Filed 9/23/03 Modified and certified for partial publication 10/10/03 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CECELIO GUTIERREZ, Defendant and Appellant.	G031028 (Super. Ct. No. 01NF2147) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Francisco P. Briseno, Judge. Affirmed.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Douglas C.S. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Cecelio Gutierrez was convicted by jury of attempted murder and two counts of assault with a firearm. The jury also found true two allegations of personally using a firearm. In addition, defendant admitted a probation violation.

Defendant contends: the court committed prejudicial error when it failed to instruct the jury on attempted voluntary manslaughter; his conviction for assault with a

firearm was not supported by substantial evidence; he received ineffective assistance of counsel; and the abstract of judgment should be corrected to reflect a probation violation instead of a drug offense. None of defendant's contentions have merit. Accordingly, the judgment is affirmed

FACTS

Defendant, along with his nephew, Emiliano Perez (Perez), and a friend, Jorge Castillo (Castillo), went bar hopping during the late evening hours of August 16, 2001. In the course of the evening, they were thrown out of three Anaheim bars for annoying patrons, using false identification to obtain drinks, and for starting fights. During their series of misadventures, defendant shot a bar patron in the shoulder, and, not long thereafter, went to a local gas station and pointed a loaded gun at an innocent bystander.

The Off Limits Bar (Uncharged Offense)

Defendant, Castillo, and Perez began their evening at the Off Limits Bar in Anaheim. After annoying a female patron, they headed over to the bar area. When asked for identification, they attempted to use one set of identification by passing it around under the table. The bartender told them to leave. As they were leaving, Perez punched a patron, and the three men ran to their car.

Another patron ran out of the bar and began to yell at them. Perez, who was sitting in the back seat of the car, pulled out a gun, looked the patron in the eye, and pointed the gun at him. The patron took evasive action, and saw Perez hand the gun to the defendant who was sitting in the front passenger seat. As the car was pulling out of the parking lot, it almost hit the patron. The car stopped when it reached the street, and defendant extended his arm outside the window and pointed the gun at the assembled

crowd of spectators. The spectators dropped to the ground when they saw the weapon in defendant's hand. The car left, and about 10 to 15 seconds later, two shots were heard.

Sugar's Bar (Charged Offense)

About 40 minutes later, defendant and his two cohorts arrived at Sugar's Bar in Anaheim. The owner yelled at them when they walked in carrying their own drinks. As the confrontation escalated, the owner picked up Perez and pushed him towards the door. Two customers, one of them being victim Geoffrey Anderegg (Anderegg), helped the owner remove the three men from the bar. After leaving the bar, Perez and Castillo got into the car while defendant stood in the parking lot with a gun. Defendant initially fired two shots that created a lot of smoke. As Anderegg walked back towards the front door of the bar, he saw the smoke and said, "It's fake." Defendant responded by firing a shot into Anderegg's left shoulder area. Anderegg was treated and released at UCI Medical Center for a flesh wound.

The Mobil Gas Station (Charged Offense)

Shortly after the incident at Sugar's Bar, as defendant and his two companions were passing a Mobil gas station in Anaheim, defendant pointed a gun at Britz Alberto, Jr., a motorist who was in the process of leaving the gas station. Alberto followed defendant's vehicle to get a license plate number, and saw defendant fire a shot into the window of a white Honda Accord that was parked on the side of the road.

After the gas station incident, the three men traveled to Cuban Pete's Bar in Anaheim, where they were involved in another altercation. Shortly after this incident, the police arrested defendant, Castillo, and Perez. Their vehicle was searched, and a small caliber revolver with one live round in the cylinder was recovered from beneath the passenger seat. The police also found bullet casings inside the gun that indicated it had been fired.

DISCUSSION

I

The Trial Court Had No Sua Sponte Duty to Instruct the Jury on Attempted Voluntary Manslaughter

Defendant argues the court committed prejudicial error when it failed, sua sponte, to instruct the jury on the lesser included offense of attempted voluntary manslaughter. We disagree.

The duty to instruct on lesser included offenses is well established. "'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation], but not when there is no evidence that the offense was less than that charged. [Citations.] The obligation to instruct on lesser included offenses exists even when as a matter of trial tactics a defendant not only fails to request the instruction but expressly objects to it being given. [Citations.] Just as the People have no legitimate interest in obtaining a conviction of a greater offense than that established by the evidence, a defendant has no right to an acquittal when that evidence is sufficient to establish a lesser included offense.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.)

Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by a sudden quarrel or heat of passion, or by an unreasonable but good faith belief in the necessity of self-defense. "Only these

circumstances negate malice when a defendant intends to kill." (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Here, self-defense, imperfect or otherwise, is not argued. To establish voluntary manslaughter under a heat of passion theory, both provocation and heat of passion must be found. (*Id.* at p. 60.) "First, the provocation which incites the killer to act in the heat of passion case must be caused by the victim or reasonably believed by the accused to have been engaged in by the decedent. [Citations.] Second, . . . the provocation must be such as to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (*People v. Lujan* (2001) 92 Cal.App.4th 1389,1411-1412.)

When relying on heat of passion as a partial defense to the crime of *attempted* murder, both provocation and heat of passion must be demonstrated. (*People v. Williams* (1988) 199 Cal.App.3d 469, 475.) We agree with the Attorney General that evidence of provocation or heat of passion is not present in this case, and there is nothing in the record "'substantial enough to merit consideration' by the jury of the lesser included offense of attempted voluntary manslaughter under a theory of sudden quarrel or heat of passion. . . ." (*Ibid*.) Not only was defendant's state of mind never argued by the defense, but the evidence failed to demonstrate any indicia of provocation. During closing argument, counsel argued defendant was not the shooter, and unlike Perez, who was thrown out of the bar by the owner, had no motive to shoot anyone.[1] Generally, when a defendant completely denies complicity in the charged crime, there is no error in failing to instruct on a lesser included offense. (See *People v. Medina* (1978) 78 Cal.App.3d 1000, 1005-1006 [no duty to instruct on voluntary manslaughter based on diminished capacity when defendant testified he was not present when victim was shot].)

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[1] *People v. Breverman, supra,* 19 Cal.4th 142, at pages 154-155, held the court's sua sponte duty arises regardless of defendant's theory of the case. Here, counsel specifically stated an instruction on attempted voluntary manslaughter was not required as "the state of the evidence is either he's the shooter or he's not the shooter." That appears to be an accurate assessment of the record.

Although defendant did not testify, there is no evidence in the record remotely suggesting any objectively reasonable provocation. Thus, there was no basis to instruct on the lesser included offense of voluntary manslaughter based on a theory of heat of passion or sudden quarrel because the evidence did not support giving the instruction.

Relying on *People v. Lasko* (2000) 23 Cal.4th 101, and on *People v. Blakely* (2000) 23 Cal.4th 82, defendant also argues the court had a sua sponte duty to instruct the jury on attempted voluntary manslaughter on the theory defendant may have acted with a conscious disregard for life, but without intent to kill. Defendant's argument is misplaced because the lesser included offense was *attempted* voluntary manslaughter and not voluntary manslaughter.

People v. Lasko, supra, 23 Cal.4th 101, 110, held that intent to kill is not a necessary element of voluntary manslaughter. Thus, a killer who, acting with conscious disregard for life and knowing that the conduct endangers the life of another, unintentionally but unlawfully kills in a sudden quarrel or heat of passion is guilty of voluntary manslaughter. *People v. Blakeley, supra,* 23 Cal.4th 82, 85 held voluntary manslaughter is also committed when a defendant, "acting with conscious disregard for life and the knowledge that the conduct is life-endangering, unintentionally but unlawfully kills while having an unreasonable but good faith belief in the need to act in self-defense."

In relying on these cases as authority for an attempted voluntary manslaughter instruction based on conscious disregard, defendant misses a fundamental point. An *attempt* to commit a crime requires a specific intent to commit the crime. (Pen. Code, § 21a.) This is true "even though the crime attempted does not [require a specific intent].)" (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000.) Elements, § 53.) Thus, for example, it has been the rule for more than a century "that implied malice cannot support a conviction of an *attempt* to commit murder." (*People v. Bland* (2002) 28 Cal.4th 313, 327.)

Similarly, attempted voluntary manslaughter cannot be premised on the theory defendant acted with conscious disregard for life, because it would be based on the "internally contradictory premise" that one can intend to commit a reckless killing. (See *People v. Johnson* (1996) 51 Cal.App.4th 1329, 1332 [holding there is no crime of attempted involuntary manslaughter because the essential premise is a "manifest impossibility"].) Since implied malice cannot support conviction of an attempt to commit murder (*People v. Bland, supra,* 28 Cal.4th 313, 327), it would turn logic on its head to allow implied malice to support conviction of attempted voluntary manslaughter. Thus, the court had no sua sponte duty in this case to instruct on attempted voluntary manslaughter.

II

Substantial Evidence Supported the Conviction for Assault With a Firearm at the Mobil Gas Station

Defendant argues there was insufficient evidence to convict him of assault with a firearm at the Mobil gas station because he merely pointed the gun at Alberto. We disagree.

When a challenge is made to the sufficiency of the evidence, "'[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We view the evidence in the light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.)

An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) In *People v. Williams* (2001) 26 Cal.4th 779, 782, the court held an assault requires the

willful commission of an act that by its nature will probably and directly result in injury to another (i.e., a battery), with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury. Despite the definition of an "assault" in section 240 of the Penal Code as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," *Williams* explained the word "attempt," as used in this statute, is not the usual criminal attempt which requires specific intent to commit the crime. Instead, "[a]n assault occurs whenever '"[t]he next movement would, *at least to all appearance,* complete the battery."'" (*People v. Williams, supra,* 26 Cal.4th 779, 786, original italics.) Thus, pointing a loaded gun in a threatening manner at another constitutes an assault. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269; *People v. Raviart* (2001) 93 Cal.App.4th 258, 263.)

Here, the evidence was more than sufficient to convict defendant of assaulting Alberto with a firearm. Alberto testified he was at a Mobil gas station in Anaheim early in the morning on August 17, 2001. As he stopped in the driveway of the gas station to allow an approaching car to pass, defendant pointed a gun at him from his position as a passenger in the passing car. Alberto pursued the car as it drove away to get the license plate number. During the pursuit, Alberto saw defendant put his arm outside the window and fire a shot. The closeness in time between defendant pointing the gun at Alberto and his firing it out the window is substantial evidence from which the jury could infer the gun was loaded when pointed at Alberto, and that defendant had the clear and present ability to inflict injury upon Alberto.

Counsel Did Not Render Ineffective Assistance

Defendant argues counsel rendered ineffective assistance because he failed to object under Evidence Code sections 352 and 1101, subdivision (b), and because he failed to request a limiting instruction regarding the uncharged offenses committed at the Off Limits Bar. We find counsel was not ineffective. The evidence was clearly

admissible under Evidence Code section 1101, subdivision (b) to show common plan, scheme and identity, and was more probative than prejudicial.

1. The Events That Occurred at the Off Limits Bar Were Admissible

Evidence of crimes other than those not currently charged may not be used to show the defendant is a bad person or has a criminal disposition, but may be "admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. (Evid. Code, § 1101.) Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.] On appeal, the trial court's determination of this issue, being essentially a determination of relevance, is reviewed for abuse of discretion." (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.)

As to identity, "To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a "'pattern and characteristics . . . so unusual and distinctive as to be like a signature."'" (*People v. Kipp, supra,* 18 Cal.4th at pp. 369-370.) And, as to the issue of common plan or design, "[a] lesser degree of similarity is required to establish relevance . . . For this purpose, 'the common features must indicate the existence of a plan rather than a series of spontaneous acts, but the plan thus revealed need not be distinctive or unusual.' (*Id.* at p. 371.)

Here, the evidence of the incident at the Off Limits Bar was manifestly admissible under Evidence Code section 1101, subdivision (b) to show common plan or scheme, and the identity of the shooter. The incidents involving the Off Limits Bar and

Sugar's Bar occurred within a period of 40 minutes to an hour. The perpetrators in both incidents were the same, and the same vehicle was driven during the commission of both shootings. In both of the bars, defendant and his companions engaged in conflict that eventually caused them to be thrown out. And, in each case, defendant pointed the same weapon at bar patrons. Further, as discussed *post*, defendant argued that Perez was the shooter. The events at the Off Limits Bar included evidence that the gun, originally held by Perez, was passed to defendant.

Defendant also contends trial counsel should have objected to the evidence under Evidence Code section 352. Evidence Code section 352 gives the trial court discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Ibid.)* While all evidence that tends to prove guilt is by nature prejudicial, the prejudice referred to in Evidence Code section 352, is evidence that uniquely evokes an emotional bias against the defendant as an individual and has little effect if any on the issues. (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1396.)

Here, the evidence was highly probative and it did not evoke a uniquely emotional bias against the defendant. Had defense counsel in the instant case objected to the admission of the evidence surrounding the events at the Off Limits Bar, counsel's objection would have been soundly overruled.

2. Trial Counsel Was Not Ineffective for Failing to Request a Limiting Instruction

An objection to the admission of the evidence surrounding the events at the Off Limits Bar would have been overruled by the court, but a limiting instruction, such as found in CALJIC No. 2.50, in all likelihood would have been given. The question then becomes whether the failure by counsel to request this instruction constitutes ineffective

assistance. We believe not. Defendant has the burden of showing both deficient performance and prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) If the record on appeal sheds no light as to why counsel acted or failed to act in the manner challenged, the claim of ineffective assistance of counsel at trial must be rejected unless counsel was asked for an explanation and failed to provide one, or there is no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

Here, defendant has not met his burden. Defendant suffered no undue prejudice by the introduction of this evidence, and there was a tactical reason on the record for its admission. Counsel used the evidence to defendant's benefit to argue he was not the shooter. Thus in closing argument to the jury, counsel argued defendant had no motive to shoot anyone. Rather, it was Perez who was the shooter. Perez had the motive as well as the disposition to shoot someone. Perez was underage, Perez was a "hot head," Perez was the person who got into fights with other patrons, and Perez was the person who was thrown out of the Off Limits Bar thereby giving him a motive to shoot. In sum, defendant had as much reason as the prosecution to use evidence of the encounter at the Off Limits Bar. A limiting instruction, such as CALJIC No. 2.50, would likely have been very confusing for counsel to deal with in argument. We conclude there was good reason not to request a limiting instruction, and, in any event, no prejudice was caused by its absence. The evidence was plainly admissible for the many reasons discussed above.

The Abstract of Judgment Is Correct

Defendant argues, and the Attorney General agrees, the abstract of judgment erroneously states the trial court imposed a two-year concurrent term for defendant's guilty plea to a violation of section 11350, subdivision (a) of the Health and Safety Code. We disagree. According to the abstract of judgment, defendant was convicted after a guilty plea to the section 11350 offense on September 14, 1998, some

three and a half years earlier. Upon admission of his probation violation in connection with that offense, sentence was imposed for that earlier offense on July 12, 2002. We see no error.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.

Filed 10/10/03

CERTIFIED FOR PARTIAL PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CECELIO GUTIERREZ, Defendant and Appellant.	G031028 (Super. Ct. No. 01NF2147) ORDER GRANTING PARTIAL PUBLICATION; MODIFICATION OF OPINION; NO CHANGE IN JUDGMENT

Respondent has requested that our opinion, filed on September 23, 2003, be certified for partial publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 976(b). The request is GRANTED.

The introductory paragraph, facts, part I, and the dispositional paragraph are ordered published in the Official Reports. Part II is not to be published as it does not meet the standards for publication.

It is further ordered that the above opinion be modified in the following particulars:

1. On page 6, line 7; insert the word "attempted" after the word "of" and before the word "voluntary."

2. On page 7, line 2; insert the words “for life,” after the word “disregard” and before the word “defendant.”

There is no change in judgment.

_____
IKOLA, J.

WE CONCUR:

_____
BEDSWORTH, ACTING P. J.

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FYBEL, J.