyone in that area. (*People v. McCloud* (2012) 211 Cal.App.4th 788, 803 (*McCloud*); *People v. Cardona* (2016) 246 Cal.App.4th 608, 615, review granted July 27, 2016, S234660 (*Cardona*).)

The trial court properly gave the instruction that defendant could be liable for Jose's attempted murder on a kill zone theory. Jose was standing in the compact area alongside the three South Los members at the time the shots were fired into that area, and defendant fired enough bullets—four to eight, for just three intended victims—to kill everyone in that area. (Cf. *People v. Perez* (2010) 50 Cal.4th 222, 232 (*Perez*) ["indiscriminate[ly] firing . . . a single shot at a group of persons, without more, does not amount to an attempted murder of everyone in the group"].) These facts mirror those in *People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1243 (*Falaniko*), where the court held that a "defendant who targets a specific person by firing a flurry of bullets into a crowd may . . . be convicted of attempted murder if the evidence shows he intended to kill everyone in the victim's vicinity in order to kill the intended victim."

Defendant responds with two arguments. First, he argues that a "kill zone" can only exist in an enclosed area (such as a structure or a car), and not in an open area such as a crowd. *Falaniko* refutes this argument.

Second, defendant contends that *Cardona* and *McCloud* dictate a result in his favor. But these cases are distinguishable on their facts. In *Cardona*, the court held that the facts were "a poor fit for the kill zone theory" because the defendant in that case had tried to rob someone with a gun and then fired the gun when that person pulled a knife to resist the robbery. Importantly, "no witness testified that [the defendant] sprayed everyone near [his intended victim] with gunfire." (*Cardona*, *supra*, 246 Cal.App.4th at pp. 614-615, review granted.) In *McCloud*, the court held that a defendant who shot 10 bullets into a crowd could not be held liable for 46 counts of attempted

murder on a kill zone theory because he did not fire enough bullets to kill everyone in the area. (*McCloud*, *supra*, 211 Cal.App.4th at pp. 799-801; accord, *Stone*, *supra*, 46 Cal.4th at pp. 136, 138 [same, for single shot into crowd of 10 people]; *Perez*, *supra*, 50 Cal.4th at p. 232 [single shot into group of eight people].)

## II. Sufficiency of the Evidence

Defendant contends there was insufficient evidence to support the jury's findings that he committed the murders and attempted murder in a premeditated manner. For the three counts of first degree premeditated murder and the single count of attempted premeditated murder, the People were required to prove beyond a reasonable doubt that defendant acted with premeditation and deliberation. (§ 189 [defining first degree murder to include "any other kind of willful, deliberate, and premeditated killing"]; § 664, subd. (a) [prescribing life sentence for attempted murder that is "willful, deliberate, and premeditated"].) ""Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance."' (*People v. Sandoval* (2015) 62 Cal.4th 394, 424, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) What matters is "'the extent of the [defendant's] reflection,'" not the "'duration of time'" in which he undertakes it. (*Ibid.*) Our Supreme Court has identified three guideposts bearing on whether a defendant has acted with premeditation and deliberation: (1) the defendant's motive; (2) any planning activity; and (3) the manner of killing. (*People v. Cage* (2015) 62 Cal.4th 256, 276, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) In evaluating whether there is sufficient evidence to sustain a jury's findings of premeditation and deliberation, we

examine whether the record, viewed in the "light most favorable to the" verdicts, contains "evidence which is reasonable, credible, and of solid value from which a rational trier of fact could find [the] defendant guilty beyond a reasonable doubt." (*Cage*, at p. 275.)

***A. Evidence (viewed in the light most favorable to the verdict)***

Defendant is a member of the Gardena 13 street gang. One of Gardena 13's rivals is the South Los gang. Defendant "usually" carries a nine-millimeter handgun on his person. On the night of the shootings, Jose's cousin saw defendant with a nine-millimeter handgun, and casings from a nine-millimeter handgun were recovered from the scene of the shooting. Defendant may have walked back to his car to retrieve the gun prior to the shooting. One of the South Los members died from a gunshot wound to the chest; another had two gunshot wounds, including one in his back; and the third died from a gunshot wound to the head from point-blank range.

***B. Analysis***

Looking to the three guideposts our Supreme Court has identified, there was substantial evidence from which a rational jury could conclude that defendant acted with premeditation and deliberation in shooting the three South Los members and Jose. As defendant concedes, he had a motive to shoot and kill his gang rivals, which supports a finding that he acted with premeditation and deliberation. Defendant also planned to have a loaded gun at the ready—either by carrying it on his person or by returning to his car to retrieve it. (Accord, *People v. Lee* (2011) 51 Cal.4th 620, 636 [bringing "a loaded handgun . . . indicat[es]" that a defendant was "consider[ing] the possibility of a violent encounter"]; *In re Gray* (2007) 151 Cal.App.4th 379, 407-409 [retrieving a weapon is

evidence of premeditation].) And defendant's decision to shoot one of the South Los members at point-blank range in the head and another in the back indicates that defendant intended to execute these men. (Accord, *In re Gray*, at pp. 408-409 ["execution-style" killing is evidence of premeditation].) This would constitute substantial evidence of premeditation and deliberation outside the gang context. It is most certainly sufficient "in the context of a gang shooting," where "the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849.)

Defendant makes four arguments to the contrary. First, he argues that there was no evidence that he was looking for trouble. But a long-gestating plan to kill is not required. (See *People v. Memro* (1995) 11 Cal.4th 786, 863 [""[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly""].) Second, defendant contends that Jose and his cousin dispute that defendant went to his car to retrieve his gun. This is of no concern because we disregard conflicting evidence when evaluating its substantiality (*People v. Hernandez* (2000) 22 Cal.4th 512, 526), and because, as noted above, defendant's act in carrying a loaded firearm with him on his person is also evidence of planning. Third, defendant asserts that firing a gun at close range is not evidence of prior planning and cites *People v. Ratliff* (1986) 41 Cal.3d 675, 695. The issue in *Ratliff*, however, was whether firing a gun at close range established a defendant's intent to kill, not whether the killing in that case was premeditated (*id.* at pp. 695-696); *Ratliff*'s analysis is accordingly unhelpful. Lastly, defendant suggests that the fact he shot Jose indicates that the killing was unplanned. But it just as likely suggests that he was a bad shot

or that he did not care whom he shot or killed in the course of killing the three South Los members. Because we draw all reasonable inferences in favor of the verdict (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1444), we need not—and, indeed, cannot—draw the inference defendant requests.

**III. Cumulative Error**

Because we reject defendant's individual claims of error, we necessarily conclude there was no cumulative error. (Accord, *People v. McWhorter* (2009) 47 Cal.4th 318, 377 [no cumulative error where no individual error exists].)

**DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.*

GOODMAN

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