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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.

RODRIGO PEREZ,

Defendant and Appellant.

B198165

(Los Angeles County
Super. Ct. No. BA298659)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Affirmed with directions.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

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Rodrigo Perez appeals from the judgment entered following a jury trial in which he was convicted of one count of attempted murder, seven counts of attempted premeditated murder of a peace officer, one count of assault with a semiautomatic firearm, seven counts of assault on a peace officer with a semiautomatic firearm, and one count of felony vandalism. The jury further found that defendant personally used a firearm and inflicted great bodily injury, and that the offenses were committed for the benefit of a criminal street gang. Defendant was sentenced on one of the counts of attempted murder of a peace officer to 15 years to life plus an enhancement of 25 years to life for personal use of a firearm causing injury. Sentences on the remaining attempted murder offenses were imposed concurrently, sentences on the assault counts were imposed but stayed under Penal Code section 654, and the remaining firearm use enhancements were also imposed but stayed, for an aggregate term of 40 years to life in state prison.

Defendant contends that (1) the evidence was insufficient to support the findings that (a) he reasonably should have known that some of the victims were peace officers (and alternatively that trial counsel rendered ineffective assistance as to this issue) and (b) the attempted murders were premeditated, and the evidence was also insufficient to support his convictions of (c) all but one of the attempted murders and (d) felony vandalism. Defendant further contends that (2) stayed firearms enhancements should not have been imposed at all and (3) conduct credits were erroneously denied. We affirm the judgment and direct the trial court to grant precommitment conduct credits.

BACKGROUND

On July 1, 2005, Los Angeles police officers who were sitting in an unmarked car across from Christopher Dena Elementary School on Olympic Boulevard and Grande Vista Avenue in East Los Angeles saw a car stop in front of the school. Defendant got out from the front passenger seat and, using a can of spray paint, sprayed graffiti on two walls that identified the Eighth Street gang. Defendant then got back into the car, which sped off. A gang expert testified that defendant is a member of the Eighth Street criminal street gang, which is a rival of the Varrio Nueva Estrada (VNE) gang. Eighth Street

claims territory bordered on one side by Grande Vista Avenue. VNE claims the territory on the other side of Grande Vista.

On the afternoon of the following day, July 2, 2005, defendant, his girlfriend, Vanessa Espinoza, and Espinoza's cousin, Lissette Guerrero, attended a barbeque in Elysian Park. Guerrero testified that the three left the barbeque after dark. Defendant dropped Guerrero and Espinoza off at defendant's house and drove away. Espinoza testified (under a grant of immunity) that defendant woke her up around 3:00 a.m. the next morning (July 3). Defendant appeared drunk and told Espinoza he thought he had shot a cop.

Meanwhile, about 1:30 a.m. on July 3, 2005, officers responded to a report of a carjacking. The car which had been stolen was at an apartment building parking lot abutting the VNE side of Grande Vista Avenue. Officers arrived at the scene and detained some of the carjack suspects. The carjack victims were brought to the scene for in-field identifications.

At one point, eight uniformed officers and one of the carjack victims, as well as three marked police cars, were in the parking lot. A fourth marked police car was at a nearby corner. One of the officers noticed a car with two people inside turning from Olympic onto Grande Vista, driving about 60 feet away at 10 to 15 miles per hour. A shot was fired from the passenger side window. The shot hit the middle finger of Officer Rodolfo Fuentes, who was standing next to the carjack victim. Fuentes dropped down (as did the other officers at the scene) and pulled the carjack victim down with him. The car, with what appeared to have been two males inside, sped off.

The parking lot where the officers were standing had an "overhang illuminated light." There were also some trees between the lot and Grande Vista. The lighting conditions were described by one officer as "good enough where you can see." Another officer described the lighting as "very dim" and "very dark." When the shot was fired, several officers were standing in an area near the carjack victim and his car. As described in the testimony of the various officers, the carjack victim (counts 17–18) was standing next to Officer Fuentes (counts 1–2), Officer Trujillo (counts 9–10) was two feet

from Fuentes, Officer Meneses (counts 5–6) was about three away, Officer Davis (counts 13–14) was four to eight feet away, Officer Aguilera (counts 11–12) was approximately five feet away, Officer Villaneda (counts 7–8) was 10 to 15 feet away from Officer Fuentes, and Officer Ortega (counts 15–16) was standing near the other officers, taking photographs of the victim's car. (Officer Monahan (counts 3–4) was standing farther away from Fuentes than the other officers, and defendant was acquitted of attempting to murder and assaulting him.)

The bullet that hit Fuentes almost severed his finger, requiring surgery and several days of hospitalization. Investigators established that the bullet then continued through a metal security door and the wooden front door of a unit in the nearby apartment building. Finally, it struck a kitchen cabinet and bounced into a bathroom. The bullet was found to be consistent with a .40-caliber or a 10-millimeter semiautomatic handgun, possibly manufactured by Glock. The vehicle used in the shooting was eventually identified as being registered to Espinoza (defendant's girlfriend).

Jose Morales, who testified in the hope of leniency following a nonrelated conspiracy plea, said that he had grown up with defendant. Defendant told Morales that he had been drinking with friends and decided "to pass by the VNE's." When defendant got to a stop sign, he saw some men with bald heads whom defendant thought were VNE gang members.[1] Defendant further told Morales that "he shot and when they ducked that is when he noticed it was police officers, because the flashing . . . from their badges, so he stepped on the accelerator of his car to leave." The gun defendant used was a Glock belonging to Paul Leyva.

Leyva testified (under a grant of immunity) that he owned a "40 Glock." Two days before the shooting, when defendant and Leyva were together, defendant took hold of Leyva's gun, saying that it was nice. Leyva asked defendant to return it. Defendant

[1] One of the officers testified that, at the time of the incident, his head was "shaved." Another officer described his hair as "close shaved."

responded, "'[L]et me hold on to it. Let me use it.'" Leyva acceded to defendant's request, stating that he would come back for the gun in two days. Two days later, when Leyva went to retrieve the gun, defendant told him that he was drunk the night before, had fired a shot, and then sped home.

The prosecution's gang expert was of the opinion that the shooting had been committed for the benefit of the Eighth Street gang, whose primary activities included murder and robbery. Members of the gang had committed predicate offenses.

Testifying in his own behalf, defendant admitted that in the past he had been a member of the Eighth Street gang but asserted that his gang activities ceased in 2004. (Defendant's father and an ex-VNE member who directed a youth program also testified to this effect.) Defendant denied spray painting the elementary school. On the night of the shooting, defendant drove to an apartment complex to meet a friend. The two smoked marijuana and drank beer. As defendant was driving home, another friend asked for a ride. Defendant drove the friend on Olympic Boulevard, intending to get on the Interstate-5 freeway. Defendant had turned on Grande Vista when his friend said, "'Who's them fools right there, fool?'" Defendant said he did not know who they were, at which point he heard a loud noise and saw his friend holding a gun. The friend told defendant to "'step on it,'" and defendant drove away quickly. The next morning, defendant heard on the news of a police officer getting shot. Defendant further claimed that his conversations with Morales and Leyva did not include an admission that he had fired a gun.

DISCUSSION

1. Sufficiency of the Evidence

In resolving claims of insufficient evidence, "our role on appeal is a limited one. '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. [Citation.]

[¶] Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' [Citation.]" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

a. Finding of knowledge that victims were peace officers

The jury in this case made special findings with respect to seven of the attempted murder and assault counts that defendant "knows or reasonably should know that the victim is a peace officer." (Pen. Code, §§ 664, subd. (e), 245, subd. (d)(2).) Defendant contends that the evidence was insufficient to support these findings. We disagree

The basis of defendant's contention is evidence that the lighting conditions in the parking lot were poor, the officers (two of whom had shaved heads) were standing in VNE territory approximately 60 feet away from defendant's car, defendant's view was obstructed by trees and other cars, and defendant had been drinking beer and smoking marijuana. But in asserting that this evidence undermines the contested findings, defendant ignores contrary evidence that the lighting conditions at the parking lot were "good enough where you can see" and that in addition to the officers' uniforms, marked police cars were also at the scene. Defendant further fails to recognize that when the jury was evaluating the testimony of the officer victims, references were made to diagrams and photographs of the scene, which were placed into evidence to aid the jury in a determination of whether defendant could reasonably have known that the victims were police officers. Those diagrams and photographs have been transmitted to this court and have been viewed by us in conjunction with our review of the issue. Based on our review

of the transcripts and exhibits, we conclude ample evidence was presented to demonstrate that someone in defendant's position reasonably should have known that his intended victims were peace officers.

Defendant alternatively contends that his trial counsel rendered ineffective assistance in failing to object to, or later clarify, the prosecutor's opening argument to the jury that voluntary intoxication could not be used in determining whether defendant reasonably should have known that his intended victims were peace officers. Again, we disagree.

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. [Citations.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 519–520; see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215–218.) The first prong of this test is satisfied on direct appeal only if the record affirmatively discloses that counsel had no rational tactical explanation for the allegedly ineffective act or omission. (*People v. Zapien* (1993) 4 Cal.4th 929, 980; *People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

It is true that during closing argument the prosecutor disparaged defendant's legitimate intoxication defense to knowledge that he was shooting at police officers, stating among other things that "you don't get to walk on that allegation because you were intoxicated, because your perceptions were off." It is also true that defense counsel also argued that "[y]ou can't go out and get drunk, and then use intoxication as a defense." But as to defense counsel's statement, it appears more likely that these words were merely a summary of the prosecutor's position, said in a tone of voice which, of course, is not knowable from the record. Immediately after making that statement, defense counsel went on to argue the intoxication defense, referring the jurors to the instruction they would be receiving on the topic and asserting that no one would be so

careless as to fire knowingly on a group of police officers.[2] Thus, defense counsel may have made a tactical decision to forgo objection because the prosecutor's misstatement of law would soon be corrected in the closing argument defense counsel would make and by virtue of the instruction that the jury would ultimately receive on the topic. As such, defendant's ineffective assistance contention must be rejected. (*People v. Ledesma*, *supra*, 43 Cal.3d at pp. 215–218; see also *People v. Cash* (2002) 28 Cal.4th 703, 735.)

b. Finding of premeditation

In analyzing the sufficiency of a finding of premeditation, we are required to "focus upon evidence of (1) the defendant's *planning* activity prior to the killing; (2) his *motive* to kill, derived from his prior relationship or conduct with the victim; and (3) the *manner* of killing, indicating some preconceived design to kill in a certain way. Evidence of all three elements is not essential, however, to sustain a conviction. A reviewing court will sustain a conviction where there exists evidence of all three elements, where there is 'extremely strong' evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill. [Citation.]" (*People v. Edwards* (1991) 54 Cal.3d 787, 813–814, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) "In identifying categories of evidence bearing on premeditation and deliberation, *Anderson* did not purport to establish an exhaustive list that would exclude all other types and combinations of evidence that could support a finding of premeditation and deliberation.

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[2] The jury was instructed under CALCRIM No. 625, which provides in relevant part: "As to [the counts alleging that the victims were peace officers], you may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant knew or should have reasonably known, that the victims were Peace Officers performing their duties. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose."

[Citation.] . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; accord, *People v. Hawkins* (1995) 10 Cal.4th 920, 957, overruled in part in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

The evidence here established that at the time of the shooting defendant was a participant in the activities of the Eighth Street gang, which had a rivalry with the VNE gang. Shortly before the shooting, defendant borrowed a gun from a friend, asking to use it for two days. On the night of the shooting, defendant decided to "pass by the VNE's" territory. While doing so, driving at a slow speed, defendant saw a group of people about 60 feet away whom defendant stated he thought to be VNE members. At that point, defendant fired a shot into the group, hitting Officer Fuentes.

Defendant's reliance on cases such as *People v. Herrera* (1999) 70 Cal.App.4th 1456 and *In re Serigio R.* (1991) 228 Cal.App.3d 588, which he characterizes as having evidence of premeditation that appears stronger than here, and on *People v. Munoz* (1984) 157 Cal.App.3d 999, where the evidence of premeditation appears weaker, is of no avail. The question we must resolve is whether the evidence in *this* case was sufficient to convince a rational trier of fact beyond a reasonable doubt that the attempted murders committed by defendant were premeditated. Based on the evidence outlined above, we conclude that it was.

c. Convictions of multiple attempted murders

Defendant was convicted of attempted murder in counts 1, 5, 7, 9, 11, 13, 15, and 17. He contends that because he fired only one shot, with which he hit Officer Fuentes, only the conviction of attempting to murder Fuentes (count 1) was supported by the evidence. The contention is without merit.

In *People v. Smith* (2005) 37 Cal.4th 733, the defendant fired a single bullet into a slowly moving vehicle, narrowly missing the driver and her baby son who was seated directly behind her. On appeal, the defendant contended that his conviction for attempted murder of the baby was unsupported because he harbored no animus toward the baby and the single shot evidenced only an intent to kill the mother. (*Id.* at pp. 738–739.) The

Supreme Court disagreed, holding that in the absence of any contrary evidence, a rational jury could reasonably infer that the defendant acted with intent to kill both the baby and the mother when he fired a shot at them from close range, knowing both of them were directly in his line of fire, even though the defendant had no motive to kill the baby. (*Id.* at pp. 743–744.)

In *People v. Chinchilla* (1997) 52 Cal.App.4th 683, which the Supreme Court cited with approval in *People v. Smith*, *supra*, 37 Cal.4th at pages 744–745, the defendant fired a single shot at two police officers, one of whom testified she was "crouched behind but above" the other officer. (*Chinchilla*, at p. 690.) The Court of Appeal rejected the defendant's challenge to more than one conviction for attempted murder and held that a reasonable jury could infer that the defendant intended to kill both officers where he "endangers the lives of both officers" who were visible to him. (*Id.* at p. 691.)

Here, defendant fired at a group of people from a distance of 60 feet. The jury, which heard testimony and viewed exhibits regarding the officers' relative locations, was in a position to determine whether the officers' proximity to each other was such that in intending to kill any of the officers defendant's shooting endangered the lives of all. Indeed, in making these determinations, the jury acquitted defendant of the count involving the officer who was farthest from Fuentes. Accordingly, defendant's multiple convictions for attempted murder must be affirmed.

d. Conviction of felony vandalism

In rendering a guilty verdict on the vandalism charge (count 19), the jury found that defendant's damage exceeded $400. At sentencing, the court determined the offense to be a felony.[3] We disagree with defendant that the evidence in this case established only misdemeanor vandalism.

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[3] Vandalism is an alternative felony or misdemeanor "[i]f the amount of defacement, damage, or destruction is four hundred dollars ($400) or more." (Pen. Code, § 594, subd. (b)(1).) If the damage is in a lesser amount, the crime is a misdemeanor. (*Id.*, § 594, subd. (b)(2)(A).)

The graffiti defendant sprayed on the two walls of the Christopher Dena Elementary School on July 1, 2005, was painted over on July 5. Two witnesses testified on the issue of the damage caused by defendant's vandalism: Los Angeles Unified School District "senior painter" Edward McEniry and Los Angeles Unified "paint supervisor" Charles Sawyer.

McEniry testified that the timecard of the painter who did the actual work showed that he spent 2.25 hours at a rate of "[a]t least $49 an hour" with a paint cost of $25 to $30. A painter doing such work might paint over only the graffiti rather than paint the entire wall on which the graffiti is written. Schools in the East Los Angeles area such as Christopher Dena needed graffiti painted out on a "not-too-infrequent basis."

Sawyer, who is McEniry's supervisor, was shown a photograph of the graffiti sprayed on by defendant before it was painted over. McEniry testified that to paint over the graffiti and restore the walls to their original condition would take 10 hours of labor at $29 per hour and $200 in materials, for a total of $490. Including overhead and fringe benefits, the cost would rise to $687. Sawyer's department does not ask for entire walls with graffiti to be put back in their original condition because there is not enough time or manpower to do so. Sawyer further explained that it was not general policy to paint entire walls, but to paint only the sections of walls on which graffiti has been sprayed. In some cases, a section that had been painted over might have more graffiti sprayed on it the following week. Sawyer agreed that 2.25 hours for labor and approximately $25 in costs is "[t]he most accurate estimate for the repair of that wall is the work that was actually done."

Defendant asserts that the policy of the school district in dealing with graffiti, which was put into practice here, limited the damage done by defendant's vandalism to under the $400 threshold (2.25 hours at $49 per hour plus $25 equals $135.25). But merely because a school district may not have the resources to fully repair graffiti damage by completely repainting the wall on which it is written, the amount of damage caused by the defendant does not change. The $697 figure for that damage, which the

jury accepted in reaching its verdict, constituted sufficient evidence to support defendant's conviction of felony vandalism.

2. Sentence on Enhancements

The jury found firearm use enhancements against defendant under Penal Code section 12022.53, subdivisions (b), (c), and (d). At sentencing, a term of 25 years to life was imposed under subdivision (d), and the lesser sentences under subdivisions (b) and (c) were imposed but stayed. Defendant contends that the latter two enhancements should not have been imposed.

In *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1122–1123, which was decided after the parties filed their briefs in this case, the Supreme Court concluded it was proper in a circumstance such as this for sentence on the lesser enhancements to be imposed but stayed. Accordingly, defendant was properly sentenced and his argument to the contrary must be rejected.

3. Conduct Credits

At sentencing, the trial court awarded presentence custody credits of 384 days to defendant but declined to award any conduct credits. This was error. Although presentence conduct credits may not be used to reduce the minimum term of an indeterminate sentence, such credits may be used in determining the ultimate release date from prison. (*People v. Carpenter* (1979) 99 Cal.App.3d 527, 535–536.) Accordingly, defendant contends, and the Attorney General aptly concedes, that under Penal Code section 2933.1 defendant is entitled to 57 days of conduct credit, representing 15 percent of the greatest whole number of his custody credits. We shall order the abstract of judgment to be appropriately amended. (See *People v. Culp* (2002) 100 Cal.App.4th 1278, 1284; *People v. Ramos* (1996) 50 Cal.App.4th 810, 815–816.)

DISPOSITION

The judgment is affirmed. The trial court is directed to correct the abstract of judgment to award 57 days of presentence conduct credits and to forward the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

MALLANO, P. J.

I concur:

NEIDORF, J.*

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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.

ROTHSCHILD, J., Dissenting.

Rodrigo Perez fired a single bullet at a distance of 60 feet, from a car going 10 to 15 miles per hour, at a group of eight people who were standing 2 to 15 feet apart from one another. The bullet wounded one person in the group but killed none. Apart from the firing of that one shot, the record contains no evidence that Perez intended to kill anyone. The jury convicted Perez on eight counts of attempted murder, and the majority concludes that the convictions are supported by substantial evidence. I disagree.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Moreover, a defendant cannot be liable for a criminal attempt unless the defendant had "'an apparent ability to commit the crime in the way attempted.'" (*People v. Reed* (1996) 53 Cal.App.4th 389, 397, quoting *People v. Siu* (1954) 126 Cal.App.2d 41, 44.)

Assuming for the sake of argument that the record in this case contains substantial evidence to support each attempted murder conviction *considered individually*, the record contains no evidence supporting the eight attempted murder convictions *considered collectively*. A single bullet fired at a moderately dispersed crowd from a moving car 60 feet away cannot support a reasonable inference that the shooter intended to kill eight people or that the shooter had the apparent ability to kill all eight people with that one shot.

Thus, the question is whether, on a substantial evidence challenge, we are limited to considering the convictions individually or, on the contrary, must look at them collectively. Although the Supreme Court has never said it in so many words, the Court's analysis in both *People v. Smith* (2005) 37 Cal.4th 733, and *People v. Bland* (2002) 28 Cal.4th 313, strongly suggests that we are required to consider them collectively.

In *Bland*, the defendant fired numerous rounds at close range into a car, killing one occupant (the apparent target) and injuring the other two. The Court endorsed a "kill

zone" theory to uphold the defendants' convictions on one count of murder and two counts of attempted murder. (*People v. Bland*, *supra*, 28 Cal.4th at pp. 318, 329-331.) The "kill zone" theory would have been unnecessary, however, if the Court had not been considering the convictions collectively. Each conviction, considered individually, would have been supported even if the defendant had not created a "kill zone" by firing multiple rounds but rather had fired only one bullet into the car.

In *Smith*, the defendant was standing behind a car when he fired a single bullet through the rear windshield, hitting the driver's headrest but missing both the driver and her three-month-old son, who was "secured in a rear-facing infant car seat in the backseat" directly behind her. (*People v. Smith*, *supra*, 37 Cal.4th at pp. 736-737.) In affirming the defendant's convictions on two counts of attempted murder, the Court repeatedly emphasized that both victims "were in [the defendant's] direct line of fire." (*Id.* at p. 745; see also *id.* at p. 746 ["two victims who are both, one behind the other, directly in [the defendant's] line of fire"].) Again, the presence of *both* victims in the defendant's "direct line of fire"—which gave the shooter the apparent ability to kill them both with one shot—would have been irrelevant if the Court had not been considering the convictions collectively. Considered individually, each conviction would have been supported by the evidence even if the victims had been situated in such a way that a single bullet could *not* have killed them both. (See also *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690-691 [affirming two attempted murder convictions on the basis of one shot "fire[d] at two officers, one of whom [was] crouched in front of the other"].)

Given the Supreme Court's analysis, I believe we must consider Perez's eight attempted murder convictions collectively when evaluating his substantial evidence challenge. If we do so, the convictions must be reversed. The record contains no evidence that Perez intended to kill eight people or had the apparent ability to kill eight people with one bullet.

In her dissent in *People v. Smith*, *supra*, 37 Cal.4th 733, Justice Werdegar described the following hypothetical: "If assailant D shoots a handgun once at close range in the direction of a targeted victim, V1, who is standing in a close crowd of

strangers, V2 through V10, could a jury find D intended to kill all 10 victims, even in the absence of evidence D had any reason to want V2 through V10 dead?" (*Id.* at p. 754 (dis. opn. of Werdegar, J.).) Justice Werdegar rejected as "absurd" the conclusion that "an assailant has tried to murder everyone his act endangers." (*Ibid.*) The Supreme Court majority did not disagree. (See also *People v. Anzalone* (2006) 141 Cal.App.4th 380, 392 ["[A]n attempted murder is not committed as to all persons in a group simply because a gunshot is fired indiscriminately at them"].)

The facts of the case before us are even more extreme than those presented by Justice Werdegar's hypothetical. Here, there is no evidence of a "targeted victim." Here, the single shot was fired from 60 feet away, not "at close range." Here, the victims were standing anywhere from 2 to 15 feet apart from one another, not "in a close crowd." But the majority still embraces the conclusion that Justice Werdegar rejected, basing its reasoning on the inference that Perez "endangered the lives" of everyone in the group. (Maj. opn. *ante* at p. 10.)

For all of these reasons, I conclude that Perez's convictions on eight counts of attempted murder are not supported by substantial evidence. I would therefore reverse.

ROTHSCHILD, J.