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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. SANDOR TORRES THIESSEN et al., Defendants and Appellants.	C065896 (Super. Ct. No. 09F08195)

APPEAL from a judgment of the Superior Court of Sacramento County, James L. Long, Judge. Affirmed as modified.

Law Office of A.M. Weisman, for Defendant and Appellant, Sandor Torres Thiessen.

Julie Schumer, for Defendant and Appellant, Juan Jose Ramirez.

S. Lynne Klein, for Defendant and Appellant Marvin Orantes.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Daniel B. Bernstein, Deputy Attorney General, for Plaintiff and Respondent.

Two juries convicted three defendants based on an incident where drive-by shooters wounded both their target, Joseph ("Mexicuz") Fresquez, and a bystander, Jamila Williams. One

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, the opinion is certified for publication with the exception of parts I-IV and part VI.

jury convicted Sandor Torres ("Loco") Thiessen of two counts of attempted premeditated murder and two counts of shooting from an occupied vehicle, and found true firearm enhancements appended to each count. (Pen. Code, §§ 664/187, subd. (a), 12034, subd. (c), 12022.53, subd. (b).) Another jury convicted Juan Jose ("Puppet") Ramirez and Marvin ("Shorty") Orantes of one count of attempted premeditated murder and two counts of shooting from a vehicle, but deadlocked on firearm enhancements against Ramirez. The trial court sentenced Thiessen to prison for 14 years to life plus 20 years, and sentenced Ramirez and Orantes to prison for seven years to life plus five years. Defendants appealed.

On appeal, Thiessen contends the trial court erred in denying his motion to exclude his inculpatory statements which he argues were involuntary. We disagree. Thiessen also contends no substantial evidence supports the finding that he personally used a firearm. We address this contention in the published portion of our opinion.

All defendants contend that: 1) the trial court should have granted a mistrial based on trial references to gangs; 2) the trial court misinstructed the jury that an aider is "equally guilty" with a perpetrator; and 3) references to the "kill zone" murder theory were prejudicial. As we will explain in the unpublished portion of our opinion, we disagree and shall reject each of these contentions.

Defendants further contend that the trial court's sentences as to each defendant must be modified to reflect life terms,

rather than seven (or 14) years to life. We agree and shall modify the sentences, and otherwise affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

All of the following evidence was heard by both juries, except for the evidence about Thiessen's inculpatory statements, which was heard only by Thiessen's jury.

Jamila Williams testified she was shot at about 9:00 p.m. on August 26, 2009. She was visiting an apartment complex on 43rd Avenue near Martin Luther King Boulevard, and was on the sidewalk standing near two people, "Dakota" and "Mexicuz" (Fresquez). A four-door silver car drove by. Fresquez told Dakota, "'There they go,'" and as Williams looked up, the car stopped, shots were fired, and people scattered. Williams ran after the first of two shots she heard, but was felled and saw her "leg blown wide open[.]"[1] Fresquez was also felled. Williams admitted telling the police she thought the driver looked like "Shorty," but testified she had been referring to a woman.

Carla Basurto, who did not want to testify, testified she had two children by defendant Ramirez, known as "Puppet." Ramirez also had two children by Basurto's *mother*, Minda Arias, and stayed with Arias, who shared a duplex with Basurto. Basurto knew Orantes as "Shorty" and Thiessen as "Loco." On August 25, 2009, the day before the shooting, Basurto, Ramirez

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[1] A bullet broke Williams's right femur, and injuries on her left leg indicated she may have been shot twice, or was twice injured by one bullet.

and friends got drunk to celebrate Basurto's birthday. Basurto passed out in the afternoon and did not know of a fight between Ramirez and Fresquez. She claimed not to remember much about the next day, but testified that when she spoke to detectives she had told the truth. At some point, Ramirez sent Basurto's brother Nathaniel and Orantes to get something, perhaps money, from Fresquez, possibly using her sister's silver car. After Nathaniel and Orantes returned, the men talked, Ramirez seemed "pissed off," and then left.

Basurto admitted telling the detectives that her brother Nathaniel was upset and afraid "'that they were going to jump [Nathaniel] and he felt like [Orantes] didn't defend him.'" She denied seeing Thiessen at that point, but testified she saw him that night or "early morning of the next day" by a liquor store. She admitted she may have told the detectives she saw Ramirez, Orantes and Thiessen leave together, but testified, "that's not what I remember right now."

She told the detectives she saw a gun in a pillowcase, and that there were guns in a crawl space on Arias's side of the duplex, and there were two shotguns, but testified she had learned these were not real guns, but air guns or BB guns. She also denied knowing the difference between real and fake guns. She could not remember if she told detectives she saw Ramirez get a gun and put it in the trunk of a car on the night of the shooting. She later denied remembering telling them there were two brown shotguns and a black rifle. She did not recall saying that when the men left, Orantes was driving, Ramirez was in the

front passenger seat, and Thiessen was in the back. She remembered saying they came back "'like 20 minutes later'" and "It happened really quick.'" When Ramirez returned, he yelled to Basurto and Arias to get the kids, and two carloads of people left the duplex.

Fresquez testified he was a current state prisoner serving time for false imprisonment, and he had two prior convictions, for residential burglary and possession for sale of narcotics. He had sold Ramirez a vest that was supposed to be bulletproof, but lacked the armor plates that were designed to fit in it. Fresquez learned Ramirez wanted a refund, and went to Ramirez's duplex to discuss the matter the day before he got shot. When Fresquez arrived, "a whole bunch of people started beating me up." He could not remember who beat him, and claimed that when he spoke to detectives in the hospital, he was on drugs and therefore whatever he had told the police would not be reliable.

The next day, as Fresquez and his girlfriend were walking, Orantes "rode up on me" in a white or silver car. "He asked for the money. I told him to go to 43rd. And when they hit 43rd I had a whole bunch of friends out there, too. I guess they ran up to the car and they took off." There were three other people in that car, including "Chaparro," but Thiessen was not one of them. That evening, as Fresquez was standing outside an apartment with "Dakota," a car that looked like the car Orantes had driven earlier drove by, and Fresquez heard gunshots. He

turned to run and was struck by a bullet.[2] Fresquez at first could not recall having told detectives that Orantes was still driving the car, but then confirmed he had done so, but he picked Orantes's photograph only because "it looked like a similar car that he was driving." He did not see Ramirez or Thiessen in the car. He had used methamphetamine that day.

Detective Brandon Luke testified he spoke with Fresquez at the hospital on September 8, 2009, and he seemed able to understand and respond to questions. Fresquez identified defendant Orantes as the driver of the car involved in the shooting, but could not identify anybody else in the car. Fresquez said that the day before, Ramirez, Orantes, Chaparro and Thiessen beat him up. On October 27, 2009, Luke spoke with Fresquez at the jail medical unit, and he identified a picture of Orantes as the driver.

On October 29, 2009, Luke spoke with Basurto, who came to the police station at his request. A video recording of her interview was played at trial.[3] Luke and Detective Robert Stewart participated in the interview. Basurto told them Ramirez was having a dispute with Arias, so he was staying with Basurto instead, and Orantes came with Ramirez to the house

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[2] Fresquez sustained a gunshot wound to the abdomen that broke his pelvis.

[3] The transcripts of the Basurto and Thiessen recordings were not admitted into evidence, but were provided in the Clerk's Transcript. However, the parties cite them freely, treating them as accurate transcriptions of the taped interview, so we shall do the same.

because "they're like partners." Ramirez sent Orantes and Basurto's brother Nathaniel to do something, "I think pick up money" from Fresquez, using her sister's silver car. When they came back, "my brother was upset that they were gonna jump him and he felt like [Orantes] didn't defend him, but I really don't know. [Ramirez] got all bent outta shape because he was very pissed off and then they left[.]" By "they" she meant Orantes, Thiessen and Ramirez. Orantes was driving, Ramirez was in the front passenger seat, and Thiessen was in the back. According to Basurto, Ramirez retrieved a black rifle from under the duplex and placed it in the trunk.

About 20 or 30 minutes later Ramirez and Orantes returned, and Ramirez was crying and "screaming for me and [Arias] to grab our kids and run[.]" With Orantes's help, they took the kids away from the house in two cars. Ramirez "was scared they were gonna come and retaliate" and hid in the house for about a week. Although Ramirez first denied shooting someone, he later told Basurto he had shot "the guy" and a "girl" while he was slouched down in the passenger seat. Ramirez told Basurto that Fresquez had disrespected Basurto's brother by trying to jump him.

The Thiessen jury heard testimony about Thiessen's interrogation and watched a video recording of it. Thiessen had been in jail, and when he was brought to the stationhouse, he was allowed to see that Ramirez was also there. During the interview, the detectives implied that Ramirez and others had spoken to them about the shooting, and indicated they wanted to hear Thiessen's side of the story. At first he denied any

involvement. He later admitted that he, Ramirez and Orantes "ass whooped" Fresquez over a vest on Basurto's birthday. When the detectives indicated they had searched a garage, Thiessen said, "Fuck. Alright. And you found the weapons." Thiessen also asked what the charges would be, how much time he would face, and whether he could still be released on January 13, 2010, his then-current release date for the unrelated case that caused him to be in jail. Thiessen elaborated about the vest, stating that when someone was about to shoot Thiessen while he was wearing it, Thiessen realized it lacked the critical armor inserts. As a consequence, Thiessen, Ramirez and Orantes beat Fresquez up. Fresquez did not provide a refund, and later, with some friends, jumped Basurto's brother Nathaniel ("Sleepy"), who had been trying to resolve the dispute amicably. Then Thiessen, wielding a shotgun he claimed was inoperable, and Ramirez, wielding a rifle, got into a car that Orantes drove. When Fresquez was located, Ramirez fired two shots.

According to Thiessen, he pointed his shotgun at Fresquez through the same window Ramirez fired through and pulled the trigger, but his shotgun did not fire. The men then returned to Ramirez's house, which they evacuated for fear of retaliation.

Arias testified on behalf of Ramirez. Ramirez was her "children's father," and she was unhappy that Ramirez, who was "like my husband[,]" was having a sexual relationship with her daughter. They argued about this relationship the entire day of the shooting, and Ramirez never left the residence except when

they both went to a gas station. There was a BB gun that looked like a rifle at the house, but no real guns.

In argument, Orantes took the position there was no showing that Ramirez intended to kill anyone, no showing Orantes knew of Ramirez's purpose, and there remained a reasonable doubt about whether Orantes was the driver. Ramirez argued Basurto lied to the police, and there was insufficient evidence he had an intent to kill. Thiessen argued his inculpatory statements were not reliable due to intimidation, and the evidence indicated only two people were in the car, Ramirez and Orantes.

Thiessen's jury convicted him of two counts of attempted premeditated murder, and two counts of shooting from an occupied vehicle, and sustained firearm enhancements. The other jury convicted Ramirez and Orantes of two counts of shooting from a vehicle and the attempted premeditated murder count involving Fresquez, but acquitted both men of the attempted murder count involving Williams.

DISCUSSION

I

Coercive Interrogation

Thiessen moved to exclude his inculpatory admissions, alleging they were coerced and therefore involuntary. The trial court watched the video recording and read a transcript of the interrogation, but heard no live testimony. The trial court found Thiessen was "no rookie," the gap between initial contact and the bulk of the interrogation was not coercive, and the

detectives did not make "any meaningful threat or any meaningful inducement," thus, the admissions were voluntary.

As the parties agree, because the motion was decided based only on the video recording and transcript, we must review the denial of defendant's in limine motion de novo. (*People v. Maury* (2003) 30 Cal.4th 342, 404 (*Maury*).)[4]

The People must demonstrate by a preponderance of the evidence that a defendant's inculpatory statement was voluntary. (*Maury*, *supra*, 30 Cal.4th at p. 404.) The California Supreme Court has summarized the relevant test as follows:

> "A statement is involuntary if it is not the product of '"a rational intellect and free will."' [Citation.] The test for determining whether a confession is voluntary is whether the defendant's 'will was overborne at the time he confessed.' [Citation.] '"The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were 'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.' [Citation.]" [Citation.] In determining whether or not an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.' [Citation.]" [Citation.]' [Citation.]
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> "A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. [Citations.] A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or

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[4] A small number of facts about the interrogation were developed *after* the denial of the motion. It does not appear the motion was renewed. However, even considering these facts, we reach the same conclusion as described *post*. (Accord *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176 [where ruling is reviewed de novo, appellate court not always limited to facts before trial court at time of ruling].)

> secured by the exertion of improper influence. [Citation.] Although coercive police activity is a necessary predicate to establish an involuntary confession, it 'does not itself compel a finding that a resulting confession is involuntary.' [Citation.] The statement and the inducement must be causally linked. [Citation.]" (*Maury*, *supra*, 30 Cal.4th at pp. 404-405.)

We have reviewed the video recording and the transcript, and conclude that no reasonable person watching the recording would find Thiessen's will was overborne.

Thiessen, who was in custody on an unrelated matter, was chained by his leg to the floor or the table. Despite the restraint, he appeared physically comfortable throughout the interview, at times stretching his legs out and leaning back in his chair, often putting his arms behind his head. After full warnings pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]), which Thiessen indicated he knew well, Thiessen was left alone for close to two hours. When the interview resumed, it became apparent that, as the trial court found, he was clearly no novice at talking to the police. (See 2 LaFave, et al., Criminal Procedure (3d ed. 2007) Interrogation and Confessions, § 6.2(c), p. 641 [experience with the police can militate against finding coercion] (LaFave).) By turns he was cocky, defiant, or indifferent; he never seemed cowed, frightened, or helpless. At times he actually seemed to be enjoying himself. He "effectively parried the officers' accusations and questions[.]" (*People v. Williams* (2010) 49 Cal.4th 405, 442; see *People v. McWhorter* (2009) 47 Cal.4th 318, 358.) When he came to believe his cohorts had spoken to the

police, he became angry at them and at himself for trusting them, but he spoke freely with the detectives. He laughed and joked with the detectives at times throughout the interview.

We see no evidence his will was overborne.

Defendant's circumstances are easily distinguished from those circumstances cited in his briefing where coercion was found. (Cf., e.g., *People v. Hogan* (1982) 31 Cal.3d 815, 835-843 (maj. opn.) [under former standard requiring voluntariness to be shown beyond a reasonable doubt, police indication to defendant--who was "sobbing uncontrollably throughout his statement and vomited"--that he would be treated for mental problems, and false statements about evidence that caused defendant to question his sanity, made statements involuntary]; *People v. Lee* (2002) 95 Cal.App.4th 772, 781-786 (*Lee*) [giving witness defendant's moniker and threatening to try witness for murder unless he named defendant as the killer rendered witness's statement involuntary; police conduct was not designed to reveal truth, but "to produce evidence to support a version of events the police had already decided upon"]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1484-1487 ["outrageous police behavior" including "lengthy and unlawful pre-*Miranda* questioning . . . lies, trickery and threats," badgering of "hysterical" suspect for hours, appeals to manhood, and repeated disregard of statements that suspect did not want to talk further].)

Appellate counsel claims Thiessen asked to go to the bathroom at 10:24 a.m. but was not taken to the bathroom until

11:09 a.m., however, the record citations supplied show Thiessen asked to go to the bathroom at 10:57 a.m. In either scenario, the delay was inconsequential. Further, there is no indication it was purposeful. (See *United States v. Marenghi* (1st Cir. 1997) 109 F.3d 28, 30-33 [lack of female officer and concern arrestee would destroy drugs caused at least 90 minute delay in access to bathroom; held not coercive].)

Contrary to counsel's claim, the fact that Thiessen was left alone for less than two hours is irrelevant unless he was cowed by that delay, and the video shows he was not. (Cf. *United States v. Koch* (7th Cir. 1977) 552 F.2d 1216, 1218-1219 [prison inmate with known suicidal and claustrophobic tendencies locked in small "boxcar" cell for six hours].) Further, although counsel states the detectives "purposely" left Thiessen alone, the record citations supplied show he was left alone because "we were doing something else at the time[,]" not for the purpose of breaking him down.

Although counsel emphasizes that Thiessen was chained to the floor, there is no hint this caused him any distress. To the contrary, he presented as physically quite comfortable when interacting with the detectives.

The fact the detectives tricked Thiessen by implying that other evidence implicated him in the shooting was not inherently coercive. "[T]elling a suspect falsehoods regarding the status of the case against him is widely accepted." (3 Ringel, Searches & Seizures, Arrests and Confessions (2d ed. 2011) Voluntariness of Confessions and Admissions, § 25:8, pp. 25-38;

see 2 LaFave, *supra*, § 6.2(c), pp. 629-633.) The tricks the detectives used were not of the sort that would force someone to confess *falsely*, such as where officers threaten to hold a loved one unless the suspect talks. (See *People v. Steger* (1976) 16 Cal.3d 539, 550.) "Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted." (*People v. Farnam* (2002) 28 Cal.4th 107, 182; see 1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 69, p. 760.)

Nor was the fact that the detectives gave Thiessen some information about the shooting inherently coercive. Cases cited in Thiessen's brief generally involve the browbeating of a person who ultimately parrots information fed by the interrogators back to them. (See, e.g., *Lee*, *supra*, 95 Cal.App.4th at p. 786.) That is not what happened here, as Thiessen provided new details, such as the fact he was about to be shot in the vest when he discovered it was not bulletproof, and that he used an inoperable shotgun and Ramirez used a rifle during the shooting.

Thiessen asserts that the detectives threatened him with life in prison and used a "carrot-and-stick approach that caused Thiessen to confess." We do not come to the same conclusion. Rather, *after* Thiessen asked what the charges would be, the detectives suggested Thiessen, who said he was 30, might be in prison until he was 55 or 60, based on an attempted murder charge. This was an accurate statement of possible legal consequences, and was not problematic. (See *People v. Seaton*

(1983) 146 Cal.App.3d 67, 74 (*Seaton*) [mention of parole hold "was simply a police comment on the realities of defendant's position"]; *People v. Flores* (1983) 144 Cal.App.3d 459, 469 ["truthful and 'commonplace' statements of possible legal consequences, if unaccompanied by threat or promise, are permissible police practices"].) The detectives' various exhortations were not inherently coercive, and the detectives made no bargains. (See *Seaton*, *supra*, 146 Cal.App.3d at p. 74 [no implied promise of lenity where officer "told defendant the district attorney would make no deals unless all of the information defendant claimed to have was first on the table"]; *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1203-1204; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28.) When the detectives suggested Thiessen had a limited time to make up his mind, they did not state or imply he had to make any particular statement, contrary to counsel's assertion. When Thiessen said he would be killed for snitching, Detective Luke told him he could choose to do "what's right" and die or he could die in prison, and Thiessen in part replied he was dead either way and, "I had a fuckin feelin neither one of them mother fuckers could be trusted." Thus, although Thiessen was *unhappy* about his plight, his spirit was intact and he continued to weigh what to say and come to his own conclusions, not the conclusions forced upon him by the detectives, which further distinguishes his case from those cases he cites in his briefing.

Although these and other passages mentioned by appellate counsel were *effective*, they were not *coercive* because they did

not unfairly overcome Thiessen's will. Accordingly, the trial court properly admitted Thiessen's inculpatory statements.

II

Mistrial Motion

Before the jury was selected, Ramirez's counsel pointed out that no gang offenses were charged, but "the police officers . . . keep mentioning the fact he's a former gang member." The trial court noted Thiessen's jury would hear mention of a gang during his interrogation.[5] After the prosecutor confirmed gangs were not relevant, the following took place:

> "THE COURT: All right. Well, that's it.
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> "[Ramirez's counsel]: I'm just concerned it might slip out somewhere because I just see repeated theme within the court's police officers bringing it up. [*Sic*.]
>
> "THE COURT: All right. And the other thing is if that's the situation and based upon my ruling, maybe you and the prosecutor should get together to see whether or not the reference to gangs that's made by your client can be taken out where, you know, when the statement still makes some sense. I'll leave that up to you to try to work that out.
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> "[Ramirez's counsel]: Okay."

Despite the limited content of this exchange, defendants interpret it as an in limine order barring any reference to gangs at trial.

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[5] Before he admitted knowledge of the shooting, Thiessen told detectives that Ramirez "looks like a fuckin straight goddamned gang banger" and that is why Orantes typically drove the silver car, to avoid being pulled over by the authorities.

In any event, after the Basurto video recording was partially played, the trial recessed for lunch. When trial resumed, all counsel moved for a mistrial, because during the portion of the recording seen by the jury, Detective Luke is twice seen wearing a jacket with "Sheriff [¶] Gang Unit" emblazoned on the back, when he stands up to leave and then returns and sits down. The motion was denied, and the trial court noted the recording had already been heavily sanitized. Later, Thiessen's counsel stated she wanted a limiting instruction regarding this incident, but counsel for Orantes and Ramirez stated they did not. Thiessen's counsel did not submit such an instruction.

When Detective Goncalves testified about the Thiessen interrogation (before the Thiessen jury alone), he identified himself as "a detective with the gang suppression unit." No objection was interposed at that time, but at the next break, Thiessen's counsel moved for a mistrial. In denying the motion, the trial court stated in part, "You're making a whole lot out of nothing" and advised counsel to propose a limiting instruction if desired.

On appeal, all defendants contend the gang references were prejudicial violations of the purported in limine order, and their chances of getting a fair trial were irreparably damaged, therefore the trial court abused its discretion by denying a mistrial. (See *People v. Burgener* (2003) 29 Cal.4th 833, 873.)

We agree with the trial court that this is "a whole lot out of nothing." There was no testimony that the defendants or

victims were even affiliated with any gang, much less members, and no testimony the drive-by shooting was gang related. (Cf. *People v. Cardenas* (1982) 31 Cal.3d 897, 904-906 (plur. opn.) [prejudicial inference that attempted store robbery was a "gang operation" and defendants were gang affiliates]; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1497 ["California courts have long recognized the potentially prejudicial effect of gang membership evidence"].) Further, even had the juries inferred defendants were involved with a gang, based on the stray mention of the term "gang" during trial, neither jury was exposed to any prejudicial gang information, such as descriptions of violent gang incidents.

Nor do we believe the defenses would have been undermined even had either jury leapt to the conclusion any defendant was a gang member. (Cf. *People v. Avitia* (2005) 127 Cal.App.4th 185, 194-195 [improper gang evidence weakened defendant's testimony he had fired a pellet gun, rather than "dry firing" a real gun, as reported by the victim].) Both juries heard evidence defendants were involved in obtaining a bulletproof vest and seeking vengeance by means of a drive-by shooting because that vest was defective. Given such evidence, the implication of gang membership would not have altered either jury's verdict.

Therefore the trial court acted within its discretion in denying the mistrial motions pertaining to gang evidence.[6]

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[6] To the extent defendants recast the claim as a federal due process violation, our conclusion that the juries would not draw prejudicial inference from the stray references to gangs answers

III

Aider and Abettor Instruction

Defendants contend the trial court erred by instructing that a perpetrator and an aider are "equally guilty[.]" As we explain, the claim is forfeited; further, any error was harmless. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1120 (*Lopez*).)

The introductory instruction to the series of instructions on aiding, CALCRIM No. 400, as given to the Orantes and Ramirez jury in this case, provided in part as follows:

> "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I'll call that person the perpetrator. Two, he or she may have aided and abetted the perpetrators, who committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."[7]

As indicated by this introductory instruction, it is the general rule that a person who aids another person to commit a crime--that is, helps commit the crime while sharing the perpetrator's intent--*is* "equally guilty" of that crime. (See *Lopez, supra*, 198 Cal.App.4th at p. 1118; Pen. Code, § 31;

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the parallel federal claim. (See *People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 281, fn. 8; *People v. Partida* (2005) 37 Cal.4th 428, 439 ["admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*"].)

[7] The instruction as read to the Thiessen jury was nearly identical. CALCRIM No. 400 has been amended to remove the "equally guilty" language. (1 CALCRIM (2011 ed.) p. 167.)

1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123.)

"However, in *certain* cases an aider may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114-1122 [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider might be guilty of lesser crime than perpetrator, where the ultimate crime was not reasonably foreseeable consequence of act aided].)

"Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on [defendants] to request a modification if [they] thought it was misleading on the facts of this case." (*Lopez, supra*, 198 Cal.App.4th at p. 1118.) Their failure to do so forfeits the claim of error. (See *Lopez, supra*, at p. 1119; *People v. Lee* (2011) 51 Cal.4th 620, 638; *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Further, although defendants contend the instruction improperly eliminated the People's burden to prove intent, we disagree. Ramirez claims the instruction impaired his heat of passion theory of attempted voluntary manslaughter, based on anger at being cheated over the vest deal.[8] Orantes argued at

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[8] Ramirez asserts the jury found he was not a perpetrator, pointing to the deadlock on the allegations that he personally used a firearm. But even an *acquittal* on those charges would not necessarily show the jury found he was not a perpetrator. An acquittal on one charge does not affect the evidence of

trial there was a doubt he was the driver, and that there was no showing Ramirez had an intent to kill.[9] On appeal, Orantes argues the jury could have found he merely aided Ramirez to recover the money for the vest. As the People point out, Thiessen makes no prejudice argument in his opening brief, and in the reply brief merely argues this was a close case.

In essence, defendants assert the challenged portion of the instruction would have the following effect: Once a perpetrator was found to have committed a particular crime, each defendant automatically would be found "equally guilty[.]" However, we do not believe any rational juror would so interpret the instructions on aiding, read as a whole.

"In reviewing claims of instructional error, we look to whether the defendant has shown a reasonable likelihood that the jury, considering the instruction complained of in the context of the instructions as a whole and not in isolation, understood that instruction in a manner that violated his constitutional rights. [Citations.] We interpret the instructions so as to support the judgment if they are reasonably susceptible to such interpretation, and we presume jurors can understand and correlate all instructions given." (*People v. Vang* (2009) 171

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another. (See Pen. Code, § 954; *People v. Pahl* (1991) 226 Cal.App.3d 1651, 1656-1657; 6 Witkin & Epstein, Cal. Criminal Law, *supra*, Criminal Judgment, § 75, p. 109.)

[9] Orantes declined attempted manslaughter instructions, to avoid impairing his alibi defense.

Cal.App.4th 1120, 1129.) Here, other instructions eliminated any possible confusion about the required intent.

Both juries were instructed (CALCRIM No. 203) to "separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately." Further, CALCRIM No. 401, given to both juries, explained that, "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: the perpetrator committed the crime[,]" the defendant *knew* the perpetrator intended to commit the crime, that the defendant "*intended to aid and abet* the perpetrator in committing that crime," and that the "defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows [of] the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage or instigate the perpetrator's commission of that crime."

Thus, the "equally guilty" language in CALCRIM No. 400, when read in light of CALCRIM Nos. 203 and 401, would not be read to mean that once a perpetrator's intent is determined, the jury should automatically ascribe that intent to the aider. Thus, any error in the phrasing of CALCRIM No. 400 was harmless because the point--the required intent for aiding liability--was adequately covered elsewhere. (*Lopez, supra*, 198 Cal.App.4th at p. 1120; *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165; *People v. Stewart* (1976) 16 Cal.3d 133, 141.)

IV

Kill Zone Instruction

Each jury was given the standard "kill zone" instruction, part of CALCRIM No. 600, as follows:

> "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.' In order to convict the defendant of the attempted murder of [Williams], the People must prove that the defendant not only intended to kill [Fresquez] but also either intended to kill [Williams], or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [Williams] or intended to kill [Fresquez] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of [Williams]."

On appeal, defendants contend the phrase "kill zone" is inherently prejudicial. We see nothing prejudicial about the term "kill zone," nor apparently did trial counsel, as no objection to it was interposed. (See *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236, 1244 [identical challenge forfeited for lack of objection at trial, and meritless, because the term is neither argumentative nor inflammatory].)

To the extent defendants contend the trial court failed to *define* "kill zone," they concede the California Supreme Court has stated the "'kill zone' theory 'is not a legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.'" (*People v. Stone* (2009) 46 Cal.4th 131, 137.) Thus, the concept is not akin to a crime

with elements that must be defined. Further, we find the instruction given adequately explained the concept.[10]

Accordingly, we reject defendants' various attacks on the "kill zone" instruction given in this case.

V

Firearm Use Enhancement

Thiessen told the detectives he pointed a shotgun through the same window that Ramirez used to fire a rifle, and pulled the trigger so that the shotgun made a sound, to make "sure he knew, he heard the click. That way he can't say--oh you didn't even fuckin pull the trigger, you know what I mean?" On appeal, Thiessen contends this is not sufficient to show that he personally used the shotgun for purposes of the firearm enhancement because there was no evidence either victim *saw* the shotgun.

The relevant statute provides that any person who, in the commission of specified offenses or attempts, "personally uses a firearm," shall receive extra punishment, and provides that, "The firearm need not be operable or loaded for this enhancement to apply." (Pen. Code, § 12022.53, subd. (b).)[11]

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[10] Ramirez and Orantes were acquitted of attempted premeditated murder of Williams, the only count against them to which the "kill zone" concept could apply. This shows their jury was *not* inflamed by that term to convict them. Nor is there any real possibility the term inflamed Thiessen's jury.

[11] This enhancement was designed to discourage criminal firearm use. (*People v. Palmer* (2005) 133 Cal.App.4th 1141, 1148-1149 ["Section 12022.53, also known as the '10-20-life' law [citation], was enacted in 1997" to substantially increase penalties for using firearms to commit enumerated felonies].)

In construing a similar statute, the California Supreme Court held: "Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. 'Use' means, among other things, 'to carry out a purpose or action by means of,' to 'make instrumental to an end or process,' and to 'apply to advantage.' [Citation.] The obvious legislative intent to deter the use of firearms in the commission of the specified felonies requires that 'uses' be broadly construed." (*People v. Chambers* (1972) 7 Cal.3d 666, 672 (*Chambers*).)

Even if the shotgun were inoperable and unseen by anyone else, as Thiessen claimed, by pointing it alongside Ramirez as Ramirez aimed a rifle at the intended victim, and pulling the trigger to make a "click" noise, Thiessen emboldened Ramirez to shoot. He therefore *used* the firearm to facilitate the commission of the crimes.

We agree with Thiessen that a firearm is *more commonly* used in other ways, *viz.*, 1) by firing it, 2) by wielding it as a bludgeon, or 3) by displaying it to menace a victim. (See, e.g., *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319.) We realize that some cases have stated or assumed that a weapon cannot "menace" a person who is unaware of its existence. (*People v. Jacobs* (1987) 193 Cal.App.3d 375, 381 ["a firearm is displayed when, by sensory perception, the victim is made aware

of its presence"]; accord, *People v. James* (1989) 208 Cal.App.3d 1155, 1163 [victim did not see knife].)

But here, as we have explained, Thiessen used his firearm in a way that facilitated the crime, by showing his solidarity with Ramirez. We see no reason why such "use" does not satisfy both the terms and purpose of the statute. "Personal use of a firearm may be found where the defendant intentionally displayed a firearm in a menacing manner *in order to facilitate the commission of an underlying crime*." (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059, emphasis added.)

Further, more recent authority persuasively undermines defendant's view that a victim must perceive a firearm in order for it to support a use enhancement: "To excuse the defendant from this consequence merely because the victim lacked actual knowledge of the gun's deployment would limit the statute's deterrent effect for little if any discernible reason." (*People v. Granado* (1996) 49 Cal.App.4th 317, 327 [construing Pen. Code, § 12022.5] (*Granado*).) "At its core the statute addresses the pervasive and inherent escalation of danger which arises from the *defendant's act* of deployment." (*Ibid.*)

Thiessen relies on a passage in *Chambers*, reiterated in later cases, as follows: "Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the

specified felonies." (*Chambers*, *supra*, 7 Cal.3d at p. 672; quoted with approval by *People v. Bland* (1995) 10 Cal.4th 991, 997.) Thiessen reads this to mean a display of a weapon must cause fear to qualify. However, that passage is not a *limitation* on the types of use that qualify, but an *expansion*: The passage indicates conduct which "actually produces harm" suffices, as does conduct which produces a fear of harm. By using his gun to embolden Ramirez, defendant used his gun in a way that helped actually produce harm. "Defendant's contrary interpretation is incompatible with the injunction in *Chambers* itself that the statute must 'be broadly construed.'" (*Granado*, *supra*, 49 Cal.App.4th at p. 327.)

Accordingly, we conclude substantial evidence supports the firearm use enhancement imposed on defendant Thiessen.[12]

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[12] Federal law provides for increased penalties for a defined drug criminal who "uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm[.]" (18 U.S.C.A. 924(c)(1)(A).) This statute has been held to apply "if the possessor of a weapon intended to have it available for possible use during or immediately following the transaction, *or if it facilitated the transaction by lending courage to the possessor*." (*United States v. Payero* (1st Cir. 1989) 888 F.2d. 928, 929, emphasis added; see *United States v. Harmon* (10th Cir. 1993) 996 F.2d 256, 258 [use occurs when firearm "emboldens the defendant"].) While we recognize the definition in this federal statute is broader than "use" under California's "10-20-life" statute (see, e.g., *Smith v. United States* (1993) 508 U.S. 223 [124 L.Ed.2d 138] [trading gun for drugs qualifies as use]), this reasoning bolsters our conclusion: Defendant pulled the trigger of the shotgun he was pointing, in line with the rifle Ramirez was pointing, in order to let Ramirez know he was doing so, and the jury could find this act emboldened Ramirez.

VI

Sentencing Error

The trial court characterized each of the sentences for attempted premeditated murder as "seven years to life." However, the parties correctly point out that the only authorized sentence for attempted premeditated murder is "life with the possibility of parole." (Pen. Code, § 664, subd. (a).) We shall modify the judgment accordingly.[13] (Pen. Code, § 1260.)

DISPOSITION

The judgments are affirmed as modified to reflect life sentences as to each defendant, consistent with this opinion. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation certified abstracts of judgment reflecting these modifications.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.

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[13] The trial court's mistake was caused by incorporating a seven-year *minimum parole eligibility period* (see Pen. Code, § 3046, subd. (a)(1)) into the life sentence itself. We note that this is a common error.